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NEW ENGLAND REPORTER.

VOLUME I.

ALL CASES DETERMINED

IN THE

COURTS OF LAST RESORT,

AS FOLLOWS:

MAINE, SUPREME JUDICIAL COURT.

NEW HAMPSHIRE, SUPREME COURT.

VERMONT, SUPREME COURT.

MASSACHUSETTS, SUPREME JUDICIAL COURT.

RHODE ISLAND, SUPREME COURT.

CONNECTICUT, SUPREME COURT OF ERRORS.

From September, 1885.

JAMES E. BRIGGS,

EDITOR.

ROCHESTER, N. Y.

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ADVERTISEMENT.

THE object of the publication of the NEW ENGLAND, CENTRAL and WESTERN REPORTERS is to make series of harmonious and homogeneous State Reports, showing concurrent decisions as promptly as possible, so arranged as to contain the maximum amount of matter within the minimum space, and to accompany these with the most complete, conveniently arranged and compact indexes that can be devised; thus bringing within the reach of every practicing lawyer all the case law he can require.

Briefs of counsel, which generally constitute the best annotation or amplification of the subject of any given case, have been fully reported; and a generous amount of space has been devoted to additional matter, of similar value, in the form of editorial foot notes.

The index to this volume constitutes a complete digest of the contents, which aggregates more than five times the amount of an ordinary volume of law reports. The main index refers not only to the decision or judgment in each case, but also to every principle affirmed, denied, criticised or commented upon; thus including the premises, argument and collateral matter in each opinion.

Dissenting opinions, which are also reported, are referred to and distinguished in the main index. Each proposition is repeated, with appropriate changes in phraseology, under every appropriate head or subject, thus avoiding the use of specific cross-references, and confining the office of cross-references to a full exposition of the system of classification.

A table of statutes has been embodied in the index, arranged chronologically by States, and giving the subject of each citation.

The supplemental index refers to editorial notes and to briefs of counsel. The general subject of briefs on either side has been given, and also the more specific points of each. When a point or subject is extended over several pages, the reference is made to the first page, and in each case the State is indicated.

The aim has been to *prepare* complete indexed digests of everything deemed worthy of being in the books, and to prompt others to (1) abandon the cheap form of mere compilation of syllabi, which, while too full for such use, is yet only a partial index, and (2) to index the valuable matter so generally buried and lost, for want of any indexing whatever.

While in many particulars the editor's ideal is far from realized in this volume, he hopes that his professional brethren will, upon critical examination and comparison of all its distinguishing features, be pleased with the general result. At all events, that no one volume can be found in the library containing so rich a mine of reference to law on almost any subject, he feels confident. This is doubtless due to the exhaustive study and consideration given by the New England bar and bench to the subject in hand. To the carefully organized plan of co-operation of both members and friends—too many for enumeration here—of this association of lawyers, is due the result so fully realized to the profession in so many directions, viz: *more promptness, better books and cheaper books.*

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ERRATA.

NEW ENGLAND REPORTER, VOL. I.

Page 1, in list of judges; for "Hon. George A. Bingham," read "Hon. Alonzo P. Carpenter."

Page 8, 1st column, last line of opinion; for "Clark, ante, 81," read "Clark, 61 N. H. 81."

Page 68, 1st column, 80th line from bottom; for "ante" read "61 N. H."

Page 72, 1st column, 28d line; for "supra," read "61 N. H."

Page 78, 1st column, 26th line from bottom; for "Allen," read "Mass."

Page 95, 2d column, 20th line from bottom; for "188 Mass.," read "189 Mass. 290."

Page 98, in 6th line of syllabus, between "parent" and "who," insert the words "a child."

Page 159, 8d line of syllabus; for "and," read "land."

Page 210, 2d column, 15th line; for "18," read "12."

Page 258, 2d column, at end of last line of opinion, supply "61 N. H. 207."

Page 267, title of case reported; for "Caffey," read "Gaffey."

Page 306, 1st column, 7th line from bottom; for "adopted," read "adapted."

Page 326, 1st column, 9th line; for "ante 303, 308," read "ante, 168."

Page 527, 2d column, 7th and 8th lines; for "Dundee," read "*The Dundee*."

Page 575, 1st column, 6th line of syllabus; for "trial justice," read "presiding judge."

Page 661, 2d column, 16th line; for "proceedings to locate a highway. *Sustained*," read "*Certiorari* to quash record in proceedings to locate a town way. *Proceedings sustained*."

Page 747, in title of case reported; for "Gronsbra," read "Gronstra," and for "Bourgies," read "Bourges;" in 2d column, "for maliciously making litigation," read "tort in procuring a trespass."

Page 898, 1st column, beginning with 6th line from bottom; for rest of paragraph read "insolvent before the insolvent law was enacted, if the note was not proved against the insolvent estate"

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CASES
DETERMINED IN THE
SUPREME COURT OF NEW HAMPSHIRE,

ON AND AFTER JULY 31, 1885.

CHIEF JUSTICE,
HON. CHARLES DOE.

ASSOCIATE JUSTICES,
HON. WILLIAM H. H. ALLEN, HON. LEWIS W. CLARK,
HON. ISAAC W. SMITH, HON. ISAAC M. BLODGETT,
HON. GEORGE A. BINGHAM.

HON. WILLIAM S. LADD, *Reporter*.

STATE OF N. H.
v.
Sir Moses D. PERKINS.

An indictment for keeping for sale fermented cider in less quantity than ten gallons **need not contain** a denial that it was intended to be sold elsewhere than in this State.

(Merrimack — July 31, 1885.)

INDICTMENT. The respondent moved to quash the indictment, because,

1. It does not sufficiently inform the respondent of the facts expected to be proved against him, or of the offense with which he is charged.

2. It does not identify the offense so as to protect the respondent from a subsequent prosecution for the same offense, or enable the court to render a proper judgment upon it.

3. It does not follow the words of the statute, or employ language equivalent thereto, or words which express its true meaning.

4. The offense is not fully, directly and expressly charged, but the charge is uncertain and ambiguous.

5. It alleges no crime or offense known to the law.

6. It is otherwise defective and insufficient. The motion was denied, and the respondent excepted.

The State introduced evidence tending to show sales by the respondent in January, March, June, and August, 1884, of cider made in November, 1883. The respondent contended that the cider was unfermented, and non-intoxicating. George P. Tuttle, called by the State, testified that he, with four or five others, went to the respondent's house one Sunday in the winter of 1883-84, and bought, paid for and drank upon the premises a few glasses of cider, and that there were about twenty persons in all present. He further testified as follows, subject to exception by the respondent: "I should judge some of them appeared under the influ-

ence of stimulants. Some of them acted rather funny. They seemed stupid, and could not go very well. I saw three or four that way. None of them belonged to the party that went with me. Down on the pond below the woods we heard a noise in the respondent's house, and we went there from curiosity. I don't think there was any disturbance after we got there."

This evidence was received as tending to show that the cider kept by the respondent was fermented and intoxicating. Verdict, guilty. The respondent presented the foregoing bill of exceptions, which was allowed.

Mr. Edward Leach, Solicitor for the State.
Messrs. A. F. L. Norris and Henry Robinson, for defendant:

The allegation of "keeping for sale" etc., without stating that the intent of the keeping was for sale in this State or otherwise, distinctly and formally alleging where the sale was intended to be made, does not set forth the offense, *Commonwealth v. Kennedy*, 131 Mass., 584.

The evil intent only can be punished, and it is necessary, therefore, to allege the intent with distinctness and precision, and to support the allegation by proof. *Commonwealth v. Hersay*, 2 Allen, 180; *Commonwealth v. Shaw*, 7 Met., 57; *State v. Wilson*, 2 Mil. (S. C.), Const. Rep., 185; *State v. Philbrick*, 31 Me., 401.

The allegations in the indictment may be true and yet defendant may have committed no crime. See form of complaints in *Commonwealth v. Peto*, 136 Mass., 155; *Commonwealth v. Atkins*, 136 Mass., 160; *Commonwealth v. McGarry*, 135 Mass., 558; *Commonwealth v. Snow*, 133 Mass., 575; under statutes legally the same. *Commonwealth v. Odlin*, 23 Pick., 275.

An indictment simply averring the sale of one pint without words negotiating a larger quantity, is insufficient. *Commonwealth v. Pearson*, 23 Pick., 280, n.

Mr. Justice Allen delivered the opinion of the court:

The ground of the motion to quash the in-

dictment is, that it does not with sufficient definiteness describe the offense so as to give the defendant full information of what the State expected to prove against him. Ordinarily, in indictments for offenses created by statute, it is sufficient to describe the offense in the words of the statute. *State v. Abbott*, 8 N. H., 484; *State v. Blaisdell*, 88 N. H., 895; *State v. Wentworth*, 87 N. H., 222.

The indictment charges, that the respondent on, etc., at, etc., "Not being an agent of any town, place or city for the purpose of selling spirit, with force and arms did then and there unlawfully, knowingly and criminally keep for sale fermented cider in less quantity than ten gallons, which said fermented cider was not then and there kept for sale by a manufacturer at the press, contrary, etc.," and the description is substantially in the language of the statute creating the offense. G. L., ch. 109, sec. 15. The defendant's claim, that the description of the offense should contain an averment of keeping the cider with intent to sell the same in New Hampshire and not elsewhere, is a claim not warranted by the statute. "Keeping for sale" is the language of the statute, and the indictment uses the phrase and names the place of the offense, and it is not necessary to aver a negative of an intent to sell anywhere else. If keeping the cider, with intent to sell elsewhere than at the place charged in the indictment, would be a different offense, it is not necessary to exclude the different offense by a formal denial; and if such keeping, with intent to sell elsewhere, is no offense, it cannot be necessary to negative such intent. It is not alleged that any specific quantity less than ten gallons was kept for sale, but some quantity less than that. Had the specific quantity kept for sale been alleged, it would have been necessary to use other words limiting the amount to the specific measure, that it might be certain that a less quantity than ten gallons was intended. *Commonwealth v. Odlin*, 28 Pick., 275. As it is, language could not be used to make it more certain that fermented cider less than ten gallons by measure was alleged to be kept for sale. The indictment charges the offense substantially in the language of the statute and with sufficient certainty.

Exceptions overruled.

Mr. Justice Smith did not sit; the others concurred.

Elbridge G. BOODY *et al.*,

v.

William W. WATSON *et al.*

The statute authorizing towns to exempt manufacturing property from taxation for a term not exceeding ten years, does not confer authority to exempt the same property for a second period of ten years.

(Rockingham — July 31, 1885.)

PETITION for *mandamus*, requiring the selectmen of Northwood to assess a tax upon the shoe manufacturing property of Pillsbury Brothers for the year 1884. Facts agreed

for the judgment of the court. June 21, 1878, the town voted as follows: "Resolved, that we exempt from taxation any shoe manufactory, or any other manufactory that has been or may be established in this town, for the term of ten years, provided there shall be invested in such manufacturing business at least \$10,000, and is established prior to January 1, 1875."

For a period of ten years following this vote, the establishment and capital of the Pillsbury Brothers were not taxed. September 23, 1882, the following vote was passed: "The town will exempt from taxation any shoe manufacturing establishment and the capital used in operating the same, for the term of ten years, which has been or may be established in said town, or any other manufacturing establishment that has been or may be established, provided there shall be invested in any such manufacturing business at least \$10,000, and may be established prior to January 1, 1884." Under this vote the selectmen omitted to assess a tax upon the property in question in April, 1884, and it is to compel the assessment of such tax that this proceeding is brought.

Messrs. Marston & Eastman, for plaintiffs:

Statutes exempting persons or property are construed strictly, and the exemption will be denied unless so clearly granted as to be free from fair doubt. Such statutes will be construed most strongly against those claiming the exemption. *Academy v. Exeter*, 58 N. H., 807; 2 Dillon, Mun. Corp., sec. 776; *Banks v. Billings*, 4 Pet., 514; *Charles Riv. Bridge v. Warren Bridge*, 11 Pet., 420; *Bank v. Skelly*, 1 Black, 486 (XVII., Law. ed., 178); *P. & W. R. Co. v. Maryland*, 10 How., 898; *Trask v. Maguire*, 18 Wall., 391 (XXI., Law. ed., 938); *R. R. Co. v. Low*, 60 Me., 146.

Where the language of the statute is clear and distinct, and leads to no absurd results, it must be construed in the light of its obvious meaning. *Wood v. Adams*, 86 N. H., 35.

The statute declares an exemption to be a contract, and upon the ground that it is a contract, it has been sustained. *Cases supra*; *Cox Needle Co. v. Guilford*, N. H. Aug. T., 1883.

The warrant for a town meeting held for the purpose of voting to exempt persons or property from taxation, should specify the particular establishment proposed or offered by some person or persons to be erected or put in operation. *Cox Needle Co. v. Guilford*, N. H., Aug. T., 1883.

Messrs. Bingham & Mitchell, for defendants:

The laws under which exemptions are claimed for a period of years for the encouragement of manufacturers are found in Gen. Laws, ch. 58 sec. 10. The original Act "An Act to Encourage Manufacturers," was passed July 8, 1860, and has been held constitutional, and to authorize a valid contract. *Opin. of Justices*, 58 N. H., 623.

Any doubt as to the validity and binding force of a vote, from want of formality, may be removed by a subsequent vote of the town in which the establishment to be encouraged is expressly named. *Cox Needle Co. v. Guilford*, Sup. Ct. N. H., Aug. T., 1883.

The object and general intent of the Legislature is in all cases to be regarded in putting a

construction on the language of statutes. *Jones v. Gibson*, 1 N. H., 272.

The letter of the law is the body; the sense and reason of the law, the soul. Potter's Dwar. Stat., 175.

In the absence of express terms to the contrary, authority granted by the Legislature must be held to be a continuing power; as the implied authority of a railroad to make a contract for the use of its road for a period of, or less, than five years. See Gen. Laws, ch. 164, sec. 10.

So the power to compel property holders to pave a street, extends to compelling them to *repave* when required by the municipal authorities. 2 Dill. Mun. Corp., sec. 780; *McCormack v. Patchin*, 14 Am. R., 440.

Mr. Justice Blodgett delivered the opinion of the court:

"Towns may by vote exempt from taxation, for a term not exceeding ten years, any establishment therein, or proposed to be erected or put in operation therein, and the capital used in operating the same, for the manufacture of fabrics of cotton, wool, wood, iron, or any other material; and such vote shall be a contract binding for the term specified therein." G. L. c. 53, §. 10. Under the authority thus delegated the Town of Northwood, at a legal meeting held in 1882, and in accordance with an article in the warrant therefor, passed a vote exempting certain manufacturing property for a second term of ten years, and by virtue of that vote the defendants, as selectmen and assessors of the town, omitted to assess the property for purposes of taxation in the annual assessment for 1884.

Waiving the question of the sufficiency of the vote by reason of its general terms (*Cox Needle Co. v. Guilford*, Belknap, June T., 1883), the case is reduced to the single point of the authority of the town to grant further immunity from taxation to property which had already received the benefit of a ten year's exemption. This point is neither difficult nor doubtful. The statute exemption in each case is limited to ten years. *Opinion of the Justices*, 58 N. H., 628. The language of the statute strongly supports this conclusion, and so does the uniform current of authority that, taxation being the rule and exemption the exception, the exemption is to be strictly construed, and will never be permitted to extend, either in scope or duration, beyond what its terms clearly require. *Academy v. Exeter*, 58 N. H., 306, 307, and cases cited; *People v. Davenport*, 91 N. Y., 474, 475; *Washburn College v. Comrs.*, 8 Kan., 844; *Comrs. v. Brackenridge*, 12 Ib., 114; *State v. Bank of Smyrna*, 2 Houst. (Del.), 99; *Bailey v. Maguire*, 22 Wall., 215, 226 (XXII., Law. ed., 850, 852); *Tucker v. Ferguson*, Ib., 527, 528, 575. But irrespective of these considerations, and without regard to the obvious applicability of the maxim *Expressio unius est exclusio alterius*, it cannot reasonably be supposed that the Legislature would have fixed a definite period of exemption, if their purpose was to enable towns to make it practically perpetual by renewal and extension. In fact, there is no legitimate point of view which does not lead to the conclusion that the right of towns to vote exemptions is applicable to temporary exemptions only, and for a period not exceeding ten years in all.

The second exemption by Northwood, not being within the terms or the meaning of the statute, nor within the apparent scope of its powers as a town, was a mere nullity under which no rights could be acquired; and as the vote conferring the exemption is the only justification set up by the defendants for their neglect to assess the property embraced in it, no legal defense whatever is made.

Petition granted.

Mr. Justice Clark did not sit; the others concurred.

CLARK *et al.*

v.

LABRECHE.

A constructive receipt and acceptance of goods to meet the requirement of the Statute of Frauds can only be proved by clear and unequivocal acts on the part of the buyer.

The defendant verbally bargained with the plaintiffs for a lot of crockery to be imported by them at Boston and forwarded to him at Manchester; and it was further agreed that upon its arrival in Boston it should be stored and kept there by the plaintiffs for him till he ordered it sent forward. After keeping it a reasonable time, they forwarded it to him at Manchester with a bill, and he refused to receive and pay for it. Held, that there was no acceptance of the goods within the meaning of the Statute of Frauds.

(Hillsborough — July 31, 1885.)

ASSUMPSIT, for goods sold and delivered. Facts found by the court. September 18, 1883, the defendant at Manchester, through the plaintiffs' agent, verbally ordered a lot of crockery. The crockery was to be imported by the plaintiffs at Boston, and on arrival, was to be sent to the defendant, at Manchester. The plaintiffs ordered the crockery. November 8, the crockery not having arrived in Boston, the defendant wrote the plaintiffs not to send it until further orders, as he was having some repairs done in his store. November 9, the plaintiffs replied by letter saying, "We will notify you when goods arrive and won't ship until you are ready." About a week after this the defendant was at the plaintiffs' place of business in Boston, and requested that, if the crockery should arrive before he ordered it sent, it should be kept for him there until he directed it to be forwarded. The crockery arrived November 30, and the defendant was notified and, as he had not ordered it sent, it was stored in a warehouse by the plaintiffs. About the middle of January, 1884, the plaintiffs' agent called on the defendant and asked him what he was going to do about the crockery. He said he did not want it then and that they need not send it. February 16, 1884, the plaintiffs shipped the crockery by cars to Manchester directed to the defendant, and the same day sent him notice by mail that it was shipped together with an itemized bill of it, amounting to \$245.97. The defendant refused

to receive the goods, and they have since remained at the railroad warehouse at Manchester. At the time the defendant was in Boston in November, he understood the plaintiffs were to store the crockery on its arrival and keep it for him until he should order it sent forward. The plaintiffs then, and at the time of its arrival, understood the same thing. There was no acceptance and no receipt of the crockery by the defendant within the meaning of the Statute of Frauds, unless, upon the facts stated, the plaintiffs were his agents and became his bailees from the time of its arrival and storage in Boston, or, upon the facts, an acceptance is implied.

Messrs. Cross & Taggart for plaintiffs in error:

The conduct of a party under the 17th section of the Statute of Frauds may be proved to show the contract between the parties.

Browne, Stat. Fr., § 315.

The inference deduced from the conduct of a buyer showing an acceptance, may as well be drawn from his *silence and failure to act*, as from what he *does and says*.

Browne, Stat. Fr., § 321.

There was a valid delivery and acceptance of a span of horses where the buyer notified the seller to keep them at livery for him. *Elmore v. Stone*, 1 Taunt., 457.

So where one agreed to buy two puncheons of rum to remain in bond till wanted. *Castle v. Sworder*, 6 Hurl. & N., 828.

So where the purchaser of a horse requested the seller to keep it for him. *Marvin v. Wallis*, 6 El. & B., 726.

So where the purchaser offered to resell the horse to a third person. *Blenkinsop v. Clayton*, 7 Taunt., 597.

There is a sufficient delivery and acceptance of goods, especially if ponderous and cumbersome, under circumstances similar to those in the case at bar. *Chaplain v. Rogers*, 1 East, 192; *Hurry v. Mangles*, 1 Campb., 452; *Searle v. Keeves*, 2 Esp., 598; *Beaumont v. Brengari*, 5 C. B., 301.

The only exceptions to the rule being sales for ready money, where seller would not part with the goods till payment. *Holmes v. Hoskins*, 9 Ex., 753; *Tempest v. Fitzgerald*, 3 B. & Ald., 680.

The English rule as to constructive delivery and acceptance is followed in a case, where purchaser of sheep requested the seller to keep them till a certain day. *Green v. Merriam*, 28 Vt., 801.

So where purchaser requested vendor to store the goods bought by him. *Janorin v. Maxwell*, 23 Wis., 51; *Chapman v. Searle*, 3 Pick., 38.

So where the livery-stable keeper was requested to keep a mare purchased from a third party. *Tupworth v. Moore*, 9 Pick., 847.

So where cabbages purchased were left on the land of the seller to be taken as vendee wanted them. *Ross v. Welch*, 11 Gray, 235.

In some cases it was held that delivery and acceptance in such cases was a question for the jury as to whether vendors hold as agents of the vendees. *Weld v. Came*, 98 Mass., 152.

To establish the fact, there must be evidence of a change in relations of the parties. *Knight v. Mann*, 118 Mass., 143.

In New Hampshire, to satisfy the Statute of Frauds, there must be a delivery and actual acceptance; the purchaser must have exercised

his option to receive or not, or done something to deprive him of his option; *Gilman v. Hill*, 36 N. H., 311; *Shepherd v. Pressey*, 32 N. H., 49; as assuming control and selling part of the property. *Chaplin v. Rogers*, 1 East, 192.

Acts of ownership by the buyer are evidence of acceptance, but it may be shown in any other way. *Parkham v. Mattox*, 53 N. H., 606.

A mere non-examination of the goods will not negative acceptance, since he may accept and afterwards reject them if not as warranted. *Remick v. Sanford*, 120 Mass., 316.

There is a distinction between the formation of a contract within the statute and its performance. *Morton v. Tibbett*, 152 B., 428; *Benj. Sales*, secs. 149, 150; *King v. Jarman*, 35 Ark., 190.

An acceptance of part only of the goods is sufficient; but this is not "acceptance" in satisfying the statutes. Gen. Laws, ch., 220, sec. 16.

An unreasonable delay in examining the goods after their receipt before notice of refusal to accept, will be considered an acceptance. *Benj. Sales*, sec. 162; *Bushel v. Wheeler*, 15 Q. B., 442; *Curtis v. Pugh*, 10 Q. B., 111; *Coleman v. Gibson*, 1 Mood. & R., 168; *Spencer v. Hale*, 30 Vt., 314; *Borrouscale v. Bosworth*, 99 Mass., 381.

In such cases the statute must be liberally construed. *Carville v. Crane*, 5 Hill, 483.

Messrs. Burnham & Brown, for defendant in error:

A contract of sale of personal property for more than \$38 without memorandum, part payment or earnest money, is invalid "Unless the buyer accepts and actually receives part of the property." Gen. Laws, ch. 220, sec. 16.

There must be both an actual acceptance and receipt, except in case of ponderous articles. *Prescott v. Locke*, 51 N. H., 94, 100; *Gilman v. Hill*, 36 N. H., 311; *Shepherd v. Pressey*, 32 N. H., 49; *Messer v. Woodman*, 22 N. H., 182; *Heves v. Jordan*, 39 Md., 408; *S. C.*, 17 Am. Rep. 578; *Baldev v. Parker*, 2 B. & C., 37; *Shindler v. Houston*, 1 N. Y., 261; *S. C.*, 49 Am. Dec., 316; *Bailey v. Ogden*, 3 Johns., 399; *S. C.*, 3 Am. Dec., 509; *Smith v. Bouck*, 33 Wis., 19; *Nicholle v. Plume*, 1 Car. & P., 272; *Browne, Frauds*, sec. 318.

There is no actual acceptance so long as the buyer has a right to reject. *Shepherd v. Pressey*, 32 N. H., 49; *Heves v. Jordan*, 39 Md., 472; *S. C.*, 17 Am. Rep., 578; *Rodgers v. Phillips*, 40 N. Y., 531; *Howe v. Palmer*, 3 Barn. & A., 321; *Hunt v. Heet*, 8 Ex., 814; *Shindler v. Houston*, 1 N. Y., 261; *S. C.*, 49 Am. Dec., 316; *Maxwell v. Brown*, 39 Me., 98; *Kent v. Huskisson*, 3 Bos. & P., 233; *Hanson v. Armitage*, 5 Barn. & A., 557; *Prescott v. Locke*, 51 N. H., 94, 108.

A subsequent agreement constituting part of an existing contract does not constitute an acceptance. *Shepherd v. Pressey*, 32 N. H., 49, 57; *Shindler v. Houston*, 1 N. Y., 261; *S. C.*, 49 Am. Dec., 316; *Ely v. Ormaby*, 12 Barb., 570; *Artcher v. Zeh*, 5 Hill, 200; *Walker v. Nussey*, 16 Mees. & W., 302; *Bowers v. Anderson*, 49 Ga., 146; *Malone v. Plato*, 22 Cal., 108.

Nor do mere words afterwards used as to acts to be done in carrying out the contracts. *Shepherd v. Pressey*, 32 N. H., 49, 57; *Dole v. Stimpson*, 21 Pick., 384.

The acceptance must be clear and unequivocal

cal. *Prescott v. Locks*, 51 N. H., 94, 100; *Norman v. Phillips*, 14 Mees. & W., 277; *Nicholle v. Plume*, 1 Car. & P., 272.

In a cash transaction it is improbable that the vendors should accept the agency of the vendee and thus waive their lien for the price. *Pinkham v. Mattox*, 53 N. H., 600, 603; *Shepherd v. Pressey*, 32 N. H., 49, 56.

The vendor could not act as agent for himself and another, their interests being adverse. *Nichoud v. Girod*, 4 How., 504, 555; *N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co.*, 14 N. Y., 85; *Story, Agency*, sec. 211.

So an auctioneer cannot by memorandum bind the buyer. *Bent v. Cobb*, 9 Gray, 397; *Nichoud v. Girod*, 4 How., 504, 555.

Nor can a vendee authorize the vendor to bind him. *Wright v. Dannah*, 2 Camp., 203; *Farebrother v. Simmons*, 5 Barn. & A., 383.

The vendor cannot be the agent of the vendee to accept. *Clark v. Tucker*, 2 Sand., 157; *Nichoud v. Girod*, 4 How., 504, 555; *Browne, Frauds*, sec. 327; *Caulkins v. Hellman*, 14 Hun, 390; *Cent. Ins. Co. v. Nat. Prot. Ins. Co.*, 14 N. Y., 85.

The same party cannot act as agent both of seller and buyer. *Caulkins v. Hellman*, 14 Hun, 390.

Where the buyer in presence of the seller signified his willingness to accept and receive and constitutes the seller his bailee, to which the seller assents, the title passes at once and absolutely. *Smith v. Bouck*, 83 Wis., 19, 25.

In *Elmore v. Stone*, 1 Taunt., 457, there was an immediate change of title and of character, and yet this case was doubted in *Hove v. Palmer*, 3 Barn. & A., 821; in *Castle v. Swooner*, was disapproved, and in *Proctor v. Jones*, 2 Car. & P., declared overruled.

In *Martin v. Wallace*, 6 El. & B., 726, the vendor requested the loan of a horse to which vendor consented; held, an acceptance, but on the same state of facts the reverse was held in *Phillips v. Humewell*, 4 Me., 376.

In *Blenkinsop v. Clayton*, 7 Taunt., 597, vendee tried to sell the horse at a profit.

In *Green v. Merriam*, 28 Vt., 201, vendee made an express agreement with vendor.

In *Calkins v. Lockwood*, 17 Conn., 154, the iron was not in possession of the vendor.

In *Janerin v. Maxwell*, 23 Wis., 51, vendee accepted in person.

In *Chapman v. Searle*, 8 Pick., 88, vendor gave a certificate of receipt for storage for vendee.

In *Turworth v. Moore*, 9 Pick., 347, the mare was not in possession of the vendor.

In *Ross v. Welch*, 11 Gray, 285, part of the cabbages were actually removed by the vendee.

Where vendor agreed to retain possession as vendee's agent or bailee without any act of delivery, it is not an acceptance. *Bowers v. Anderson*, 49 Ga., 148.

So where vendor agreed to keep cattle until a certain date at his expense. *Bissell v. Balcom*, 40 Barb., 98.

So upon a sale of cattle in a field where the buyer told the seller to keep and feed them at his (the buyer's) expense until he sent for them. *Kirby v. Johnson*, 23 Mo., 854; *Malone v. Plato*, 22 Cal., 106; *Ely v. Ormsby*, 12 Barb., 570.

And numerous cases which do not discuss the whole question, hold that there was no accept-

ance, because the sale, as in case at bar, was for cash, and the vendor's lien was not divested. *Holmes v. Hoskins*, 9 Ex., 753; *Tempest v. Fitzgerald*, 8 B. & A., 680.

It is only when goods reach their destination and have been received by vendee that an unreasonable detention operates as an acceptance. *Browne, Frauds*, sec. 333; *Bushel v. Wheeler*, 15 Q. B., 442; *Norman v. Phillips*, 14 M. & W., 277; *Nicholls v. Plume*, 1 Car. & P., 272; *Curtis v. Pugh*, 10 Q. B., 111.

Mr. Justice Blodgett delivered the opinion of the court:

The verbal bargain between the parties was an executory contract for the sale of certain goods. The single question is whether the goods were accepted and received within the requirement of that clause of our Statute of Frauds (G. L., c. 220, §. 16), enacting that no oral contract for the sale of goods, wares or merchandise, for the price of \$38, or more, is valid, unless the buyer accepts and actually receives part of the property. So far as the question is one of fact, it has been found against the plaintiffs; and such must be the finding as matter of law.

Conceding that acceptance and receipt may be constructive only, all the cases agree that such acceptance and receipt must be proved by clear and unequivocal acts on the part of the buyer; but as acceptance generally implies receipt and plainly would have that effect in this case, it is necessary to consider the question of acceptance only, which, as against the buyer, is to be determined solely by his acts.

The test here, therefore, is, whether the acts of the defendant, done or undone, clearly amount in legal effect to a constructive acceptance; for the question being one of the fact, it is only when the facts are not controverted, and afford plain and unequivocal evidence of the parties' intention, that the court will undertake to determine their legal effect.

What, then, are the facts? So far as they bear upon the matter of acceptance, they are: that both parties understood the plaintiffs were to store the goods on their arrival in Boston until the defendant should order them to be forwarded to his place of business in Manchester; that the goods were accordingly stored by the plaintiffs in a Boston warehouse; that they remained there a reasonable time and then were withdrawn by the plaintiffs and forwarded in their firm name to the defendant contrary to his order, who refused to receive them; and that he had a reasonable time in which to exercise his right of examining the goods before they were so forwarded.

Bearing in mind that no act of the seller alone, in however strict conformity to the terms of the contract, will satisfy the Statute, and that the mere storage of goods by the seller, or their removal to a place appointed by the buyer, will not imply any acceptance of them by the latter (*Shepherd v. Pressey*, 32 N. H., 55, 56, and cases cited), it is obvious that, upon the facts to which reference has been had, the law does not imply an acceptance; for, so far as appears, the goods were deposited in the warehouse by the plaintiffs as their property, without any *indictum*, whatever, of title or ownership in the defendant, and with no agreement affecting their

lien, and so continued to remain under the same apparent ownership and control until they were taken away and billed and forwarded by the plaintiffs as owners; whereas, acceptance cannot legally take place, in the absence of a special agreement, so long as the seller preserves his dominion over the goods so as to retain his lien for the price, for he thereby prevents the purchaser from accepting and receiving them as his own within the meaning of the Statute. *Baldevy v. Parker*, 2 B. & C., 37, 44; *Benj., Sales*, (3d Am. ed.), s. 187; *Story, Sales*, § 276; *Browne, Stat. Fr.* (4th ed.), § 817, and, consequently, if there is nothing indicating a surrender of the seller's lien, any acts of control by the buyer will not be an acceptance (*Shepherd v. Pressey, supra*, 56, and cases cited); for although there may be cases in which the goods remain in the possession of the vendor, and yet may have been received and accepted by the vendee, in such cases the vendor holds possession, not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed. *Cusack v. Robinson*, 1 B. & S., 299, 308; *Castle v. Swoorder*, 6 H. & N., 828; *Doddsley v. Varley*, 12 A. & E., 632; *Safford v. McDonough*, 120 Mass., 290, 291. But the acts of the parties must be, in such a case, wholly unequivocal; and if the vendor retain possession of the subject-matter of the sale, it must be under circumstances which expressly show that he holds as agent or bailee of the other party, and has abandoned all claim to the property of every kind. *Story, Sales*, § 278.

No such acts or circumstances appear in this case. In fact there is nothing found on which it can be held as matter of law that the plaintiffs acted as the defendant's agents or bailees in the storage and retention of the goods, or from which an acceptance can be implied against him.

Judgment for the defendant.

Mr. Justice Allen did not sit; the others concurred.

Addison N. OSGOOD

v.

William B. THORNE. *et al.*

The fact that a conveyance was made for the purpose of preferring certain creditors of the grantor, does not of itself make such conveyance fraudulent as to his other creditors.

An objection to the competency of a magistrate appointed to determine whether an execution debtor shall be admitted to take the poor debtors' oath, should be addressed to the judge who makes the appointment.

(Merrimack — July 31, 1885.)

DEBT, on a bond to take the poor debtor's oath. Pleas, the general issue, with a brief statement that the principals, Thorne, took the oath within the year. Facts found by the court.

July 1, 1882, the plaintiff recovered judgment against Thorne for about \$800. Directly upon learning of the judgment, and between July 5 and July 11, Thorne mortgaged and conveyed to certain of his creditors all his attachable property as security for and in payment of his indebtedness to them with the intent to prefer those creditors. July 23, Thorne was arrested on an execution issued upon the above judgment, and gave the bond in suit. Upon his application, afterwards made to a Justice of this court, two magistrates were appointed to determine whether he should be admitted to take the oath.

One of those magistrates, Mr. Fitts, acted as scrivener in making some of the conveyances above referred to. May 28, 1883, a hearing was had before the magistrates and Thorne was admitted to take the oath. When Fitts wrote one of the mortgages, he had knowledge that Osgood had recovered a judgment against Thorne. The mortgages and conveyances would not have been made but for the rendition of the judgment.

The plaintiff objected that Fitts was disqualified to act as magistrate; and that the decision of the magistrates was wrong as matter of law, inasmuch as they have decided that the conveyance, of Thorne, though made to hinder, delay and defraud his creditors, were not fraudulent.

The court ordered a nonsuit and the plaintiff excepted.

Messrs. William L. Foster and J. B. Haselton, for plaintiff:

The application of a poor debtor to take the oath prescribed by law for his relief, "shall be refused," if he has been guilty of any fraud. *Gen. Laws*, ch. 241, secs. 6, 8.

Grantors of the debtor having knowledge of his design to defeat, hinder or delay creditors are, in law, charged with participation in an act which constitutes fraud, although the conveyances were given "upon an adjustment of existing valid debts," however full and valuable the consideration. *Robinson v. Holt*, 39 N. H., 557, 558, 561, 562; *Seavey v. Dearborn*, 19 N. H., 851, 858; *Blodgett v. Webster*, 24 N. H., 91, 103.

The certificate of the Justices, that the debtor, as matter of law, was entitled to his discharge, is not conclusive. The question may be inquired into collaterally. *Banks v. Johnson*, 12 N. H., 445, 450, 451; *Gear v. Smith*, 9 N. H., 63; *Parker v. Stanleys*, 38 N. H., 251; *Guernsey v. Edwards*, 26 N. H., 224, 229; *Sanborn v. Fellows*, 22 N. H., 478.

And if the court can see, that, in coming to their result, they were influenced by manifest error in point of law, their judgment will be set aside. *Fuller v. Bailey*, 58 N. H., 81; *Haywood, Petitioner*, 10 Pick., 358.

One employed to write the conveyance of a debtor is disqualified to sit as a magistrate upon questions involving the validity of such conveyance. *Bean v. Quimby*, 5 N. H., 94, 98; *Whitcher v. Whitcher*, 11 N. H., 350, 354; *Sanborn v. Fellows*, 22 N. H., 478.

Mr. A. F. L. Norris, for the defendants:

The Justices having had jurisdiction, no error of law appearing, their finding that the debtor was guilty of no fraud, deceit or falsehood, was upon a matter of fact merely, and it cannot be revised by this proceeding. *Richardson v. Smith*,

59 N. H., 517; *Hayward's Case*, 10 Pick., 338.

Fraud may be inferred from the evidence adduced before the Justices, on which it is their peculiar province to pass. *Banfield v. Whipple*, 14 Allen, 13; *Giddings v. Sears*, 115 Mass., 505.

A justice is not disqualified to act as one of the justices, by reason of having done the clerical work in making the conveyance. *Cook v. Berth*, 102 Mass., 372.

Mr. Justice Blodgett delivered the opinion of the court:

As matter of law, the mortgages and conveyances were not fraudulent. They were made to secure or pay just debts and, as a consequence of ownership and dominion, a debtor may legally either give or allow a preference in respect of his property to one creditor rather than another, provided that it be done in good faith. Nor, in the absence of statute provisions to the contrary, is this right affected by the debtor's insolvency, or the preferred creditor's knowledge of such insolvency. If there is no secret trust or understanding between them for the debtor's benefit, and the motive of the transfer is to pay or secure an honest debt, the transaction is a lawful one, although the effect may be to delay or even to prevent the other creditors from obtaining payment of their equally meritorious claims; in short, the payment or security of a debt to one creditor, by way of preference, is legally no fraud upon other creditors, and so does not come within the provisions of the Statute of 13 Elizabeth, chapter 5, as to fraudulent conveyances. "The distinction is between a transfer of property made solely by way of preference of one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, which is fraudulent and illegal." *Bigelow, C. J.*, in *Banfield v. Whipple*, 14 Allen, 15.

Between the debt of the plaintiff and those of the preferred creditors, the law knows no distinction. The Statute is aimed only at intended fraud; hence, if the debtor acts in good faith in the transfer of his property, and reserves no advantage to himself, fraud cannot be predicated upon such a transaction, and the rights of creditors must be determined according to their respective priorities. In point of law, therefore, no manifest error appears in the finding of the magistrates, exonerating the debtor from "Any fraud, deceit or falsehood in relation to his property." *G. L.*, c. 241, § 6.

Whether Fitts was disqualified to act as one of the magistrates on the debtors' application to take the poor debtors' oath by reason of the mere clerical service of writing some of the mortgages, it is unnecessary to determine. See, however, *Cook v. Berth*, 102 Mass., 372.

If he was disqualified, the objection was not properly taken at the hearing, but should have been made to the Justice of this court, by whom Fitts was appointed, so that another magistrate might have been seasonably substituted in his stead.

Exceptions overruled.

Mr. Justice Smith did not sit; the others concurred.

John R. BATES,

v.

Jesse A. HAZEN.

Question of fact as to ownership of note:

(Merrimack — July 31, 1885.)

ASSUMPSIT, on an account annexed. The dispute was whether the plaintiff agreed to take the note of one Nichols in payment, provided Nichols said he would pay the note to him; or whether he took it as collateral security for the debt. The plaintiff excepted to the admission of a letter from Nichols to him, saying he would pay the note.

Mr. W. W. Flanders, for plaintiff.

Mr. A. P. Davis, for defendant.

"If the seller accepts a note without indorsement, this fact indicates an intent to take the note in exchange for the goods, and not to hold the buyer." 2 *Benj. Sales*, 939, sec. 1081, n. 17; *Am. Notes* by Corbin, 4th ed.; 2 *Dan.*, *Const. of Instruments*, sec. 1264; *Jaffrey v. Cornish*, 10 N. H., 505; *Johnson v. Cleaves*, 15 N. H., 332; *Whitbeck v. Van Ness*, 11 Johns., 409; *Youngs v. Stahelin*, 84 N. Y., 258; *Ford v. Mitchell*, 15 Wis., 304.

"But when a debtor indorses the note of a third party to his creditor, this is held to show that he gives the note as conditional payment." 2 *Dan.*, sec. 1265; 2 *Am. L. Cas.*, 302, 5th ed.

Mr. Justice Blodgett delivered the opinion of the court:

The evidence excepted to was so clearly competent as to the capacity in which the plaintiff received and held the note, that its admission does not afford ground even for doubt; and it is equally clear that no sufficient cause is assigned for setting aside the verdict. The plaintiff testified that he took the note as collateral security, and the defendant, that it was taken as payment. The issue thus presented was one of fact purely, and there is nothing in the evidence as reported tending to show that the judgment of the court was not fairly exercised in its consideration, or that the conclusion reached might not properly have been arrived at by any tribunal.

Exceptions overruled.

Mr. Justice Bingham did not sit; the others concurred.

Christopher MORAN

v.

George W. MANSUR.

A judgment for the plaintiff in an action of trespass quare clausum fregit, rendered upon a plea of soil and freehold in the defendant, is conclusive of a title in a writ of entry for the same land brought by the former defendant against the former plaintiff.

(Merrimack — July 31, 1885.)

WRIT OF ENTRY, for land in Concord. The defendant pleaded a judgment rendered

in his favor in an action of trespass brought by him against the plaintiff for breaking and entering the demanded premises and there pulling down a building, whereto this plaintiff pleaded soil and freehold in himself. To this plea the plaintiff demurred.

Mr. A. F. L. Norris, for the plaintiff, cited *Morton v. Dresser*, 108 Mass., 71; *Smith v. Royston*, 8 M. & W., 381; *Richards v. Peake*, 2 B. & C., 918; 2 Gr. Ev., sec. 626; *Beckwith v. Thompson*, 18 W. Va., 108; *Dunklee v. Wiles*, 5 Den., 296; *King v. Dunn*, 21 Wend., 253; *Ritche v. Ritche*, 16 Wend., 663; *Stevens v. Whistler*, 11 East, 51; *Palmer v. Russell*, 43 N. H., 625; *Eastman v. Cooper*, 15 Pick., 276; 1 Gr. Ev., sec. 532; *Arnold v. Arnold*, 17 Pick., 14; *Johnson v. Morse*, 11 Allen, 840; *White v. Chase*, 128 Mass., 158.

Messrs. Chase & Streeter, for the defendant, cited *Dame v. Wingate*, 12 N. H., 291; *King v. Chase*, 15 N. H., 9; *Chamberlain v. Carlisle*, 26 N. H., 540; *Sanderson v. Peabody*, 58 N. H., 116; *Morgan v. Burr*, 58 N. H., 470, 471; *Forist v. Bellows*, 59 N. H., 229, 230; *Tibbetts v. Shapleigh*, *Id.*, 319; *Eastman v. Clark*, *ante*, 31; *Metcalf v. Gilmore*, *Id.*, 174.

Mr. Justice Blodgett delivered the opinion of the court:

The parties are adjoining land owners. The controversy between them, in point of fact, is as to the divisional line between their lots. But it appears clearly from the facts stated in the case, that the identical matter in issue was determined and adjudicated in the former action of *trespass quare clausum*, between the same parties, and hence the judgment in that proceeding is an absolute bar in this, the difference in the form of action being immaterial. Then, as now, the location of the divisional line was, aside from the incidental one of damages, the only question in controversy, and therefore the plaintiff cannot now object to a judgment upon the merits which was rendered upon an issue, that he then voluntarily presented by his pleadings, and upon which he was fully heard. Having elected to put his defense in that suit upon a claim of ownership and title up to a certain specified line, by the judgment therein against him, he became estopped to contest the same matter again; and this proposition is quite too plain for discussion or for the citation of authorities, especially in this jurisdiction. See, however, *Eastman v. Clark*, *ante*, 31.

Judgment for defendant.

Mr. Justice Bingham did not sit; the others concurred.

George JANVRIN, *Admr.*,

v.

George J. CURTIS *et al.*

An administrator can maintain a bill in equity for the discovery of assets and the recovery of property conveyed by the deceased in fraud of his creditors, so far as it is needed to pay the debts of the deceased.

A conveyance made to hinder and prevent the wife of the grantor from col-

lecting alimony, in a proceeding for divorce, is fraudulent as to her, and will be set aside if necessary to enable her to collect the amount of the decree.

There may be contribution among fraudulent grantees of land when the land conveyed to one of them is taken to pay the grantor's debts, such contribution to be adjusted according to existing equities between the several grantees.

(Rockingham — July 31, 1885.)

BILL IN EQUITY, to cancel fraudulent conveyances, made by George Janvrin, the plaintiff's intestate, to the defendants. Facts found by the court:

George Janvrin married Jane Janvrin in 1870. Before marriage they made an agreement that at his decease she should have \$1,000 and all household furniture then belonging to him. Some troubles arose between them in 1874, when, April 8 of that year, she left him and never lived with him afterwards. She petitioned for a divorce on the ground of extreme cruelty and her petition was dismissed after a hearing on the merits at the January Term, 1878. February 8, 1878, he filed his petition for a divorce on the ground of abandonment. This was heard before a referee, who, June 15, 1878, announced his award for a divorce and that the libelant pay the libelee \$1,490 as alimony. After proceedings at the law term on the referee's report, a decree of divorce and that he pay the alimony was made, October 15, 1878. Suit was brought by Jane upon the decree for alimony, upon which, November 17, 1881, she recovered judgment for \$1,802.41 and costs \$7.52. This has never been satisfied. George Janvrin died intestate March 22, 1882, leaving, so far as is known, only a small amount of personal estate, which was applied in payment of his funeral expenses. He left no debts of any considerable amount, and none to be considered in this case, except the judgment for alimony in favor of Jane Janvrin. He left children, a son and four daughters, to each of whom and to a grandson, George J. Curtis, during the ten years from 1868 to 1878, he conveyed real estate, at different times and in distinct parcels, altogether being all he had, and of the value of many thousands of dollars. The son is the plaintiff. The grandson and three of the daughters are the defendants. The plaintiff was appointed administrator and brings this bill solely in the interest of Jane Janvrin as a creditor of the intestate, and seeks to cancel the conveyances that were made to these defendants on the ground that they are fraudulent and void as to her.

Messrs. Wiggin & Fuller and *W. W. Stickney*, for the plaintiff.

Messrs. J. G. Hall and *Jeremiah Smith*, for the defendants.

Mr. Justice Smith delivered the opinion of the court:

No question is made as to the correctness of the finding that the following conveyances were valid as to Jane S. Janvrin, a creditor of George Janvrin, viz.: the deed dated January 10, 1873, to George J. Curtis of land in Hampton Falls and Kensington; the deed dated April

10, 1868, to Mrs. Curtis of land in Hampton Falls; the deed dated January 10, 1874, to Susan and Caroline D. Janvrin of the west part of the block; and the deed dated January 12, 1874, to George Janvrin, Jr., of twenty-four acres of pasture.

Also, no question is made as to the correctness of the finding that the following conveyances were fraudulent as to Jane S. Janvrin, viz.: the assignment, September 10, 1877, to Mrs. Curtis of the note for \$200 secured by mortgage of land in Brentwood; the deed dated December 3, 1875, to George Janvrin, Jr., and Charles W. Janvrin of the east part of the block, subject to the life estate of Albert Janvrin; and the deed dated October 26, 1876, to Frank J. Brown of a part of the spring lot.

It is found that the conveyance of January 23, 1877, to Mrs. Curtis, of the spring lot, was valid unless it shall be held to be defeated by the claim of Mrs. Janvrin on the facts stated. The finding, that the depriving of his wife of any power to collect her claim entered into the purpose of George Janvrin in making this conveyance, and that this was understood by Mrs. Curtis, brings the conveyance within the prohibition of the Statute 18 Ellz., c. 5: Mrs. Curtis having purchased with knowledge of the fraudulent design of her grantor to defeat, hinder and delay the plaintiff in interest by the conveyance in collecting her claim, is in law charged with a participation in the fraud, although she may have paid full compensation for the land; and the conveyance as to Mrs. Janvrin is void. *Robinson v. Holt*, 39 N. H., 557, 561; *Crowningshield v. Kittredge*, 7 Met., 520; *Wadsworth v. Williams*, 100 Mass., 126; 1 Story, Eq. Jur., s. 869, and authorities cited.

The conveyance, August 22, 1874, of the Grove Street house to Susan and Caroline D. Janvrin, is found to be in fraud of the rights of Jane S. Janvrin. If the conveyance was without consideration, it was fraudulent as to creditors, and the finding is based upon the assumption that the conveyance was a gift. The facts reported do not support the finding. The conveyance was a substitute for the one half of the Academy Street house conveyed in February, 1873. That conveyance was valid not only as between the parties, but as to the creditors of George Janvrin. As between the parties, the title of the grantees was as good as if they had paid full value for it. George Janvrin was then solvent, and had no purpose of defrauding any creditor. With the delivery of the deed the title to the premises passed to the grantees, and was not re-vested in the grantor when they returned the deed to him, for it is found that it was not their intention to divest themselves of their title by returning the deed. When the grantor subsequently conveyed the premises to Jefferson Janvrin without their knowledge or consent, he became thereby their debtor to the value of the premises, and this indebtedness was paid by the conveyance of the Grove Street property. The conveyance was for an adequate consideration, and the fact is expressly found that the grantees had no knowledge of any fraudulent purpose on the part of the grantor. The conveyance is valid as against the creditors of George Janvrin.

If Wellington Bros. and Prescott's estate are liable to the plaintiff in interest for the value of

Albert's life interest in the block levied upon by them, no decree can now be rendered against them, they not being made defendants. For the same reason no decree can now be rendered against George, Jr., and Charles W. Janvrin for their interest in the block, nor against Frank J. Brown for that part of the spring lot conveyed to him October 26, 1876.

This is a bill for the discovery of assets and to cancel fraudulent conveyances. Jane S. Janvrin is the plaintiff in interest and the only creditor interested in the purposes for which the suit was brought. There is no reason why she should be compelled to bring in the creditors of Albert or the other fraudulent grantees, and be subjected to further delay and expense in litigating with them their titles to property. If the assets discovered are sufficient to satisfy her claim, she ought not to be compelled to ferret out all the fraudulent conveyances in order that the equities may be adjusted between them. She may amend the bill so as to include in her claim a decree against Mrs. Curtis for the spring land and the note for \$200 secured by mortgage upon land in Brentwood. If the defendants desire that all persons who appear to have received fraudulent conveyances from George Janvrin be made parties in order that they may contribute to the value of Mrs. Janvrin's claim, in proportion to the value of what they have respectively received from George Janvrin in fraud of her claim, it may be done. The maxim that there can be no contribution among wrongdoers does not apply. *Bailey v. Bussing*, 28 Conn., 455, 459; *Goldborough v. Darst*, 9 Bradw. (Ills.), 205, 211.

Chamberlayne v. Temple, 2 Rand. (Va.), 384, was a bill to set aside conveyances fraudulent as to creditors. The plaintiff, who was a creditor of the grantor, convened all the parties who had received such conveyances and laid before the court all the evidence for an apportionment of his claim among all the defendants. A decree was ordered against each defendant for his proportionate share of the plaintiff's claim, with a reservation of the right to the creditor to resort for satisfaction to all the parties responsible to him to the full extent of their liabilities respectively, in the event of his failing, for insolvency or other cause, to procure satisfaction from any of the parties of their due proportions of his demand. The court said: "At law, persons claiming under voluntary fraudulent conveyances cannot require a creditor to proceed against them severally for rateable proportions of their debt. He might proceed against them severally after the death of the debtor as executors *de son tort* for the full value of the assets of the debtor in their hands; and the insolvency of one would not excuse any other, and so it should be in equity, if an attempt to equalize the burden produced any unreasonable delay or detriment to the creditor."

In *Brice v. Myers*, 5 Ohio, 121, the case was this: the defendant conveyed to his four sons and son-in-law five tracts of land, one to each, in consideration of an annuity of \$20. The conveyances were held fraudulent as to the plaintiff, a creditor of the defendant, and it was ordered, that on failure of the debtor to pay the amount of the plaintiff's judgment, the land conveyed to the other defendants be separately valued, that such part of each tract might be

sold as should appear necessary to satisfy the plaintiff's claim.

In *Cornish v. Clark*, L. R., 14 Eq., 184, Clark had distributed his property to his children and made no provision to pay debts. The conveyance was held fraudulent under the Statute 13 Eliz., c. 5. The plaintiff sued for himself and all other creditors (the debtor having died during the pendency of the suit). It was ordered that as between the defendants the funeral and administration expenses and debts of the intestate (Clark), be borne by them in proportion to the amount or value of the several gifts to them respectively, but the order to be without prejudice to the right of the plaintiffs to enforce the decree against all or any of the defendants and against all or any part of the estate of the intestate as they may be advised. The question of contribution of the defendants *inter se* was reserved for further consideration.

As between George Janvrin and the defendants, the conveyances were valid and effectual. The title to the several tracts passed by the conveyances from him to them respectively. They did not take the conveyances subject to the payment of his debts. They did not agree to pay his debts and were under no legal obligation to pay them. If he had paid his debts or they had been satisfied out of other property of his, he would have had no claim upon the defendants or the lands conveyed to them for re-imbursement. A gift of property by a father to his child is not in itself wrong. A conveyance fraudulent as to a creditor, is set aside because it deprives the creditor of the means of satisfying his debt. When a grantee, under such circumstances, pays the debt to save his land from sale, it has been held that he is entitled to subrogation as against the grantor. *Cole v. Malcom*, 66 N. Y., 363; see also, *Sheldon on Sub.*, §§ 46, 210, 213; *Bridgen v. Cheever*, 10 Mass., 450; *Crosby v. Taylor*, 15 Gray, 64; *Harbert's Case*, 3 Rep., 11; *Campbell v. Mezier*, 4 Johns. Ch., 384.

Some of the defendants, whose conveyances have been found fraudulent, paid adequate considerations for the same. This fact can be considered when the other grantors, whose conveyances appear to have been fraudulent, are made parties to this suit, and when the question what proportion of Mrs. Janvrin's judgment shall be borne by the several grantees, as between themselves, is presented for consideration.

The plaintiff may have a decree canceling the fraudulent conveyances to the defendants and for a sale of so much of the lands as will satisfy the claim of Mrs. Janvrin, with interest, costs and expenses of sale, unless they shall pay into court for her use the amount of her claim with interest and costs. If the defendants do that, they may have an amendment making the execution creditors of Albert, Albert's children, George, Jr., and Charles W., and Frank J. Brown co-defendants, who will be entitled to be heard; and if the fraudulent character of their conveyances is established, a decree may be rendered for equitable contribution in favor of those who pay Mrs. Janvrin's claim.

Mr. Justice Allen did not sit; the others concurred.

The foregoing opinion was delivered at the

June Term, 1884. The case was subsequently amended and reargued. The amendments appear in the opinion of the court delivered at the June Term, 1885, by

Smith, J. In the former opinion the conveyance of the Grove Street property was held valid as against the creditors of George Janvrin, because the conveyance was for an adequate consideration and it had not been found that the grantees had any knowledge of any fraudulent purpose of the grantor. The plaintiff, upon a rehearing, contended that the conclusion of the trial court, that the conveyance was in fraud of the rights of Jane S. Janvrin, was a conclusion of fact and not of law. The case has been amended and the fact now appears that the grantees had no knowledge of the fraudulent purpose of their father, George Janvrin. The conveyance must, therefore, be held valid, as against the creditors of George Janvrin.

At the former argument no question was made as to the correctness of the finding of the trial court that the conveyance of the west part of the brick block was not in fraud of the grantor's creditors nor of any rights of the plaintiff, and it was, therefore, assumed in the former opinion that the conveyance was valid as against creditors. A rehearing upon this part of the case was also asked for upon the ground that the facts reported did not justify the conclusion of the trial court, that the conveyance was not in fraud of the claim of Jane S. Janvrin, but, on the contrary, did show that it was in fraud of her claim. By an amendment of the original case, the fact now appears that the grantees of the block, Susan and Caroline D. Janvrin, had no knowledge of any fraudulent purpose of the grantor, George Janvrin, in the conveyance of that property to them; and further, that "They understood it was done in accordance with, and in fulfillment of, a long cherished purpose of his to convey the block to them, partly in payment of a debt due to them from him and partly as a gift for their benefit." It is now contended by the plaintiff that the conveyance was fraudulent on the part of George Janvrin, and this contention is based upon the finding in the original case that "After April, 1874, it was George Janvrin's purpose and he sought to prevent the establishment of any claim of his wife, and after its establishment in 1878, he used every means in his power to prevent its collection, and in making the conveyances bearing date subsequent to April, 1874, the depriving of his wife of any power to collect her claim entered into his purpose, * * *." The "deed of the west part of the block to Susan and Caroline D. Janvrin is dated January 10, 1874, but was not delivered until the spring or summer of 1875, and it is claimed that this conveyance should be treated as if dated at the time of its delivery. But we interpret the finding to mean the literal date of the deed. The other construction would be inconsistent with the finding that the deed was on good consideration, and not in fraud of the grantor's creditors."

It appears that the value of the block was \$9,000 at the time of the conveyance, and to the extent of about \$5,000 was a gift from George Janvrin to his daughters, the grantees. The plaintiff claims that if the conveyance was

not fraudulent as to the whole premises, it was fraudulent as to this balance of \$5,000. The facts appear to be that, at the time of the delivery of this deed, the grantor then owned the east part of the block, worth \$4,200, conveyed to Albert Janvrin and his sons, December 8, 1875; twenty acres of the spring land, conveyed January 23, 1877, to Mrs. Curtis for \$1,000, and the rest of the spring land, conveyed October 26, 1876, to Frank J. Brown; property much more than sufficient for the payment of all his debts. The conveyance of the west part of the brick block, therefore, was not fraudulent either in fact or in law.

The result reached in the former opinion is not changed.

Case discharged.

Mr. Justice Allen did not sit; the others concurred.

BERRY
v.
BICKFORD.

A town which becomes the purchaser of land sold for taxes, under G. L., c. 59, § 6, is not estopped to set up the title so acquired by the fact that for two years after the sale and before a deed had been given by the collector the premises were taxed to the owner and the taxes paid by him.

(Strafford — July 31, 1885.)

WRIT OF ENTRY. Trial by the court.

The land in question was conveyed in mortgage to the Gonic Five Cents Savings Bank by one Nutter, February 4, 1869. February 26, 1874, Nutter's assignee in bankruptcy quitclaimed it to the bank, and October 10, 1882, the assignee of the bank quitclaimed it to the plaintiff.

The defendant's title was a quitclaim deed of the premises from the Town of New Durham, dated March 14, 1882; and the title of the town was through a deed of quitclaim, dated January 14, 1882, from its collector of taxes for 1878. May 31, 1879, the land was duly sold for the taxes of 1878, and was bid off by the town. In 1880, and also in 1881, the land was taxed to the bank, and the bank paid the taxes.

The court ordered judgment for the defendant, and the plaintiff excepted.

Meers. Sanborn & Cochrane, for the plaintiff.

Mr. R. G. Pike, for the defendant.

Mr. Justice Allen delivered the opinion of the court:

The only point raised by the plaintiff in the case is, that the town, by assessing a tax upon the land to the bank, the plaintiff's grantor, and receiving the tax in 1880 and 1881, after it had purchased the land and had a right to a deed, was estopped from denying the title of the bank, and as against that title took nothing from the collector's deed and conveyed nothing to the defendant.

Although the town had a right to demand and receive a deed at the end of a year from the time of sale, the land was open to redemption by the bank, which had an interest to protect at any time prior to the reception of a deed from the town. G. L., c. 59, §§ 8, 14. The bank had a title to the land as early as 1874, and there is nothing to show it was not the duty of the bank to pay the tax of 1878. The proceedings of the collector, in selling the land in 1879 for the unpaid tax of 1878, were matters of public record in the town and were constructively known to the bank, and the bank had the right and privilege of paying the delinquent taxes and protecting its title at any time up to January, 1882, when the town took its deed. The fact that, during all the time, between the tax sale in May, 1879, and January, 1882, or any part of it, when the land was open to redemption, it was taxed to the bank whose duty it was to pay the tax, cannot estop the defendant nor the town under whom the defendant claims from asserting a title, which the bank might have defeated, but did not take the necessary steps to do. So long as the land was open to redemption, neither the town nor its selectmen could know that the bank would not pay the tax and make its title sure. Having a right to redeem the land, the bank had such an interest in it that the town, during the existence of such right, might well assess the tax against the bank, and in doing so there would be no estoppel nor waiver of a right on its part to assert a title not before defeated or destroyed by a redemption of the land from a tax sale. The position of the bank, the plaintiff's grantor, was not changed to its injury or disadvantage by anything which the town did. Even if neither the plaintiff, at the time of his purchase, nor the bank at the time of the proceedings, in the sale of the land to and by the town, had actual notice of the same, there could be no estoppel against a purchaser at a tax sale, notice of the proceedings, as provided by law, having been given, and actual notice not having been intentionally or fraudulently withheld. No question is raised by the case upon the effect of want of notice to the bank, beyond the bearing of the fact upon the question of estoppel, and that question cannot be affected by want of notice, if the want did not arise or was not promoted by the fraud of the defendant or the town. It was no fault of the town that the bank was ignorant of the assessment of the tax of 1878, or of the sale of the land for that tax in 1879; nor was it the fault of the town that the bank did not redeem the land and protect its title by paying the tax sometime in the two and one half years after the sale and before the deed was taken, and neither the plaintiff nor his grantor, the bank, can now complain, if the defendant and his grantor, the town, insist upon asserting a title, which they, the plaintiff and the bank, might by reasonable diligence have easily defeated.

The selectmen of the town are public officers, whose duties are defined by law, and the town could not be estopped from claiming title to its land by any wrongful or unauthorized act of its selectmen in assessing a tax upon the land against one not the owner, nor in collecting and receiving the tax. *Rossin v. Boston*, 4 Allen, 57, 58; *St. Louis v. Gorman*, 20 Mo., 598; *Ellis*

worth v. Grand Rapids, 27 Mich., 280; *McFarlane v. Kerr*, 10 Bosworth (N. Y.), 249.
Exceptions overruled.

Mr. Justice Blodgett did not sit; the others concurred.

Harriet A. FULLER

v.

John DANIELS.

Injunction granted to restrain a mill owner from opening his gates and allowing water to run to waste when the plaintiff, an owner on the other side of the stream, taking his water from the same dam, has a right to all the water not needed for use by the defendant.

(Hillsborough, — July 31, 1885.)

BILL IN EQUITY, for an injunction to restrain the diversion of water from the plaintiff's mill, for an assessment of damages for such diversion, and to define the respective water rights of the plaintiff and defendant. Facts found by the court.

April 2, 1849, the Souhegan Manufacturing Company owned a dam and water power on the Souhegan River in Milford Village, and land and mills on both sides of the river, and on that day conveyed to Daniel Putnam and Leonard Chase all the land, buildings, etc., of said company, lying on the westerly side of the river and between the river and highway, together with the right to rebuild and repair the company's dam, in case the same should be abandoned or suffered to fall into decay by the company; also, the right to maintain gates "Whereby water may be admitted into the flume belonging to the premises hereby released, as it is now admitted from said company's pond, whenever there is a surplus of water running to waste, not needed for said company's use; and to admit and draw into said flume, through such gates, any such surplus of water, whenever the same may be done without detriment or inconvenience to said company, and without interrupting or preventing said company, their successors and assigns, in prosecuting any purpose connected with said dam or pond, or their water power derived therefrom, or their works operated thereby." Excepting and reserving to the company their dam and so much of the west bank of the river as supports the west wing thereof, with the right to enter for repairs; also excepting and reserving the water power at said dam and pond formed thereby, and the control and management of the water therein and flowing thereinto, and also the right to enter for the purpose of closing the gates admitting water from the pond into the flume, whenever the flume or penstock shall be so out of repair as to suffer the water to run to waste.

The plaintiff now has title by deed to all which Putnam and Chase took by this deed, and the defendant now has all the land and rights on both sides of the river which remained in the company after its execution.

At the time of the above conveyance to Putnam and Chase, the Souhegan Manufacturing

Company owned a cotton mill of the capacity of about 5,000 spindles, situated on the east side of the river, and operated by its dam and water power. It continued to operate this mill until it was destroyed by fire in 1872. The mill was never rebuilt. There was no controversy about the use of the water until about July 3, 1884, when the pond was drawn down to such an extent that the plaintiff was unable to obtain sufficient power for operating the machinery in her mills. The plaintiff's agent called on the defendant and complained that he was allowing the water to run to waste, and requested him to close his gates and flume. The defendant claimed that he had the right to keep his gates open, and to draw all the water from the pond if he chose; and refused to close his gates or allow them to be closed; giving as a reason, that it was necessary for the preservation of his flume and waterwheel that they should be kept wet. As a matter of fact, the water was not needed by the defendant for the preservation of his property, nor for any manufacturing or useful purpose.

Subject to exception, the plaintiff introduced evidence of the manner in which the water had been used by Putnam and Chase, and by Andrew Fuller, the plaintiff's deviser, when the Souhegan Manufacturing Company was operating its cotton mill.

If the plaintiff is entitled to recover damages of the defendant in the proceeding for the diversion of water from July 5 to August 16, 1884, such damages are assessed at \$150.

Mr. Robert M. Wallace, for plaintiff, cited: *Sumner v. Foster*, 7 Pick., 32; *Ballou v. Woods*, 8 Cush., 48; *Lyon v. McLaughlin*, 32 Vt., 423; *Ranlet v. Cook*, 44 N. H., 512; Gould, Waters, secs. 320, 374, 491.

Messrs. A. F. Stevens and Thos. H. Dodge, for defendant:

Where the bill alleges that the plaintiff is joint owner of the water in controversy, and the proof adduced to sustain her claim shows, that her right and interest in the water is qualified, contingent and subject to the prior rights of defendants, it constitutes such a variance as to defeat her right to maintain the bill. *Wilbur v. Brown*, 3 Denio, 356.

The deed offered by her in evidence shows merely a right or property in the surplus of the water, when running to waste, and parol evidence is not admissible to alter or change the clear and express words of the deed. *Webster v. Atkinson*, 4 N. H., 21.

The general rule is that contemporaneous evidence is inadmissible to vary the terms of a valid, written instrument. *Lou v. Blodgett*, 1 Post., 121.

Parol evidence is not admissible even to show that part of the premises was not intended to be exempt from the grant; the conclusive presumption being that the whole engagement of the parties and its extent and manner were reduced to writing. *Nutting v. Herbert*, 35 N. H., 121.

Plaintiff's action must fail, because she does not show, that any adverse claim to the water was ever set up by anyone under conveyance through which she claims title, the use of the water being simply a privilege or favor which could be granted or withheld at pleasure; *Ballou v. Wood*, 8 Cush., 48.

And because she does not show that defendant used or allowed to run to waste any water to which she laid claim. *Whittier v. Cochecho Mfg. Co.*, 9 N. H., 458.

As to the right of defendant to the use of the water, where a right exists to use a certain quantity; a change in the mode and objects of the use without increasing the quantity, is no violation of the right. *Bullen v. Runnels*, 2 N. H., 262; 1 B. & Ald., 253; *Saunders v. Newman*, 15 Mass., 318; *Bigelow v. Battle*, 15 Johns., 218, 3 Cal., 313; 17 Johns., 320; *Whittier v. Cochecho Mfg. Co.*, 9 N. H., 458; *Johnson v. Rand*, 6 N. H., 23.

As to his right to change the mode in which he used the water, provided he took no more than was necessary; 1 Barn. & Ald., 258; *Saunders v. Newman*, 2 N. H., 255; *Bullen v. Runnels*, 2 N. H., 262; *Luttrell's Case*, 4 Coke, 86; *Alder v. Lavil*, 5 Taunt., 454; *Johnson v. Rand*, 6 N. H., 23.

A construction in a will which would allow such change in the mode of use should be favored. *Wiggin v. Wiggin*, 43 N. H., 566.

So of a grant by deed. *Dow v. Edes*, 58 N. H., 195.

He may appropriate the amount of water to which he is entitled to any use he pleases. *Davey v. Williams*, 4 N. H., 227, 8.

It can be of no importance when the contract is made, to what use the water should be applied. *Bigelow v. Battle*, 15 Mass., 314.

The rule is to interpret the grant as a privilege conveyed of a certain quantity of power, and not power limited to a certain use. *Pratt v. Lamson*, 2 Allen, 280-282.

Where the grant of the privilege is left in doubt, whether it is the grant of a sufficient quantity, or the grant of water for a particular use, the former construction will be favored. *Ashley v. Pease*, 8 Pick., 275; *Tourtellot v. Phelps*, 4 Gray, 374; *Cromwell v. Selden*, 3 N. Y., 255, 257; *Rogers v. Bancroft*, 20 Vt., 257; *Garland v. Hudson*, 46 Me., 615.

So a reservation in a grant expressed in the most general way, without limit as to the manner of use or future application of the water, is interpreted in the same way. *Borst v. Empe*, 1 Seld., 38-40; *Adams v. Warner*, 23 Vt., 410; *Rood v. Johnson*, 26 Vt., 73; *Blake v. Madigan*, 65 Me., 626-629.

The plaintiff is entitled only to the surplus beyond that used by the defendant. *Olmstead v. Loomis*, 9 N. Y., 431, 432.

All grants and exceptions of water power are absolute without restriction as to the use. *Wakeley v. Davidson*, 26 N. Y., 891, 895; see, *Fisk v. Wilber*, 7 Barb., 402, 404; *Comstock v. Johnson*, 46 N. Y., 619; 1 N. Y., 96; also, cases in 4 U. S. Digest, 1st series, 568-565; 14 Id., 284, 285.

Mr. Justice Blodgett delivered the opinion of the court:

The provisions of the conveyance from the Souhegan Manufacturing Company to Putnam and Chase expressly gave to the latter the right to draw from the grantor's pond, through the flume belonging to the premises conveyed, all the water not needed for the grantor's use; that is, Putnam and Chase took by the conveyance the right to draw and to use so much of the water in the pond as was not required by the

company in operating their mill as it was then operated. The plaintiff has succeeded to the rights of Putnam and Chase, and the defendant to those remaining in the company. The plaintiff is, therefore, entitled to the surplus water not needed for the defendant's use. Necessity being the test of the defendant's right, it is not for him to complain that the plaintiff's surplus was increased by the burning of the company's mill in 1872. Whenever he requires such increase for any useful purpose, he may take it, upon the familiar principle that where a right exists to use a certain quantity of water, a change in the mode or object of the use, without increasing the quantity, is no violation of the right; but until then he plainly has no power to raise his gates and cause the water for which he has no use to run to waste. Having done so, and to the plaintiff's injury, he is liable to respond to her in damages in this proceeding. *The assessment made at the trial Term is, accordingly, affirmed.*

The evidence excepted to was admissible. The acts and conduct of the parties thus shown did not alter or vary the terms of the conveyance in any respect. Their only effect was to define and limit the water rights of each as they understood them to exist under the conveyance. This they might properly do, and certainly there can be no more weighty evidence in the interpretation of that conveyance, so far as it relates to water rights, than the practical construction given to it by the parties themselves as evidenced by the manner of their use of such rights.

The temporary injunction heretofore granted is made perpetual. If, however, in point of fact, the storage capacity of the pond, or the water supply of the river, has been increased by the defendant or his grantor since the conveyance to Putnam and Chase, to the extent of that increase the injunction will be modified upon application. *Whittier v. Cochecho Man. Co.*, 9 N. H., 454.

Decree for plaintiff.

Mr. Justice Clark did not sit; the others concurred.

NOTE.—A mandatory injunction lies to compel defendants to restore a stream of water to its natural channel, and allow plaintiffs the use to which they are entitled. *Corning v. Troy*, etc., 40 N. Y., 191; 8 C., 39 Barb., 311.

The right to such equitable relief is established by authority as well as principle. *Webb v. Portland Mfg. Co.*, 3 Sum., 190; *Tyler v. Wilkinson*, 4 Mason, 400; *Townsend v. McDonald*, 4 N. Y., 381.

Even where actions at law are proper to recover damages for waste or trespass, courts will interfere by injunction to restrain acts of that character to avoid a multiplicity or an indefinite repetition of suits. *Livingston v. Johnson*, 6 Johns. Ch., 497; *Spear v. Cutler*, 2 Code Rep., 100; *Angell, Wat. Courses*, §§ 449, 450; *Story, Eq. Jur.*, § 901.

Cases of a nature calling for like remedial interposition of courts of equity are: the obstruction of water-courses, the diversion of streams from mills, etc. 2 *Story, Eq. Jur.*, 241; *Notes* 1, 2; § 928 p. 243.

It will be allowed to prevent waste against a tenant in common in possession; *Hawley v. Clowes*, 7 Johns. Ch., 122; but not where the right is doubtful or where defendants in possession claim adversely. *Storm v. Mann*, 4 Johns. Ch., 21.

Even where parties are tenants in common of a mill, mill-dam and water privilege, one of the co-tenants, will be restrained from diverting the water to a private mill of his own, in such manner as to prevent complainants from using their factory for a short time daily. *Kennedy v. Scovill*, 12 Conn., 316; see, *Bliss v. Rice*, 17 Pick., 23.

Equity will restrain defendants from wasting water running to complainant's mill, and thereby diminishing the water power. *Ballou v. Inhabitants, etc.*, 4 Gray, 324; and see, *Bemis v. Upham*, 13 Pick., 169; *Quackenbush v. Van Riper*, 2 Green, Ch., 360.

It will lie to restrain diversion of water after a long enjoyment of it by plaintiff; *Gardner v. Trust-*

ees of Newburgh, 2 Johns. Ch., 162; and against a grantee of a water privilege, who encroaches on a privilege reserved in the grant. *Olmstead v. Loomis*, 9 N. Y., 423.

It will be allowed to stay or prevent future waste. *Winship v. Pitts*, 3 Paige, 259; *Kane v. Vandenburg*, 1 Johns. Ch., 11; *Johnson v. White*, 11 Barb., 184; *Rodgers v. Rodgers*, 11 Barb., 595.

CASES
DETERMINED IN THE
SUPREME COURT OF RHODE ISLAND,

ON AND AFTER JANUARY 17, 1885.

CHIEF JUSTICE,
HON. THOMAS DURFEE.

ASSOCIATE JUSTICES,

HON. THOMAS MATTESON,
HON. JOHN H. STINESS,

HON. PARDON E. TILLINGHAST,
HON. GEORGE A. WILBUR.

HON. ARNOLD GREEN, *Reporter*.

Leander C. BELCHER *et al.*, *Complainants*,
v.

William W. ARNOLD *et al.*

A purchaser of real estate at an execution sale may, in equity, avoid conveyances previously made by the judgment debtor in fraud of his creditors.

(January 17, 1885.)

BILL IN EQUITY, to avoid certain conveyances of realty as in fraud of creditors and for an account.

The case is sufficiently stated in the opinion. *Messrs. Charles Bradley & George B. Barrows*, for complainants:

In cases of fraud, for which the common law affords relief, chancery possesses concurrent jurisdiction. Snell's Prin. Eq., Eng. ed., 384.

The cognizance of every case of fraud, with the single exception of fraud in obtaining a will, has been conceded to chancery, even though there be a remedy at law. 1 Spence, Eq. Jur., 625.

Courts of chancery have always exercised a concurrent jurisdiction on the statutes of Elizabeth on fraudulent conveyances. May, Fraud. & Vol. Conv., 472.

Even where there is a remedy at law, as in ejectment. *Bennett v. Musgrove*, 2 Ves., 51.

Or to recover money paid. *Colt v. Woollaston*, 2 P. Wms., 154.

Or where merely pecuniary relief was prayed for alleged fraudulent conduct. *Evans v. Bicknell*, 6 Ves., Jr., 174, 182; *Slim v. Croucher*, 1 DeG. F. & J., 518; *St. Aubyn v. Smart*, L. R., 5 Eq., 188, affirmed L. R., 3 Ch., 646; *Ramsaire v. Bolton*, L. R. 8 Eq., 294; *Hill v. Lane*, L. R., 11 Eq., 215.

The rule that equity will not try conflicting titles to land which are wholly legal, requires that there be no element in the case which brings it under any recognized head of equity jurisprudence, such as fraud, accident and the like. *Crane v. Conklin*, Sax. (N. J.), 846; *Lewis v. Cocks*, 28 Wall., 466. (XXIII. Law. ed., 70.)

The record of a fraudulent deed, valid on its

face, is a cloud on the true title which equity alone can remove, by compelling conveyance to be made for the purpose of correcting the record. *Gray v. Jenks*, 3 Mason, 520-525; *Brown v. Stewart*, 56 Md., 421; *Bunce v. Gallagher*, 5 Blatchf., 481.

Though a court of equity is not the proper tribunal to determine the title to lands. *Devaux v. Detroit*, Har. Ch., 98; *Blackwood v. Van Fleet*, 11 Mich., 252; *Flint, etc. R. R. Co. v. Gordon*, 41 Mich., 420.

Yet it is only so where the remedy at law is plain and adequate; still it asserts jurisdiction over cases of legal title where plaintiff is not in possession. *King v. Carpenter*, 37 Mich., 363.

Or where defendant fraudulently took advantage of a break in plaintiff's record title. *Eaton v. Troubridge*, 88 Mich., 455; *Meth. Church of Newark v. Clark*, 41 Mich., 730.

Or where there was a disputed title, and plaintiff sought to have a mortgage set aside. *Allen v. Waldo*, 47 Mich., 516.

It would not become a court of equity to take a single step to save harmless a party detected in a fraudulent combination to cheat. *Sands v. Codwise*, 4 Johns., 589.

A fraudulent intent may be presumed from circumstances in cases of conveyances by a debtor. *Bump, Fraud Conv.*, 202, 203; *Bean v. Smith*, 2 Mason, 252.

Mr. John D. Thurston, for respondents.

Mr. Chief Justice Duffee delivered the opinion of the court:

The object of this suit is to have certain conveyances of real estate, executed by William W. Arnold to divers persons, defendants, set aside as void under the statute of fraudulent conveyances, because made with the intent to hinder, delay and defraud his creditors. The complainants are purchasers of the estates conveyed under an execution issued on a judgment recovered in their favor against the said William W. Arnold. The objection is raised that the court has no jurisdiction, because there is an adequate remedy at law. In *Beckwith v. Burroughs*, Index T, 95, 99, we had occasion to remark that there is a conflict of decision on this point and to cite the cases, but without ex-

pressing any definite opinion. Now, however, after further consideration, our conclusion is that the suit is maintainable, the jurisdiction in equity and at law being generally concurrent in cases of fraud. See cases and authorities cited for complainants.¹

We have come to the conclusion, on the evidence, that the conveyances complained of ought to be set aside for the reason alleged.

¹As follows:

Snell, Principles of Equity, 384; 1 Spence, Eq. Jur., 625; May, Fraudulent and Voluntary Conveyances, 472; 1 Story, Eq. Jur., sec. 66; Bennett v. Musgrove, 2 Ves. 51; Colt v. Wollaston, 2 P. Wms., 154; Evans v. Bicknell, 6 Ves. Jr., 173; Slim v. Croucher, 1 DeG. F. & J., 518; St. Aubyn v. Smart, L. R., 5 Eq., 185; also on appeal L. R., 3 Ch. App., 646; Hampshire v. Bolton, L. R. 8 Eq., 204; Hill v. Lane, L. R. 11 Eq., 215; Hartshorn v. Bames, 81 Me., 93; Lillard v. McGee, 4 Bibb, 165; Dodge v. Griswold, 8 N. H., 425; Abbey v. Commercial Bk. of N. O., 31 Miss., 434; Wampler v. Wampler, 30 Gratt., 454; Crane v. Conklin, 1 N. J. Eq., 346; Lewis v. Cocks, 23 Wall., 466, [XXIII. Law, ed., 70]; Gray v. Jenks, 3 Mason, 520; Brown v. Stewart, 56 Md., 421; Bunce v. Gallagher, 5 Blatchf., 481; Flint & P. M. R. R. Co. v. Gordon, 41 Mich., 420; King v. Carpenter, 37 Mich., 383; Eaton v. Trowbridge, 38 Mich., 454; Methodist Church of Newark v. Clark, 41 Mich., 780; Allen v. Waldo, 47 Mich., 510; Sands v. Codwise, 4 Johns., 536.

Mary MALONE

v.

Patrick RYAN.

In Pub. Stat., R. I., cap. 206, § 9, clause second, the words "**trespass on the case**" in the statute apply to actions *ex delicto*, not to actions *ex contractu*.

An action for breach of promise of marriage is an action *ex contractu* not *ex delicto*.

(January 17, 1886.)

TRESPASS ON THE CASE. On defendant's motion to dismiss the action.

The writ in this case was as follows:

"The State of Rhode Island and Providence Plantations.

Providence, sc. To the Sheriffs of the several counties or to their deputies, Greeting:

We command you to arrest the body of Patrick Ryan of the Town of Lincoln, County of Providence, State of Rhode Island, if he may be found within your precinct, and in safe custody keep, to answer the complaint of Mary Malone, of the Town of Cumberland, said county and State, at the next Supreme Court to be holden at Providence within and for the County of Providence, on the first Monday of October next ensuing the date hereof, in an action of trespass on the case for breach of promise of marriage as by declaration to be filed in court will be fully set forth; to the damage of the plaintiff \$5,000. Hereof fail not, and make true return of this writ with your doings thereon.

Witness, Hon. Thomas Durfee, *Chief Justice* of our Supreme Court at Providence, this 11th day of May, in the year 1884.

Charles Blake, *Clerk.*"

The writ was not indorsed with any affidavit,

and was served by arrest. The declaration set out a simple breach of promise to marry. The defendant moved for a dismissal of the action on the ground that there had been no legal service of the writ.

The following are the statutory provisions referred to in the opinion of the court.

Pub. Stat. R. I., chap. 206, § 9, is as follows:

Writs of Arrest.

Sec. 9. An original writ, commanding the arrest of any person not exempt by law from arrest, may be issued from the Supreme Court, court of common pleas or any justice court:

First. In any action for the recovery of a debt; or of a state or town tax, the cause of which accrued previous to the first day of July in the year one thousand eight hundred and seventy.

Second. In any action on penal statutes, or in any action of trover, detinue, trespass, trespass on the case, trespass and ejectment, *trespass quare clausum fregit* and *scire facias* against bail in criminal cases.

Third. Whenever the plaintiff, in an action to be commenced by such writ, his agent or attorney, shall make affidavit to be indorsed thereon or annexed thereto, that the plaintiff has a just claim against the defendant upon which the plaintiff expects to recover, in the action commenced by such writ, a sum sufficient to give jurisdiction to the court to which such writ is returnable; *And also, either*, That the defendant or some one of the defendants is about to leave the State without leaving therein real or personal estate whereon an execution that may be obtained in such action can be served, or that the defendant or some one of the defendants has committed fraud in contracting the debt upon which the action is founded or in the concealment of his property or in the disposition of the same.

Provided, That, whenever an arrest shall be made in accordance with the third clause of this section, the court to which the writ is made returnable, or any justice thereof, may order upon application of any defendant so arrested, and for cause shown upon hearing the parties therein, release such defendant from such arrest and discharge the bail, if any, taken thereon; but said writ shall not be abated on account of such release and discharge, but may be prosecuted to final judgment in the same manner as if no such release and discharge had been granted.

Chapter 226 "Of the Relief of Poor Debtors," sections 1 and 16 are as follows:

Relief of Debtors Imprisoned.

Section 1. Any person who shall be imprisoned for debt, whether on original writ, *meene* process or execution, or for non-payment of military fine, or town or state taxes, or on execution awarded against him as defendant in any action of trespass and ejectment, or trespass *quare clausum fregit*, in which title to the close was in dispute between the parties, may complain to any justice of the Supreme Court or to any justice of the peace in the county where such person shall be committed, that he has no estate, real or personal, wherewith to support himself in jail or to pay jail charges, and may request to be admitted to take the poor debtors' oath.

Sec. 16. No person who shall be committed on execution awarded against him a plaintiff

in replevin, or as defendant in any action on a penal statute, or in any action of trover or detinue, or for any malicious injury to the person, health or reputation of the plaintiff in such suit, or for seduction, or for any trespass, excepting on such as are particularly named in section 1, shall be deemed to be within the meaning of the provisions of that section or entitled to be admitted to take the oath as aforesaid.

Chapter 227 "Of Poor Tort Debtors," section 1 is as follows:

Sec. 1. Any person who shall be imprisoned upon an original writ, *meane* process, execution or upon surrender or commitment by bail in action for breach of promise of marriage, on a penal statute, or in any action of trover, detinue, deceit, trespass and ejectment, or *trespass quare clausum fregit*, in which the title to the close was not in dispute between the parties, or in any action of the case for libel, or for words spoken, or for any action otherwise arising in tort, and who shall complain on oath to the keeper of the jail in which he is imprisoned that he has no estate, real or personal, where-with to support himself in jail, or to pay jail charges, shall be entitled to a citation as herein-after provided.

Mr. George J. West, for plaintiff.

Messrs. Williard Sayles & Henry J. Dubois, for defendant.

Per Curiam. We are of the opinion that the action of "trespass on the case" which warrants an arrest under Pub. Stat. R. I., chap. 207, § 9, *second* clause, is the action *ex delicto* or in tort and not *assumpsit*, *assumpsit* being now commonly denominated an action of the case, the word "trespass" being omitted as more appropriate to tort and, consequently, that the defendant in *assumpsit* for a breach of promise of marriage cannot be arrested without the affidavit presented by the *third* clause of section 9, notwithstanding that the action may technically be properly denominated trespass on the case. A promise of marriage is simply a contract. The breach of it is not a tort, though it may resemble a tort in its consequences. We are not convinced that it is to be regarded as other than a breach of the contract because it is classed with torts for certain purposes in chapter 227, section 1; for, though classed with torts, it is not classed with them in chapter 226, section 16, as would be natural, if it was intended that it should be generally so regarded.

Motion to dismiss granted.

Mary FOLEY

v.

William H. GREENE *et al.*

When a son had been guilty of embezzlement and his mother made a note and executed a mortgage to the employer from whom he had embezzled, and the court was satisfied that the mother's controlling motive was to protect her son from exposure and prosecution.

Held, that she was not a free agent and that the note and mortgage should be annulled and canceled. The maxim, *In pari delicto potior est conditio defendentis*, does not apply to such a case.

(January 24, 1886.)

BILL IN EQUITY to annul a note and a mortgage of real estate.

The case is stated in the opinion of the court.
Mr. Edwin D. McGuinness, for complainant.

Mr. Charles E. Gorman, for respondents.

Mr. Chief Justice Durfee delivered the opinion of the court:

The bill shows that, on August 1, 1881, the complainant gave the defendant, Hanley, a mortgage, with power of sale on her real estate in Providence to secure the payment of her promissory note for \$1,000, of even date with the mortgage, payable to the order of Hanley one year after date, and that on December 30, 1881, Hanley assigned the mortgage to the defendant, Greene. The bill alleges that the note and mortgage were given by the complainant to prevent the criminal prosecution of her son for embezzlement, and prays that the mortgage deed and the assignment thereof may be set aside as void, and for other relief. It appears by allegation and evidence that, for several years before July 31, 1881, the complainant's son, John B. Foley, was in the employ of Hanley as clerk or collector, and as such had the custody of large sums of money collected for Hanley, who was a brewer and wholesale liquor dealer; and that in the spring of 1881 Hanley discovered that said John B. Foley had embezzled some \$1,500 or more of the money so collected. The bill avers that thereupon it was represented to the complainant, who was a poor and rather ignorant woman, by Hanley and by others, that if she would pay Hanley \$500 and give her note and mortgage for \$1,000 more, the whole matter of the defalcation would be kept quiet and no criminal charge would be made against her son; and that, being terrified, she furnished the money and gave the note and mortgage to save her son from prosecution and her family from disgrace. We think the averment is substantially proved. It is true there was no direct threat by Hanley, but there was a pressure exerted which had the effect, and was, doubtless, intended to have the effect of a threat. Hanley testifies that the note and mortgage were given, not to stifle a prosecution, but as security for advances which he was making to the son to set him up in the liquor business, in the hope that he would make enough to repay him the amounts embezzled. The testimony shows that Hanley did make such advances and, undoubtedly, if the son, who has failed, had succeeded and repaid the advances and the amounts embezzled, Hanley would have regarded the note and mortgage as satisfied. We think, however, that the complainant did not intend the note and mortgage as security for such advances, but gave them under the compulsion of her fears, with the understanding that they would have the effect to protect her son from exposure and punishment; and, in view of the testimony by her and her son as to her conversation with Hanley when they were given, we think that Hanley knew when he accepted them that such was her understanding and acquiesced in it. If the prospect of the advances had any influence, it had only an incidental or subsidiary influence, and did not affect

the real character of the transaction. In our opinion, therefore, the note and mortgage are invalid. *Williams v. Bayley*, L. R. 1 H. L., 200.

The defendants contend, that it is not the duty of the court to set them aside, if they are invalid, but that the court ought to leave the complainant in the predicament in which she has placed herself. It is doubtless true that the court, acting on the maxim, *In pari delicto potior est conditio defendentis et possidentis*, will not generally interpose for the relief of parties who are concerned in illegal agreements or transactions. But the maxim is not regarded, if public policy requires that relief shall be given, and where the parties are not *in pari delicto*, as when the complaining party acts under oppression, hardship or undue influence, the maxim does not apply. Story's Eq. Jur., §§ 298, 800.

The case of *Bayley v. Williams*, 4 Giff., 638, is exactly in point. There agreements and securities were given by a father to protect his son from criminal prosecution for the forgery of his father's name to certain promissory notes. There was nothing to show that the father was liable to pay the notes, or that the defendants negotiated for the agreements and securities on the footing of his being under any legal liability to pay them. The rule of law is thus laid down by the court, to wit: p. 659:

"If the fair result of the evidence shows that the agreements were executed under influence felt by the plaintiff and exercised by the defendants; if the fear of the criminal prosecution against the plaintiff's son, or if the result of the discovery of a criminal act, for which the plaintiff was not liable, was used by the defendants against the plaintiff to operate upon his fears, so as to induce him to give a security which would relieve his son from a criminal prosecution, according to the law of this court a security obtained under such circumstances cannot stand. The inequality of the situation of the parties, the one exacting a security which the other is driven to give in order to save his son from exposure, disgrace and ruin, taints the security obtained under the influence of such fears. If the main and inspiring purpose was the relief of the son from the consequences of his crime; if this was the main consideration operating on the father's mind, and was the origin and real cause of the transaction, the intervention of other circumstances or other collateral advantages to the father, will not be enough to justify the court in upholding such a security."

The rule could hardly be expressed in terms more appropriate to the case at bar. In *Bayley v. Williams*, the decree was entered declaring the agreements invalid and ordering them to be delivered up to be canceled, and the securities to be returned. *Similar relief will be given here, the defendant, Green, who took the assignment after the maturity of the note, being subject to the equities.*

Charles A. WILSON, Assignee,

v.

Randall ESTEN *et al.*

A executed a mortgage to B, of certain personality. The mortgage was made and

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received in good faith. The mortgagee never recorded the mortgage nor took possession of the property, but there was no collusion between the parties nor design to give the mortgagor a fictitious credit.

A subsequently made an assignment "of all his estate and property" for the benefit of his creditors.

On a bill of interpleader brought by the assignee: held, that the mortgagee was entitled to the proceeds of the mortgaged property. Held, further, that the creditors were entitled only under the assignment and that the assignee succeeded only to the rights of the assignor. Held, further, that Pub. Stat. R. I., cap. 176, sec. 9, which provides that "No mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the said mortgage be recorded," must be construed in accordance with the above holding.

(January 24, 1885.)

BILL OF INTERPLEADER.

The facts appear in the opinion of the court. Mr. Thomas A. Jenckes, for complainant. Mr. William H. Greene, for respondent. Randall Esten:

In a sale of chattels, property may pass without possession. Benj. Sales, sec. 674, *et seq.*

A deed is sufficient of itself to pass the property in goods; it supplies the want of delivery. Williams, Pers. Property, * 85; Hilliard, Sales, sec. 12.

"A formal mortgage of personal property is a conditional sale. It operates to transfer the legal title to the mortgagee, to be defeated only by a full performance of the condition." Jones, Chat. Mort., sec. 1.

A mortgage of a stock of goods and any additions thereto, conveys only the stock on hand at the date of the mortgage; as between the parties thereto it may be a lien upon the substituted property. *Id.*, sec. 70, *et seq.*

It creates in the mortgagee an equitable interest which will prevail against judgment creditors and others. Jones, Chat. Mort., sec. 170; see *Williams v. Briggs*, 11 R. I., 476; *Cook v. Carthell*, 11 R. I., 482; *Williams v. Windsor*, 12 R. I., 9; *Groton Mfg. Co. v. Gardinier*, 11 R. I., 626.

This doctrine of equitable lien is the well settled law of this country. Jones, Chat. Mort., sec. 173, and cases; *Wright v. Bircher*, 72 Mo., 179; *Sutherland v. Stewart*, 79 Mo.

Although not recorded, it vests the general property in the mortgagee and the right to immediate possession. Jones, Chat. Mort., sec., 287.

As between the parties it is valid, although fraudulent to the mortgagor's creditors. *Id.*, sec. 288, 289, and cases; *Kilbourne v. Fay*, 29 Ohio St., 264, per Boynton, J., dissenting; *Gill v. Pomeroy*, 13 Ohio St., 88, 47, per Scott, C. J.

As between the parties, they are impeachable for fraud. Jones, Chat. Mort., sec. 241.

A mortgagee who has taken his mortgage in good faith to secure a pre-existing debt is entitled to be regarded and protected as a purchaser. 1 Jones, Mort., sec. 458; *Elliott v. Benedict*, 13 R. L., 465.

The assignee succeeds only to the rights of the assignor, and takes subjects to all equities, all existing liens, charges and set-offs. *Burrill, Assignments*, 483, 484.

Creditors are not placed in the category of purchasers, nor protected as such by the recording Acts. 2 Lead. Cas. in Equity, 8 Am. ed., 104, 105.

A trustee in insolvency takes the estate burdened by the equitable incumbrance. *Cooke, Trustee, v. Thresher*, 51 Conn., cited in 18 The Reporter, 618.

A voluntary assignee for the benefit of creditors takes the assignor's estate subject to all existing equities. *Williams v. Winsor*, 13 R. L., 9.

He is bound by the equity to which the property was subject when it came into his hands from the assignor. *Shaw v. Glenn*, 10 Stewart, N. J. Ch., 33.

He cannot impeach a mortgage given by his assignor, for defect in registry. *Van Huse v. Radcliff*, 17 N. Y., 580; *Lyle v. Palmer*, 42 Mich., 814; *Hawks v. Pritskaff*, 51 Wis., 160.

Such assignment is voluntary, and the assignee takes only the rights of the assignor. *James v. Mech. Nat. Bk.*, 12 R. L., 460.

And so of the assignee in bankruptcy, with respect to irrevocable deeds. 1 Jones, Mort., sec. 468.

Messrs. Lemuel H. Foster and Dexter B. Potter, for creditors:

The withholding of a mortgage from the records is a badge of fraud. Bump, Fraud. Conv., 2d ed., 38, 39; *Shipman v. Seymore*, 40 Mich., 274.

An unrecorded chattel mortgage is void as to creditors of an insolvent estate, in the hands of a voluntary assignee. *Bingham v. Jordan*, 1 Allen, 373; *Putnam v. Reynolds*, 44 Mich., 118; *Currie v. Knight*, 34 N. J. Eq., 485; *Lockwood v. Salein*, 28 Ind., 124; *Hanes v. Tiffany*, 25 Ohio St., 549.

Even actual notice does not save an unrecorded mortgage. The recording (or possession taken) is a condition precedent to a valid holding. *Denny v. Lincoln*, 18 Met., 200; *Travis v. Bishop*, 18 Met., 304; *Rich v. Roberts*, 48 Me., 548; *Sheldon v. Conner*, 48 Me., 584-5; *Robinson v. Willoughby*, 70 N. C., 858; *Bevans v. Bolton*, 81 Mo., 437; *Smith v. Moore*, 11 N. H., 55; *Hill v. Gillman*, 39 N. H., 88; *Chenyworth Daily*, 7 Ind., 284.

Mr. Chief Justice Durfee delivered the opinion of the court:

The object of this suit is to have the court decide to whom a sum of \$907.29, now in the registry of the court, belongs. The money was derived from certain goods, fixtures, etc., sold by the plaintiff, as assignee of Alfred A. Esten, under a voluntary assignment executed by said Alfred for the benefit of his creditors, January 14, 1884. It is claimed, not only by the general creditors, but also by Randall Esten, the father of said Alfred, under a mortgage given to him by Alfred, May 5, 1883. The mortgage was given to secure a note for \$3,000, money lent by Randall to Alfred to start him in business.

We see no reason to doubt that the mortgage was originally given in good faith. The mortgagee, however, did not take possession and the mortgage was not recorded. The general creditors claim that the neglect to have it recorded has operated as a fraud upon them, because, in consequence of the neglect, they have given credit to Alfred, which otherwise they would not have given; and they, therefore, contend that, notwithstanding the mortgage, they are entitled to the fund. The allegation on this point in their answer is as follows, to wit:

"And these defendants further answering, say that said supposed mortgage deed was not recorded as by law required in the office of the recorder of deeds in the City of Providence, State of Rhode Island, where the said Alfred A. Esten resided, and where also the property was at the time of the making of said supposed mortgage; that had said Randall B. Esten taken and retained possession of said property, or if said mortgage deed had been recorded as by law required, the knowledge of the existence thereof would have come to these defendants and they would not any longer have given credit to said Alfred A. Esten, and the debts contracted with these defendants since the time of the making of said supposed mortgage, and which are the larger parts of said debts, would not have been contracted nor outstanding, and the conduct of said Randall Esten, in the premises, has been and become a fraud upon these defendants; and these defendants had no notice of any mortgage, either implied or in fact, until after the time of said assignment."

It will be seen that the answer does not charge that the mortgage was left unrecorded in consequence of any collusion between the mortgagee and the mortgagor, nor of any design to enable the mortgagor to obtain a fictitious credit on the faith that the property covered by the mortgage was unincumbered. And the testimony adduced at the hearing did not show the existence of any such collusion or design. The testimony was, that the mortgagee was a farmer, residing in Attleborough, Massachusetts; that he lent the money to his son in Providence on the understanding that he was to have the mortgage, but went home before it was prepared, and that it was sent to him two or three days later by mail, and that he had simply kept it without bringing it back for record. We do not think that, in these circumstances, the lien of the mortgage can be held to have been lost by the omission to record, whatever might have been the result if it were shown that the omission was collusive or fraudulent.

The creditors contend that they are entitled to the fund because the mortgage, being unrecorded, is valid only between the parties to it. The creditors, however, show no right to the fund which they can enforce in this case, unless they are entitled to it under the assignment; and the question, therefore, is, whether the assignee, as trustee for them, has acquired a right which is superior to the mortgage, or has simply succeeded to the right of his assignor which is subject to it. There can be no doubt that, ordinarily, where there is no statute to add to the effect of the assignment, a voluntary assignee succeeds simply to the right of the assignor. The cases to this effect are numerous, and have always been regarded as law by this court.

Williams v. Winsor, 12 R. I., 9; *Gardner v. Commercial Nat. Bk.*, 18 R. I., 155, 173; *Bridgford v. Barbour*, 80 Ky., 527; *Housel v. Oremier*, 13 Neb., 298; *Heinrichs v. Woods*, 7 Mo. App., 286.

The statute, Pub. Stat. R. I., cap. 287, § 15, alters the law to some extent; but not so as to affect this case. If the fund belongs to the creditors, it belongs to them under Pub. Stat. R. I., cap. 176, § 9, which declares that "No mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the said mortgage be recorded," etc. Under this provision, taken literally, the mortgagee can have no claim under the mortgage against any person but the mortgagor. The statute, however, must receive a reasonable construction. We do not suppose anybody would seriously assert that the mortgage, because unrecorded, would be invalid against a mere donee. In *Pratt v. Harlow*, 16 Gray 379, it was held, under a statute like ours, that the mortgagee could maintain trover against a mere stranger or intruder tortiously converting the mortgaged chattel. But how, after demand, is the assignee, if he simply succeeds to the right of the mortgagor, in any better position? In this case we should be very glad to yield to the authority of some of the cases cited for the creditors, if we could consistently; but we have reluctantly come to the conclusion that the mortgage is good as against the assignee, the assignee having no better right than the assignor. *Hawks v. Pristaff*, 51 Wis., 160; *Wakeman v. Barrows*, 41 Mich., 363. If the assignment were made subject to the mortgage, no one would say that the assignee could hold against the mortgage. As we construe it, it is, in legal effect, made subject to the mortgage. Indeed, the assignment purports to be only an assignment of "all my estate and property," etc., in general terms. It does not specifically convey the assignor's stock in trade. It may be doubted even whether an assignee for value under such an assignment would not take subject to the mortgage. *Adams v. Cuddy*, 13 Pick., 460; *Chaffin v. Chaffin*, 4 Gray, 280; *Cook v. Farrington*, 10 Id. 70, *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159.

We conclude, therefore, that the mortgagee must have the fund, but considering that his neglect has been the cause of the difficulty, let it be without costs from the creditors and subject to the further costs of the case.

Decree accordingly.

RHODE ISLAND HOSPITAL TRUST COMPANY

COMMERCIAL NATIONAL BANK *et al.*

When a **testamentary gift** is expressly limited to the donee, for life, a superadded power given to the donee to sell and appropriate the proceeds will not enlarge his interest into an absolute estate.

A testamentary gift for life with added power in the donee of sale and appropriation of proceeds, will not enable the do-

nee to mortgage more than his life interest.

(Providence—January 31, 1886.)

BILL IN EQUITY to construe a will, for an account and for an injunction. On demurrers to the bill.

The will of Mary R. Burnside of the City of Providence, dated September 18, 1871, and proven before the Municipal Court of the City of Providence, April, 4, 1876, contains the following provisions:

"I, Mary R. Burnside, of the City and County of Providence in the State of Rhode Island, wife of Ambrose E. Burnside, make this my last will and testament in manner following, that is to say:

"I give, devise and bequeath to my beloved husband, Ambrose E. Burnside, for and during the term of his natural life, the free use and improvement, rents, profits and income of all my estate, real, personal and mixed, wherever or however the same is or may be situated, and including therewith all such other real estate as I may hereafter acquire of which I shall die seised, possessed of and entitled to at the time of my decease.

"To have and to hold the same to him, the said Ambrose E. Burnside, for and during the term of his natural life, with full power and authority, at his pleasure, to change the investment of any of my personal property and estate, and also with power and authority, at his pleasure, to sell, transfer and convey any portion of my personal property and estate, execute the requisite conveyance and conveyances thereof, receive the proceeds of any such sale or sales, and apply and appropriate the net proceeds thereof to and for his own use, benefit and behoof forever.

"And from and upon the decease of my said husband, Ambrose E. Burnside, I give, devise and bequeath to my mother, Fanny Bishop, if then living, for and during the term of her natural life, the free use and improvement, rents, profits and income of all my estate then remaining, real, personal and mixed, wherever or however situated.

"To have and to hold the same to her, the said Fanny Bishop, for and during the term of her natural life.

And from, after and upon the decease of them, the said Ambrose E. Burnside and Fanny, I give and bequeath" * * * * *

Follow a series of legacies and a residuary devise and bequest, after which come the appointment of executors and a revocation of prior wills.

Messrs. Charles Hart and Joseph C. Ely, for complainant.

Mr. James Tillinghast, for respondent, Commercial National Bank:

The bonds in question, passed by delivery like any other negotiable instrument; and when passed, for value before maturity, *nothing but fraud, not even gross negligence*, could affect purchaser's title. *Goodman v. Harvey*, 4 Ad. and El., 870; *Goodman v. Simonds*, 20 How., 348 (61 U. S., XV, 984); *Murray v. Lardner*, 2 Wall., 110 (69 U. S., XVII, 857; *R. R. Co. v. Bank of Republic*, 102 U. S., 14 (XXVI, 61); *Tucker v. N. H. Savings Bk.*, 58 N. H., 83; *Frank v. Lilsenfeld*, 83 Gratt., 377; *Re Simeon*

Idland, 6 Ben., 175; 2 Dan. Neg. Inst., secs. 1478, 1808; Jones, R. R. Securities, secs. 197, 198, 199, 200, 206, 207; Jones, Pledges, secs. 89, 90, 91, 92, 96, 97, 104.

By its very terms, the bond, notwithstanding its registration, still remains negotiable by delivery merely. The holder passing it, for value, thus elects to have it still payable to bearer, and is estopped from afterwards questioning the right of his transferee to hold it and also to receive payment of it. See Jones, Pledges, sec. 135; *Felt v. Heye*, 28 How. Pr., 859.

"What more is registration than an entry in the books of the Company of the fact that the debt has been transferred?" *Athenium Life Ins. Society v. Pooley*, 3 De G. and Jones, 802.

If the registration affected a purchaser at all, which is by no means clear, it only put him upon inquiry, to see that the party who passed the bond to him was its lawful holder. It did not affect him with notice of mere limitations upon the right or power of such holder to pass it. Had its effect been to make the bond payable to order only, and to require indorsement, its transfer or pledge, by mere delivery, would, in equity, have been perfectly good between the parties, though, as against the maker, it might have subjected it to equities existing between him and such prior holder. Jones, Pledges, secs. 92, 98, 142.

And there are insuperable difficulties in giving to this clause, and to the registration under it, any further effect. Pub. Stat., p. 422, sec. 5; *Tillinghast v. Holbrook*, 7 R. I., 820.

"When both parties have acted upon a certain construction of an ambiguous document, that construction, if in itself admissible, will be adopted by the court." Pollock, Cont., 892.

Where plaintiff being executor stood by, well knowing how defendant Bank claimed to hold them, and allowed it to apply their proceeds to the payment of Burnside's notes, and thus to lose its claim upon his estate, the plaintiff is now estopped from setting up the claim here made. *Preston v. Mann*, 25 Conn., 118; *Smith v. Smith*, 30 Conn., 111; *Abrams v. Seale*, 44 Ala., 297; *Rapalee v. Stewart*, 27 N. Y., 810; *Stowe v. U. S.*, 19 Wall., 13 (86 U. S., XXII, 144); *Robinson v. Barnett*, 19 Fla., 672; *Mayer v. Ramsey*, 46 Tex., 871; *Voorhees v. Olmstead*, 6 Thomp., 172, S. C.; 8 Hun, 744.

The executor is liable to those interested in the estate, for any misapplication of the assets, but the purchaser or pledgee is not bound to know whether the money is required for the payment of the debts of the estate, or, in fact, to know anything about the estate beyond the executor's appointment. Jones, Pledges, secs. 481, 482, and cases.

The mere fact, that Burnside gave his own notes for the original loans, and thus made them his own debts, and that the proceeds were carried to Burnside's individual account, and that the loans were renewed, which is all that the bill charges, was not enough to put the Bank upon inquiry or to invalidate the securities in its hands. See, *Goodwin v. American Nat. Bk.*, 48 Conn., 550; *Carter v. Nat. Bk. of Lewiston*, 71 Me., 448; *Hutchins v. State Bk.*, 12 Met., 421; *Ashton v. Atlantic Bk.*, 8 Allen, 217; *Earl Vane v. Rigdon*, L. R., 5 Ch., 668.

The power of Burnside, under the will, to control the personal property, was absolute, "To

sell, transfer and convey," "at his pleasure," and to "receive the proceeds, and apply and appropriate the net proceeds thereof to and for his own use, benefit and behoof forever." Broader language could scarcely be used, to authorize and justify these pledges. *Tomlinson v. Dighton*, 1 P. Wms., 149; *Pearson v. Otway*, 2 Wils., 6; *Barford v. Street*, 16 Ves., 135; *Irwin v. Farrer*, 19 Ves., 86; *Henderson v. Cross*, 29 Beav., 216; *Perry v. Merritt*, L. Rep., 18 Eq., 152; *Harris v. Knapp*, 21 Pick., 412; *Gleason v. Fayerweather*, 4 Gray, 848; *Hall v. Marsh*, 100 Mass., 468; *Lewis v. Palmer*, 46 Conn., 454; *Kendall v. Kendall*, 86 N. Jer. Eq., 81; *Smith v. Fulkinson*, 25 Pa. St., 109; *Reformed Church v. Disbrow*, 52 Pa. St., 219; *Swope v. Swope*, 5 Gill, 225; *May v. Joynes*, 20 Gratt., 692; *Royston v. Tel-lair*, 2 Dev. Ch., 414; *Stroud v. Morrow*, 7 Jones (N. C.), 463; *Cannon v. Raine*, Harper Eq. (S. C.), 1; *David v. Brigham*, 2 Yerg., 557; *Davis v. Richardson*, 10 Yerg., 290; *Bean v. Myers*, 1 Cold., 226; *Steifel v. Clark*, 9 Baxter, 466; *Shields v. Netherlands*, 5 Lea., 198; *Mackillie v. Rayland*, 77 Ill., 96; *Crouser v. Hoyt*, 97 Ill., 28; *Noicum v. D'Oench*, 17 Mo., 98; *Orr v. O'Brien*, 55 Tex., 149; *Yates v. Clark*, 56 Miss., 212.

Messrs Colwell & Barney, for respondent Manchester.

Mr. Chief Justice Durfee delivered the opinion of the court:

The bill shows that Mary R. Burnside, wife of General Ambrose E. Burnside, late of Providence, died March 9, 1876, leaving a will by which she devised and bequeathed all her property, real and personal, to General Burnside for life, "With full power and authority at pleasure to sell, transfer and convey any portion of my personal property and estate, execute the requisite conveyance and conveyances thereof, receive the proceeds of any such sale or sales, and apply and appropriate the net proceeds thereof to and for his own use, benefit and behoof forever." The will gives all the estate of the testatrix, remaining at the decease of General Burnside, to her mother for life, and then to other persons and charities. The will appoints General Burnside executor, and after his decease the complainant Corporation. It was admitted to probate, April 4, 1876. General Burnside having qualified as executor, filed an inventory of the personal estate, which was accepted August 21, 1877, and October 2, 1877, settled his first and only account, wherein he charged himself with the whole amount of the inventory as "Taken to myself for life, as per the will of Mary R. Burnside."

The personal property as inventoried was appraised at \$69,506.26 and consisted in part of forty-five eight and a half per cent one thousand dollar bonds, appraised at \$45,000, made by one Simon B. Buckner and secured by a trust mortgage of his real estate in Chicago to the Farmers Loan and Trust Company of the City of New York. The bonds were issued payable to bearer, but contained the following provision, to wit: "The holder of this bond may present the same at the office of said The Farmers Loan and Trust Company, for registration, and the same shall thereupon be registered in conformity with usage in such case, and thereupon it shall become and be payable.

both principal and interest, to the order of said holder, or to the bearer, as he may elect." After the probate of the will, General Burnside delivered eighteen of these bonds to the Commercial National Bank of Providence, as security for moneys lent. The eighteen bonds were registered under the provision therein by Mary R. Burnside, in her lifetime, in her name, and when pledged bore an indorsement under date of November 14, 1872, signed by the transfer agent, indicating that they were then transferred into her name. A copy of one of the bonds, annexed to the bill as a sample of all, likewise bears an indorsement under the date of November 21, 1876, indicating that it was then transferred to the Commercial National Bank of Providence; but the complainant alleges in the bill that it is ignorant of the form of the pledge. The bill, however, alleges that the pledge was made by General Burnside in his own name and to secure his own indebtedness, and that the Bank took the bonds with full notice that they were a part of the estate of Mary R. Burnside, and that the General had no right or title in them other than that given him by her will. General Burnside died September 13, 1881, leaving said eighteen bonds still in pledge, and after his death they were paid, the money being received by the Bank. On October 21, 1881, the complainant qualified as executor of the will of Mary R. Burnside, and afterward demanded of the Bank the money received on the said bonds above the life interest, if any, of General Burnside. The Bank refused to comply with the demand, claiming that the General had full power to pledge the bonds. The bill also sets forth that one J. Howard Manchester has been appointed administrator on the estate of General Burnside, and that as administrator he claims the surplus of the money received in payment of the eighteen bonds, beyond what is necessary for the payment of the indebtedness to the Bank, as belonging to the estate of General Burnside. The complainant brings this suit against the Bank and said Manchester, as administrator, for a construction of the will, a determination of the rights of the several parties, for an account by the Bank and for a decree for such portion of the proceeds of the bonds as is due to it. The defendants have severally filed general demurrers to the bill.

The ground on which the defendant, Manchester, rests his claim is that the will of Mary R. Burnside bequeathes her personal estate in legal effect absolutely to her husband, the power of disposition given to him being inconsistent with and destructive of the limitations over. Some of the cases cited in support of this view are closely if not exactly in point. *Bean v. Myers*, 1 Cold., 226; *Davis v. Richardson*, 10 Yerg., 290; *May v. Joyner*, 20 Gratt., 692; *Irwin v. Farrer*, 19 Ves., Jr., 86.

We think, however, that where in a will the gift to the first taker is expressly limited to him for life, it is not enlarged into an absolute gift by the mere annexation of a power to him to dispose of or appropriate the fee or capital, at least when the power is only a power to dispose of or appropriate the fee or capital during his life. For, as has been well said, "An express bequest of an estate for life negatives the intention to give the absolute property, and converts the superadded right of disposition

into a mere power." *Denson v. Mitchell, et al.*, 26 Ala., 360.

Of course we ought, if possible, to construe a will according to the intention of the testator and, in such a case, we have only to treat the power bestowed as power, and not as property, in order to give effect to the limitations over. And we think this view is best supported not only in reason but by authority. 4 Kent, Com., *485; *Jackson v. Robins*, 16 Johns., 587, 588; *Ayer v. Ayer*, 128 Mass., 575; *Burnell's Executors v. Anderson*, 3 Leigh, 848, 356-358; *Stuart v. Walker*, 72 Me., 145; *McCauley's Appeal*, 98 Pa. St., 102; *Flintham's Appeal*, 11 Serg. & R., 16; *Burleigh v. Clough*, 52 N. H., 267; *Pennock v. Pennock*, L. R., 13 Eq., 144; *Herring v. Barron*, L. R., 13 Ch. Div., 144; *Smith v. Bell*, 6 Pet., 68.

Among these cases we direct attention particularly to *Burleigh v. Clough*, where the point is exhaustively examined and discussed. We, therefore, decide that the claim of Manchester, as administrator, cannot be sustained.

The next question is, whether the Commercial National Bank is entitled to apply the money received on the bonds, beyond the interest accruing thereon during the life of General Burnside, to his indebtedness. We do not think it is necessary to the determination of this question to decide whether the bond of an individual, payable in terms to order or bearer, is negotiable, or whether the eighteen bonds after registration, if originally negotiable, ceased to be transferable by simple delivery; for, as the case stands, we feel bound to suppose that the indorsement of November 21, 1876, was made by the direction of General Burnside, and was as effectual to transfer the bonds, as against the obligor at least, as an indorsement by General Burnside himself would have been, and that the Bank took them with notice that they were a part of the estate of Mary R. Burnside, and that he had no other title than was given him by the will, such notice being expressly averred. The bill also avers that the bonds were pledged or transferred to the Bank by General Burnside in his own name, to secure his own indebtedness, so that we think the Bank is precluded from claiming that the transaction was with him as executor. We also think that there is nothing in the bill to show that the complainant has been guilty of *laches*, or even of any unreasonable delay, in making its claim upon the Bank. The question, therefore, on the pleadings as they stand is: was the power conferred on General Burnside by the will, broad enough to authorize the transfer of the bonds to the Bank as security for moneys lent to him?

The complainant has cited numerous cases in which a power to sell was held not to authorize a mortgage. The cases are mostly cases in which it was manifest, or at least inferable, that an out and out conversion of the property was intended, being cases in which the power was

1.—*Stroughill v. Anstey*, 1 DeG. M. & G., 635; *Hal-denby v. Spofforth*, 1 Beav., 360; *Devaynes v. Rob-inson*, 24 Beav., 86; *Bloomer v. Waldron*, 3 Hill (N. Y.), 361; *Alb. Fire Ins. Co. v. Bay*, 4 N. Y., 8; *Ferry v. Laible*, 31 N. J. Eq., 566; *Patapeco Guano Co. v. Morrison*, 2 Woods, 385; *Stokes v. Payne*, 58 Miss., 614; *Henderson v. Blackburn*, 104 Ill., 227; *Switzer v. Wilvers*, 24 Kan., 353; *Cunningham v. Blake*, 121 Mass., 369; *Hoyt v. Jacques*, 129 Mass., 236; *Loring v. Brodie*, 124 Mass., 453; *Wilson, trustee v. Maryland Life Ins. Co.*, 60 Md., 150.

bestowed on trustees, agents or executors, the power in several of them being a power to sell for re-investment. Undoubtedly, such a power ought to be more strictly construed than a power given to the donee simply for his own benefit. *Norcum v. D'Ench & Ringling*, 17 Mo., 98, 117; *Stokes v. Payne*, 58 Miss., 614.

One of the cases cited, however, is a case where the power was given simply for the benefit of the donee, and where, notwithstanding, it was held that the donee had no authority to mortgage. *Hoyt v. Jaques*, 129 Mass., 286.

We do not find among the many cases cited for the Bank any case which holds that a power to sell authorizes a mortgage. There are a few such cases. *Mills v. Banks*, 3 P. Wms., 1; *Wayne, Trustee, v. Middleton*, 2 Ga., 883; *Williams v. Woodward*, 2 Wend., 487, 492; but in *Stroughill v. Anstey*, 1 DeG. M. & G., 635, Lord St. Leonards allows a mortgage under a power to sell only where the estate is settled or devised, subject to a particular charge, and the mortgage is made to raise the charge.

In *Bloomer v. Waldron*, 3 Hill (N. Y.), 361, 367, the propriety of this exception to the rule is doubted, and the ground of the rule is stated as follows, to wit: "There is a substantial difference between raising money by mortgage and sale; and it is enough to say that a power to raise money by one of these methods puts a negative on the other." See, also, *Butler v. Duncomb*, 1 P. Wms., 448, 452; *Ioy v. Gilbert*, 3 P. Wms., 18; *Mills v. Banks*, 3 P. Wms., 1.

The difference between a mortgage and a sale is more marked now than it was formerly and, therefore, it is more difficult now than formerly to construe a power to sell as including a power to mortgage. Even a chattel mortgage with delivery resembles a pledge more closely than it does an ordinary sale.

In *Bloomer v. Waldron*, the court also say: "The most we can say is, that when the power is to sell, and something is added over and above, showing that the power of sale is not to be taken in its primary sense, but means a power to mortgage, then the donee may act accordingly. The principal may always make his own vocabulary." And to the same effect is the language of the court in *Hoyt v. Jaques*, 129 Mass., 286.

The question, then, is: is there anything in the will of Mary R. Burnside which shows that it was her intention that the power to sell should include the power to mortgage? Undoubtedly, the will evinces a generosity on her part toward her husband, which would have led her to give a power to mortgage, if it had occurred to her to give it; but did it occur to her, and if so, did she suppose that a power to sell included it? We find nothing in the will which enables us to answer the question affirmatively. She speaks only of a power to sell, and of "such sale or sales." Can we infer a power to mortgage from the character of the property, taken in connection with the language of the will? The property consists of bonds, mortgages, shares of stock and money on deposit. It could be as readily sold as mortgaged. We notice only one matter which merits consideration. It consists in part of money on deposit. Undoubtedly, General Burnside had authority under the power to draw this money and use it without a sale, for, as the only purpose of a sale is to convert

into money, the law will not require a sale when the purpose is accomplished without it. If General Burnside had lived until the Buckner bonds fell due, we have no doubt that it would have been competent for him to receive payment and appropriate the proceeds, so far as he needed, to his own use, without going through the form of selling them, because selling them in that event, would be but an idle form, which the law would not exact. And so, too, if the eighteen bonds transferred to the Bank had fallen due and been collected and applied by the Bank to the payment of General Burnside's indebtedness during his lifetime, we think the application would have been valid, for it would have been the same, in legal effect, as if General Burnside had himself collected and so applied them. But why, it may be asked, if this be so, is not the application by the Bank after his death equally valid? The answer is, because the application after his death is no longer his application, the pledge or mortgage being ineffectual as such for more than his life interest; and immediately after his death the will carried all of the personal estate bequeathed, which remained unapplied by him to his use, over to the legatees in remainder. This is not the conclusion which, considering the circumstances, would give us the most satisfaction, but we do not see how we can escape it. If only a power be given, then only the power can be used, and not another, the donee having no other.

The demurrer of the defendant, Manchester, will, therefore, be sustained and the bill dismissed as to him, with costs, and the demurrer of the Bank overruled.

Decree accordingly.

Franklin INSTITUTION for SAVINGS,
by its Receiver,

v.

PEOPLE'S SAVINGS BANK *et al.*

Conveyance by deed to A, B and C, in trust for them "Or other the trustees hereunder for the time being to take charge and possession of said trust estate and to hold the same for the sole use" of the *cestuis*, with power to them "or the survivors or survivor of them or other the trustees or trustee hereunder for the time being, at any time and from time to time, in their or his discretion and as soon as reasonably and profitably may be, to sell, let or lease the same," and in further trust for them "or the survivors or survivor of them or other the trustees or trustee hereunder for the time being, to receive the proceeds of all sales or leases," to pay taxes, etc., "and the surplus to pay whenever and so often as it can conveniently be done to" the *cestuis*.

Held that A, B and C, took as joint tenants.

Courts incline to hold trustees joint tenants rather than tenants in common to avoid inconvenience in administering the trust.

BILL IN EQUITY for the partition of realty, with an alternative prayer for the appointment of a new trustee.

In April, 1878, Josiah Chapin executed a mortgage deed of certain lands in Providence to trustees in order to secure his notes held by certain Savings Banks. After default in the conditions of the mortgage, the trustees sold these lands, and Robert Knight became the purchaser in the interest of the holders of the notes. January 1, 1877, Knight executed an indenture conveying the lands to three trustees in trust for the holders of the notes, *i. e.*, the Franklin Institution for Savings or its Receiver, the Cranston Savings Bank or its Receiver, the People's Savings Bank, the City Savings Bank, and the Union Savings Bank. Two of these trustees died, and the third wished to resign the trust. Whereupon the Franklin Institution for Savings and its Receiver filed a bill in equity against its fellow *cestuis*, and the surviving trustee asking that the trust be terminated and the trust realty divided, with an alternative prayer for the appointment of a new trustee. One of the respondents objected to the bill, on the ground that under Pub. Stat. R. I., cap. 172, sec. 1, Knight's indenture of trust conveyed an estate in common, not a joint tenancy, and that the heirs and devisees of the deceased trustees were, therefore, necessary parties to the bill and were not made parties respondent.

Pub. Stat. R. I., cap. 172, sec. 1, is as follows:

"Sec. 1. All gifts, grants, feoffments, devises and other conveyances of any lands, tenements and hereditaments which shall be made to two or more persons, whether they be husband and wife or otherwise, and whether for years, for life, in tail or in fee, shall be taken, deemed and adjudged to be estates in common and not in joint tenancy, unless it is or shall be therein expressly said that the grantees, feoffees or devisees shall have or hold the same lands, tenements or hereditaments as joint tenants or in joint tenancy, or to them and the survivors or survivor of them, or unless other words be therein used manifestly showing it to be the intention of the parties to such gifts, grants, feoffments, devises or other conveyances, that such lands, tenements and hereditaments shall vest and be holden as joint estates and not as estates in common."

So much of Knight's deed as is involved in the respondent's objection is recited in the opinion of the court.

Messrs. Thomas C. Greene and Raymond G. Mowry, for complainant:

In cases of trust estates under tenancy in common, courts will, if possible, construe the holding to be in joint tenancy. Hill, Trustees, 508; 1 Perry, Trusts, 343; Freeman, Co-tenancy and Partition, sec. 44; 1 Washburn, Real Estate, 559.

Statutes relating to the abolishment of joint tenancies have, in some States, been held not to apply to the case of trust estates, and that survivorship in such cases not being within the spirit or intent of the Act is not embraced by it. Grey v. Lynch, 8 Gill, 424; Parsons v. Boyd, 20 Ala., 112.

Other courts have held that trust estates are not excepted from the operation of the Statutes in question. Boston, etc., Co. v. Condit, 4 C.

E. Green (19 N. J., Eq), 394; Sanders' Heirs v. Morrisons' Exec., 7 B. Monroe, 24.

Under such statutes, a distinction should be drawn between dormant and active trusts in favor of the exception in the statute. See Earle v. Wood, 8 Cush., 447.

Messrs. James Tillinghast and Benjamin N. Lapham, for defendants:

The common law favored joint tenancies but our state statutes reverse the common law as to conveyances of lands to two or more persons in trust, which provides that the title shall be taken in common and not in joint tenancy, unless manifestly intended to the contrary by the terms of the conveyance. See Shaw v. Hearsey, 5 Mass., 521; Jackson v. Stevens, 16 Johns., 110; Rogers v. Benson, 5 Johns. Ch., 431; Thornton v. Thornton, 3 Rand., 179; Den v. Hardenbergh, 5 Halst., 42; Ross v. Garrison, 1 Dana, 35; Rogers v. Grider, 1 Dana, 272; Brownson v. Hall, 16 Vt., 809; Ketchum v. Wilson, 5 Wis., 95.

Judges are bound to take the statute as the Legislature has made it. Potter's Dwar. Stat., 215.

In courts of equity, as in courts of law, neither can enlarge, diminish nor alter the sense in a single tittle. 3 Bl. Com., 431; compare Sedg., Stat. and Const. Law, 860-863; Bockford v. Wade, 17 Ves., Jr., 88; Everett v. Mills, 4 Scott (N. C.), 531; Lamond v. Effice, 3 Q. B., 910; Demarest v. Wyncoop, 3 Johns. Ch., 142; Collins v. Carmen, 5 Md., 505; see Appleton v. Boyd, 7 Mass., 181; Goodwin v. Richardson, 11 Mass., 467.

Nor in such cases has the argument *inconvenienti* any proper place. Hull v. Franklin, 3 Mees. & W., 359.

It is better to defeat the object of the statute than to give it a construction not warranted by its words, from any supposed intention of the Legislature. Rez v. Barnham, 3 Barn. & C., 104; see Broom, Legal Max., 189, 140; and compare Randall v. Phillips, 3 Mason, 378; Robison v. Codman, 1 Sumn., 121; Boston Franklinite Co. v. Condit, 19 N. J. Eq., 398; Sanders' Heirs v. Morrisons' Exec., 7 Mon., 54; Burnett v. Pratt, 23 Pick., 556; Gilson v. Gilson, 2 Allen, 115.

So, as to the language of the conveyance—"words" that "manifestly" show the intention. See Nash v. Cutler, 16 Pick., 497; Church v. Warren Mfg. Co., 14 R. I. (Index U., 88.)

Mr. Chief Justice Durfee delivered the opinion of the court:

We do not think it is necessary for us to decide, in this case, whether the statute, Pub. Stat. R. I., cap. 172, § 1, extends to deeds of trust; for, granting that it does, we think the deed here contains words "manifestly showing it to be the intention" to have the three grantees take as joint tenants. The deed here is to the grantees, their heirs and assigns, to have and to hold "unto and to the use of them, their heirs and assigns" in trust. The words which, we think, manifestly show an intention to have the grantees take as joint tenants follow, to wit: "In trust for the parties of the second part," *i. e.*, the grantees, "or other the trustees hereunder for the time being to take charge and possession of said trust estate, and to hold the same for the sole use," etc., of the *cestuis que trustent*.

* * * With power to the parties of the second part, or the survivors or survivor of them, or other the trustees or trustee hereunder for the time being, at any time and from time to time, in their or his discretion and as soon as reasonably and profitably may be, to sell, let or lease the same, together or in parcels, and by public or private sale. * * * And in further trust for the parties of the second part or the survivors or survivor of them or other the trustees or trustee hereunder for the time being to receive the proceeds of all sales or leases," etc., "and to pay therefrom all the taxes," etc., "and the surplus to pay whenever and so often as it can conveniently be done to" the *cestuis que trustent*.

Perhaps the clause first quoted affords no inference, but the words that succeed do, in our opinion, manifestly show an intention to have the trustees take as joint tenants, for otherwise the powers and the estate over which the powers are to be exercised may be partly disjoined, a result which, in the case of an estate conveyed in trust for others for whose benefit the powers are conferred, it is utterly unreasonable to suppose can have been intended. Moreover, the language, "the parties of the second part or the survivors or survivor of them or other the trustees or trustee," plainly indicates that it was in the mind of the settlor that the sole survivor might be the sole trustee. No reason can be conceived why the settlor should have wished not to have the estate and the powers survive together. Slighter indications will suffice in a trust-deed than in other deeds to amount to a "manifest showing," because the courts are inclined to hold that trustees are joint tenants on account of the inconvenience resulting from their holding as tenants in common. Perry, Trusts, § 343. *Our conclusion is that the estate is in the surviving trustee and that, therefore, the heirs of the deceased trustees are not necessary parties.*

William JENKS *et al.*

v.

Henry F. SMITH *et al.*

In equity proceedings for an account all the parties, both complainant and respondent are, after decree for accounting, actors.

Assued B in account. B afterwards filed a bill in equity against A for partition and for an account of the matters involved in the action at law. A answered the bill and joined in the prayer for an account; whereupon a decree was entered referring the cause to a master. Pending the master's hearing, A in the action at law, sued out and served a writ of attachment against B by *mesne* process. On motion of B in the equity cause:

Held, that A should be restrained from prosecuting the action at law and be required to discharge the attachment.

(Providence—January 31, 1886.)

BILL IN EQUITY for partition and an account. On motion for an injunction.

The case is stated in the opinion of the court. *Messrs. James M. Ripley and John F. Lonsdale*, for complainants.

Messrs. Hopkins & Potter, for respondents.

Mr. Chief Justice Durfee delivered the opinion of the court:

This is a suit in equity for partition and account. It comes before us now on a motion, the ground and object of which may be stated thus: on August 25, 1881, the defendants in this suit commenced an action of account against the complainant William Jenks and the complainant Royal Lee, executor of the will of Pardon Jenks, deceased, to hold them to an account, on the charge that the said William and Pardon, and, since the decease of said Pardon, the said Royal Lee, as his executor, had had the care and management of certain lands and water rights and privileges, belonging to the parties, and had received more than their proportion of the rents, issues and profits thereof, and had refused to account therefor when requested. Pending said action, the defendants therein and others commenced this suit in equity for a partition of the common rights and estates and for an account covering the matters involved in the action at law, and for an injunction to restrain the suits at law. The defendants answering, joined in the prayer for the account. Thereupon a decree was entered referring the cause to a master for him, among other things, to take the account. After the hearing under this decree was begun, the defendants sued out a writ of *mesne* process in the action at law and attached thereon by garnishment certain moneys belonging to said William Jenks and the said Royal Lee as executor. The motion is, that the defendants may be restrained from further prosecuting the action at law and be ordered to discharge the attachment.

It is the practice in chancery, where a party is suing for the same matter, both at law and in equity, to compel him to elect in which court he will proceed. Story, Eq. Juris., sec. 889; *Rogers v. Vosburgh*, 4 Johns. Ch., 84.

Where a party so suing has obtained a decree in equity for an account he will be deemed to have made his election without any order therefor and will not be permitted afterwards to proceed at law. *Mocher v. Reed*, 1 Ball & B., 318; *Wilson v. Wetherherd*, 1 Meriv., 406; *Conover v. Conover*, 1 N. J. Eq., 408; *Wedderburn v. Wedderburn*, 2 Beav., 208.

"When a decree has been pronounced," say the court in *Mocher v. Reed*, "and the party obtains the relief he prayed, it is a contempt of court to proceed at law." In *Quidnick Company v. Chaffee*, 13 R. I., 367, 389, this court decided that after a complainant has carried his suit in equity to a decree, the court will presume that he has made his election and will stay suits at law for the same matter and order the discharge of attachments in them. The case does not differ, in this respect, from the case at bar, except that in the case at bar it is the defendants, and not the complainants, who are proceeding at law. But the suit here is for an account, the defendants joined in the prayer for the account, and the decree has been entered accordingly. In such a suit after a decree all the parties are actors, and the court will

not permit a complainant to dismiss his own bill unless upon consent. 1 Daniell, Chan. Plead. & Prac., *793. In such a suit, if a balance be found for the defendant, he is entitled to a decree for it against the complainant. If the complainant dies after decree for an account, the defendant can revive the suit against the personal representatives of the complainant, and if he himself dies his personal representative may revive it. 1 Story, Eq. Jur., sec. 522. We think, therefore, that at least after a decree to account in a suit for an account, the same presumption of election which applies to the complainant must be held to apply to the defendant praying for the account, and the same rule must be enforced. Clearly, since both suits cannot go on, the suit in equity, in which both parties have joined in obtaining the interlocutory decree for an account, is the one which is entitled to proceed.

The defendants will, therefore, be required to discharge the attachment.

Order accordingly.

PETITION OF Stephen HARRIS, Administrator, *et al.*, for an Opinion of the Court.

The sale of a decedent's realty to pay his debts was advertised by the administrator in a newspaper issued daily, the advertisement being inserted twice a week during two weeks and in each issue during the two following weeks preceding, the time of sale.

Held, that the notice given complied with the provisions of Pub. Stat. R. I., cap. 179, § 16, which required notice "In some public newspaper for four successive weeks."

The day before that appointed for the sale, notice of a postponement for a week at the same hour and place was added to the notice of the sale, and the notice of sale and postponement appeared in each issue of the paper up to and including the day of sale.

Held, that the notice of the postponement was sufficient under Pub. Stat. R. I., cap. 179, § 17, which required notice of "Such adjournment in the same manner in which notice of the sale was given, as soon as may be after such adjournment and up to the day of the adjourned sale, unless the adjournment shall be from day to day only, and then by making public proclamation thereof at the time and place of the sale, and by setting up a notice thereof at such place."

(Providence—February 3, 1885.)

CASE STATED for the opinion of the court under Pub. Stat. R. I., cap. 192, sec. 23.

Stephen Harris, administrator with will annexed, of the estate of Caleb F. Harris, after obtaining permission from the probate court to sell the realty of the estate for the payment of debts, had the same sold at public auction. The purchaser, Stephen H. Arnold, refused to accept the administrator's deed, alleging that

the advertisement of the sale had not been such as was required by statute. The will of Caleb F. Harris made his wife sole devisee. She died before his death, and left no issue.

On the purchaser's refusal, the administrator, the heirs at law of Caleb F. Harris, and the purchaser Arnold, joined in presenting this case to the court.

The Public Statutes of Rhode Island provide: cap. 179, secs. 16, 17.

Sec. 16. Before making any such sale at auction, the executor, administrator or guardian, shall give thirty days' public notice thereof, by posting up at least three notifications of such sale, in three public places in the town where the real estate or other property to be sold lies, and at least one in each of the adjoining towns, and in the town where the ward dwells, or where the testator or intestate last dwelt, or shall publish the same in some public newspaper, for four successive weeks; or shall give notice thereof in such other manner, instead of or in addition to the above, as the court may direct.

Sec. 17. The executor, administrator or guardian, may, in his discretion, adjourn any such sale to any future day whenever he may deem the same advisable, giving notice of such adjournment in the same manner in which notice of the sale was given, as soon as may be after such adjournment and up to the day of the adjourned sale, unless the adjournment shall be from day to day only, and then by making public proclamation thereof, at the time and place of the sale, and by setting up a notice thereof at such place. Cap. 180, § 4.

Sec. 4. In all cases not specially provided for, in which notice is required, it may be given in either of the following modes, at the discretion of the court: *i. e.*, the court of probate.

1. By causing a citation to be served by some sheriff, deputy-sheriff, town sergeant or constable, upon all known parties interested, at least seven days previous to proceeding, which citation shall give notice of the subject-matter of the proceeding and of the time and place thereof, and shall be served by reading the same to the parties, if to be found, or by leaving an attested copy thereof at the last and usual place of abode of each of them.

2. By advertisement of such notice for fourteen days, once a week at least, in some newspaper published in the State.

3. By causing the clerk of the court to post up such notice in some conspicuous place in his office or in the place at which the court usually meets, and in three other public places within the town, at least fourteen days before proceeding.

Mr. Samuel Ames, for the administrator, and heirs of Caleb F. Harris.

Mr. James Tillinghast, for Stephen H. Arnold:

Notice is an essential prerequisite to the validity of an administrator's sale. *Early v. Doe*, 16 How., 610, and cases cited; *Scammon v. Chicago*, 40 Ill., 146; see *Wade*, Notice, 474; *Blackw. Tax Ti.*, ch. 12, pp. 211, 250, ch. 14, pp. 257, 263.

Posted notices must not only remain up, but must be in a public place during the whole thirty days. Compare, *Tidd v. Smith*, 3 N. H., 178.

Although a literal compliance with the statute would require only the posting of the notices thirty days before the sale, whether they remain up or not. Compare, *Weld v. Rees*, 48 Ill., 482.

But the advertised notice must be published "in some public newspaper for four successive weeks"; "for" meaning "during." *Early v. Doe*, 16 How., 610; Blackw. Tax Tl., 286, 287; Compare *Oleott v. Robinson*, 21 N. Y., 180; *Pearson v. Bradley*, 48 Ill., 250; *In re King*, 7 N. B. R., 279; *Bachelor v. Bachelor*, 1 Mass., 366; *Cass v. Bellows*, 11 Fost., 501; *Ronken-dorf v. Taylor's Lessee*, 4 Pet., 849; *Rounseville v. Hasen*, 19 Am. L. Rev., 321.

In respect to the execution of trusts, ignorance of the law will not excuse a neglect to pursue its provisions under which estates are to be divested. *Feathers v. Reg*, 6 Best. & S., 269.

Mr. Chief Justice Durfee delivered the opinion of the court:

The first question is, whether the notice given was notice "In some public newspaper for four successive weeks" within the meaning of the Pub. Stat. R. I. cap. 179, sec. 16. The notice was published twice a week during the first two weeks, and during the last two weeks in every issue. The contention is, that the newspaper being a daily, the notice ought to have been published in every issue during the entire four weeks. The statute would be open to that implication if it required the notice to be published in some daily newspaper, but since it does not require it, we do not think the implication is necessary. The statute was made to be executed by plain men, who would be likely to understand it according to its plain and obvious meaning, and we think, therefore, that the court ought to interpret it, as far as possible, in the same manner. It is conceded that a notice published in "a weekly" for four successive weeks would be good, and if so, we can see no reason why a notice published weekly in "a daily," for four successive weeks, the daily being a proper vehicle of notice, would not also be good. It is urged that the notice ought to be continuous, and that a person reading the notice in his daily paper one day, and missing it another, might suppose that the sale had been abandoned. The notice is continuous from week to week, which is all that the statute requires, and it is so common for notices in a daily paper to appear at intervals, that we do not think the rest of the argument is of much weight. In Pub. Stat. R. I., cap. 180, sec. 4, it is provided, in regard to certain important probate notices, that they may be by advertisement for "fourteen days, once a week at least, in some newspaper published in the State." It is urged that there would be a literal compliance with the statute by a publication of the notice every week, for four successive weeks, in a different newspaper, which could not be permitted, and that, therefore, a literal compliance is not enough. It seems to us that this is introducing a subtlety of interpretation which is unwarranted, for the language is not, "some newspapers," but "some newspaper," which men of plain minds would not construe to mean four different newspapers. We do not mean to say, however, that a literal compliance with the statute is all that is necessary; for the statute might be literally complied with in bad faith, with the

intention of violating the spirit while observing the letter, as for example, if the notice of a sale in the City of Providence were published in some village newspaper in a remote part of the State. We are far from wishing to encourage any remissness in the giving of notices; on the contrary, we think it would be well if courts of probate would, more frequently than they do, direct the form of notice with a view to insure its sufficiency, and that executors or administrators would more frequently obtain the direction of the courts for their own guidance. But here there is no suggestion of bad faith or of any lack of publicity, but the only question is whether the notice given was a compliance with statute. We think it was. *Johnson v. Dorsey*, 7 Gill., 269; *Bowen v. Argall*, 24 Wend., 496; *Brewer v. City of Springfield*, 97 Mass., 152.

We are also of the opinion that the notice of the adjournment was sufficient under cap. 179, sec. 17. The objection is that the adjournment was not made by proclamation or posting at the place and time appointed for the sale. The statute does not direct any form of adjournment, unless the adjournment is from day to day. When the adjournment is for a longer period, the statute requires that the notice thereof shall be given as the notice of the sale was given "as soon as may be after the adjournment, and up to the day of the adjourned sale." Here the adjournment was made and the notice given in the manner following, to wit: on November 12, 1884, the day before the day appointed for the sale, notice that the sale was postponed until November 20, 1884, at the same hour and place, was added to the former notice of sale, in that form the notices of the sale and of the adjournment thereof, were published on and from November 12, 1884, in every issue of the paper, until, and including, the issue of November 20, 1884. It is admitted that sales of real estate, particularly mortgage sales, have been quite commonly adjourned in this manner. We think such an adjournment is sufficient, though doubtless it may be wise often to supplement it by posting a proclamation.

Order accordingly.

NOTE.—See *Thurston v. Miller*, 10 R. I., 368; *Barrows v. National Rubber Co.*, 12 R. I., 173.

Jonathan MAXON *et al.*

v.

Nancy C. GRAY *et al.*

1. A widow's right of dower is, before assignment of dower, a mere chose in action.

2. Courts of equity have, in the absence of statutory provisions, no power to subject a widow's right of dower before assignment to the payment of her judgment debts.

3. The mere neglect or refusal of the widow to have assignment of dower made is not such a fraud upon her creditors as to give jurisdiction to a court of equity.

(Providence—February 14, 1885.)

BILL IN EQUITY to satisfy a judgment debt out of a right of dower. On demurrer to the bill.

The case is stated in the opinion of the court.
Mr. Thomas H. Peabody, for complainants.

CITES:—*Davison v. Whittlesey*, 1 McArthur. (D. C.), 168; *Tompkins v. Fonda*, 4 Paige, 448; *Payne v. Becker*, 87 N. Y., 158; *Potter v. Everett*, 7 Ired. Eq. 152; *Stedman v. Fortune*, 5 Conn., 464; *Wooster v. Lyman Iron Co.*, 38 Conn., 256.

Messrs. Crafts & Tillinghast, for respondents.

Mr. Justice Matteson delivered the opinion of the court:

This is a bill by judgment creditors to subject a right of dower to the payment of their judgment debt. It sets forth that the respondent, **Nancy C. Gray**, was the wife of **Jirah I. Gray**, late of Hopkinton, deceased. That said **Jirah** died intestate, on or about the 21st day of June, 1879, and that said **Nancy** as his widow is entitled to dower in certain lands, particularly described in the bill, with the improvements thereon, situated in Hopkinton, of which he died seised in fee. That he left surviving him, his widow, said **Nancy**, and five children, who are still living and are his heirs at law, and that said real estate is now owned by said heirs subject to the dower therein of said **Nancy**. The bill also recites the obtaining of a judgment of the Justice Court of Westerly against the respondent **Nancy** by the complainants; the taking out of execution thereon, its levy upon, and the sale in pursuance thereof, at public auction, to the complainants, of all her right, title and interest in and to said real estate, being her dower right therein; the appropriation of the sum paid towards the expenses of the levy and sale; the return of the execution for want of other goods, chattels and real estate of the said **Nancy**, to be found by the officer within his precinct, unsatisfied for the balance of such expenses and the amount of said execution; the recording of the execution and of the officer's doings thereon in the land records of Hopkinton, and the making and delivery to the complainants by the officer prior to the return of the execution, of a deed of all the right, title and interest of said **Nancy** in said real estate; being her said dower right therein, and the recording of such deed in said land records.

The bill further alleges that the said **Nancy** has been, since the death of her husband, and still is, in the possession and occupation of all of said real estate, and in the receipt of the rents and profits thereof, by the agreement with and consent of the children and heirs of her deceased husband, without taking any steps to have her dower therein set off or assigned to her; and that she has neglected and refused, and still neglects and refuses, to pay said judgment, or any part thereof, or to apply any part of said rents and profits towards the satisfaction of said judgment which remains in full force and has not been annulled, reversed or satisfied. That said heirs have at all times since the death of said **Jirah** neglected and refused, and still do neglect and refuse, to assign and set off to said **Nancy** her said dower right in said real estate.

The bill prays for an answer, the oaths there-to being waived, that the dower right of said **Nancy** in said lands may be subjected to the payment of said judgment, expenses and the costs of this suit, and for general relief.

The respondents have demurred to the bill on various grounds, not necessary to be stated.

A widow's right of dower in the real estate of her deceased husband, before assignment, is not an estate, but a mere *chose* or right in action. *Weaver v. Sturtevant*, 12 R. I., 537, 539, 540. Being a *chose* in action, it is not subject to levy and sale on execution. Freeman on Executions, sec. 185; *Nason v. Allen*, 5 Me., 479, 481, 482; *Gooch v. Atkins*, 14 Mass., 378, 381; *Waller v. Mardus*, 29 Mo., 25, 27; *Shields' Heirs v. Batts*, 5 J. J. Marshall, 12, 15; *Petty v. Malier*, 15 B. Mon., 591, 604. The proceedings set forth in the bill did not, therefore, confer any title to the right of dower of the respondent **Nancy** upon the complainants, or create any lien thereon in their favor, which can afford a basis for relief in equity.

The only cases in which a right of dower before assignment has been subjected in equity to the payment of debts, cited by the complainants, or which have come to our notice, are, *Davison v. Whittlesey*, 1 MacArthur, 168; *Tompkins v. Fonda*, 4 Paige, 448, and *Payne v. Becker*, 87 N. Y., 158, 158. The first and last of these rest upon the authority of the second, *Tompkins v. Fonda*. In this case the Chancellor says, that if the widow is in possession or is entitled to an assignment of dower immediately, the want of a mere formal assignment of dower is not considered material. The only authority cited by him to sustain this statement is the remark of the Lord Chancellor in *Duke of Hamilton, Lord Mohun*, 1 P. Wms., 118, 122, which was a suit by the heir against the widow, as the guardian of the heir, for an account of the rents and profits of real estate; and it was held just, that a court of equity, in taking the account, should allow to the widow one third of the profits for her right of dower. For this purpose, the taking of the account, the Lord Chancellor did not deem the want of a formal assignment of dower material, the right of the widow to one third of the profits, being the same in conscience, whether her dower had, or had not, been assigned. The question in the present case, however, is not one of account, but of jurisdiction. In *Greene v. Keene*, Index T, 116, this court held, that in the absence of fraud, trust or other ground of equitable jurisdiction, and in the absence of statutory provisions conferring it, courts of equity have no jurisdiction to subject a *chose* in action of a debtor to the payment of a judgment. We have no such provision in our statutes as existed in New York when *Tompkins v. Fonda* was decided, upon which the decision of the Chancellor in that case apparently rests. 2 Rev. Stat. N. Y., 174, sec. 39. Unless then there is some distinction to be drawn between a right of dower, before assignment, and other *chooses* in action, or unless the bill sets forth some fact, or facts, of equitable cognizance, the suit cannot be maintained.

It has been suggested that a distinction between a right of dower and other *chooses* in action may be found in the fact, that courts of equity have concurrent jurisdiction with courts of law in the assignment of dower. We do not think so. The jurisdiction in equity for this purpose was originally auxiliary, only, to that at law. It was resorted to for a discovery of title deeds, or of dowerable lands, or to remove some impediment to the widow's recovery at law, or for an

account of the *mense* profits before assignment, or to ascertain the comparative values of different estates, in which the widow might be entitled to dower, and which might be in the possession of various purchasers. Though the jurisdiction in equity has become an independent jurisdiction, concurrent with the jurisdiction at law, it appears to be based upon the fact that the remedy which it affords is in many cases a better and more convenient remedy than that which exists at law, rather than upon any essential difference in nature between dower rights and other *chooses* in action. Such rights still continue to be legal rights and courts of equity in exercising jurisdiction over them professedly act upon them as legal rights.

The allegations in the bill, upon which the complainants apparently rely to maintain it, are that the widow has been in the possession and occupation of the real estate described, by consent of, and agreement with, the heirs, without taking any steps to have her dower assigned, and has neglected and refused, and still neglects and refuses, to pay the judgment in favor of the complainants against her, or to apply any part of the rents and profits towards the payment of that judgment. In *Tompkins v. Bond*, 4 Paige, 448, 449, cited above, the Chancellor remarks: "She," the widow, "has no right in conscience or in equity, to deprive her creditors of the benefit of her right of dower, for the satisfaction of their debts, by continuing in possession with the heirs and neglecting to ask for a formal assignment, which assignment and entry under it, would enable the creditors to reach it by execution." Doubtless the Chancellor uses this language in view of the equity jurisdiction, modified by the statute, then existing in New York; but, if not, although it may be conceded that a widow, like every other debtor, is bound in conscience to pay her creditors and to devote her right of dower and other *chooses* in action to that purpose, it by no means follows that courts of equity have power to subject this species of property to the payment of debts. Unless it can be said that neglect or refusal, to have dower assigned, amounts to a *fraud* upon creditors, which we are not prepared to hold, we know of no head of equitable jurisdiction to which the case is referable.

The argument concerning the hardship which must result to creditors, unless *chooses* in action can be reached for the payment of debts, is to be addressed to the Legislature rather than the court.

The bill must be dismissed for want of jurisdiction.

Demurrers sustained.

STATE

v.

George W. HOXSIE and Albert F. Hoxsie.

At the trial of one indicted for keeping a liquor nuisance the presiding justice commits no error in refusing to allow a juror to be asked on his *voir dire* whether he has contributed money for the prosecution of persons generally who are charged with keeping such nuisances.

On such a trial a request to charge the jury "that the sale of intoxicating liquor

on divers occasions at a place or tenement is not conclusive evidence that the sale was illegal unless the State prove that the defendant at the time of said sales had no license," was rightfully refused. The guilt of the defendant is to be established not conclusively but beyond a reasonable doubt. A statute makes the keeping for sale evidence that the sale or keeping is illegal, and it is for the defendant to produce his license.

On such a trial a request to charge the jury "That the notorious character of the defendant's premises or the notoriously bad or intemperate character of persons visiting the same, or the keeping of the implements or appurtenances usually appertaining to grog shops, tipping shops and places where intoxicating liquors are sold is not *prima facie* evidence that such premises are nuisances," was rightfully refused, because ambiguous and misleading.

The credibility of witnesses is a question for the jury, and a "spotter" or informer is not, in contemplation of law, an accomplice.

Two persons may be convicted for maintaining the same nuisance if both take part in the maintenance, though one be merely an assistant of the other.

A place may be a liquor nuisance if liquor selling is carried on as an incidental or subordinate purpose of the place, not as a main purpose.

Query: whether a single sale of liquor would suffice to make the place of sale a nuisance.

It is not error for a judge to refuse a request to charge which is inapplicable to the evidence, or to refuse to charge in the words requested even if the requested instructions are proper.

(Washington — April 4, 1885.)

EXCEPTIONS to the Court of Common Pleas.

Mr. Benjamin M. Bosworth, Asst. Atty-Gen., for plaintiff.

Messrs. Crafts & Tillinghast, for defendants.

Mr. Chief Justice Durfee delivered the opinion of the court:

This case comes up on exceptions from the Court of Common Pleas. It is an indictment for nuisance under Pub. Stat. R. I., cap. 80. The indictment was found and tried at the May Term, 1884.

The first exception is for the refusal of the court below to allow the defendants to ask one of the jurors, called to sit in the trial, on his *voir dire* "Whether he had contributed money for the purpose of prosecuting persons charged with keeping liquor nuisances and having them bound over to the Court of Common Pleas for indictment at said May Term." The contention is that the juror was open to challenge if he had so contributed. It will be noticed that the question was not whether the juror had contributed money for the purpose of having the defendants prosecuted and bound over; the rec-

ord does not show in fact that the defendants had been bound over; but whether the juror had contributed for the prosecution of persons generally who were charged with keeping nuisances. If the question had been allowed and had been answered affirmatively, the answer would show, not any personal hostility to the defendants, but only that the juror was an earnest temperance man, who had demonstrated his zeal in the cause by giving of his means to aid in the enforcement of the law against the illegal sale of intoxicating liquors. The fact that he had given money would not affect him with any pecuniary interest in the conviction of the defendants. We do not see, therefore, how he could be challenged off the jury unless evinced strong temperance man is liable to be challenged off simply because he is a strong temperance man, anxious to have the law enforced.

In *Commonwealth v. O'Neil*, 6 Gray, 843, it was held that members of an association for the prosecution of a certain class of offenses, who had subscribed to the funds of the association, were not incompetent to sit as jurors on the trial of a prosecution of an offense of that class commenced by the agent of the association and carried on at its expense, inasmuch as it did not appear but that they had paid their subscription before the prosecution was commenced, though the court remarked that it might have been well if the presiding Judge had in his discretion excused the jurors. The case is much stronger than the case made here. And to the same or like effect, see *State v. Wilson*, 8 Iowa, 407; *Musick v. People*, 40 Ill., 268; *Boyle v. People*, 4 Col., 176; *Commonwealth v. Thrasher*, 11 Gray, 55; *Thompson & Merriam, Jurors*, § 181. The first exception must be overruled.

The other exceptions are for refusals by the presiding Judge to give certain instructions to the jury as requested by the defendants. We do not think the court is bound, even when instructions requested are proper, to give them in the language of the requests; for the language, though perfectly correct, may be such that a jury would not readily understand it. One of the instructions requested and refused was, "That the sale of intoxicating liquor on divers occasions at a place or tenement is not conclusive evidence that the sale was illegal, unless the State prove that the defendants at the time of said sales had no license." The language implies that it was necessary for the State, for the purpose of convicting the defendants, to establish their guilt conclusively and not simply beyond a reasonable doubt. We think, therefore, that the instruction was rightly refused. The statute, Pub. Stat. R. I. cap. 80, § 3, provides that "Evidence of the sale, or keeping of intoxicating liquors for sale in any building, place or tenement, shall be evidence that the sale or keeping is illegal;" and we see no reason why a jury might not be satisfied, beyond a reasonable doubt, by the mere proof of the sale, that the sale was illegal, since it would be unnatural, not to say unreasonable, for the accused, if he had a license, not to produce it. And see, *State v. Higgins*, 13 R. I., 330; *State v. Mellor*, 13 R. I., 666.

The bill of exceptions sets forth that, at the trial, testimony was introduced by the State, going to show that during the time covered by the indictment, intemperate persons were in the

habit of resorting to the shop complained of and that the implements and appurtenances which are usual in a grog shop or tipping shop were there. The defendants requested the presiding Judge to charge the jury that "The notorious character of the defendants' premises or the notoriously bad or intemperate character of persons visiting the same, or the keeping of the implements or appurtenances usually appertaining to grog shops, tipping shops and places where intoxicating liquors are sold, is not *prima facie* evidence that such premises are nuisances." The Judge refused on the ground that the request was inapplicable and did instruct the jury that they must be satisfied of the truth of the charge. The statute makes the matters mentioned in the request evidence of a nuisance, but not *prima facie* evidence. The objection to the request is that it is ambiguous. The defendants may have meant simply that the jury was not necessarily obliged, in the absence of counter evidence, to find the defendants guilty on such evidence. The request so understood would be proper enough, for unquestionably the jury ought to be satisfied of the guilt of the defendants, beyond a reasonable doubt, before returning a verdict against them. The request, however, may have been intended to have or, if given, might have been understood by the jury as having another meaning, namely: that proof of the matters mentioned would not be sufficient to throw upon the defendants the burden of defending themselves or to warrant a conviction, even though the jury were satisfied by said matters, beyond a reasonable doubt, that the defendants were guilty as charged. The request so understood would be repugnant to the statute and, therefore, the Judge rightly refused to give it, leaving it to the jury to say on all the testimony whether they were satisfied, beyond a reasonable doubt, of the guilt of the defendants.

The bill of exceptions shows that among the witnesses, called by the government, were witnesses who testified that they were employed at so much compensation a day in this and other cases, and that they made it their business to procure illegal sales of intoxicating liquors for the purpose of prosecuting the sellers. The defendants requested the Judge to charge the jury in regard to these witnesses: "That the testimony of 'spotters' is to be received with great caution and distrust." But the Judge refused and instructed the jury "That they must weigh all testimony with caution, especially where they see any reason to doubt its truth or to discredit it." We do not see any error in this. The credibility of witnesses is a question for the jury. Counsel are always permitted to argue it to the jury as a matter peculiarly within their province. Without doubt, it is proper for the court to direct the attention of the jury to anything in the conduct or character of witnesses which affects their credibility; and we think the court below, though it might, doubtless, have expressed itself more pointedly without fault, did all that it was necessary for it to do. "A spotter" is not in contemplation of law an accomplice.

One of the witnesses called by the government testified that during the time covered by the indictment there was a sign over the shop complained of, bearing the words "Geo. W. Hoxsie & Co.," and that George W. Hoxsie and

Albert F. Hoxsie were members of the firm of Geo. W. Hoxsie & Co. The only other evidence going to show that said Albert F. Hoxsie was one of the firm or one of the proprietors of the shop, was to the effect that said Albert and one Charles Hoxsie were seen in and about the shop making sales and acting as a clerk or proprietor would act. The shop was a country store containing dry goods, groceries, etc. The defendants requested the court below to instruct the jury "That a witness has no right to testify who were the members of a firm, that being a question of law; and that the testimony of a witness to that effect, unsupported by any facts or explanation, is entitled to no weight." The court refused on the ground that the instruction requested was inapplicable, and did instruct the jury to find whether one or both of the defendants kept and maintained the place, instructing them that it might have been kept or maintained by both even if they were not copartners. We do not see any error here. If the defendants had wished to object to the testimony, they should have objected when the testimony was offered, for if they had objected then the State could have required the witness to give the ground of it; and for anything that appears, the defendants themselves may have told him that they were carrying on the business as partners. The court, moreover, rested their refusal on the ground that the instruction requested was inapplicable; which we infer means, that the government did not press for conviction on account of any copartnership, but asked for it only on the evidence that the two defendants were both actually and actively engaged in carrying on the business; and we think the instruction given was correct, namely: that both might be convicted if both took part in maintaining the nuisance, even though one simply assisted the other as agent or clerk. *Commonwealth v. Burke*, 114 Mass., 261; *Commonwealth v. Gannett*, 1 Allen, 7; *Commonwealth v. Dowling*, 114 Mass., 259.

The defendants also requested the court to instruct the jury that proof that they or either of them kept intoxicating liquor for illegal sale during the time and at the place named was not conclusive evidence that they or either of them kept a nuisance; that the jury might, notwithstanding, acquit them if the jury were satisfied that the sale of liquors was not one of the main purposes of the place, but that the sales were isolated instances. The court refused so to charge, but did charge the jury that they must find that the defendants kept and maintained a place as described in the indictment. We do not think it was necessary for a conviction that the jury should be satisfied that the sale of liquors was one of the main purposes of the place complained of; on the contrary, we think it was enough if liquor selling was one of the purposes, though it may have been only an incidental or subordinate purpose, and manifested by only a few instances of sale. *Commonwealth v. Higgins*, 16 Gray, 19; *Commonwealth v. Gallagher*, 1 Allen, 592; *Commonwealth v. Cogan*, 107 Mass., 212. Whether a single sale would suffice, if no other was or ever had been intended, is a more debatable question, which we leave for decision when it shall be duly raised. Our conclusion is that the exceptions must be overruled and the case remitted for sentence.

Exceptions overruled.

STATE

v.

Calvin B. PALMER.

A statute required the complainant to give recognizance "To prosecute such complaint to final judgment with effect or in default thereof to pay the costs which may accrue thereon to the State or to the person or persons accused."

The complainant gave recognizance "to prosecute the complaint with effect or in default thereof to pay all lawful costs which may accrue therefrom."

Held, that the difference was immaterial.

(Washington — April 4, 1885.)

EXCEPTIONS to the Court of Common Pleas.

The case is stated by the court.

Mr. Thomas H. Peabody, for plaintiff.

Mr. A. B. Crafts, for defendant.

Per Curiam:

This is a criminal complaint for assault and battery. The complaint originated in a justice court, was carried to the court of common pleas by appeal, and is brought here on exceptions. In the justice court the defendant moved to dismiss the complaint for defect in the recognizance, and renewed the motion in the court of common pleas. The motion was overruled, which is the error alleged in the exceptions. The statute requires that on a complaint for assault and battery the complainant shall, before the warrant issues, give recognizance with surety, "To prosecute such complaint to final judgment with effect or, in default thereof, to pay the costs which may accrue thereon to the State or to the person or persons accused." Pub. Stat. R. I., cap. 197, secs. 4, 10. In this case recognizance was given "To prosecute the complaint with effect or, in default thereof, to pay all lawful costs which may accrue therefrom." The question is, whether such a recognizance meets the requirement of the statute. Undoubtedly, the Justice taking the recognizance would have acted more wisely if he had followed the words of the statute in full, for if he had done so the question would not have arisen. We think, however, the recognizance is, in legal effect, the same as if the words had been used in full; for, in our opinion, to prosecute the complaint with effect, means the same as to prosecute it to final judgment with effect, and to pay all lawful costs which may accrue therefrom means the same as to pay the costs that may accrue thereon to the State or to the person accused, since all lawful costs include all costs which can accrue either to the State or to the person accused. We do not think the case materially differs from *State v. McCarty*, 4 R. I., 82.

Exceptions overruled.

H. D. EDDY

v.

The Providence MACHINE COMPANY.

A, garnished in an action brought by B, against C, the writ being returnable to

a justice court June 26, filed his sworn account headed "Justice Court, June 29." The justice court charged A as trustee, the memorandum being "A chg'd no aff't." Whereupon B, after obtaining judgment against C, sued A for neglecting to file a sworn account.

Held, that the heading of the account formed no part of it, and that A had filed his affidavit as garnishee; **held**, further, that the order of the justice court in charging A as trustee did not have the force of a judgment.

Under the law of Rhode Island the charging a garnishee who does not appear has not the force of a judgment. The garnishee's liability is statutory, not fixed by the charging as by an adjudication.

(Kent ——— April 25, 1885.)

EXCEPTIONS to the Court of Common Pleas.

This action was trespass on the case brought in the Court of Common Pleas against the defendant for neglect to file an account when garnished in a prior action brought by the plaintiff against one Willis H. Payson in the Justice Court of the City of Providence. The defendant in this action pleaded the general issue, not guilty, and the action was tried to the court upon an agreed statement of facts, jury trial being waived. After judgment for the defendant, the plaintiff brought this bill of exceptions.

The facts involved are stated in the opinion of the court. The statutory provisions referred to by the court are as follows:

Pub. Stat. R. I., cap. 208.

Sec. 13. If it shall appear by the disclosure of the person making such oath that the person, copartnership or corporation served with a copy of such writ had at the time of service thereof any of the personal estate of the defendant in his or their hands, then and in such case the plaintiff, after having recovered judgment against such defendant, may bring his action against such person, copartnership or corporation to recover so much as will satisfy such judgment, with interest and costs, if there shall appear by such disclosure to be a sufficiency for the same, otherwise for so much as shall appear by the same to be in his hands.

Sec. 18. If any person, copartnership or corporation, after being served as trustee with a copy of any writ, and after having been tendered at the time of such service \$2 and his traveling fees as a witness in the Supreme Court or Court of Common Pleas, and \$1 and like traveling fees in any other court, shall refuse or neglect to render such an account on oath as aforesaid, of what personal estate of the defendant he had in his hands at the time of the service of such copy, such trustee shall be liable to satisfy the judgment that the plaintiff shall obtain against the defendant in such writ, to be recovered by action on the case, except as provided in section 22, chapter 222.

Cap. 213.

Sec. 10. Whenever any person shall be served with a copy of a writ by which he shall be sought to be charged as trustee of the defendant named therein, and such person shall appear

and answer to the action so commenced as to whether he is or is not a trustee of the defendant, the court in which such action is brought or may be pending shall determine whether the person so served is properly chargeable as the trustee of the defendant, and if chargeable, to what extent.

Cap. 222.

Sec. 21. In every execution issued against any defendant in an action in which another person shall have been charged, as the trustee of such defendant, under the provisions of section 10 of chapter 213, or by the default of the person served with a copy of the plaintiff's writ for the purpose of charging him as the trustee of the defendant to appear and file his affidavit therein, there shall be inserted next after the words "goods and chattels or real estate of the defendant," the words following, namely: "And the personal estate of the said defendant, in the hands and possession of (here insert the name of the trustee), charged as trustee of the said defendant to the extent of (here insert the amount for which the trustee is charged)," or if the trustee shall be charged by his default in not filing the necessary affidavit in said cause, insert in lieu of the clause fixing the extent to which such trustee shall be charged, the following, after the word defendant, namely, "by the default of the said trustee to file his affidavit in said action."

Sec. 22. If any person named as the trustee of a defendant in any execution, who shall have had a judgment that he be charged as trustee rendered against him by default, shall make affidavit as to whether or not he had personal property of the defendant in his hands or possession at the time of the service of the original writ in said action upon him and stating the amount, if any, so in his hands, and that he failed to file an affidavit therein before he was charged by the court as the trustee of the defendant, either from want of actual notice of the service of the said writ, or by accident or mistake; and shall give such affidavit to the officer charged with the service of said execution, the officer shall annex such affidavit to his return to the said execution, and if the trustee shall pay to the said officer the money paid for his attendance at the time of the service of the original writ, and another like sum, together with the sum stated in his affidavit to be so in his hands, if any, no further proceedings shall be had therein against such trustee, except as is provided in 'section 11 of chapter 213, and the officer shall pay the money paid to him by such trustee to the plaintiff.

Mr. John J. Arnold, for plaintiff.

Mr. Dexter B. Potter, for defendant.

Mr. Justice Stiness, delivered the opinion of the court:

The defendant is sued for neglecting to make an affidavit as garnishee in a suit by the plaintiff against Payson, in the Justice Court of Providence. The return day of the writ in the justice court was June 26, 1882. The defendant, by its clerk, upon whom the copy of the writ was served, made its affidavit, which was filed in the clerk's office of the justice court June 20, 1882. In a corner of the sheet, above the affidavit, were placed the words, "Justice Court, City of Providence, June 29, 1882."

The plaintiff, therefore, claims that the affidavit could not apply to the original case. We think the date was no part of the affidavit. It was a mere memorandum placed above it for convenience in reference. It was not referred to in the affidavit nor made a part of it in any way, but, on the contrary, the case is therein accurately designated. The affidavit was duly made, duly filed and sufficiently described the case to which it referred. The insertion of an erroneous date above the affidavit could not change those facts. It does not appear that there was any other case between the parties named to which the affidavit could relate. The defendant did all that is required of a garnishee by law. But the defendant was charged as trustee of said Payson, by the justice court, the memorandum on the papers being, "Prov. Machine Co. chg'd. no aff't." Hence the plaintiff in this action claims that such charging is in the nature of a judgment, which is conclusive upon this defendant.

As garnishment is a statutory proceeding, it is only by force of statute that the charging of a garnishee can, in any case, operate as a judgment. But in those States where it has this effect, it is not conclusive as to the amount owing by the garnishee to the attachment defendant. *Barton v. Albright*, 29 Ind., 489. Drake on Attachment, § 707, 4th ed., and cases cited.

If so, as between them, it cannot be conclusive as to whether anything is owing. The conclusiveness of a finding against a garnishee applies only to the suit in which it is made. The statutes of this State do not treat the charging of a garnishee as a judgment. By Pub. Stat. R. I., cap. 208, § 18, if he makes a disclosure of funds in his hands, the plaintiff may sue for the amount, or so much as will satisfy his judgment against the defendant. The execution does not run against the garnishee, though by cap. 222, § 21, it runs against the fund, without providing any immediate remedy if the garnishee refuses to turn it over. Even after an execution issues, he may avoid his liability altogether by making an affidavit, under the provisions of § 22.

The only case in which the court acts judicially with reference to the garnishee is under cap. 218, § 10, to determine, in case he *shall appear*, whether he is properly chargeable as the trustee of the defendant and, if chargeable, to what extent. There is no provision in the statute for the court to charge a garnishee upon his default to make an affidavit. His liability in that case is determined by cap. 208, § 18, and is the same that it was before the passage of the Act authorizing the court to determine the liability after appearance. Provision is made, cap. 222, § 21, "if the trustee shall be charged by his default," that the execution shall run against the personal estate of the said defendant, in the hands and possession of the garnishee, charged as trustee of the said defendant, by the default of the said trustee to file his affidavit in said action. But this charging must refer to the garnishee's statutory liability, for no express authority is given to the court to charge him by default. It is possible to infer such an authority from the words quoted above, but such an inference would enlarge a statute which can be more plainly satisfied by reference to the statutory liability. If, therefore, a garnishee, in

case of default, becomes liable by force of statute, and not by an adjudication of the court, the fact that he is "charged by his default" cannot be regarded as a judgment. It follows that the defendant is not bound by the charging in the justice court, but may show, as he has done, that he duly filed his affidavit, and should not have been charged.

Exceptions overruled.

William AMES, Trustee,

v.

Samuel AMES.

Testamentary disposition as follows:

"The remaining one third part of said residuary (estate) I give, devise and bequeath unto my said nephew, William Ames, in trust for the use and purposes following, that is to say: the said trustee shall collect and receive all the rents, dividends, profits and income that may arise or accrue from or out of said one third part, and the same from time to time in his own discretion **apply and appropriate** for the sole use and benefit of my said sister Candace C. Carrington, for and during the term of her natural life; hereby authorizing and empowering my said trustee in his discretion and, if he shall at any time deem it wise and expedient, to apply and appropriate **the whole or any portion** of the body or capital of said one third so held in trust as aforesaid, to the use and benefit of my said sister Candace during her lifetime. And upon the decease of my said sister Candace, I hereby direct my said trustee to **assign, transfer and convey** the said one third part of my residuary estate, or such portion thereof as shall remain in his hands, unto the children of my said sister Candace, or their descendants, in equal portions, share and share alike, to have and to hold the same unto them, their heirs and assigns forever."

Held, that Ames took as trustee a fee simple, with power to sell and to convey the fee.

(Providence— May 9, 1885.)

PILLIN EQUITY for specific performance. The will of Sullivan Dorr, proved before the Municipal Court of the City of Providence, sitting as a Court of Probate December 9, 1884, contains the following provision:

"The remaining one third part of said residuary (estate) I give, devise and bequeath unto my said nephew, William Ames, in trust for the uses and purposes following, that is to say: the said trustee shall collect and receive all the

NOTE.—An authority to sell and dispose of the estate does not warrant a mortgage of it. *Stokes v. Payne*, 58 Miss., 614.

Where a gift of certain personal property was made to the wife, and if any remained over at her decease it was to be equally divided among his children, it gives an absolute power of disposal. *McKenzie's Appeal*, 41 Conn., 607.

Where a testator gave to the executors a naked power to sell, the widow takes an estate for life or

rents, dividends, profits and income that may arise or accrue from or out of said one third part, and the same from time to time in his own discretion apply and appropriate for the sole use and benefit of my said sister Candace C. Carrington, for and during the term of her natural life; hereby authorizing and empowering my said trustee in his discretion and, if he shall at any time deem it wise and expedient, to apply and appropriate the whole or any portion of the body or capital of said one third so held in trust as aforesaid, to the use and benefit of my said sister Candace during her lifetime. And upon the decease of my said sister Candace, I hereby direct my said trustee to assign, transfer and convey the said one third part of my residuary estate, or such portion thereof as shall remain in his hands, unto the children of my said sister Candace, or their descendants, in equal portions, share and share alike, to have and to hold the same unto them, their heirs and assigns forever."

Ames, the trustee, contracted to sell to the respondent realty received under this provision, and this bill was filed to settle doubts as to the power of Ames, trustee, to convey a good title in fee simple.

Mr. N. H. Truman, for complainant:

Words in a will are sufficient to convey a fee simple even if there were no trust; and they are sufficient to vest such estate in a trustee notwithstanding the word "heirs" is omitted in the devise. See, *Arnold v. Lincoln*, 8 R. I., 384; *Waterman v. Greene*, 12 R. I., 488, and cases cited.

In case of a devise in trust, courts will, in their discretion, enlarge the estate into a fee simple or cut it down to less than a fee simple, according to the words used. 1 Perry, Trusts, secs. 315, 316, and cases cited.

The fee of the estate being in this case vested in the trustee, the question is as to his authority to sell the same free from the trust. 2 Perry, Trusts, sec. 766.

Any form of trust from which a power to convey can be inferred will authorize a sale. Hill, Trustees, 471.

A direction to divide and pay over shares to legatees where literal division is impracticable, implies a power to sell. Hill, Trustees, 471, n.

However obscurely the intent in a will may be expressed, if it appears that a power of sale was intended, a sale will be supported. See, *Going v. Emery*, 16 Pick., 107; *Purdie v. Whitney*, 20 Pick., 25; *Rankin v. Rankin*, 86 Ill., 298; *Fluke v. Fluke*, 16 N. J. Eq., 478; *Hamilton v. Buckminster*, Law Rep., 3 Eq., 323; *Warnesford v. Thompson*, 3 Vesey, Jr., 513; *Winston v. Jones*, 6 Ala., 550; *Putnam Free School v. Fisher*, 30 Me., 527; *Conrad v. Conrad*, 6 Ohio, 114; *Schermerhorn v. Schermerhorn*, 6 Johns. Ch., 70; *Mather v. Norton*, 8 Eng. L. & E., 255.

during widowhood, and the devisees a remainder in fee which vested in present. *Mundiebaum v. McDonell*, 20 Mich., 78.

Where no express power is given to executors to sell lands, a power will not be implied by a mere charge of debts upon the land. *Will of Fox*, 52 N. Y., 530.

A devise for life is not enlarged to a fee by a subsequent implied power to sell. *Reinders v. Coppelmann*, 63 Mo., 482.

If the terms of a devise empower the devisee to dispose of the property, a limitation over is void for 20

The intention is shown by the fact that, at the termination of the trust, the trustee is directed to convey the said one third part of my residuary estate or such portion thereof as may remain in his hands. See, *Purdie v. Whitney*, 20 Pick., 25.

But cases where the legacies were only an implied charge on the real estate are not in point, as *Mathewson v. Arnold*, 12 R. I., 145, and *Potter v. Brown*, 11 R. I., 232.

Mr. Samuel Ames, *pro se ipso*, defendant: There is no express power of sale contained in the will, which ought to be in every instrument where powers of sale are intended to be granted. Hill, Trustees, 471.

The court is always reluctant to enlarge an estate in trustees beyond the term of the gifts and it will not be done, unless it is necessary for the execution of the trust. 1 Perry, Trust, sec. 317; *White v. Simpson*, 5 East, 162; *Player v. Nichols*, 1 Barn. & C., 343; *Jones v. Bion*, 2 Sim. & Stu., 600; *Heardson v. Williamson*, 1 Keen, 33; *Parks v. Parks*, 9 Paige (N. Y.), 110; see, also, Perry, Trusts, sec. 508, and cases there cited; *Hutchinson v. Cole*, 6 R. I., 815; *Mulington v. Mulgrave*, 8 Mad. Rep., 491; *Mortimer v. Watts*, 14 Beav., 616.

Mr. Justice Stiness delivered the opinion of the court:

Under the will before us, the trustee of Mrs. Carrington takes an estate in fee simple. As stated in *Waterman v. Greene*, 12 R. I., 488, "It is well settled that words of inheritance are not necessary in a will to pass a fee, if an intent to pass it is otherwise evinced." Such an intent is clearly shown by the direction to the trustee, upon the decease of Mrs. Carrington, "To assign, transfer and convey the said one third part of my residuary estate, or such portion thereof as shall remain in his hands, unto the children of my said sister Candace or their descendants, in equal portions, share and share alike, to have and to hold the same unto them, their heirs and assigns forever."

The estate thus to be conveyed by the trustee is an estate in fee simple. He could not convey such an estate if he did not receive it. If he took only an estate for life of Mrs. Carrington, with remainder vested in her descendants, there would be no necessity for a conveyance from him to them.

In this case, as in *Waterman v. Greene*, Gen. Stat. R. I. cap. 171, § 5,¹ went into effect after the execution of the will.

Has the trustee a power of sale under the will? He is authorized and empowered "In his discretion and if he shall at any time deem it wise and expedient, to apply and appropriate the whole or any portion of the body or capital of said one third so held in trust as aforesaid to

¹ Printed in 12 R. I., 485, note.

repugnancy. *Rona v. Maler*, 47 Iowa, 607.

Where there was a restriction on the heirs of the power to sell, and by a subsequent clause he gave the power to dispose of her interests, they took only life estates. *Ulrich's App.*, 86 Pa. St., 386.

An absolute power of disposal in the first taker renders a subsequent limitation repugnant and void. *Jones v. Bacon*, 68 Me., 34.

A power in a will to convey lands in fee is well executed by a warranty deed, upon full consideration, although it does not refer to the will. *South v. South*, 91 Ind., 221.

the use and benefit of my said sister Candace during her lifetime."

Express authority to sell is not here given to the trustee, but express authority is not requisite in cases where it is necessarily implied. The rule is clearly stated in 2 Perry on Trusts, § 766. "No particular form of words is necessary to create a power of sale. Any words which show an intention to create such a power, or any form of instrument which imposes duties upon a trustee that he cannot perform without a sale, will necessarily create a power of sale in the trustee." See, also, Hill, Trustees, *471, and cases cited; 1 Sugden, Powers, *513.

Our inquiry, therefore is: does this will impose duties upon the trustee which require a power of sale to enable him to perform them? We think it does. When he deems it wise or expedient, he is to "apply and appropriate the whole or any portion of the body and capital" of the trust estate to the use and benefit of Mrs. Carrington during her life. The defendant suggests that "body" and "capital" seem to be used synonymously, and that capital indicates personal rather than real estate. Undoubtedly, the word "capital" is more frequently used with reference to personal property; *e. g.* with reference to the capital stock of a corporation or the business fund of a firm. Yet in either of these cases it may, and often does, include real estate. In *New Haven v. City Bank*, 81 Conn. 106, the term "capital stock" was held to include both real and personal estate. The word, capital, suggests personalty because it presents to the mind a sum of money which is the equivalent for other forms of property. We cannot restrict its meaning to this use nor say that it so commonly means personalty that we must conclude that the testator so meant. The real and personal estate in this will are blended in the same residuary provision. If one can be sold, the other can, and *vice versa*. But how can the trustee apply and appropriate the whole or any portion of the trust estate to the use of the beneficiary, without sale? As suggested by the complainant's counsel, she cannot eat, drink or wear real estate or shares of stock; and in many cases the only way in which they could be appropriated to her use and benefit would be by turning them into some other kind of property, which, of itself, implies a power of sale. The direction to the trustee to convey to the children such portion of the trust estate "as shall remain in his hands," also indicates that the testator contemplated the sale of a part, or all, if necessary. We think the words "body or capital," as used in the will, mean the principal or substance of the estate, from which income may be derived, and that the authority to appropriate the whole or any portion of it means an authority to dispose of and to appropriate the whole or any part of the substance, in the form of real or personal property, when the income does not suffice. The language may be unusual to indicate a power of sale, but we think it is sufficient. A general authority to sell also implies a power to convey the fee.

No question is made as to the sufficiency of the personal estate to pay legacies; nor as to the good faith of the trustee in exercising this discretion; nor as to security for the applica-

tion of the fund. Consequently, considering that the trustee has power to pass an estate in fee simple, we see no reason why the contract should not be performed.

Decree accordingly.

Philip REXROTH, *Plff.*,

v.

Herbert COON.

Bees are animals *feræ naturæ* and until reclaimed are only owned *ratione soli*.

In obtaining possession of an animal *feræ naturæ* no title is gained by one who when so obtaining possession is a trespasser.

A. without B.'s permission put upon a tree on B.'s land an empty box for bees to hive in. The box remained there more than two years, when C. took the box down, took out a swarm of bees and replaced the box. A. after demand upon C. brought trover against C. for the value of the bees, honey and honey comb.

Held: that A. could not maintain his action against C.

When a case has been heard by the Court of Common Pleas without a jury both as to law and facts, and the facts as found by the court are brought upon the record by a bill of exceptions, Pub. Stat. R. I., cap. 220, § 10, gives the Supreme Court power to review the rulings of law made by the Court of Common Pleas upon the facts so found.

(Washington—May 28, 1885.)

EXCEPTIONS to the Court of Common Pleas.

Mr. Thomas H. Peabody, for plaintiff:

A qualified property may be had in bees when reclaimed and hived. 1 Swift, Dig., 169; *Gillett v. Mason*, 7 Johns., 16.

Occupation, which is hiving or including them, gives property in bees. 2 Bl. Com., *398; 2 Kent, Com., *350; Inst., 2, 1, 14, 15; *Goff v. Kilts*, 15 Wend., 550; *Gillett v. Mason*, 7 Johns., 16.

As between the owner of bees escaped from his hive and gone into a tree upon another's land, and a mere finder, the right of the former is preferred. *Merrills v. Goodwin*, 1 Root, 209.

The inability of the owner to retake his property while on the premises of another, without committing a trespass, does not impair his legal interest in it. *Goff v. Kilts*, 15 Wend., 550, *supra*.

Mr. A. B. Crofts, for defendant.

Mr. Justice Tillinghast delivered the opinion of the court:

This is an action of the case in trover for the recovery of damages for the wrongful conversion of a hive of bees together with the honey and honey comb, belonging, as is alleged, to the plaintiff. The case was originally brought and tried in the Justice Court of the Town of Westerly, from whence it was carried by appeal to the court of common pleas. In the

court of common pleas, jury trial was waived and it was tried to the court upon the law and the facts. It comes here by bill of exceptions, the only exception taken being the ruling of the court, that, upon the facts which appeared in evidence the plaintiff was not entitled to recover. Said facts are incorporated in the bill of exceptions and are a part of the record of the proceedings. They are substantially as follows, namely: in May, 1881, the plaintiff placed a small pine box called a bee hive, in the crotch of a tree in the woods, on land of Samuel Green, in the Town of Hopkinton. It remained in this position until about the first of September, 1888, when the defendant went upon the premises and took and carried away the hive together with a swarm of bees that was then in it; also the honey and honey comb, and appropriated the same to his own use. The plaintiff had visited the hive about twice a year while it remained in its position, for the purpose of ascertaining whether any bees were in it or had been. He had found none. The plaintiff never had any express permission or license from the owner of the land to place or keep his hive in said tree.

The defendant never had any express permission or license from the owner of the land to come upon it and take and carry away said property. Said hive was at some distance from any house, and no person knew where said bees came from into said hive, although a number of people kept bees in said town. There was evidence that for several years signs had been posted up by said Green on his premises forbidding all persons from trespassing thereon, and that one of said signs was within about twenty rods of said line, but the plaintiff testified that he never saw any of them, and that he never had any notice to keep off said premises. The defendant split open said hive, took out its contents, and then nailed it together again and replaced it in said tree in as good condition as it was before he took it away. The defendant testified that he knew the owner of said land had forbidden all persons from trespassing thereon, but that said owner had told him that he did not put up said notice to keep off his neighbors, and had given him permission to go upon said land. Demand was made upon defendant in due form, before the commencement of suit. After the suit was commenced, the defendant turned over to said Green, what then remained in his hands of said bees and honey comb. The value of the property taken was variously estimated at from \$2.50 to \$10. Upon said facts the court ruled that the plaintiff was not entitled to recover and rendered judgment for the defendant for his costs, to which ruling the plaintiff duly excepted.

The only question, therefore, is whether said ruling was correct.

The plaintiff claims that he hived the bees, and that he thereby acquired at least a qualified property in them, notwithstanding they were upon the land of another, which was sufficient to enable him to maintain this action. We do not think the claim can be substantiated. The action is trover, and in order to recover, the plaintiff must prove title, some title, in himself, coupled with possession or the right of immediate possession. We do not think he has proved either.

Bees are *feræ naturæ*; and the only ownership in them until reclaimed and hived is *ratione soli*. This qualified ownership, however, although exceedingly precarious and of uncertain tenure, cannot be changed or terminated by the act of a mere trespasser. That is to say, the act of reducing a thing *feræ naturæ* into possession, where title is thereby created, must not be wrongful. And if such an act is effected by one who is at the moment a trespasser, no title to the property is created. *Blades v. Higgs*, 11 H. L., 621.

"Property *ratione soli*," said the Lord Chancellor in said case, "is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil." It was further held in the same case that such animals when found, killed and taken by a mere trespasser, became also the property of the owner of the land, the same as if taken by him or his servants. See, *Sutton v. Moody*, Ld. Raym., 250; *Earl of Lonsdale v. Rigg*, 11 Exch. Rep., 654; *Rigg v. Earl of Lonsdale*, 1 H. & N., 928.

We understand that the law in this country with regard to property in animals *feræ naturæ* is substantially in accord with that of England, excepting of course all game laws and statutory regulations, which are now very numerous upon this subject. See, *Idol v. Jones*, 2 Dev., 162.

In support of the plaintiff's position in the case at bar, he cites the following authorities, viz.: 1 Swift, Digest, 169; 2 Blackstone, Com. *398; 2 Kent, Com., *350; 2 Inst., 1, 14, 15; *Merrils v. Goodwin*, 1 Root, 209; *Gillett v. Mason*, 7 Johns., 16, and *Goff v. Kilts*, 15 Wend., 550. All of these authorities, in so far as they are pertinent, omitting of course the citations from the civil law, which is not in force here, tend, in our judgment, to support the defendant's position rather than that of the plaintiff.

The case of *Merrils v. Goodwin*, cited by the plaintiff, decides that a man's finding bees in a tree standing upon another man's land, gives him no right either to the tree or the bees; and that a swarm of bees going from a hive, if they can be followed and identified, are not lost to the owner but may be reclaimed. That is to say, a man may pursue his property of this sort even upon the land of another and retake it; and this, although the owner might be liable for a trespass in so doing.

Gillett v. Mason, 7 Johns., 16, cited by the plaintiff, also recognizes the doctrine of a qualified ownership in bees, *ratione soli*; and while it decides that hiving or inclosing them gives property therein, and that he who first incloses them in a hive, becomes their proprietor, yet it is clear from the general tenor of the case as from the note which follows it, that it "Must be understood with the restriction that a person could not come upon the land of another without his consent, for the purpose of taking bees, although unreclaimed."

The case of *Goff v. Kilts*, 15 Wend., 550, is clearly against the position taken by the plaintiff. It was trespass for taking and destroying a swarm of bees which was the property of the plaintiff, but which left the hive and flew off

into a tree on land of another. The owner, however, kept the bees in sight, followed them, and marked the tree into which they entered. The court held that the plaintiff's qualified property in the bees continued so long as he could keep them in sight and possessed the power to pursue them; and that even though he might be liable for trespass in following and retaking them upon the land of another, yet that the qualified property remained in him, and that no one else would be entitled to take them. With regard to obtaining the ownership in bees the court say: "According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it; but since the institution of civil society and the regulation of the right of property by its positive laws, the forest as well as the cultivated field, belong exclusively to the owner, who has acquired a title to it under those laws." "The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *feræ naturæ* could be found, has given way, in the progress of society, to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the inclosure of another for that purpose. He would be a trespasser, and as such liable for the game taken." See, also, *Ferguson v. Miller*, 1 Cow., 248; *Adams v. Burton*, 48 Vt., 86, 88, and *Bennett, Farm Law*, 64.

In the case at bar, the plaintiff was a trespasser upon the land of Green from the beginning. He had no right to place the box or hive in the tree; and by placing it there he acquired no title to the bees which subsequently occupied it, or to the honey which they produced. Neither is it material to the issue for us to inquire whether the defendant by taking the bees and honey away without previous permission from the owner of the land, was also a trespasser; for even admitting that he was, does not in any way aid the plaintiff in this suit. The fact that A. commits a trespass upon land of B. and carries away some of his personal property, would hardly be considered a cause of action in favor of C.

As to the point raised by defendant's counsel that no exception can be taken to the judgment where the court below finds both as to the law and the facts, we have to say that we do not so construe the statute. It provides that "If such *** party be aggrieved by any opinion, direction, ruling or judgment of the court of common pleas, on any matter of law raised by the pleadings or by an agreed statement of facts, or apparent upon or brought upon the record by a bill of exceptions, shall be entitled to have such matter of law heard and decided by the Supreme Court, etc." Pub. Stat. R. I., cap. 220, § 10. The ruling complained of in this case was made upon a certain state of facts, first found by the court below, which facts are brought upon the record by a bill of exceptions. With regard to the finding of those facts we have nothing to do; but with regard to the law applicable to that state of facts we have to do upon proceedings of this sort. See, *Prov. Co. Savings Bank v. Phalen*, 12 R. I., 495; *Prov. Gas Burner Co. v. Barney*, 14 R. I., 18; *Kenney v. Sweeney*, 14 R. I., 581.

Exceptions overruled.

Charles REDECKER *et ux.*, Complainants,

William Shaw BOWEN *et al.*

In Pub. Stat. R. I., cap. 220, sec. 22, of partition, the words "**costs of partition**" cover counsel fees as well as the costs of suit and the other expenses of making partition.

(Kent—June 13, 1885.)

BILL IN EQUITY for partition. On motion for a final decree.

This is a bill in equity for partition of certain lands in Kent County, held by the wives of said Redecker and Bowen, as tenants in common. After the partition was made and upon the coming in of the report of the commissioners appointed to make the partition, complainants' counsel moved that the costs of the suit should be equally divided between and payable by complainants and respondents, and that the sum of \$50 should be assessed upon the respondents as their portion of the solicitor's fee. The respondents, while admitting the liability of the respondents to pay one half of the general costs of the partition, deny the right of the complainants to claim from respondents the above sum of \$50, or any other sum as a part of their solicitor's fees.

The draft decree presented by the complainants in this case contained the following clause:

"Fourth. That the costs of this suit to be taxed by the clerk be equally divided between and payable by the complainants and the defendants, William Shaw Bowen and wife, that the sum of fifty dollars be assessed upon the said William Shaw Bowen and wife as a solicitor's fee, that the sum so assessed and one half the costs taxed as aforesaid be a lien on the land set off as aforesaid to the said William Shaw Bowen and wife, and that in default of payment thereof within sixty days from the date of this decree, execution therefor issue in favor of the complainants to enforce said lien."

The respondents objected to this clause as not being authorized by the statute, Pub. Stat. R. I., cap. 220, sec. 22, which is as follows:

"In suits for partition, either at law or in equity, the costs of partition, in such proportion as the court trying the same shall adjudge to be paid by any party or parties to said suit, shall be a lien upon the interest of any party or parties in the several shares to him or them assigned, and in addition to the mode of recovery now used may be recovered by sale of said several shares upon execution to be issued in due form therefor in favor of the party or parties who may, by payment of said costs, be entitled to recover the same."

The respondents claim that the words "costs of partition" cannot be construed to include counsel fees; that the words were intended to cover only clerk's fees, the expenses of surveying, the commissioners' fees, and the ordinary costs taxable in every case. See, *Cozzens v. Whitney et ux.*, 8 R. I., 79, 82.

Mr. Edwin Metcalf, for complainants.

Mr. Thomas C. Greene, for respondents.

Per Curiam:

The court has heretofore, as a matter of prac-

tice, construed the phrase "the costs of partition" in Pub. Stat. R. I., cap. 280, sec. 22, as broad enough to include counsel fees as well as the ordinary costs of suit and other expenses of making the partition. We think the construction correct, the phrase being used to denote not simply the costs of suit but the costs of partition itself.

Motion granted and decree entered.

Jennie P. FOSDICK, *Petitioner*,

v.

Charles B. FOSDICK.

Articles of separation by husband and wife which contain no express stipulation against divorce, are not *per se* a bar to a divorce prayed for by the injured party for causes existing prior to the execution of the articles.

That the liberal divorce law of this State influenced a petitioner for divorce to come here, does not make him any the less a domiciled inhabitant of the State, if he came here *bona fide* to reside permanently and not merely to obtain a divorce and then return to his former home.

(Newport — July 18, 1885.)

PETITION for divorce. The case is stated by the court.

Mr. Francis B. Peckham, for petitioner: The court has jurisdiction of the parties; of the petitioner, by her bringing the suit; and of the respondent by service of process on him, and by his general appearance. *Stewart, Divorce*, sec. 201; *Chester v. Wilson*, 9 Wall., 108, 110, 111, 124 (XIX., Law. ed., 604); *Garner v. Garner*, 56 Md., 127, 128; *People v. Baker*, 76 N. Y., 78, 83, 84; *Kinnier v. Kinnier*, 45 N. Y., 535, 539; *Gregory v. Gregory*, 20 Law Jour. (St. Louis), 181. The attention of the court is particularly asked to the case in 45 N. Y.

The statute requires the petitioner to have resided in the State a year and to be at the time of filing a petition a domiciled inhabitant. The law of domicile is well stated by Story in his *Conflict of Laws*, sec. 46.

"Sixthly. *Prima facie*, the place where a person lives is taken to be his domicile, until other facts establish the contrary, citing *Bruce v. Bruce*, 2 Bos. & P., 228, n. 230; *Bempde v. Johnstone*, 3 Ves., 198, 201; *Stanley v. Bernes*, 8 Hagg. Ecc., 374, 437.

Seventhly. Every person of full age, having a right to change his domicile, it follows that if he removes to another place, with an intention to make it his permanent residence, *animo manendi*, it becomes instantaneously his place of domicile.

Eighthly. If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period." Cases, *supra*, and note to *Sears v. Boston*, 1 Met., 250, an important case; *Thorn-*

dike v. Boston, 1 Met., 242; *Greene v. Windham*, 18 Me., 225.

The fiction that a wife's domicile is that of her husband ceases upon actual separation, particularly when his conduct furnishes ground for divorce. *Stewart, Divorce*, sec. 221; *Chester v. Wilson*, 9 Wall., 108, 124 (XIX., Law. ed., 604); *Harding v. Alden*, 9 Me., 140; *Harteau v. Harteau*, 14 Pick., 187; *Irby v. Wilson*, 1 Dev. & B. Eq., 568.

The result of authority is that a deed of separation is no bar to a suit for divorce for cruelties which occurred before the separation. 1 Bishop, *Marriage & Divorce*, secs. 680, 680; *Stewart, Divorce*, sec. 191; *Anderson v. Anderson*, 1 Edw. Ch., 380; *Rogers v. Rogers*, 4 Paige, 517; *J. G. v. H. G.*, 83 Md., 401; *Beedy v. Beedy*, 1 Hagg. Ecc., 789; *Nash v. Nash*, 1 Hagg. Consist., 142; *Wilson v. Wilson*, 40 Ia., 230; *Kremelberg v. Kremelberg*, 52 Md., 558, 557; note to *Squires v. Squires*, 88 Am. Rep., 670; *Brown v. Brown*, L. R., 3 P. & D., 202; *Morrall v. Morrall*, L. R., 6 P. Div., 98; *contra*, *Squires v. Squires*, 53 Vt., 208; 88 Am. Rep., 668.

This was the rule in the ecclesiastical courts. *Durant v. Durant*, 1 Hagg. Ecc., 738; *Westmeath v. Westmeath*, 2 Hagg. Sup., 1; (4 Eng. Ecc., 238); *Spering v. Spering*, 3 Swab. & T., 211; *Hunt v. Hunt*, 32 Law J. Eq. Prob., 168.

Although in some cases it has been held that a deed of separation in connection with lapse of time and other circumstances, showing the application not *bona fide*, the application has been denied. *Mattheus v. Mattheus*, 1 Swab. & T., 499; *Williams v. Williams*, 85 Law J. Ch., 12, decided in 1866.

The mere lapse of time will not in itself operate as a bar to a divorce, on the ground of adultery. *Ferrers v. Ferrers*, 1 Hagg. Con. R., 180; *D'Aquilar v. D'Aquilar*, 1 Hagg. Eccl., 778; 3 Eng. Ecc. R., 329; *Cood v. Cood*, 1 Curteis' Eccl. R., 755; 6 Eng. Eccl. R., 452.

A deed of separation constitutes no bar to a suit for divorce or to the claim for alimony. *Miller v. Miller*, Sax. (N. J. Ch.), 386; *Wilson v. Wilson*, 40 Ia., 230.

Formerly English courts refused to enforce or recognize deeds of separation; *Spering v. Spering*, 3 Swabey & T., 211; but there has been a change in this respect. *Hunt v. Hunt*, 4 DeG. F. & J., 221, and *Beant v. Wood*, R. L., 12 Ch. Div., 605; cases *supra*, and *Mattheus v. Mattheus*, 3 Swab. & T., 161.

Estoppels are odious and not favored as defenses. *Andrews v. Lyons*, 11 Allen, 349.

An estoppel by deed must be in clear, precise and unequivocal language, not dependent on doubtful inference. *Rich v. Atwater*, 18 Conn., 418; *Hubbard v. Norton*, 10 Conn., 438; *Russell v. Place*, 94 U. S., 606 (XXIV., Law. ed., 214); *Chrisman v. Harman*, 29 Gratt., 494.

Estoppels in *pais* are based upon some intended deception by conduct or declaration, or gross negligence, amounting to constructive fraud, misleading another to his injury. *Brant v. Va. Coal Co.*, 93 U. S., 326 (XXIII., Law. ed., 927); *Zuchtmann v. Roberts*, 109 Mass., 53; *S. C.*, 12 Am. Rep., 662.

A deed of separation is not a bar to a divorce, nor is a divorce a good defense to the enforcement of the provisions of a separation agreement. *Stewart, Div.*, sec. 191; *Kremelberg v. Kremelberg*, 52 Md., 558, 563; *Goslin v. Clark*,

12 Com. B. (N. S.), 681, 692; 104 Eng. C. L., 680; *Charleworth v. Holt*, 43 L. J. Ex., 25; *Jee v. Thurlow*, 3 Barn. & C. 547; 9 E. C. L., 174; *Grant v. Budd*, 30 L. T. (N. S.), 819, 820; *Blaker v. Cooper*, 7 Serg. & R., 500, 502; *Andrus v. Randon*, 34 Tex., 536.

Meers. Edward H. Hazard and Charles H. Parkhurst, for respondent:

Nowhere is the law upon the question of good faith, in the changes of domicile or residence in divorce cases, better stated than in 2 Bishop, *Marriages and Divorce*, 6th ed., secs. 120-122, 124, and cases cited. See, also, *Dilson v. Dilson*, 4 R. I., 87; *Harteau v. Harteau*, 14 Pick., 181; *Sevall v. Sevall*, 122 Mass., 156; *Gregory v. Gregory*, 76 Me., 535; also Cent. Law. Jour., Feb. 13, 1885, p. 181, and cases cited.

An agreement for separation between man and wife is valid by the general law everywhere. *Walker v. Walker*, 9 Wall., 743 (XIX., Law. ed., 814); *Squires v. Squires*, 53 Vt., 208.

Mr. Chief Justice Duffee delivered the opinion of the court:

This is a petition for divorce on the charge of extreme cruelty. The respondent makes three defenses, namely: *first*, that the charge is not true; *second*, that the petitioner was not during the year before the preferring of her petition a domiciled inhabitant of this State; and, *third*, that the parties have agreed to articles of separation which have been duly executed. The questions raised by the first two defenses are questions of fact. We think it is enough to say of them that in our opinion both of them on the evidence must be decided in favor of the petitioner. The fact that the liberal divorce law of this State was one of the inducements which led the petitioner to come here, is certainly calculated to awaken suspicion; but, nevertheless, it does not make her any the less a domiciled inhabitant of the State, if she came here, *bona fide*, for the purpose of making the State her permanent home, and not simply to get a divorce and then return again to her former home in New York. We will, therefore, pass to the consideration of the third defense. The articles of separation were agreed to and embodied in the deed of separation, February 14, 1883, after the treatment complained of as amounting to extreme cruelty had been received and when the parties were already living apart. The validity of the deed is not questioned. It is admitted that the sums agreed to be paid as a provision for the wife have all been paid as agreed. The respondent contends that in these circumstances, as the petitioner is obligated to keep the articles on her part in good faith, and that, inasmuch as they contemplate not a divorce but a continuance of the marital relation, they must be taken to be a complete bar to the petition. In support of his position, he cites *Squires v. Squires*, 53 Vt., 208; also 88 American Reports, 668, which holds that when articles of separation have been agreed to and fully performed by the husband, a divorce will not be granted at the suit of the wife, for cruel treatment received before the agreement was made.

The authority which is cited by the court in *Squires v. Squires* in support of the decision, is *Mathews v. Mathews*, 3 Swab. & Trist., 161, and *Williams v. Williams*, L. R., 1 Prob. & Div., 178.

The doctrine in the latter cases, however, is

not that articles of separation are *per se* a bar to divorce for causes previously existing and known to the petitioner, but only that they may be taken in connection with lapse of time and other circumstances as evidence to show that the petitioner is not prosecuting the petition in good faith, and is, therefore, not entitled to the favorable consideration of the court. With the exception of *Squires v. Squires*, all the cases, both English and American, are to the effect that such articles are not *per se* at bar. *Beeby v. Beeby*, 1 Hagg. Ecc., 789; *Nash v. Nash*, 1 Hagg. Consist., 140; *Anderson v. Anderson*, 1 Edw. Ch., 880; *Rogers v. Rogers*, 4 Paige, 516; *J. G. v. H. G.*, 33 Md., 401; *Kremelberg v. Kremelberg*, 52 Md., 553, 557; *Wilson v. Wilson*, 40 Iowa, 230.

The case of *Brown v. Brown*, 5 Gill, 249, which has been thought to hold otherwise, is explained in *J. G. v. H. G.*, *supra*. We can think of no ground on which such articles can be held to be a bar, unless they can be held to rest on an implied condition that the marital relation shall continue notwithstanding the separation. But is any such implication warranted? We think not, where the agreement is only an agreement for separation with provision for the injured party. Such an agreement is not inconsistent with divorce, for divorce is only a more absolute separation. It is reasonable to suppose that such a condition, if it had been intended, would have been expressed. It follows that the agreement, whatever effect we might give to it, if it were subject to such a condition, is no bar, and that the divorce, the cause alleged being proved, must be granted.

John A. BOSS, *Plff.*,

v.

PROVIDENCE AND WORCESTER R. R. CO.

1. The verdict of a jury will not be set aside when the question of fact is not free from doubt or when more than one conclusion can be drawn from the facts by reasonable men; and it is quite immaterial that the court might have come to a different conclusion from that drawn by the jury or that another jury might on the same evidence find a different verdict.

2. The train on which A was approaching his home stopped before arriving at the station, to allow a freight train coming in the opposite direction to pass the station. It was dark. A, thinking that the station was reached, got out and was injured by the freight train. The conductor, as soon as he learned the cause of the stop, moved his train forward to the station. It was in evidence that passengers at the station habitually left the train on both sides. A sued the railroad company for his damages and recovered a verdict.

3. Held, that the questions of the defendant's negligence and of the plaintiff's contributory negligence were for the jury to decide under proper instruc-

tions from the court, which in the case at bar were presumably given.

(Providence — July 26, 1886.)

DEFENDANT'S petition for a new trial.

The case is stated by the court

Messrs. Oscar Lapham and Simon S. Lapham, for plaintiff:

Where the plaintiff had a right to suppose the train had arrived at the depot and had stopped for him to alight, it was negligence not to have given him notice. *Pennsylvania R. R. Co. v. Hoagland*, 8 Am. and Eng. R. R. Rep. and notes; Wharton, Neg., secs. 647-649, 376.

Defendant, in the night, placing plaintiff where he had a right to suppose the stopping of the train was an invitation to alight, is liable for the injury, even if it was the result of plaintiff's act. Whart. Neg., sec. 375.

It is within the province of the jury to decide on the effect of evidence, and the verdict should not be set aside. Hilliard, New Trials, 448, secs. 9-12; *Davis v. Memphis City R. R. Co.*, 22 Fed. Rep., 887.

Messrs. Edwin Metcalf, Nicholas Van Slyck and Stephen O. Edwards, for defendant.

Even if a freight train is slightly behind time, negligence will not be imputed to the railroad company from that fact. *State v. Phila. W. & B. R. R. Co.*, 47 Md., 76.

Stopping short of a station and calling out the name of the place does not afford evidence of negligence. *Bridges v. North Lond. R. Co.*, L. R., 8 Q. B., 377.

It is negligence for a passenger to alight from a train on the side opposite the station. *Penn. R. R. Co. v. Zebe*, 33 Pa., 318; *Gonzales v. N. Y. & H. R. R. Co.*, 88 N. Y., 440; *Chicago, etc., R. R. Co. v. Dingman*, 1 Ill. App., 162.

A custom on the part of the public of alighting from a train at a place of danger will not excuse one who follows it and is injured in so doing. *Wheelwright v. Boston & A. R. R. Co.*, 185 Mass., 225.

A traveler approaching a railroad track is bound to use vigilance to avoid danger, and his omission to do so is concurring negligence and when proof of this is clear, he should be non-suited. See, Whart. Neg., sec. 384; *Stubley v. London & N. W. R. W. Co.*, L. R., 1 Ex., 18; *Gonzales v. N. Y. & H. R. R. Co.*, 88 N. Y., 440; *Wheelwright v. Boston & A. R. R. Co.*, 185 Mass., 225; *Bancroft v. Boston & W. R. R. Co.*, 97 Mass., 275.

A railroad company is not liable for an accident which a passenger might have prevented by ordinary care for his own safety even though the train agents were remiss in their duty. *Railroad Co. v. Aspell*, 28 Pa., 147.

In an action for negligence, plaintiff must show affirmatively that defendant was the sole cause of the injury. *Detroit, etc., R. R. Co. v. Von Steinburg*, 17 Mich., 99, 119; *Hart v. Hudson River Br. Co.*, 80 N. Y., 622.

Mr. Justice Tillinghast delivered the opinion of the court:

This is a petition for new trial on the grounds that the verdict is against the evidence and the weight thereof, and that the damages found by the jury are excessive. The main facts in the

case are not in dispute, and are substantially as follows, viz.: the plaintiff, who resides at Pawtucket, was a passenger on defendant's road from Providence to Pawtucket on the night of January 2, 1883, leaving Providence in the 6.10 P. M. train, which was due at Pawtucket at 6.22 P. M. The train, which consisted of five cars, ran on the west track going out, and as it approached the Dexter Street crossing, which is about six hundred feet south of the Pawtucket Station, which is on the west side of the track, it was signaled to stop by a crossing tender of the road, and did stop. When it came to a standstill, the engine and one car had passed over said Dexter Street crossing, the remainder of the train being over and immediately to the south thereof. A freight train on the east track was about to pass the Pawtucket Station going south, and the signal to the passenger train to stop was given to prevent the latter from reaching the station at the time when said freight train was passing the same, and to avoid the consequent liability to accident on the part of the passengers. No notice was given in the smoking car that the train had not arrived at the station. Directly upon the stopping of the train, the plaintiff, who occupied a seat near to the forward door of this car, which was next the engine, went to the front platform, and having alighted, attempted to cross the east track of said road, going in the direction of his home. In the act of crossing he was struck by the engine of said freight train, knocked down, his right leg so badly injured that it had to be amputated just below the knee, and other injuries inflicted. The cars were well filled with passengers at the time of the accident, quite a number of whom were for Pawtucket, and when the train stopped as aforesaid, many of them, supposing that they had arrived at the station, arose from their seats and started to leave the cars. The plaintiff testified upon this point as follows:

"There are two tracks laid side by side. George Brown was with me. * * * Finally the train stopped, and I thought we had got to the depot. Judging by the time, I thought it was just about time to get to the Pawtucket depot. I never thought anything about Dexter Street for I had never stopped there before. I thought I was at the depot, and felt perfectly safe in getting out. * * * That is the side I always got off at. * * * I got out the same as I always had at the depot. It was dark and I could not see what there was in front of me. It is just the common distance between the two tracks."

It was and long had been the custom for passengers to board and leave trains at the Pawtucket Station, on either side thereof, without caution or restriction from the officers or servants of the road; and passengers alighting from a train at said station on the east side of the train going north, would necessarily descend upon the ground, there being no platform between the tracks, and would cross the east track, which is the one used by inward, Providence, bound trains. There were platforms on each side of the double track at the station, the one on the east side, however, being very short and used mainly in the handling of baggage, but it frequently happened that they were not of sufficient length to accommodate the entire trains

stopping there; in which cases passengers in the extreme front and rear cars descending upon either side thereof would frequently alight upon the ground. The train in which plaintiff was a passenger was on time and it had never before stopped, so far as the *employees* of the defendant knew, at said Dexter Street crossing. One of the printed rules of the road provided that "When a passenger and freight train approach a station at the same time, the freight train must always be stopped before reaching it, and wait for the passenger train, and no switching will be done until it has passed." Said rules took effect Jan. 1, 1879. But since then the road has been provided with electric signals; and to meet this new condition of things the superintendent has from time to time supplemented and varied these rules and regulations by personal instructions given to the *employees* of the company. At the time of the accident, both trains and the crossings were in charge of the usual number of careful, competent and experienced officials, and the gates at said Dexter Street crossing were closed and furnished with the lights ordinarily used at such places. The conductor of the passenger train had no warning of the intended stop or the cause thereof. He proceeded promptly to ascertain the cause, and having done so, caused his train to move forward slowly to the station. The stop at said crossing was but momentary. The engine on the freight train carried a headlight which lighted the track in front for a considerable distance. There was a curve in the road, however, at and near to said Dexter Street crossing, which prevented said headlight, to some extent, from lighting the track where the accident occurred. Said freight train was running at the rate of about fifteen miles per hour; and both the engineer and fireman thereon saw the plaintiff on the track before he was struck, but it was impossible then to stop the train or lessen its speed before it struck him.

The plaintiff was well acquainted with the surroundings at said crossing and at the station, having been on the police force of the town for several years, and had frequently been a passenger on defendant's road between Providence and Pawtucket. There is some conflict of testimony as to whether it was cloudy and foggy at the time of the accident, but it was dark and there was no moon. The witness, Sewell Read, testified upon this point as follows:

"It was a very dark night, that is, it was misty. It is just as dark when you get opposite the depot as it is there, place of the accident."
* * * Going on the opposite side, from the depot, you are going into total darkness. There is a light on Exchange Street, clear at the corner of the bridge but you could not tell by that I should think."

The jury found for the plaintiff and assessed the damages at \$6,000. The defendant contends: *first*, that, upon this state of facts there is no evidence of negligence on its part; and *second*, that there is evidence of gross carelessness on the part of the plaintiff.

In regard to the degree of care which the law imposes upon common carriers of passengers, it is settled by a long and uninterrupted line of adjudications, that they are bound to exercise the utmost care and skill which prudent men would use under similar circumstances; and

that they are liable for injuries resulting from even the slightest negligence on the part of themselves or their servants. *Weed v. Panama Railroad Co.*, 5 Duer, 193; *Maverick v. Eighth Avenue R. R. Co.*, 86 N. Y., 378; *Caldwell v. Murphy*, 1 Duer, 288; *Edwards v. Lord*, 49 Me., 279. *Sales v. Western Stage Co.*, 4 Iowa, 547; *Derwort et ux. v. Loomer*, 21 Conn., 245; *Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co.*, 97 Mass., 861; *McElroy v. Nashua & Lowell Railroad Co.*, 4 Cush., 400; *Ingalls v. Bills*, 9 Met., 1, and cases there cited; *Stokes v. Saltonstall*, 13 Pet., 181, 191 [Book X., Law, ed.]; *Bowen v. New York Central Railroad Co.*, 18 N. Y., 408; *Thayer v. St. Louis, Alton & Terre Haute R. R. Co.*, 22 Ind., 26; *Chicago, Burlington & Quincy Railroad Co. v. George*, 19 Ill., 510; *Virginia Central R. R. Co. v. Sanger*, 15 Gratt., 280; *N. & C. Railroad Co. v. Messino*, 1 Sneed, 220.

It is also equally well settled that the question, as to whether or not the defendant in a given case is chargeable with negligence, is ordinarily a question of fact to be determined by the jury under proper instructions from the court as to what constitutes negligence. And the same is true with regard to contributory negligence on the part of the plaintiff. And although there are cases in which, the facts being undisputed and being decisive of the case, it becomes the duty of the court to decide as matter of law upon the question of negligence, yet it is only in those cases where the question of fact is entirely free from doubt, and where only one conclusion can be fairly arrived at therefrom, that the court has the right to thus apply the law without the action of the jury. In the language of the court in *Hart v. Hudson River Bridge Co.*, 80 N. Y., 622, cited in defendant's brief, "When, from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible, and may be differently made by different minds, it is for the jury to make them; that is to say, when the process is to be had at a trial of ascertaining whether one fact had being from the existence of another fact, it is for the jury to go through with that process." Or, as is tersely said by Cooley, *C. J.*, in *Detroit & Milwaukee R. R. Co. v. Von Steinburg*, 17 Mich., 99, 122, also cited by defendant, "When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair minded men may well differ. See, also, *Bernhardt v. Renesselaer & Saratoga Railroad Co.*, 32 Barb., 165; *Shearman & Redf. Negligence*, § 11 and notes; *Keller v. New York Central R. R. Co.*, 2 Abb. Ct. App. Decis., 480; *Ireland v. Onwego, Hannibal & Sterling Plank Road Co.*, 18 N. Y., 526, 538; Wells, Questions of Law and Fact, § 265, and authorities cited.

The case at bar in our judgment is not one in which the court, sitting with a jury, could pass upon the question of negligence as matter of law. For, while the main facts therein are not in dispute, yet the inferences and deductions to be drawn therefrom are not so manifest and apparent as to warrant the court in declaring

them. They were, therefore, properly left to the jury and, we are bound to presume, under as favorable a construction of the law as the defendant was entitled to. For, represented as it was at the jury trial by able and diligent counsel, it made no objection that the law applicable to the facts in proof was not fully and clearly stated. The jury found for the plaintiff, and the only question now is, whether that finding was clearly, palpably and decidedly against the evidence and the weight thereof, or, in other words, whether the evidence *very strongly* preponderates against the verdict. *Johnson v. Blanchard*, 5 R. I., 24, 25. If so, the court should set it aside; but if not so, it should not be disturbed. Upon a careful study of all the evidence and the law applicable thereto, we are unable to say that there is a very strong preponderance of evidence against the verdict. There were many facts and circumstances connected with the case which it was the peculiar province of the jury to weigh and consider, and from which it was their prerogative to draw such inferences as in their good judgment they might legitimately and fairly draw. For instance, we think that the question as to whether the defendant was guilty of negligence in stopping the train so near to the station in the night time without notifying the passengers in this car that they had not reached it, considering the imminency of the approaching freight train, was one which the jury might properly consider and pass upon. *Pennsylvania Company v. Hoagland et al.*, 78 Ind., 208; *Lewis v. Eastern Railroad Co.*, 60 N. H., 187; *Robinson v. N. Y. Central & Hudson River R. R. Co.*, 20 Blatchf., 338.

And as different minds would doubtless arrive at different conclusions, and that too without entire honesty and fairness, upon the evidence as to that question, it would be simply substituting the court for the jury if it should say that that they were not warranted in finding that there was negligence on the part of the defendant from this one fact. And the same is true with regard to several other facts which appeared in evidence, namely: allowing the freight train to pass the station when the passenger train was due, thereby necessitating the stoppage of the latter so near to the station, with knowledge on the part of the defendant that passengers were in the habit of leaving the train on both sides thereof the moment it arrived at the station; and that, when the trains were long, as frequently was the case, passengers in the smoking car would be obliged to alight upon the ground for want of sufficient length of platform, and this, too, where there were no lights. These facts, together with others of more or less importance, were before the jury for consideration under the instruction of the court as to the law applicable thereto, and they arrived at the conclusion that the defendant was guilty of negligence. And it is quite immaterial that the court, if originally acting as the triers of this question of fact, might have come to a different conclusion. It is immaterial, even, that another jury might arrive at a different conclusion upon the same proof so long as no claim is made that the jury that tried the case was actuated by improper motives or was not a fit and proper jury in every respect to try the same.

As to the claim made by defendant that the accident resulted from the plaintiff's careless-

ness, it seems to us that the only reply which the court need make is, that while unquestionably there was evidence tending to prove this, yet it was for the jury to say whether it was proved as matter of fact under the law as given by the court; in other words, that the evidence of carelessness on his part is not so conclusive and free from doubt as to warrant the court in deciding as a matter of law that he was guilty of contributory negligence, or that the finding of the jury upon that question was against the strong preponderance of the evidence.

In *Hoyt v. City of Hudson*, 41 Wis., 105, it was held that if the plaintiff's evidence merely tends to show negligence on his part, it is for the jury to say whether it existed. See, also, *Manufacturing Co. v. Morrissey*, 40 Ohio St., 151; *Fassett v. Roxbury*, 55 Vt., 552, 555; *Longenecker v. Pennsylvania R. R. Co.*, 105 Pa. St., 328; *Dahlberg v. Minneapolis Street Railway Co.*, 32 Minn., 404; *Scott v. D. and W. Railway*, 11 Irish C. Law, 377; *Beisiegel v. New York Central Railroad*, 84 N. Y., 622; *Bowers v. Union Pacific R. R. Co.*, 20 Reporter, 58, issue of July 15, 1885; *Hoye v. Chicago & N. W. R. R. Co.*, Id., 62.

Several of the cases cited by the defendant as bearing upon the question of the plaintiff's carelessness, namely: *Ormsbee v. Boston & Prov. R. R. Corp.*, 14 R. I., 102; *Wheelwright v. Boston & Albany Railroad*, 135 Mass., 225; *Studley v. London & Northwestern Railway Co.*, L. R. 1 Exch., 18; *Ernst v. Hudson River Railroad Co.*, 36 How. Pr., 84, and *Wharton on Negligence*, § 894, are cases in which the persons injured were not passengers on the trains from which they received the injury, but simply travelers in the act of crossing or walking upon the railroad track. But as a very different rule of responsibility obtains where an accident occurs during the existence of the relation of passengers and common carriers from that which obtains under the former circumstances, we do not think that these cases have much bearing upon the one under consideration. The case of *Bridges v. North London Railway Co.*, L. R., 6 Q. B., 377, cited on defendant's brief, would seem greatly to strengthen their position; but as this case was subsequently reversed by the House of Lords, see *Bridges v. Directors, etc., of North London Railway Co.*, L. R., 7 H. L., 218, it is not an authority.

Mr. Justice Brett, one of the Judges summoned by the House of Lords to give an opinion in the case, said, among other things: "What men of ordinary care and skill would or would not do under certain circumstances, is matter of experience, and so of fact, which a jury only ought to determine. It seems to me that it will aid the consideration of what is the proposition or rule of law which is to govern the determination of a judge whether there is or is not evidence fit to be left to a jury, to consider what duty with regard to facts is cast upon the judge after the jury has found a verdict. He must, undoubtedly, determine whether the verdict is against the weight of the evidence. Here, again, I think that a definite rule of conduct, or in other words, a definite proposition for legal application, which is, I think, a proposition of law, to be applied to the facts in evidence, should be laid down. That proposition cannot be whether the judge agrees in opinion with the

jury. If so, the judge has left to the jury evidence which he has already decided to be such as it is not unreasonable to act upon, and yet when it is acted on he overrules it. I do not speak here of the cases in which a judge may, for precaution's sake, leave matter to the jury, reserving for more careful consideration by the court the question whether there was evidence fit to be left to the jury. The proposition or rule of conduct to be applied to the consideration of the verdict, seems to me to be identical with that to be applied to the evidence before leaving the case to the jury. It is, again, not whether the judge would have decided in the same way, but whether the verdict is such as reasonable and fair men might not unfairly arrive at, or, in other words, whether the decision is such as would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men."

The following named cases cited by the defendant, namely: *Pennsylvania Railroad Co. v. Lee et al.*, 83 Pa. St., 818; *Gonzales v. New York & Harlem Railroad Co.*, 88 N. Y., 440; *Chicago, R. I. & P. R. R. Co. v. Dingman*, 1 Ill. App., 162; *Bancroft v. Boston & Worcester R. R. Corp.*, 97 Mass., 275, in so far as the facts were similar to those in the case at bar, are analogous, and seem to support the position taken by the defendant. But as the facts and circumstances in cases of this sort are so well nigh infinite in their variety, and as each case must depend almost entirely upon the facts which appear in connection therewith, authorities, however pertinent, are useful mainly only in so far as they settle general propositions of law, and assist the court in applying these propositions to the particular facts of the case before it. While, therefore, not assuming to say that the law as applicable to the facts in said cases respectively was not correctly enunciated, still we are not prepared to say that the law is so applicable to the facts in the case at bar as to control in the decision thereof.

The second ground upon which the defendant asks for a new trial is, that the damages found by the jury are excessive. This ground was not urged, however, at the hearing; and even if it had been, we do not think the court could properly say that under the evidence as to the extent and permanency of the injury the jury was influenced by passion, partiality or prejudice in assessing the damages, or that the amount is so manifestly excessive and unreasonable as to warrant the interference of the court. See, Sedgwick, *Measure of Damages*, 6th ed., 762-764 and notes; Hilliard, *New Trials*, 2d ed., 562-564, §§ 2, 3, 3a, and notes. The petition for a new trial must be dismissed.

Petition dismissed.

Zechariah CHAFEE, *Plf.*,

v.

William SPRAGUE.

1. At the hearing of a plaintiff's petition for a new trial of an action of ejectment on the ground that the verdict was against the evidence, it appeared that the only evidence on the record and allowed by the justice presiding at the trial

related to the defendant's possession. The time prescribed for the allowance of evidence under the 48th rule of practice at law had expired.

2. Held, that the plaintiff could not amend the allowed statement of evidence by affidavits setting forth what the other evidence in the case was and showing that the only matter submitted to the jury by the presiding justice was the question of possession.

3. Held, further, that the plaintiff was entitled to show to the court by proof that the only question submitted to the jury was that of the defendant's possession.

4. Held, further, it being shown by affidavits that the presiding justice ruled as matter of law in the plaintiff's favor on all questions save that of possession, which was alone submitted to the jury, that the court would consider the petition for a new trial on the allowed evidence.

(Washington — Providence, July 18, 1885.)

PLAINTIFF'S petition for a new trial.

The facts are fully set forth in the opinion.

Messrs. Benjamin M. Thurston, Charles Hart, James Tillinghast and C. Frank Parkhurst, for plaintiff.

Messrs. Abraham Payne, Elisha C. Clarke and Andrew B. Patton, for defendant.

Mr. Justice Tillinghast delivered the opinion of the court:

This is a petition for a new trial preferred by the plaintiff on the ground that the verdict is against the evidence. The action is ejectment to recover possession of the premises known as Canonchet, in South Kingstown, and was tried in the Court of Common Pleas sitting at Westerly on the 18th and 19th days of January, 1888, and resulted in a verdict for the defendant.

The first question which we are called to pass upon is, whether the statement of evidence allowed by the judge below and brought upon the record is sufficient to give the court jurisdiction to hear the petition. The 48th rule of practice provides as follows, viz.: "Motions or petitions for a new trial founded on any alleged error in the rulings or charge of the court, or upon the ground that the verdict is against evidence, shall be accompanied by or contain a written statement of the portion of the charge or of the rulings complained of, or of the evidence, in substance, against which it is complained the verdict has been rendered; which statement shall have been presented to the judge trying the cause within five days of the time of verdict rendered, for his allowance, if the court shall so long continue in session; and if not, during the session of the court, unless a further time be by him, upon motion and for cause shown, specially given, and no motion or petition for a new trial for the causes aforesaid shall be heard, unless the same shall have been presented for allowance as aforesaid, and, excepting cases of death, removal or disability, allowed in writing by the judge who has tried the same."

Within the time given by the Judge below, in this case, after verdict rendered, the plaintiff presented, for allowance, a stenographic report of that part of the evidence which related to the defendant's being in possession of the premises described in the declaration at and before the date of the plaintiff's writ. This report or statement was allowed by the Judge and is a part of the record in the case. That part of the evidence submitted at the jury trial, which related to the other branches of the case, namely: title and the right to immediate possession in the plaintiff, was not presented for allowance and is not, therefore, a part of the record.

At the first hearing in this court, it being suggested by defendant's counsel that the statement of evidence on file was not and did not purport to be a full and complete report of all the evidence submitted at the jury trial, but only of that part bearing upon the question of possession by defendant, the court declined to proceed with the trial on the ground that so far as the record appeared the jury might have decided the case upon one of the other issues raised by the pleadings and not upon the one involved in the testimony presented, there being nothing then before the court to show that this was the only issue which was left to them to decide.

The plaintiff's counsel then applied to the Judge below to allow all of the evidence submitted at the jury trial, a complete stenographic report thereof, together with the charge and rulings of the court, etc., being presented to him for this purpose. This he declined to do on the ground that he then was without authority under said rule of practice, the five days having long since elapsed. Thereupon, the plaintiff filed affidavits setting forth what the other evidence in the case was, and also setting forth the fact that the only question submitted to the jury was the one relating to possession by the defendant, the court having ruled as matter of law that the plaintiff was entitled to recover on the other issues raised in the case. He now asks the court to allow him to amend the original statement of evidence by these affidavits. This we cannot do under the rule as heretofore construed by this court. *Potter v. Padelford*, 3 R. I., 162, 169; *Olney, Receiver, v. Chadsey*, 7 R. I., 224, 229; *Peck v. Parkis*, 8 R. I., 364.

He claims, however, that even if not permitted to amend his statement of the evidence in this way, he has a right to show by proof that as a matter of fact the only question which was submitted to the jury was that relating to the defendant's possession of the premises in dispute; and that, having proved this, the court has jurisdiction to hear his petition for a new trial, because he thus brings himself clearly within the rule.

We think this position is well taken. The rule does not require all of the evidence offered in a case to be incorporated in the statement, but only "The portion * * * of the evidence, in substance, against which it is complained the verdict has been rendered." And the rule is no wise infringed upon by allowing the petitioner to prove by affidavit or otherwise that there was but one question submitted to the jury, and also what that question was. In the case at bar, the affidavits which are un-

disputed show that the Judge below instructed the jury that, as matter of law, the plaintiff was entitled upon the evidence to recover, so far as the questions of title and the right to immediate possession were concerned, and that they need not consider the evidence bearing upon those issues, but only that bearing upon the question of the defendant's possession. All of the evidence, therefore, which the jury had any right to consider, and upon which they must have based their verdict, is now before the court in strict accordance with said rule. There is no occasion for the evidence submitted upon the other issues to be brought here, or if here to be considered by the court. It would, therefore, simply be an incumbrance to the record.

It appearing, then, beyond dispute or question, that all of the evidence which was before the jury for their consideration is now regularly brought upon the record under the rule, it only remains for the court to say whether the verdict is clearly and palpably against that evidence. We entertain no doubt that it is. Considerable evidence was offered by the plaintiff strongly tending to prove that the defendant was and long had been in the actual possession and control of the premises in dispute. One of the pleas filed by him was to the effect that for more than twenty years next before the preferring of the plaintiff's writ, the defendant and those from whom he derived his title had been in the uninterrupted and actual possession of the premises; and there was no evidence whatsoever offered by the defendant to the contrary. We think the verdict was against the strong preponderance of the evidence, and therefore ought to be set aside and a new trial granted.

Petition granted.

*Petition of Frank S. ARNOLD, Receiver; in
Fogg, POTTER & Co.,*

v. .

PROVIDENCE LUMBER COMPANY.

While proceedings were pending against A and B, copartners, for the appointment of a receiver of their property under Pub. Stat. R. I., cap. 237, sec. 13, "Of proceedings in insolvency," A made an assignment of his individual property to C. The receiver after his appointment petitioned the court for an order upon A and C, requiring them to join in a conveyance to him of the assigned realty and to transfer to him the assigned personalty.

Held, that the assignment was subject to the doctrine of *lis pendens*: that the petition of the receiver should be granted.

(Providence — May 9, 1885.)

PETITION for an order of the court. The facts involved are stated in the opinion.

Mr. Frank S. Arnold, pro se ipso.

Mr. Simon S. Lapham, for Providence Lumber Co.

Messrs. Miner & Roelker, for Eben Allen.

Mr. Justice Tillinghast delivered the opinion of the court:

This is a petition filed by the Receiver of the defendants, praying for a writ of attachment against Eben Allen, one of the defendants, for contempt of court in refusing to comply with a decree thereof in said case, and also praying that Harmon S. Babcock, Esq., the assignee of said Allen, be ordered to join in a deed of conveyance to said Receiver of the real estate belonging to said Allen at the time of the making of his assignment to said Babcock, and also to deliver up possession to him of all the personal estate of every kind, including books of account, papers, evidences of property, debts and choses in action of said Allen.

The facts are as follows, *viz.*: on the 19th day of February, 1885, the plaintiffs filed a petition in equity against the defendants, under Pub. Stat. R. L., cap. 237, sec. 13, known as the Insolvency Law, for the appointment of a receiver. This petition was subsequently granted and a decree entered therein on March 23, 1885, appointing Frank S. Arnold, Esq., Receiver, "To take possession of all the property, evidences of property, books, papers, debts, choses in action and estate of every kind of said Providence Lumber Co., and of said Jesse Burdett and Eben Allen as copartners under the firm name and style of the Providence Lumber Company, and individually, including any estate and property attached or levied upon, within sixty days prior to the finding of said petition and remaining unsold, and including also all estate and property theretofore conveyed by said Providence Lumber Company, or by said Jesse Burdett and said Eben Allen, or either of them, in fraud of the rights of creditors or in violation of the provisions of chapter 237 of the Public Statutes," following substantially the language of the statute, and closing as follows: "And said debtors and each of them are hereby ordered to turn over and deliver up possession of all their aforesaid property and estate of every kind unto said Receiver, that is now in their possession."

After the filing and during the pendency of said petition for the appointment of a receiver, the said Eben Allen, under the advice of counsel, made and executed an assignment of his individual property to said Harmon S. Babcock, for the purpose, as he claims, of dissolving certain attachments which had been made upon said property.

The defendants had made a voluntary assignment of all their partnership property and estate to Dexter B. Potter, before the commencement of the proceedings against them by the plaintiffs, and before any attachments had been placed upon their property.

The said Eben Allen had been served with the citation in said original proceedings before he made his individual assignment as aforesaid.

The plaintiffs contend, first, that the defendant Allen, by voluntarily disposing of his property by assignment pending said proceedings against them, has been guilty of contempt of court. The defendants contend that he had a right, notwithstanding the pendency of said proceedings, to convey his property in this, or in any other way that he saw fit; and that to hold to the contrary would result in a great hardship to the persons against whom such proceedings

are commenced, by suspending all business transactions, and tying up all of their property until a final decree should be made in the proceedings.

If the defendants' position is tenable it is practically within the power of a defendant to render any proceedings against him under this statute, entirely nugatory. For he has only to dispose of the property which the creditors are seeking to reach, by making some sort of conveyance thereof, pending the proceedings against him, and thereby leaves absolutely nothing for the final decree to operate upon. This would be, at once, a fraud, both upon the creditors and upon the law. It would be allowing creditors to pursue the shadow only, while the real thing sought would constantly elude their grasp.

We think that the position taken by the defendants is untenable, and that the doctrine of *lis pendens* is clearly applicable to the proceedings, namely: that the voluntary alienation of property pending a suit, by a defendant therein, is not permitted to affect the rights of the parties to the suit; and also, that every person purchasing *pendente lite* is treated as a purchaser with notice and is subject to all the equities of the persons under whom he claims in privity. *Murray v. Lyburn*, 2 Johns. Ch., 441, 445; *Brightman v. Brightman*, 1 R. L., 112, 119; *Sedgwick v. Cleveland*, 7 Paige, 287; *Norton v. Birge*, 35 Conn., 250, and cases cited; *Harmon v. Byram's Admr.*, 11 W. Va., 511; *Murray v. Ballou*, 1 Johns. Ch., 565, 577, 581; *Lawrence v. Lane*, 9 Ill., 354; *Korn v. Haslerigg*, 11 Ind., 448; see, also, *Story*, Eq. Pl., §§ 156, 351; 1 *Story*, Eq. Jur. § 406.

The defendants also contend that even if the court shall hold that said conveyance was wrongful on the part of said Allen, and constituted a contempt of court, yet the court has no jurisdiction under the proceedings instituted, to order said Babcock to join with said Allen in a deed of conveyance of said assigned property, to the Receiver, said Babcock not being a party to said original proceedings; and further, because the property of the defendants not being especially described in the original proceedings, the doctrine of *lis pendens* does not apply, so as to bind him. They also urge that the proceedings against said Babcock should be by bill in equity or action at law, and not in the manner instituted.

We do not think that either of these positions is tenable. It is true that the assignee of said Allen has not been made a party to the original proceedings; nor is there any occasion, that we can see, for making him a party thereto, nor for filing a bill against him to compel a conveyance; for manifestly, if this were done, he could not be heard to urge any defense or equity whatever in his behalf, for he has none. Neither could he make any possible answer that would give him a moment's standing in a court of equity. He has been made a party to *this* proceeding and has appeared before the court and been heard as such; and he does not claim to have any interest in or right of control over the property conveyed, except by virtue of the said assignment made to him under the circumstances aforesaid.

Furthermore, it is not a case in which the title has been transferred *pendente lite*, by operation of law, as in bankruptcy proceedings,

where the assignee must be made a party before the suit can proceed. But it is a case where, by the mere voluntary act of the defendant, pending proceedings against him for the recovery of the very property in question, he has transferred that property to another, who also, at the time, knew of, although not a party to said proceedings. We think, therefore, that what has been said with regard to the debtor applies with equal force to the assignee who has been made such pending said proceedings against the insolvents. To allow him to take and hold possession of the debtor's property in this way, with power, as he manifestly would have, to again dispose of it, would defeat the main purpose and object of the law. For the person in possession of the property would have only to re-assign or otherwise convey it, pending proceedings against him, and before final decree, and then say that it was beyond his power to turn it over to the Receiver, and thus keep the creditors in a fruitless chase after that which the law intends they shall have with the least possible delay.

As to the objection that the property was not sufficiently described in the original proceedings against the defendants, so as to affect it with the doctrine of *lis pendens*, we think it is enough to reply that although the defendants' property was not specifically described and itemized therein, yet from the very nature and object of the proceedings it must have been apparent to everybody that they were intended to include and cover all of the defendants' property of every sort and kind, and however described, except what was exempt by law; and we must hold that after the filing of such a proceeding, all persons who deal with the insolvent debtors concerning any of their property, do so at their own risk. "The principle of *lis pendens*" say the court in *Lewis v. Mew*, 1 Stob. Eq., 180, 188, "is that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril." We think that the property of the defendants was so pointed out by the original proceedings in this case. The prayer of the petition was "That a receiver of the property, books, papers, debts, choses in action and estate of every kind of said Burdett and Allen, both as copartners as aforesaid, and individually, may be appointed." This was sufficient, we think, to put all purchasers upon their guard, and *a fortiori* one who took a conveyance in the manner aforesaid.

The prayer of the petitioner, in so far as it asks that said Allen and Babcock be ordered to join in a deed of the real estate to the Receiver, and that said Babcock be ordered to deliver up to him the personal estate of said Allen now in the hands and possession of said Babcock, is granted.

The petitioner does not ask for any further relief at the present time.

Order accordingly.

C. F. HERRESHOFF *et al.*,

v.

Benjamin TRIPP, City Treasurer of the City of PROVIDENCE.

In trespass for *mesne* profits two leases offered in evidence by the plaintiff to

show the rental value of the premises and the time when he obtained possession were excluded by the presiding Justice. The plaintiff petitioned for a new trial. The record of the ejectment suit had been put in. The lessee of one of the leases had testified as to his rent and the petition did not set out the rent reserved in the other lease.

Held, that the petition did not show that the plaintiff was injured by the exclusion of the deeds and should not be granted.

In such action plaintiff cannot recover counsel fees and expenses paid out in the ejectment suit, and,

Punitive damages are allowed only when the defendant has shown malice or bad faith.

Causes of action accrue when the trespasses are committed and a recovery can only be had for such time as lies within the limits of the statute of limitations.

(Providence—July 9, 1885.)

PLAINTIFFS' petition for a new trial.

Mr. Amasa M. Eaton, for plaintiffs:

In an action for *mesne* profits the jury may award extra or exemplary damages. *Goodville v. Toombs*, 3 Wils., 118, 121; *Dewey v. Osborn*, 4 Cow., 829, 838; *Lessee of Brown v. Galloway*, Peters (C. C.), 281, 300, by Washington, J.; *Drazel v. Man*, Barr (Pa.), 271, 276; 1 Sedg. Damages, 251; Tyler, Ejectment, 848; see, also, *n. to Oliver's* Precedents, p. 747.

Where circumstances of malicious aggravation are proved, the jury may give vindictive or exemplary damages. 1 Sedg. Damages, 280; *Williams v. Currie*, 1 Com. B., 347; *Moceet v. Harrey*, 5 Taunt., 448; *Perkins v. Towle*, 48 N. H., 220; *Stillwell v. Barnett*, 60 Ill., 210.

In actions of trespass, such damages may be given. *Day v. Woodworth*, 18 How., 363; *Greencille & C. R. Co. v. Partlow*, 14 Rich., 237; *Douty v. Bird*, 60 Pa. St., 48.

So, consequential damages are allowed for interruption to use of a mill by the loss of a dam. *White v. Mosely*, 8 Pick., 356.

As to the bar of the statute of limitations, there was no cause of action, and no right to *mesne* profits until the determination of the title in the suit of ejectment. *N. O. v. Gaines*, 15 Wall., 624, 633 (XXI., Law. ed., 215, 219.)

Mr. Nicholas Van Slyck, City Solicitor, for defendants, cited, Wood's Mayne, Damages.

Mr. Chief Justice Durfee, delivered the opinion of the court:

This is trespass for the *mesne* profits of land recovered in ejectment from the City of Providence. The case was tried in this court at the October Term, 1884, the trial resulting in a verdict for the plaintiffs for \$675. The plaintiffs petition for a new trial for errors in rulings and on the ground that the verdict was against the evidence and the weight thereof.

First. The first error alleged is the exclusion of two leases of the premises, the *mesne* profits of which were sued for, dated February 1st, 1883, and given by the plaintiffs to former ten-

ants of the City of Providence. The leases were offered to prove the rental value of the premises and the date at which the plaintiffs obtained possession. The lessee in one of the leases, however, had already testified to the rent which he paid, before the lease was offered in evidence, and the petition does not show what rent was reserved in the other lease. The petition, therefore, does not show that the plaintiffs have been injured in this respect by the exclusion. It does not appear that the date of the lease shows the time when the plaintiffs obtained possession, for possession may have been obtained sometime before the lease was given. The petition shows that the record in the ejectment suit wherein the plaintiff recovered the premises was put in and also the accounts of the city showing the amounts and dates of all sums paid to the city by said lessees while they paid rent for the lots they occupied. One of the lessees, called as a witness by the plaintiffs, testified that he paid the city \$50 a year until the plaintiffs got possession of the premises.

The time was, therefore, fixed independently of the lease. We do not think a new trial should be granted on this first ground.

Second. The second error alleged is the exclusion of the testimony offered to prove the expenses incurred for counsel fees and for services of engineer in examining records and making plat, etc., in the ejectment suit. The English rule is that the plaintiff in trespass for *mesne* profits may recover, as part of his damages, the costs of the ejectment suit as taxed, but not beyond the taxation when they are taxed. *Doe v. Hare*, 2 Dowl. (P. C.); 245; *Doe v. Davis*, 1 Esp., 858; *Doe v. Filliter*, 13 M. & W., 47; Mayne, Damages, by Wood, *398.

In *Alexander v. Herr*, 11 Pa. St., 587, Gibson, C. J., said: "Costs of a previous action have doubtless been recovered, but it is by no means certain that counsel fees and compensation for expense and trouble, have been treated as such. In England the costs of an attorney proper are different things; and if more was meant, the relaxation of the rule has gone to a fearful length. Clients would pay liberally out of the pockets of their adversaries, and jurors would not weigh their claims for trouble in golden scales. * * * A separate suit could not lie for the trouble and expense of a previous one, and there is no reason why they should be component parts of a cause of action in common with something else."

In *Doe v. Perkins*, 8 B. Mon., 198, cited by the plaintiffs, the court held that a plaintiff in trespass for *mesne* profits was entitled to recover as a part of his damages his reasonable counsel fees and expenses in the ejectment suit. The court cite no authority for their decision. Such an allowance may be just but it is anomalous, for there is no reason for the recovery of the counsel fees and expenses of the ejectment suit which would not apply as well to any other suit. If the plaintiff is entitled to recover his counsel fees and expenses when he succeeds in the ejectment suit, why should not the defendant have the same measure of justice when he succeeds? We do not think the court erred in this matter.

Third. The third error alleged is the refusal of the court to instruct the jury that they might find exemplary damages. We do not think

there was any error in this. Courts which allow exemplary or vindictive damages allow them only when the defendant has acted maliciously or in bad faith. In the case at bar, there was no evidence of malice or bad faith on the part of the city. The fact that the city prevented the plaintiffs from taking possession by its police does not show malice or bad faith any more than if it had done so by any other agent or servant. It was precisely what the city would do if it believed itself the rightful owner. The cases cited by the plaintiff do not show that a plaintiff in trespass for *mesne* profits is entitled to recover exemplary or vindictive damages as a matter of course, but only that the plaintiff in such a case is entitled to recover more than the profits actually received when his damages exceed such profits.

Fourth. The plaintiffs contend that the statute of limitations does not apply because they could not sue for the *mesne* profits before their recovery in the ejectment suit. We think, however, that the causes of action must be held to have accrued when the trespasses were committed, the possession relating back when recovered, and consequently that the Statute of Limitations must be held to be a bar except for the four years next before the suit. *Lynch v. Cox*, 23 Pa. St., 265; *Hill v. Meyers*, 46 Pa. St., 15; *Morgan v. Varick*, 8 Wend., 587; *Jackson v. Wood*, 24 Wend., 443.

We are not satisfied that the plaintiffs are entitled to a new trial on the ground that the verdict is against the evidence.

Petition dismissed.

UNION COMPANY *Plff.*

v.

David WHITELEY.

The bond required by Pub. Stat. R. I., cap. 220, § 14, from a defendant who takes exceptions to the rulings of a Special Court of Common Pleas, conditioned to pay "All rent or other moneys due or which may become due pending the action and such damages and costs as may be awarded against him," covers damages for wrongful occupation even where the relation of landlord and tenant has never existed.

(Providence — May 28, 1885.)

EXCEPTIONS to the Court of Common Pleas.

The facts sufficiently appear in the opinion: No briefs were filed on either side.

Messrs. Charles H. Parkhurst and Rathbone Gardner, for plaintiff.

Mr. Andrew B. Patton, for defendant.

Mr. Chief Justice Durfee delivered the opinion of the court:

This is an action of debt on a bond given by William Sprague and Inez Sprague, his wife, as principals, and by the defendant as surety, in an action of trespass and ejectment brought by the plaintiff Corporation against said William and Inez to recover possession of an estate occupied by them in the City of Providence.

In the action of trespass and ejectment the plaintiff Corporation recovered judgment for possession; but in the course of the trial, which was had in a special court of common pleas, the said William and Inez excepted to certain rulings of the special court and gave the bond in suit with a view to carrying the case into the Supreme Court on exceptions. Accordingly the case was carried into the Supreme Court, where the exceptions were overruled and the judgment of the special court was affirmed. The bond was given as required by Pub. Stat. R. I. cap. 220, and particularly by § 14 of cap. 220, which reads as follows, to wit:

"Sec. 14. In case such right (i. e. the right to carry the case to the Supreme Court on exceptions) be claimed by a defendant to an action in such special court, he shall, in addition to the ordinary bond to prosecute, within twenty-four hours as aforesaid, give bond to the plaintiff with sufficient surety or sureties to the satisfaction of such justice, in such sum as the justice may order, that he will pay *all rent or other moneys due or which may become due pending the action*, and such damages and costs as may be awarded against him."

The bond was given with condition in the language of section 14. The declaration in the case at bar sets forth the bond and condition and assigns breaches as follows, to wit: "And the plaintiff avers that said William Sprague and Inez Sprague have not kept and performed the condition of said writing obligatory but have broken the same in this; that the said William Sprague and Inez Sprague or either of them or any other person for them or either of them have not paid the rent or any other moneys due to said plaintiff at the date of said writing obligatory or any part thereof, or any rent or moneys which have become due to said plaintiff pending said action, or such damages and costs as have been awarded to said plaintiff or any part of the same," etc. The defendant pleaded *nil debet*. The bill of exceptions shows that it appeared on the trial of the case at bar that the relation of landlord and tenant had never existed between the plaintiff Corporation and William and Inez Sprague, but, on the contrary, that William and Inez held the estate sued for in the special court action adversely to the plaintiff Corporation claiming it in the right of Inez under an independent title; whereas, the plaintiff Corporation claimed as purchaser at a mortgagee's sale and prosecuted the action under the 8th clause of Pub. Stat. R. I., cap. 195, § 2, which confers on special courts jurisdiction of all actions brought for the possession of lands, tenements and estates sold under mortgage.¹ The defendant in the case at bar thereupon asked the court below to charge the jury that the plaintiff, having failed to prove that the relation of landlord and tenant existed between the parties to the special court action, had failed to prove a breach of the bond. The court refused so to charge, but did instruct the jury to bring in a verdict for the plaintiff. The question raised by the exceptions is whether the court erred. The defendant contends that the bond does not cover a claim to damages for wrongful occupation. The bond being in the language of the statute must be construed as

the statute should be construed. The question, therefore, is, whether the words "all rents or other moneys due or which may become due pending the action," as used in the statute, are broad enough in their meaning to cover damages incurred by wrongful occupation where the relation of landlord and tenant has never existed. Of course the word "rent" implies the relation of landlord and tenant, but the language is "rent or other moneys due or which may become due." The defendant argues that the phrase "moneys due or which may become due," imports an obligation by contract, express or implied, and not a mere liability to damages for tort. It is doubtless true that we often use the phrase "moneys due" to signify an obligation to pay money under a contract, or for the breach of a contract, than we do to signify a liability to pay money by way of damages for a tort; but, nevertheless, we do not think the phrase, if used with the latter signification, would be very much at fault, since an obligation to pay money may be incurred by tort as well as by contract. A statute should be construed if possible so as to make it effectual for the purposes for which it was enacted. The provision in question was manifestly intended for the security of parties plaintiff; for without it a defendant in ejectment, especially if peculiarly irresponsible, would be constantly resorting to exceptions for delay so that pending the actions they might enjoy the use of the premises sued for. The provision ought, therefore, to be construed liberally to effectuate its intent; and so construing it we find no difficulty in holding that it covers damages for wrongful occupation or detention as well as rent. Indeed, if we were to hold that the provision covers only moneys due by contract, we should have to hold that it does not cover money for the use of a tenement sued for pending the action, where the suit is by a landlord to eject a tenant holding over after the expiration of his term, for in such case the commencement of the action terminates the tenancy, and the subsequent occupation is a trespass. *Dirck v. Wright*, 1 T. R., 378; *Featherstonhaugh v. Bradshaw*, 1 Wend., 134; *Jones v. Carter*, 15 M. & W., 718; *Russell v. Fabyan*, 34 N. H., 218. Evidently such a construction would conflict with the plain purpose and meaning of the Act and it, therefore, cannot be adopted.

The exceptions must be overruled and the judgment of the court below affirmed with costs of the court, and the case stand for chanceryization.

Exceptions overruled.

¹ See, *Union Company v. Sprague*, 14 R. I., 452.

HARRINGTON, *Plff.*,

v.

WADSWORTH.

1. In an action against a sheriff for neglecting to arrest upon execution a surrendering debtor; evidence of the latter's intention to take the poor debtors' oath, may properly be excluded.

2. A judgment is evidence against third persons of the fact of its rendition, but not of the facts which were in issue between the parties to it.

(Hillsborough — July 31, 1885.)

CASE, against the defendant, a deputy-sheriff, for neglecting to arrest on an execution in favor of the plaintiff, one T. upon his surrender at the jail.

The plaintiff recovered judgment against T. in an action of trover. The judgment record admitted in evidence showed that the property converted by T. consisted to a considerable extent of promissory notes. The defendant claimed that the plaintiff suffered no damage by the failure to arrest T., and introduced evidence tending to show that T. had no property and that the converted notes were of no value. The court permitted the plaintiff's counsel to comment in his argument to the jury upon the judgment as tending to prove property in the hands of T. at the date of the conversion, and as fixing the value of the notes at that time, and the defendant excepted.

As bearing upon the question of damages, the defendant offered to show that T. proposed in case he was arrested, to apply to take the poor debtor's oath, and that his counsel prepared an application for that purpose. The evidence was excluded, and the defendant excepted.

Messrs. Burns and Briggs & Huse, for the plaintiff.

Messrs. Copeland & Jones and Burnham & Brown, for the defendant.

Mr. Justice Carpenter delivered the opinion of the court:

If T. was possessed of no attachable property, and had been guilty of no fraud, he was entitled to take the poor debtors' oath (Gen. Laws, ch. 241, secs. 36 and 37), and the damages caused to the plaintiff by the defendant's neglect of duty were merely nominal. If it is difficult to see what bearing T's intention to apply, or even his actual application, to take the oath, could have upon the question whether he was entitled to take it; but if the evidence might properly have been received, it was so remote that no exception lies to its exclusion. *State v. Railroad Co.*, 58 N. H., 410.

The plaintiff's loss by reason of the defendant's failure to perform his duty could not exceed the amount of her judgment against T., of which the record is the only competent evidence. The defendant being neither a party nor privy to the judgment, it is evidence against him of the fact of its rendition, and of the amount for which it was rendered (1 Greenl. Ev. S., 527), but not of the facts which were in issue between the parties to it. Between these parties, it is no more evidence of the conversion or possession

of property by T., or of the value of any property by him converted, than would be a like judgment against him to which both the plaintiff and defendant were strangers. Permitting the plaintiff's counsel to comment to the jury upon the judgment as tending to show property in the hands of T., and as fixing the value of the notes, was equivalent to a ruling that the judgment was competent evidence of those facts, and was erroneous.

Exceptions sustained.

Mr. Justice Allen did not sit; the others concurred.

CLARK, *Plff.*,

v.

SLAYTON.

A suit in equity is not commenced until the bill is filed.

(Hillsborough — July 31, 1885.)

BILL in equity, to recover money verbally promised in support of a base ball club. The defendant, in his answer, alleges that there is no equity in the bill; that the plaintiff has an adequate remedy at law, and sets up the Statute of Limitations.

In 1877, the plaintiff was the manager of a base ball club in Manchester. He, the defendant and three others, verbally agreed to pay, each, one sixth part of the excess of the expenses over the receipts of the club. The plaintiff, as manager, advanced the expenses, and at the end of the season, in the fall of 1877, demanded payment of the defendant, of his share of the excess over the receipts, which the defendant refused to pay. About the first of June, 1883, the plaintiff drew the bill and sent it to the clerk, who notified him that, by the rule, it could not be filed and entered until the entry fee was paid. February 12, 1884, the necessary fees having been provided, the bill was filed, and an order of notice issued, which was served upon the defendant February 28, 1884. The court dismissed the bill, and the plaintiff excepted.

Mr. J. W. Fellows, for the plaintiff.

Messrs. Burnham & Brown, for the defendant.

Mr. Justice Carpenter, delivered the opinion of the court:

An action at law is in general regarded as commenced, so as to avoid the Statute of Limitations, when the writ is completed with the purpose of making immediate service. But when there is no intention to have it served, or it cannot be served, until some further act is done, the action is not deemed to be commenced until such act is performed. *Robinson v. Burleigh*, 5 N. H., 225; *Graves v. Ticknor*, 6 N. H., 587; *Hardy v. Corlis*, 21 N. H., 356; *Mason v. Cheney*, 47 N. H., 24; *Brewster v. Brewster*, 52 N. H., 80.

The same rule is applicable to suits in equity. *Leach v. Noyes*, 45 N. H., 364.

A bill in equity must be filed in the clerk's office, and an order of notice obtained, before

it can be served upon the defendant. Rules 11 and 18.

The date of the filing is, therefore, the earliest time which can be taken as the commencement of the suit.

The plaintiff's action is barred by the Statute of Limitations. This result makes it unnecessary to consider the other questions raised by the case.

Exceptions overruled.

Mr. Justice Allen did not sit; the others concurred.

Michael O'NEIL, *Plff.*,

v.

Thomas DUNN *et al.*, Patrick Barry *Claimant*.

An acceptance of an assignment of wages by an *employé* of a corporation, made in writing by one who is not an officer of the corporation, but a confidential clerk in its office apparently having authority to do the act, is not void.

(Hillsborough—July 31, 1885.)

FACTS found by referee:

November 27, 1883, Dunn was at work for the Nashua Lock Company, the trustee, and on that day made an assignment of his wages to Barry. Barry took the assignment to the counting room of the company and finding one R. P. Mosely there, asked him if he was the party to accept assignments of wages made by persons in the employment of the company. Mosely informed Barry that he was, and wrote across the back of the assignment the following words: "Accepted November 27, 1883, Nashua Lock Company, by R. P. Mosely." Barry took the assignment with this indorsement and filed it with the city clerk of Nashua where the parties reside. The Lock Company is a corporation having a treasurer in Nashua, whose acceptance of such an assignment would be good against all parties.

Mosely was not an officer of the corporation, but a clerk holding confidential relations to the company, to such an extent that he was admitted to full knowledge of all business affairs, fixing the price upon goods for which he took orders; and was employed by the treasurer, with the assent of the directors.

At the pay-day following the date of the assignment, the treasurer paid Barry the wages due Dunn, and the same payment was repeated at each succeeding pay-day until the service of the trustee process in this suit upon the company, May 8, 1884. Mosely had no authority to accept the assignment. The treasurer, for aught that he or the company had done, could have repudiated it upon the knowledge of its existence, but the treasurer and the company ratified it after it was filed with the city clerk, so far as paying the wages to Barry, the claimant, instead of Dunn, the workman, was a ratification.

The court ordered the trustee discharged, and the plaintiff excepted.

Mr. J. B. Parker, for plaintiff:

The statute in relation to assignments was made for the creditor, that he might have a general notice of the assignment. *Runnells v. Bosquet*, 60 N. H., 40.

When the adoption of any particular form or mode is necessary to confer authority in the first instance, there can be no valid ratification except in the same manner. *Dispatch Line v. Bellamy Co.*, 12 N. H., 206, 232.

The treasurer of the corporation could not delegate his power to a clerk, as officers are not the corporation and cannot delegate their powers to another. *Gillis v. Bailey*, 21 N. H., 150, 162.

The statute requires the assignment to be duly accepted in writing; and duly means legally. *Patterson v. Oresighton*, 42 Me., 367; *Plymouth v. Wareham*, 126 Mass., 475; *Hatheway v. Reed*, 127 Mass., 186.

In reply to claimant's brief: it is only when a statute is ambiguous in its terms, that courts may rightfully exercise the power of controlling its language so as to give effect to what they may suppose to have been the intention of the law-makers. *Wood v. Adams*, 35 N. H., 36; *Bidwell v. Whitaker*, 1 Mich., 469; *Koch v. Bridges*, 45 Miss., 247.

"When the language of the statute is clear and leads to no absurd results, courts are to be governed by its obvious meaning, and not extend its operation because they suppose the Legislature may have intended to provide a more extensive or more effectual remedy." *Wood v. Adams*, 35 N. H., 36; *Ezekiel v. Dixon*, 3 Ga., 146; *Koch v. Bridges*, 45 Miss., 247.

The rule of construction declaring a statute to be directory, ought to be applied by the courts with reluctance, and only in extraordinary cases where great public mischief would otherwise occur. *Koch v. Bridges*, 45 Miss., 247.

Mr. C. W. Hoitt, for claimant:

"The Statute of 1878, making all assignments, of wages to be earned, invalid against the laborer's creditors, unless accepted by the employer and filed in the town clerk's office, provided a way for general notice of the assignment." *Runnells v. Bosquet*, 60 N. H., 40.

In the interpretation and construction of statutes, the object and intent of the Legislature are, in all cases, to be regarded. *Jones v. Gibson*, 1 N. H., 272; *Barker v. Warren*, 46 N. H., 124.

Statutes not penal in their character should be construed liberally, in advancement of the object of the Legislature. *Kinsley v. Hall*, 9 N. H., 193.

Even when there was confusion in the spelling and pronunciation of the assignor's name, but no uncertainty as to the fund intended to be assigned nor in the identity of the assignor, it was held valid against an attaching creditor. *Ouimet v. Sirois*, 124 Mass., 164; affirmed, 126 Mass., 118.

Mr. Justice Clark delivered the opinion of the court:

The only objection made to the validity of the assignment is, that it was not duly accepted. The acceptance by Mosely was *prima facie* the acceptance of the Lock Company, and sufficient to entitle the assignment to record. He was a clerk employed in the counting room by the

treasurer with the assent of the directors, holding confidential relations to the company and representing it at its place of business, and holding himself out as authorized to accept assignments of wages of persons in the employ of the company. In accepting the assignment, he assumed to act for the company; the act was within the apparent scope of his duties, and the claimant was justified in relying upon his statement that he was authorized to act for the company. Under these circumstances the acceptance was not absolutely void. At most it was merely voidable, and until revoked by the company, it was sufficient as to third parties. Whether it could be revoked there is no occasion to consider, as it was treated by the company as a valid acceptance. The ratification by the company was before any objection had been made or question raised as to the validity of the acceptance, and prior to the plaintiff's attachment, and it was equivalent to a prior authority to the agent. *Haydock v. Duncan*, 40 N. H., 45.

Exceptions overruled.

Mr. Justice Bingham did not sit; the others concurred.

STATE, *ex rel.* James H. Libbey, *Plff.*,

James H. MEGIN.

In *quo warranto* to determine the right to an elective office the record of the declared election is not conclusive.

A person declared elected and inducted into office is a *de facto* officer, though not lawfully elected.

(Merrimack — July 31, 1885.)

INFORMATION, in the nature of a *quo warranto* filed by the Attorney-General at the relation of James H. Libbey to determine the right of the defendant to the office of prudential committee of School District No. 2, in Hooksett. Facts found by a referee.

The record of the school meeting, held March 7, 1885, shows that the defendant had a plurality of votes and was elected. Upon evidence tending to show how individuals voted, received subject to the defendant's exception, and upon other evidence, it was found that the relator had a plurality of votes and was elected. The defendant assumed the duties of the office, and about April 1 hired a competent teacher for the year at a stipulated salary. The relator and the defendant are equally suitable to fill the office.

Messrs. Chase and Streeter, for plaintiff:

In proceedings by *quo warranto* the court is not called upon to perform the duty of canvassing the votes as in *Osgood v. Jones*, 60 N. H., 273; but the judicial duty of determining

the title to the office is in question, as in *Attorney-General v. Colburn*, Hillsborough County, March Term, 1882, and while in performing the former duty they will not go behind the returns, they must do so oftentimes in performing the latter. High, *Extr. Legal Rem.*, secs. 688, 689, 760; Cooley, *Const. Lim.*, 625; *Osgood v. Jones*, 60 N. H., 282, 543.

There is a distinction between a case brought on the complaint upon relation of a private person, as in *State v. Mead*, 56 Vt., 353, and a case brought on information filed by the Attorney-General himself. In the latter case the court has no power to dispense with the law applicable, on its trial, or to refuse to enforce the law. *State v. Brown*, 5 R. I., 1 High, *Extr. Rem.*, secs. 606, 707, 781, *et seq.*

Messrs. Osgood and Prescott, for defendant.

Mr. Justice Carpenter delivered the opinion of the court:

Upon the question which of the parties received a plurality of votes for the office, the record of the declared vote is, in this suit, merely evidence. If the record of the declaration of the moderator in the case of town and school district officers and of the canvassing board appointed by law in the case of other officers were conclusive, this proceeding could never be maintained to test the right to an elective office. It cannot be instituted until possession of the office is taken (*Osgood v. Jones*, 60 N. H., 282); and no one can take possession until his election is declared. The exception to the reception of evidence outside the record must be overruled. *People v. Vail*, 20 Wend., 12.

Whether there may be cases in which the law does not require an information to be issued or the writ to be granted, although it appears that the defendant is not entitled to the office, as where a determination of the proceedings cannot be reached until after the expiration of the term of office, or where greater public mischief would be done by granting than by refusing the writ (*People v. Sweeting*, 2 Johns., 186; *People v. Loomis*, 8 Wend., 396; *Commonwealth v. Athearn*, 3 Mass., 285; *Howard v. Gage*, 6 Mass., 462; *State v. Jacobs*, 17 Ohio, 143; *State v. Schriener*, 5 Rich. (S. C.), 299; *King v. Parry*, 6 Ad. & E., 810; *State v. Mead*, 56 Vt., 353; *State v. Tolan*, 33 N. J., 195; *Commonwealth v. Jones*, 12 Pa. St., 365); is a question not necessary to be considered. No sufficient reason here appears why the defendant should not be removed. He was not and the relator was lawfully elected; a part only of the term of office has expired, and no public mischief can result from the removal. By virtue of his declared election and induction into the office, the defendant became, and until judgment rendered, will remain a *de facto* officer. His official acts are valid. His contract with the teacher, if made in good faith by both parties, will have the same force and va-

NOTE.—A certificate of election is only *prima facie* evidence of the election of the party holding it. It does not preclude collateral inquiry into the correctness or legality of the canvass. *People v. Thatcher*, 1 Thomp. & Co., 100; *Rust v. Gott*.

The return of the county board is not conclusive. *People v. Van Cleve*, 1 Mich., 362.

The acts of an officer *de facto*, are valid as respects the public and as to the rights of third persons.

S. H.

They are not assailable in collateral proceedings. *Bean v. Thompson*, 19 N. H., 290; *Dolan v. People*, 64 N. Y., 496; *Pepin v. Lachenmeyer*, 45 N. Y., 32; *Lambert v. People*, 6 Abb. (N. C.), 196; *Lambert v. People*, 14 How. Pr., 515; *Morgan v. Quackenbush*, 22 Barb., 79; *People v. Cook*, 8 N. Y., 67.

The proceeding by *quo warranto* is an action of a civil, not of a criminal nature. *People v. Cook*, 8 N. Y., 67.

lidity as if the judgment in this case were for the defendant. The prudential committee is charged with various duties besides the employment of teachers (Gen. Laws, ch. 86, s. 27; ch. 87, s. 14; ch. 88, s. 15; ch. 91, ss. 1 and 2), all of which may as well be performed during the remainder of the term by the relator as by the defendant, both being equally competent. No more inconvenience can result to the district from granting the information than is met in the ordinary case of the death, resignation or removal of the committee, and the election or appointment of another.

Information granted.

All concurred.

CHADBURN *et al.*, *Plffs.*,

v.

GILMAN *et al.*, *Hodsdon, Claimant.*

The maker of a negotiable sight draft, not payable in this State, cannot be held as trustee of the payee of the draft.

(Strafford — July 31, 1885.)

TRUSTEE process. Facts found by the court: July 15, 1884, the Commercial Union Ins. Co., of London, adjusted a fire loss with the defendant, and gave him, in payment therefor, a negotiable sight draft on their office in New York. July 19, and before the draft left New York, this writ was served on the insurance company as trustee of the defendant, and payment of the draft was for that reason refused when it was afterwards in the usual course of business presented for payment in New York.

Mr. J. H. Hobbs, for plaintiffs:

If, at the hearing, the claimant cannot maintain his right to appear, he must retire from the contest, and judgment on the issue must be for plaintiffs. *Davis v. Fogg*, 58 N. H., 162.

At the date of service of process upon the Trustee, he was not the owner of the draft in question, title to which was then in the principal defendant, who had merely handed it to claimant to get it cashed; he has no standing in court. Gen. Laws, ch. 249, secs. 16, 17; *Peck v. Maynard*, 29 N. H., 184-5; *Amoskeag Mfg. Co. v. Gibbs*, 28 N. H., 320.

The liability of the Trustee depends upon the state of facts existing at the date of his disclosure deposition, which was long subsequent to the protest of the draft. *Gove v. Varrell*, 58 N. H., 78.

Even if the draft can be regarded as having been received in the first instance in payment of the company's liability on the original contract of insurance, yet upon its subsequent protest, Gilman's right of action on the original contract revived. Daniel, Neg. Inst., 2d ed., 272; *Pearce v. Davis*, 1 Moody & Rob., 365-6; *Cromwell v. Lovett*, 1 Hall (N. Y.), 56; *Everett v. Collins*, 2 Camp., 515.

That the taking of a negotiable instrument for a pre-existing debt, does not extinguish the original debt in the first instance, see, Byles, Bills, 381; *Murray v. Gouvener*, 2 Johns., 438; *Hoar v. Clute*, 15 Johns., 224; *Hart v. Boller*, 15 Serg. & R., 162; *Larrabee v. Talbot*, 5 Gill, 426; *Wyman v. Race*, 11 Gill & J., 416.

The receipt given by Gilman, acknowledging payment of the amount due on the policy, 18

is not conclusive evidence of his intention to receive the draft in absolute payment. A receipt is always open to explanation. *Harden v. Gordon*, 2 Mason, 561; *Stackpole v. Arnold*, 11 Mass., 31; *Rollins v. Dyer*, 16 Me., 478.

The deposition of Wray, the special agent of the trustee, who settled this loss, shows that he was a special agent to adjust losses. *Taber v. Cannon*, 8 Met., 458.

As a general rule, a special agent, or an agent employed to make purchases for his principal, has no authority to bind his principal by a negotiable promissory note or bill of exchange. *Inhabitants of Cheeshire v. Howland*, 18 Gray, 320; *Gould v. Norfolk Lead Co.*, 9 Cush., 343; *Torrey v. Dustin Mon. Assn.*, 5 Allen, 329.

If claimant proposed to rely upon the agent's authority to make the draft, it was incumbent upon him to prove such authority clearly at the beginning. *Emerson v. Prov. Hat Mfg. Co.*, 13 Mass., 240; *Paige v. Stone*, 10 Met., 168.

Messrs. Worcester & Gafney, for claimant:

A trustee who has given a negotiable note to the principal, cannot be charged as trustee on account of such note. *Stone v. Dean*, 5 N. H., 502, 503; *Kibling v. Burley*, 20 N. H., 359, 361.

Statutes making certain classes of negotiable paper subject to trustee process must be construed strictly, and paper not described therein be held still exempt from their operation. Gen. Laws, ch. 249, sec. 15.

A non-resident, although served with process here, cannot be charged as trustee upon a contract, unless upon a contract to be performed in this State or for goods actually in his hands in this State at the time of the service of the writ. *Jones v. Winchester*, 6 Rep., 497; *Clark v. Wilson*, 15 Rep., 150; *Sawyer v. Thompson*, 24 Rep., 510; *Lawrence v. Smith*, 45 Rep., 538.

The insurance company was not created by our statute; its management, principal office and directorship, was not only in another State but in another country. It was not a corporation in this State. 28 Barb., 318.

Residence, denotes the fact that a person dwells in a given place. 2 R. & L. Law Dic., 11-13.

A corporation must dwell in the place of its creation; it cannot migrate to another sovereignty. 2 Wait, Act. & Def., 312.

Mr. Justice Clark delivered the opinion of the court:

At the time of the service of the plaintiffs' writ upon the Trustee, July 19, 1884, the Trustee was indebted to the defendant upon a sight draft, payable to the order of the defendant at the office of the Trustee in the City of New York. The draft, being a negotiable instrument not payable in this State, and one of the parties to it not residing in this State, was not subject to the trustee process; and the plaintiffs took nothing by the attempted attachment. G. L., ch. 249, sec. 15.

Prior to 1842 negotiable paper was not liable to trustee process in this State. *Stone v. Dean*, 5 N. H., 502.

By the Revised Statutes negotiable promissory notes "Made or payable in this State, or the parties to which at the time of making the same resided in this State," were subjected to this process. R. S., ch. 206, sec. 18.

In *Kibling v. Burley*, 20 N. H., 859, 362, Woods, J., in speaking of the statute, says: "It has subjected negotiable paper, made under such circumstances as to derive its effect and construction from the laws of this State as the *lex loci*, to the control of the process of foreign attachment to a certain extent."

In *Horn v. Thompson*, 31 N. H., 562, 572, Bell, J., says of the same statute: "There is no general power conferred in relation to negotiable paper; promissory notes alone are specified. All promissory notes are not embraced in the Act, but such only as are made and payable in the State, or the parties to which, at the time of making the same, resided in this State."

And in *Thompson v. Carroll*, 36 N. H., 21, 25, Fowler, J., speaks of the statute as applying to notes "payable in this State." It may be doubtful whether a note made in this State, payable at a place outside the State, the parties to which, at the time of making the same did not reside in the State, would be liable to trustee process under the Revised Statutes, as such a note would be construed and interpreted by the law of the place of payment, and not by the law of this State. But, however that may be, the statute was materially changed in 1867, and put in its present form. It was extended so as to include negotiable paper generally, and the phrase "made or payable in this State," was changed to "made and payable in this State," so that the statute now reads: "If the trustee is sought to be charged for any negotiable promissory note, or other instrument on which he is liable, made and payable in this State, or the parties to which, at the time of making the same, resided in this State, * * * Gen. St., ch. 230, sec. 21; G. L., ch. 249, sec. 15.

The process of foreign attachment being unknown to the common law, does not extend beyond the express provisions of the statute; and under the present statute, negotiable paper is subject to the trustee process, when made and payable in this State, or when the parties reside in the State at the time of making the same, and not otherwise.

In *Orcutt v. Hough*, 54 N. H., 472, the question was raised and considered, whether a note made in this State and payable generally, no particular place of payment being specified, was made and payable in this State, within the meaning of the statute, and it was held that it was within the statute. Sargent, C. J., says: "If a note is made payable at a particular place, the law of the place where it is there made payable will govern its construction; but a note made and dated in a particular place will be deemed to be a note of that place and governed by the law of that country, whether it is expressly made payable there or is payable generally, without naming any particular place." In this case, the draft being payable at New York is not "made and payable in this State" within the meaning of the statute, and the trustee is not chargeable for the draft.

The case finds that the draft was given by the special agent of the trustee who adjusted the defendant's loss, in settlement and payment of the loss, and that the defendant had surrendered his policy and all claims under it. This is an express finding that the draft was given in payment of the loss and in discharge of the claims under the policy. The

plaintiffs suggest that it does not appear that the agent was authorized to give the draft. This objection should have been made at the trial. The plaintiffs claimed to hold the fund in the hands of the trustee by force of an attachment, and it was incumbent on them to show that the fund was liable to attachment by trustee process. Consequently, the burden was on them to show that the draft was unauthorized, if such was the fact. The case does not show that any question was raised at the trial, as to the agent's authority, the trustee does not dispute it, and it is to be assumed that he acted within the scope of his authority.

Trustee discharged.

Mr. Justice Blodgett, did not sit: the others concurred.

Frederick BARTON, *Pff.*,

v.

Town of CROYDON.

The payee of a note is entitled in equity to the securities held by a surety on the note.

(Sullivan ——— July 31, 1885.)

BILL in equity, for an injunction to restrain the defendant from proceeding at law in the collection of a note given by the plaintiff upon the purchase of a farm which was mortgaged to the defendant to secure the same. The cause was heard on a demurrer to the bill.

Messrs. Henry P. Rolfe and S. L. Bowens, for plaintiff:

Formerly, there were nice distinctions as to the duties of a court of equity to grant relief in certain cases, and the old doctrine was that the court having acquired cognizance of a suit for the purpose of discovery, it will entertain it for the purpose of relief in most cases of fraud, account, accident and mistake. 2 Story, Eq. Jur., p. 3; 1 Fonbl. Eq., b. 1, ch. 1. sec. 3, n. f, 12.

"Courts of law are utterly incompetent by their general organization to make a specific decree for any relief of this sort." *Bromley v. Holland*, 7 Ves. Jr., 18; 2 Story, Eq. Jur., p. 4, sec. 692.

"Without this remedy the most serious mischiefs may often arise to parties interested." 2 Story, Eq. Jur., p. 4, sec. 692.

"The interference of a court of equity is a matter of mere discretion, not indeed of arbitrary and capricious discretion, but of sound and reasonable discretion." *Id.*, secs. 693, 5.

This jurisdiction is exercised because it "is founded upon the administration of a protective or preventive justice." *Id.*, sec. 694, p. 6.

And "The party is relieved upon the principle that is for fear that such agreements, securities, deeds or other instruments may be vexatiously or injuriously used against him, when evidence to impeach them may be lost, or that they may throw a cloud or suspicion over his title or interest." *Id.*, secs. 694, 696; Newland, Cont., ch. 34, p. 493; *Petit v. Shepherd*, 5 Paige, 493.

And the party will have a right to come into equity to have such agreement, securities, deeds or other instruments delivered up and canceled, when he has a defense which is good in equity but not being available at law. *Id.*, sec. 694; *Reed v. Bk. of Newburgh*, 1 Paige, 215, 218.

"There is a great variety of cases in which agreements, securities, deeds and other instruments have been set aside and decreed to be delivered up on the ground of accident, mistake and fraud." *Id.*, sec. 694; *Willan v. Willan*, 16 Ves. Jr., 72; *Underhill v. Norwood*, 10 Ves. Jr., 225; *Ware v. Norwood*, 14 Ves. Jr., 28, 31, 32.

"A court of equity will relieve against an unconscionable bargain." *Bedel v. Loomis*, 11 N. H., 19.

"In a writ of entry brought by an idiot, he may prove by his guardian that a deed from himself to his tenant, purporting to be signed by him, was executed when he was *non compos mentis*, and thus avoid the deed." *Long v. Whidden*, 2 N. H., 435.

"The administrator of a grantor may avoid a deed for fraud or mental incapacity whether there are any creditors to his estate or not." *Judge of Probate v. Stone*, 44 N. H., 594.

"All the law requires to make a transaction effectual is that one should have possession of his reason so as to understand the effect of the act he is about to perform when there is no insane delusion." *Dennett v. Dennett*, 44 N. H., 531.

"The point to be established is whether the party is so insane as to be capable of transacting business like that in question with understanding and reason." *Concord v. Rumney*, 45 N. H., 428; *Bull v. Manning*, 1 Dow, P. C. (N. S.), 380; 3 Bligh (N. S.), 1.

"Whenever fraud can be inferred from the circumstances of the transaction, equity will interfere to relieve against it." *Jackson v. King*, 4 Conn., 216; *Dennett v. Dennett*, before cited.

Mr. A. S. Wait, for defendant.

Mr. Justice Carpenter delivered the opinion of the court:

Including the note and mortgage to the defendant, the plaintiff paid the stipulated price for the farm. He was not injured by his mistaken supposition, however caused, that the farm was mortgaged directly to the defendant. It was immaterial to him by what means, whether by fraud or otherwise, his vendor was induced to require, or to consent that a part of the purchase money should be paid to the defendant. Upon the allegations of the bill, as it stands, the plaintiff, however it might be with his vendor, who is not a party and makes no complaint, has received no injury and is entitled to no relief.

To save delay and needless expense, to the parties, the case has been considered as if the amendment to the bill making George Barton a plaintiff, and all other amendments proposed by the plaintiff in his brief were already allowed. Thus amended, the material allegations of the bill are as follows: September 18, 1846, Peter Barton gave to Martin A. Barton a mortgage of his farm, conditioned to save him harmless for signing as surety Peter's note to the defendant, and in 1862 died insolvent leaving, substantially, no estate. Prior to 1862 Martin A. failed,

and in 1867 obtained his discharge in bankruptcy. George Barton, a son of Peter, in some way, in what way is not stated, acquired a title to the farm. He became insane before 1862, and so remains. His guardian, about July 1, 1874, sold the farm to this plaintiff, and laboring under the mistake that Peter gave the mortgage of September 18, 1846, directly to the defendant to secure the payment of the note, instead of to Martin to save him harmless for signing it as his surety, induced this plaintiff to give in payment of the agreed price his note for the same amount to the defendant with a mortgage of the farm to secure its payment; whereupon, the defendant surrendered the old note. Upon this state of facts the mistake is quite as immaterial as before. The defendant was legally entitled to the benefit of the mortgage from Peter to Martin, and the guardian in paying, or providing for the payment of, the original note out of the avails of the farm, did no more than equity would compel him to do. *Bank v. Herrick*, 61 N. H.; *Holt v. Bank*, 62 N. H.

Demurrer sustained.

Mr. Justice Blodgett did not sit; the others concurred.

Lucinda YOUNG, *Pff.*,

v.

William CURRIER.

A release to an infant co-signer of a joint note, after he has repudiated the contract and reconveyed his interest in the land for which the note was given, within a reasonable time after reaching majority has not the effect to discharge the other signer.

(Sullivan—July, 31, 1885.)

BILL in equity, heard upon the bill and answer. The material facts were:

June 30, 1883, one Wadleigh conveyed a farm in Sunapee to Carlos S. Bingham and Fred. S. Hart, and for part of the purchase money took a note signed by Bingham and Hart for \$1,089 and a mortgage of the farm to secure its payment. November 13, 1883, Wadleigh sold and assigned the note and mortgage to the defendant, and on the same day the defendant entered to foreclose the mortgage, and has ever since been in possession, receiving the income. At the time of executing the above note and mortgage Hart was an infant, and within a reasonable time after arriving at the age of twenty-one he refused to be held liable on the note, or to ratify and affirm the same, and thereupon, by deed, June 7, 1884, released to the defendant all his right and interest in the farm; and in pursuance of an agreement, then made, the defendant erased his name from the

NOTE.—Entry upon land is not necessary, to avoid a deed made by an infant; it may be avoided by a deed executed to another for the same land after arriving at majority. *Youser v. Norcoma*, 12 Mo., 549; affirmed in *Paterson v. Laik*, 25 Mo., 544.

The subsequent conveyance is disaffirmance of the prior deed. *Cresanger v. Welch*, 15 Ohio, 156.

note June 24, 1884; Bingham quitclaimed his interest in the farm to the plaintiff. The bill prays for partition; for an account of the rents, profits, waste and damage, and for permission to redeem the mortgage if anything should be found due upon it.

Mr. A. S. Wait, for plaintiff :

The transaction between defendant and Hart, on the latter reaching his majority, releases the party jointly liable with him on the joint note. See, *Braman v. Douce*, 12 Cush., 228.

This was the rule at common law. *Burke v. Noble*, 48 Pa. St., 168.

The intermarriage of the creditor with one of the joint debtors, releases all; and the making of one joint debtor the executor of the creditor, releases the debt against all. Chitty, Cont., 676; *Turner v. Hitchcock*, 20 Iowa, 810.

In regard to joint debtors, a release to one is a release to all. *Holden v. Reed*, Smith (N. H.), 278.

Messrs. Jeremiah Smith and S. L. Bow-ers, for defendants :

Upon a hearing on bill and answer, the allegations of the answer must be taken to be true in every point, because the defendant has been precluded from proving them. *Rogers v. Mitchell*, 41 N. H., 154.

The rule as to the release of a joint debtor, does not apply where the person released was not liable; such release will not destroy the right of action against those who are liable. *Turner v. Hitchcock*, 20 Iowa, 810.

The infancy of one of two joint promisors does not protect the other promisor. Schouler, Dom. Rel., 8d ed., sec. 412; *Taylor v. Dansby*, 42 Mich., 82; *Hartness v. Thompson*, 5 Johns., 160.

An infant purchaser cannot repudiate his note and mortgage to the vendor, and at the same time retain his interest under the vendor's deed to himself. *Heath v. West*, 28 N. H., 101; *Bigelow v. Kinney*, 3 Vt., 358; *Skinner v. Maxwell*, 66 N. C., 45; 1 Jones, Mort., 2d ed., sec. 104.

A disaffirmance of the mortgage restores the land to the vendor, or to the party who stands in his place. 28 N. H., 101, 108.

Hart had a right to rescind his contract, as well against as with the consent of the mortgagees. The case is "none the worse" for the mortgagees, because they assented to this act of avoidance and return of the property by Hart. See the language of Dewey, J., in 6 Gray, 457, 458.

The quitclaim executed by Hart, under the circumstances, could not possibly have been intended or understood by either party, as an affirmation of Hart's liability on the notes; and a court will so interpret it, in a controversy between one of the parties to the instrument and a third party. *Wilson v. Sullivan*, 58 N. H., 260; *Furbusher v. Goodwin*, 25 N. H., 425, 446, 452.

An infant purchaser may sometimes be liable to the vendor, to the extent of the benefit received by him from the purchase. *Hall v. Butterfield*, 59 N. H., 354.

An infant purchaser, who does not return the property, may be held upon an implied legal liability, in analogy to the well settled liability for necessities, where the infant is not bound by his express contract. *McCrillis v. How*, 3 N. H., 348.

The bill does not allege that the purchase of

this heavily mortgaged estate was beneficial to the infant; nor are any facts alleged which would justify the court in so presuming. *Armistage v. Widoe*, 86 Mich., 124, 129, 180.

A release of a mortgagor from all liability for the debt is entirely compatible with the continued existence of the mortgage as a valid and enforceable lien on the land. The debt may continue to exist so far as to support the mortgage although not so far as to support a personal action. *Tripp v. Vincent*, 8 Barb. Ch., 613; *Walworth, Chancellor*, 614; *Hemenway v. Bassett*, 18 Gray, 378, 380; *Bentley v. Vanderheyden*, 35 N. Y., 677; *N. E. Jewelry Co. v. Merriam*, 2 Allen, 390; *Johnson v. Elliott*, 26 N. H., 67, 74-5; *Pierce v. Sweet*, 38 Pa. St., 151; *Strong, J.*, 158.

Where justice requires it, mortgages have been upheld as outstanding liens, even where the parties actually intended to discharge the mortgage, and had accordingly given up the notes and executed a formal discharge. See the cases collected in *Stantons v. Thompson*, 49 N. H., 272; especially *Heath v. West*, 26 N. H., 191.

According to the weight of authority, only a technical release under seal can have the effect of discharging the other joint promisor; a parol release being insufficient to accomplish that result. The principle is very technical, and should not be extended by construction. *Spaw v. Pratt*, 22 Pick., 805, 808; *Nelson, J.*, in *DeZeng v. Bailey*, 9 Wend., 336, 337; *Gold Medal Sewing Mach. Co. v. Harris*, 124 Mass., 208; *McAllister v. Sprague*, 34 Me., 296.

As to the distinction between the parol contract and a release under seal, see, *Hayden v. Smith*, 12 Met., 511, 515.

Mr. Justice Carpenter delivered the opinion of the court :

Hart could not avoid his liability upon the note and mortgage without giving up the property conveyed to him. *Heath v. West*, 28 N. H., 101; *Heath v. Stevens*, 48 N. H., 251; *Hall v. Butterfield*, 59 N. H., 354; *Bartlett v. Bailey*, 59 N. H., 408.

His quitclaim to the defendant, of his interest in the farm, was an essential part of his rescission of the contract expressed by the note and mortgage. Whether one half the mortgage debt was extinguished by the transaction is a question unnecessary to be determined, inasmuch as the defendant consents that the plaintiff may redeem her one half of the farm by paying one half of the mortgage debt. The recital in Hart's quitclaim that in consideration of it he is released from liability upon the mortgage note, had no legal effect.

The contract was avoided, and Hart's liability upon it ended by his refusal within a reasonable time after he became of age to be bound by it, and restoring the property. What would be the effect of a technical release of an infant from his unrepudiated contract upon the liability of his joint promisor, is a question which does not arise.

The erasure of Hart's name from the note by the defendant, after the contract was rescinded, was an immaterial alteration. *Bank v. Matthes*, 8 N. H., 140; *Burnham v. Ayer*, 35 N. H., 351; *Cole v. Hills*, 44 N. H., 227, 232.

Case discharged.

Mr. Justice Blodgett did not sit; the others concurred.

Charles BALL

v.

Fred. B. DANFORTH.

An amendment introducing a new cause of action cannot be allowed against a defaulted defendant without notice.

(Sullivan—July 31, 1885.)

ASSUMPSIT, upon the common counts. Facts found by the court.

The defendant was defaulted. Subsequent attaching creditors appeared and objected to the allowance of a bank note for \$500, which the plaintiff had signed as surety for the defendant, but on which he had paid nothing at the time of the trial.

The plaintiff moved to amend by inserting in his declaration two additional special counts the first alleging a promise on the part of the defendant to pay to the plaintiff \$500, in consideration of a promise by the plaintiff, to pay the bank note; the second, that the plaintiff assumed and agreed to pay the bank note, and that, in consideration of such promise, the defendant promised to pay the plaintiff five hundred dollars.

The amendment was allowed and the creditors excepted.

Messrs. A. S. Waite and H. W. Parker, for plaintiff:

Where plaintiff had become liable for indebtedness of defendant, to indemnify himself against this liability, he had a right to take security from defendant, and such liability is a good consideration for the contract of indemnity. A promissory note is a proper form of indemnity in such a case. *Haseltine v. Gould*, 11 N. H., 390; *Lane v. Sleeper*, 18 N. H., 209; *Osgood v. Osgood*, 39 N. H., 209; *Child v. Powder Works*, 44 N. H., 354.

In case of mutual promises, it is not necessary for plaintiff, in order to recover, in an action upon such a promise, to aver performance on his part. *Nicholas v. Raynbred*, Jenk. Cent., 296; *S. C.*, Hob., 78; *Martindale v. Fisher*, 1 Wils., 88; *Ernly v. Lord Falkland*, Hardr., 108; 1 Selw. *N. P.*, 131; *Pars. Cont.*, 448 and cases cited; 2 Kent's Com., 464; 1 Wms. Saund., 320, n. 4; see also, op. in *Dodge v. McClintock*, 27 N. H., 383.

Where plaintiff before trial had paid the note he is entitled to judgment for its amount with interest. *Haseltine v. Gould*, 11 N. H., 390; *Osgood v. Osgood*, 39 N. H., 209; *Child v. Powder Works*, 44 N. H., 354.

Mr. Ira Colby, for subsequent attaching creditors:

The subsequent attaching creditors have, by virtue of their attachments, a vested right to the surplus so far as it is needed to satisfy their claims. *Page v. Jewett*, 46 N. H., 445; *Laighton v. Lord*, 29 N. H., 257; *Willis v. Crocker*, 1 Pick., 204; *Bank v. Anthony*, 18 Pick., 238.

Where in a transaction, no money and nothing treated as money passed between the parties, there is nothing to sustain the money

counts. *Child v. Powder Works*, 44 N. H., 354; *Poster v. Shattuck*, 2 N. H., 446.

An amendment introducing a new cause of action may, perhaps, be made so far as subsequent attaching creditors are concerned, if no judgment is taken upon it; but if judgment is taken upon the whole declaration as amended, the amount of damages recovered being enlarged by the amendment, it will operate to vacate the attachment. Gen. Laws, ch. 226, sec. 9; *Page v. Jewett*, 46 N. H., 441; *Hotel Co. v. Redington*, 55 N. H., 386; *Wood v. Folsom*, 43 N. H., 70; *Hall v. Dodge*, 38 N. H., 446; *Thompson v. Phelan*, 22 N. H., 339; *Pillsbury v. Springfield*, 16 N. H., 565; *Melvin v. Smith*, 12 N. H., 462; *Goddard v. Perkins*, 9 N. H., 488.

Mr. Justice Carpenter delivered the opinion of the court:

The amendment contained in the new counts on the special contract, could not be allowed against the defaulted defendant, without notice. Although it is found that it was "agreed that the writ should be made large enough to cover all the indebtedness of the defendant to the plaintiff, including the bank note," yet, so far as appears, the defendant was not a party to the hearing upon which the finding was made, and is not affected by it.

Whether the parties understood that the defendant promised to pay the amount of the bank note on demand, before the plaintiff paid the bank, or whether upon any ground there was at the commencement of the suit a breach of the contract on which the counts could be maintained, are questions upon which the reserved case is not explicit or satisfactory, and on this point a new trial is granted.

Case discharged.

All concurred.

Alfred QUIMBY, *Plff.*,

v.

Luman WOODBURY.

1. One cannot recover **compensation for an injury** occasioned by the mere negligence of another, which he might have avoided by the exercise of reasonable care. The **doctrine of contributory negligence** applies to cases of injuries by animals.

2. The statute of this State providing for the recovery of **double damages** for injury inflicted by the bite of a dog. Gen. Laws, ch. 115, sec. 11, is penal so far as it imposes a forfeiture of double damages as a penalty, and remedial so far as it provides for the recovery of damages as compensation for the injury.

3. The purpose and effect of the **exception in the statute** in respect to persons injured while in the commission of a trespass or tort, is to **limit the right of recovery** and not to extend it, and such exception does not exclude the doctrine of contributory negligence.

(Merrimack—July 31, 1885.)

DEBT, on the statute, G. L., ch. 115, sec. 11, to recover double damages sustained by the

plaintiff from being bitten by the defendant's dog.

It appeared that at the time of the injury the dog was in the plaintiff's pasture, barking by a hole in the wall, and the plaintiff went to drive it away; but as to what he did in his efforts to effect that purpose, and whether his conduct and treatment of the animal were proper and reasonably necessary to that end, or whether he brought the injury upon himself by his ill treatment of the dog, and by want of due care to avoid the injury, the evidence was conflicting.

The jury were instructed that "The plaintiff had the legal right to expel the dog from his premises, doing whatever was reasonably necessary to effect his expulsion, and acting with due care to prevent being injured; and if in the attempt to expel the dog, he acted with due care, using such means only as were reasonably necessary, and was bitten, he can recover.

If the plaintiff was bitten in consequence of not using due care in his conduct towards the dog, or if he willfully, recklessly or needlessly irritated or aggravated the dog, and in consequence of such conduct was bitten, he cannot recover, because the injury he received would be the result of his own carelessness or recklessness."

The plaintiff excepted to that part of the above instruction which required proof of due care from him, and requested the court to charge that "The burden of proof is upon the defendant to establish the fact, that the plaintiff, at the time he was bitten, was in the commission of a trespass or other tort." This instruction was refused, and the plaintiff excepted.

The jury did not agree and, on motion of the plaintiff, the questions raised by the foregoing exceptions, were reserved for the opinion of the court.

Messrs. Copeland & Jones, for plaintiff:

The statute makes the owner or keeper of such animals liable absolutely, for all injuries caused by them, unless the person injured was himself a wrong-doer, engaged in committing a trespass or other tort. See, *dictum* of C. J. Bellows, in *Orne v. Roberts*, 51 N. H., 118.

The remedy for the recovery of the penalty is debt, and this is the remedy peculiarly appropriate to recover penalties and forfeitures. It is the remedy where no other is prescribed. *Craig v. Gerriah*, 58 N. H., 518, and cases cited.

It is a rule of law almost as old as the law itself, that a penal statute is to be construed strictly; see, *Woodbury v. Thompson*, 8 N. H., 197.

Where the words are doubtful, that sense is to be adopted which best harmonizes with the context, and with the apparent policy and objects of the Legislature. *Pike v. Jenkins*, 12 N. H., 255.

It is only where a statute is ambiguous in its terms, that a court may rightfully exercise the power of controlling its language, so as to give effect to what they may suppose to have been the intention of the law-makers. *Wood v. Adams*, 35 N. H., 82, 86, and cases cited.

The Statute of Massachusetts relating to injuries by dogs, although similar to ours, is distinctly held to be not penal but remedial, and tort not debt, is the action prescribed. *Reed v. N. H.*

Northfield, 18 Pick., 94; *Mitchell v. Clapp*, 12 Cush., 278; *LeForrest v. Tolman*, 117 Mass., 109.

Section 11 of chapter 115, of the General Laws relating to injuries by dogs, is cumulative to section 10. The party injured may elect to sue either for single or double damages. See, *Orne v. Roberts*, 51 N. H., 110-114.

The fact that the Massachusetts Statute is held to be not penal, but remedial, deprives the Massachusetts cases of all weight and authority in the construction of our statute, which has so many times been held to be penal, the last time in *Whittaker v. Warren*, 60 N. H., 20.

In the case of the somewhat similar statute which imposes upon railroad companies liability for injuries caused by fire from their locomotives, this court held that the doctrine of contributory negligence does not apply. *Rovell v. Railroad Co.*, 57 N. H., 182.

Messrs. Chase & Streeter, for defendant:

A party cannot recover damages of the owner of the instrument which he uses willfully or recklessly to his injury. *Bigelow*, Torts, 248, *et seq.*; 1 Addison, Torts, sec. 265; *Domat*, Civ. Law, tit. 8, sec. 2.

Where the immediate and proximate cause of injury is the fault of the plaintiff, he cannot recover damages, although the primary cause be defendant's wrongful act. 1 Addison, Torts, sec. 84.

All men are presumed to know the nature of dogs. *Shearm. & Redf.*, Neg., sec. 188; see, *Cooley*, Torts, 846; *Sarch v. Blackburn*, 4 C. & P., 297; *S. C.*, 19 Eng. C. L., 523; *Curtis v. Mills*, 5 Car. & P., 489; *S. C.*, 24 Eng. C. L. R., 670; *Parlow v. Haggerty*, 35 Ind., 178; *Williams v. Morey*, 74 Ind., 25; *S. C.*, 39 Am. Rep., 76; *Cognell v. Baldwin*, 15 Vt., 404; *Keightlinger v. Egan*, 65 Ill., 235; *Munn v. Reed*, 4 Allen, 481; *Plumley v. Berge*, 124 Mass., 57; *Marble v. Ross*, 124 Mass., 49; *Dennison v. Lincoln*, 131 Mass., 236.

The statute provides that "Every owner or keeper of a dog shall forfeit to every person injured by it, double damages." Gen. Laws, ch. 115, sec. 11.

The Massachusetts Statute is identical, except that there is tort instead of debt. Gen. Stat., ch. 88, sec. 59.

It is necessary that plaintiff, though a boy, should prove that he was in the exercise of due care. *Plumley v. Berge*, 124 Mass., 57.

In an action of debt founded on a penal statute, there is no unbending rule which forbids defendant to show that the injury was not proximately caused by his act, when he may do so in an action of tort. See, *State v. Railroad Co.*, 52 N. H., 528.

If plaintiff had willfully, maliciously and wantonly injured or killed the dog without necessity, he would be liable to punishment. Gen. Laws, ch. 281, sec. 3; *State v. McDuffie*, 84 N. H., 528.

So if plaintiff willfully caused a spring gun, set on the land of defendant, to explode, he would not be entitled to recover for injuries caused to him by the explosion. See, *Butterfield v. Forrester*, 11 East, 59.

Mr. Justice Clark delivered the opinion of the court:

The principle of law which requires the exercise of reasonable care to avoid doing injury

to others requires also the exercise of reasonable care to avoid being injured by the negligence of others, and as a general rule one cannot recover compensation for an injury occasioned by the mere negligence of another, which he might have avoided by the exercise of reasonable care. If the injury would not have happened to him but for his own want of ordinary care, he cannot legally charge to the negligence of the other party the consequences of his own carelessness. And this doctrine of contributory negligence applies to cases of injury by animals. *Cooley, Torts, 346; 1 Addison, Torts, s. 261, Shearm. & Redf. Neg., s. 199.*

It is contended that the common-law rule has been changed by G. L. ch. 115, ss. 10, 11, and that the doctrine of contributory negligence does not apply to cases arising under the statute. The provisions of the statute are as follows:

"Sec. 10. Any person to whom or whose property any damage may be occasioned by a dog not owned or kept by said person, shall be entitled to recover of the person who owns, or keeps, or has said dog in possession, all damage which may be so occasioned, except in cases where the same have been occasioned to the party suffering such damage while engaged in the commission of a trespass or other tort."

"Sec. 11. Every owner or keeper of a dog shall forfeit to every person injured by it, double the amount of the damage sustained by him to be recovered in an action of debt."

"The action is brought under section 11, and it is claimed that under this statute the liability of the owner or keeper of a dog is not affected by the negligence of the person injured. It is said that the statute is penal and should be construed strictly, and that the terms impose an absolute liability."

The statute is neither distinctively penal nor remedial. It is so far penal that it is not unconstitutional by reason of authorizing the recovery of double damages. *Craig v. Gerriah, 58 N. H., 513.*

But it is not within the statute limiting the time within which suits founded on penal statutes must be brought. *Whittaker v. Warren, 60 N. H., 20.*

It is penal, so far as it imposes the payment of double damages as a forfeiture, and remedial so far as it provides for the recovery of damages as compensation for the injury done. But by whatever name it is called, whether penal or remedial, the statute is substantially remedial. It furnishes a statutory remedy for enforcing the common-law right of recovery of damages for the actual injury sustained, and a recovery under the statute is a bar to any subsequent action for the recovery of damages. The statute must receive a reasonable interpretation, whatever its nature. The rule requiring penal statutes to be construed strictly, means only that they are not to be extended by implication so as to embrace cases or acts not fairly and reasonably within the prohibition or penalty of the statute; and in cases of doubtful construction, that interpretation should be adopted which restricts the operation and enforcement of the forfeiture. Where there is such an ambiguity as to leave reasonable doubt of the meaning, the penalty is not to be inflicted. Disregarding the general principle of contributory negligence, the language of section 11 imports an absolute liability.

This interpretation gives a broader application to the statute than is contended for. It is said that sections 10 and 11 are to be construed together, and that the exception in section 10 of the right of a party to recover damages for injuries received while engaged in the commission of a trespass or other tort, is to be regarded as applicable to section 11 also, and it is argued that the express mention of this exception is to be construed as excluding any other exception to the absolute liability implied in the language of the statute.

In *Orne v. Roberts, 51 N. H., 110, 113*, it is said in considering this statute that it apparently originated in the idea that much damage was done by dogs, for which the injured person had no remedy, by reason of the practical difficulty of charging the owner with knowledge of the mischievous character of the dog; and therefore it was thought best to make the owner or keeper absolutely liable for the injuries caused by his dog, without regard to the fact whether he had knowledge of the vicious character of the animal or not. Assuming this view to be correct, that the purpose of the statute is to obviate the difficulty of showing the owner's knowledge of the vicious propensities of the dog, in an action for damages, a reasonable interpretation limits it to the accomplishment of that object, and the language of the statute is to be construed with reference to the established rule of law, that a party cannot recover for injuries resulting from his own negligence. In the interpretation of a statute, the general purpose is entitled to great weight in ascertaining the meaning of particular words; and if the literal meaning of particular words is inconsistent with the general purpose, or if the language used, if understood literally, is inconsistent with a well settled principle of law of general application, there is grave reason to doubt whether the literal sense is the sense intended by the Legislature.

A construction of the statute making the owner of a dog absolutely liable for injuries regardless of the conduct of the party injured, might in some cases hold the owner responsible for injuries occasioned solely by the reckless carelessness of the party injured. It would make the owner liable to a person injured while intentionally exposing himself by worrying and irritating a dog for the purpose of testing his temper and disposition. Such a construction would be unreasonable. We think the rule of interpretation applicable to this statute is analogous to that applied to the statute making towns liable for damages happening from defective highways, which, although literally imposing an absolute and unqualified liability, is construed with the qualification that the party injured is not entitled to recover if his own negligence contributed to the injury.

As the statute is to be interpreted with reference to the general principle that a party cannot recover damages for the negligence of another if his own negligence contributed to the injury, the expressed exception that the injured party cannot recover if the injury is received while he is in the commission of a trespass or other tort, is not to be regarded as excluding the doctrine of contributory negligence. The purpose and effect of the exception is to limit the right of recovery, and not to extend it. The fact that the party injured is in the commission

of a trespass or tort may or may not contribute to the injury. The fact that a person injured by a dog, trespassing on the premises of the owner of the dog at the time of the injury may not in any respect contribute to the injury. He might be injured in the same manner if he was rightfully on the premises by the owner's permission. The effect of the exception is to limit the liability of the owner by prohibiting a recovery in all cases where the party injured is engaged in a commission of a trespass or tort, regardless of the fact whether he is chargeable with contributory negligence or not. It merely imposes the condition upon the injured party's right of recovery, that it must appear that he was not a trespasser when the injury was received, and the doctrine of contributory negligence is applicable to cases under the statute as at common law.

Case discharged.

Mr. Justice Smith did not sit; the others concurred.

Charles A. WELCH, *et al.*, *Eccrs.*,

Julia ADAMS, *Appt.*,

1. It is not necessary to the legal execution of a will that it be signed or sealed in the presence of the subscribing witnesses, nor that the witnesses sign in the presence of each other.

2. The fact that the will was signed, sealed and witnessed as such in the presence of the testator and subscribing witnesses, was evidence from which the jury might find that the will was attested by the subscribing witnesses at the request of the testator.

3. The statute of this State, Gen. L. ch. 228, sec. 18, provides that neither party shall testify on a cause when the adverse party is an executor or administrator, or an insane person, unless the said executor, etc., elects to testify, except when it clearly appears to the court that injustice may be done without the testimony of the party in such case, he may be allowed to testify subject to exception and revision, is equally applicable in a trial of an appeal upon the probate of a will, as in actions upon contracts entered into or tort done or suffered accruing in the lifetime of the deceased.

4. On the trial of an appeal from the probate of a will the appellant cannot be a witness unless the executor testifies.

(Carroll—July 31, 1885.)

A PPEAL from a decree of the probate court allowing the will of Isaac Adams. The

NOTE.—A request to a witness to subscribe a will may be made by a third person, provided testator hears and understands it, and does not dissent. *Cheatham v. Hatcher*, 30 Gratt., 58.

Where a will was subscribed to in an adjoining room the communicating door being open and testator could have seen them signing if he desired, it is subscribed in his presence. *Will of Meurer*, 44 Wis., 203.

So where he could not see the signing. *Riggs v. Riggs*, 135 Mass., 238.

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only issued joined was whether the testator was of sound and disposing mind. Verdict for appellees, which the appellant moved to set aside. Neither of the appellees testify.

The appellant by the exercise of discretion under the statute was permitted to testify generally, but, subject to exception, was excluded as to conversations and matters occurring between himself and the deceased, and as to which the latter, if alive, could have testified, it not appearing to the court that injustice was done thereby, but quite the contrary. Neither of the executors testified, and no devisee or legatee was called by them as a witness.

The appellant requested the court to instruct the jury as follows:

1. "There is no legal definition, or test of insanity, or soundness of mind, or of the mental capacity to make a valid will. Soundness of mind, such as will enable a person to make a will, has reference to the business to be transacted, namely, the disposition of property by will; his mind must have been sound with reference to whatever is involved in this transaction. If it shall appear that he is able to understand the nature and situation of his property, and his relations to those persons in whom, and those things in which he has been mostly interested, the nature of the act he was doing, and the relations in which he stood to the natural objects of his bounty, this condition of his mind is evidence to be considered upon the question of his mental capacity to make a will; but such evidence furnishes no legal test of his capacity to make a will; it is simply evidence to be weighed in connection with all the other testimony in the case as to the testator's soundness or unsoundness of mind. The court does not instruct you as to what in point of law is mental capacity to make a will.

2. The mind of the testator must have been free from any condition which was the effect of disease, and which would or might lead him to dispose of his property otherwise than he would have done but for the effect of such mental disease. All the testimony which you have heard concerning his domestic relations and his feelings of like or dislike towards the members of his family; all the testimony as to what he said and what he did; all the testimony concerning his disposition and temperament, and concerning any change in these respects between the earlier and later portions of his life; concerning his troubles, griefs and disappointments, concerning his manners and habits, and any change in them between the earlier and later portions of his life; all the eccentricities and peculiarities, if you find he had any, should be considered so far as they may aid you in ascertaining the condition of his mind at the date of the will.

3. All infirmities, though not necessarily a disqualification, awaken caution to see if mental capacity is impaired or gone."

4. "Partial insanity or unsoundness of mind will not alone always and inevitably destroy the will, but whenever the insanity, partial or general, or mental disease or derangement, modifies the disposition of the testator in the will, enters into the will and forms a part of it, it will destroy the will, even though some faculties of the mind are sound.

If you find from all the evidence the existence and effect in the will of unsoundness of

mind, general or partial, such infirmity destroys the will; while it does not require universal perfection and soundness of mind to make a will, neither does it require absolute unsoundness of mind to destroy a will. If mental unsoundness or disease lurks in the will, has produced its effects there, changed or modified the disposition of the property, it is not a valid will."

The specific introductions asked for were not given, and the appellant excepted. Instructions covering the ground of the requests were given to which no exception was taken. The other exceptions sufficiently appear in the opinion.

Messrs. Wm. L. Foster, Geo. B. French and Paul Wentworth, for appellants:

"Executor or administrator" as used in the statute, Gen. Laws, ch. 228, sec. 16, indicates those parties as standing in a representative capacity, and the "cause," is a cause that existed in the lifetime of the deceased. See, Gen. Laws, ch. 228, sec. 16.

While the appeal remains undecided, everything is in suspense, and where by reason of delay in delivering the final grant of administration, a specific administrator may be appointed. Gen. Laws, ch. 195, sec. 18.

The party named in the will as executor does not give the bond required by sec. 12; and until he shall have given the bond, he cannot be considered as having that trust. Gen. Laws, ch. 195, secs. 1, 20, 22; see, Chase's Prob. Direc., 86; Smith, Prob. Law, 4th ed., 328.

The statute does not apply where the party never was, and is not yet, an executor. *Nash v. Reed*, 46 Me., 168; Abb. Tr. Ev., 64, n. 9; *Hood v. Lord Barrington*, L. R. Eq., 222.

Where the validity of a will was contested, a person named therein, as executor, is not "a party prosecuting or defending within the meaning of the statute." *Millay v. Wiley*, 46 Me., 280; compare, Maine Statute, R. S., ch. 82, sec. 83, and ch. 64, secs. 1, 2, 5, 27, 32, with N. H. Gen. Laws, ch. 228, sec. 16, and ch. 195, secs. 1, 12, 15, 18.

A person cannot be considered an executor when the controversy relates to the probate of the will, in which he is named executor. *McKeen v. Frost*, 46 Me., 239, 249.

Under the statute in Rhode Island, appellants were allowed to testify on their own motion, subject to exceptions. Gen. Stat., ch. 203, sec. 32; *Hamilton v. Hamilton*, 10 R. I., 538.

Proceedings in reference to establishing or invalidating a will, stand on a different foundation from ordinary actions or causes of action. *Garvin v. Williams*, 50 Mo., 206, 212, 213.

The real question being, whether there is a will or not, and upon that question all parties have a right to testify. *Hunt v. Acre*, 28 Ala., 580; 1 Gr. Ev., sec. 550.

The Statutes of Missouri and Massachusetts are identical in this respect; and their construction the same. *Shailer v. Bumstead*, 99 Mass., 112, 130; see, also, *Brown v. Carroll*, 36 Ga., 568; *Deupree v. Deupree*, 45 Ga., 415, 424.

Since the decision in *Shailer v. Bumstead*, the injustice of the appellee's construction has received legislative recognition by the repeal of s. 14 of ch. 131, Mass. Gen. St., and the substitution of the Act of June 22, 1870, whereby no person of sufficient understanding is ex-

cluded from testifying in any case, except husband and wife, with regard to private conversations with each other.

In Tennessee, the contest over a will is held to be not a suit by or against an executor, so as to bring the parties within the exception in the statute. *Orr v. Cox*, 8 Lea, 617, 619, approving an unreported case, *Beadle v. Alexander*.

To obviate the injustice of a wrong construction of this section of the statute, the Act of April 15, 1869, of Pennsylvania was passed, declaring that "No interest or policy of law shall exclude a party or person from being a witness in any civil proceeding." The proviso ingrafted upon this section, after excluding from the operation of the Act several classes of cases, declares that the Act (not the exception) shall apply in "issues and inquiries *deviant vel non*." 1 Brightly, Purdon's Dig., 624, sec. 16; *Bowen v. Gorauilo*, 73 Pa., 357; *Frew v. Clarke*, 80 Pa., 170, 179.

The production of certain evidence outside of transactions between himself and the deceased, as mementoes and marks of testator's hand, indicating the state of testator's mind, is proper. *Daniels v. Foster*, 26 Wis., 686.

So, copies of papers verified by the oath of a party. *Moulton v. Mason*, 21 Mich., 364, 371, 372.

The first rule governing the production of evidence, is, that the evidence offered must be confined to the point in issue. 1 Greenl. Ev., sec. 50; Best's Prin. Ev., 5th ed., 805, 806.

"This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inferences as to the principal fact or matter in dispute." 1 Greenl. Ev., ss. 52, 58; Step. Dig. of Ev., art. 127; *Campeau v. Devoey*, 9 Mich., 381, 382, 419.

On a cross-examination, for the purpose of testing the memory or the honesty of the witness, questions may be asked relative to matters collateral to the issue. *Combs v. Winchester*, 39 N. H., 13, 17.

A great deal of latitude is allowed for this purpose. *Seavey v. Dearborn*, 19 N. H., 351, 355, 356.

Unless the evidence is otherwise material, pertinent and relative to the issue, the range of cross-examination regulated only by judicial discretion, is limited to a cross-examination, in disparagement of the character of the witness. *Guterson v. Morse*, 58 N. H., 165; *Hersom v. Henderson*, 28 N. H., 498, 506.

While the evidence was irrelevant, and threw no light on the condition of the testator's mind, it was not without its injurious effect and, therefore, the verdict should not stand. *Winkley v. Foye*, 28 N. H., 513, 518, 519; *S. C.*, 33 N. H., 171, 176, 177; *Center v. Center*, 38 N. H., 318, 322; *Boyce v. Cheshire R. R. Co.*, 42 N. H., 97, 100.

The evidence offered by the appellee was incompetent, and should not have been admitted, because the writing, purporting to be a copy of the record of a deed, was secondary evidence. *Pollard v. Melvin*, 10 N. H., 554, 557, 558; *Forreath v. Clark*, 21 N. H., 409, 422; *Eaton v. Campbell*, 7 Pick., 10; *Hathaway v. Spooner*, 9 Pick., 23; *Commonwealth v. Emery*, 2 Gray, 80, 81; *Smith v. Cushman*, 59 N. H., 27; *Lyford v. Thurston*, 16 N. H., 399, 405; *Andrews v.*

Devon, 17 N. H., 418, 415; *Loomis v. Bedel*, 11 N. H., 74, 86; *Farrar v. Fessenden*, 39 N. H., 268, 278.

As secondary evidence, no foundation was laid for its admission. *Commonwealth v. Emery*, before cited; *Morill v. B. & M. R. R.*, 58 N. H., 68; *Cram v. Ingalls*, 18 N. H., 617; *Bourne v. Boston*, 2 Gray, 494; *Commonwealth v. Parker*, 2 Cush., 212, 226; *Brackett v. Evans*, 1 Cush., 79, 82; *Samuels v. Borrowdale*, 104 Mass., 207, 200; *Draper v. Hatfield*, 124 Mass., 53, 56; 1 Greenl. Ev., secs. 560, n. 3, 561, 562, 582; Best, Prin. Ev., 5th Eng. ed., sec. 482, p. 609; *Dwyer v. Collins*, 7 Ex., 639, 647, 648.

To the general rule that facts must be established by sworn testimony, or by documents the genuineness of which is verified by oath, there are certain exceptions, the evidence being otherwise competent, enumerated in 1 Greenl. Ev., secs. 479-484, 499-521; Best, Prin. Ev., sec. 484, *et seq.*

Where the record of another State is offered in evidence, the court must be informed by competent evidence, of the laws of such State, the duties of officers thereunder, the provisions for recording and for certifying copies, in order to be assured that the record is admissible. *Pickard v. Bailey*, 26 N. H., 152, 169; *Hunt v. Johnson*, 44 N. Y., 27, 40; *Dunlap v. Daugherty*, 20 Ill., 397; 1 Greenl. Ev., secs. 486, 488, 498.

The fact that a deed comes from another State, authenticated by a certificate of registration, is no proof of the existence of a law authorizing such registration. *Stevens v. Bomar*, 9 Humph. (Tenn.), 546.

Authentication, according to the United States Statutes, section 906, must be made, or equivalent oral testimony must be produced, or an examined copy offered, supported by oral testimony, as to the legal custody and quality of the record. *Bowman v. Sandorn*, 25 N. H., 87, 92, 112, 113; *Southern v. Mendum*, 5 N. H., 428; *Woods v. Banks*, 14 N. H., 101, 109, 110; 1 Greenl. Ev., secs. 488, 489, 498, 501, 504-508; *Wilcox v. Smith*, 5 Wend., 281, 284; where it is held that the act of certification is not sufficient evidence that the party certifying is the incumbent of the office claimed. 1 Whart. Ev., secs. 115, n. 1, 118, n. 4; *Drummond v. Magruder*, 9 Cr., 122, 125; *Secrist v. Green*, 8 Wall., 744 (XVIII., Law ed., 153); *Penuel v. Weyant*, 2 Harr. (Del.), 502, 505; where it is said "The proof now offered does not make known to us that this is the proper officer entitled to certify the paper, and that the mode of certification is in due form." *Key v. Vaughn*, 15 Ala., 497; *Watrous v. McGrew*, 16 Tex., 506; *McCormick v. Evans*, 38 Ill., 327; *Peterson v. Lanes*, 6 Leigh (Va.), 523; *Crowell v. Hopkinton*, 45 N. H., 9.

It should appear that the officer was the person authorized to furnish authenticated copies. *Woods v. Banks*, 14 N. H., 101, 109.

Where the officer testified to his qualification and acts, it supplies the place of a certificate of authentication. *Bellows v. Copp*, 20 N. H., 492, 494, 502, 508.

Some sworn evidence of official character must be had, even though slight evidence may be sufficient. *Forasith v. Thompson*, 4 N. H., 216; *Steele v. Stone*, 12 N. H., 90, 92.

Authentication may be supplied by oral testimony.

mony as to official capacity. *Ferguson v. Clifford*, 37 N. H., 88.

The facts that the officer was what he claimed to be, that he signed the certificate and what the state laws were, may be admitted and proved. *Homans v. Corning*, 60 N. H., 419.

There is necessity for the authentication of records of courts. *Steere v. Tenney*, 50 N. H., 461, 471; *Folsom v. Blood*, 53 N. H., 484.

There is no rule which prevents the contradiction of such secondary evidence, or which will allow a document to be conclusively proved, by anything that a party may see fit to affirm to be a copy. Dispensing with primary evidence only changes the degree of evidence required, but in no way allows a case to be made out without proof, or prevents counter proof. *Moulton v. Mason*, 21 Mich., 364, 369, 370.

The error cannot be cured by the application of the doctrine of, *Lisbon v. Lyman*, 49 N. H., 553.

The statute does not prescribe any degree or test of intelligence or soundness. Whether the testator was able to understand, etc., was a question of fact, and the instructions given the jury were erroneous in assuming it to be a question of law. *Boardman v. Woodman*, 47 N. H., 120, 147.

The decree of a judge of probate is vacated by an appeal; and proceedings for proof of a will in solemn form, are of a higher and more conclusive nature than those for proof in common form, and supersede and swallow up the less formal proceeding. There must be a confirming order in the proceedings in solemn form, or the decree in common form is void, and this without any appeal in the latter case. Gen. Laws, ch. 194, sec. 8; ch. 207, sec. 6; *Mathes v. Bennett*, 21 N. H., 188, 189, 203; *Brown v. Cochran*, 11 N. H., 199, 200; Smith, Probate Law, 294; *Arnold v. Sabin*, 4 Cush., 46; *Campbell v. Howard*, 5 Mass., 876; *Sever v. Sever*, 3 Mass., 182, 183; *Eber v. Beard*, 3 Pick., 64; *Paine v. Cowdin*, 17 Pick., 142; *Boynton v. Dyer*, 18 Pick., 1, 4; 1 Williams, Exrs., 657, 658, old ed. 588, n. 1; *Prie v. Parker*, 1 Lev., 158; *State v. Williams*, 9 Gill, 173; *Shaufler v. Stoever*, 4 Serg. & R., 202; *Fletcher v. Fletcher*, 29 Vt., 98; *Williams v. Robinson*, 42 Vt., 662, 663; *Shepard v. Rhodes*, 60 Ill., 301.

Gen. Laws, ch. 207, sec. 12, does not qualify ch. 194, sec. 8, so as to do away with the necessity for a confirming order.

The proceeding to test the validity of a will is a proceeding in rem, and with that fact in view we can come to a safe solution of the matter. 1 Williams, Exrs., 876, old ed., 833, n. g; *Benoist v. Mutrin*, 48 M., 48.

In a probate proceeding, the Code, as it stood in Jan., 1869, did not disqualify a widow, who contested a will, from testifying, the heir at law also being a contestant. *Estate of Dietrich*, 1 Tucker (N. Y. Surrogate), 129.

Messrs. E. A. Hibbard, Copeland & Edgerly, and *Thomas W. Whipple*, for appellees:

The due execution of the will is not in controversy, and it is not necessary for the appellees to prove it. *Hardy v. Merrill*, 56 N. H., 283.

The statute only requires that the will shall be "in writing, signed and sealed by the testator, or by some person in his presence and by his

express direction and attested and subscribe in his presence by three or more creditable witnesses." Gen. Laws, ch. 198, sec. 6.

The witnesses need not know that the instrument they sign is the testator's will. Bull. (N. P.), 264, cited 1 Vesey, 487.

Appellant was rightly excluded from testifying "As to conversations and matters occurring between himself and the deceased, and as to which the latter, if alive, could have testified, it not appearing to the court that injustice was done thereby, but quite to the contrary." Gen. Laws, ch. 228, secs. 16, 17, 22; *Chandler v. Davis*, 47 N. H., 462, 464, 465; *Harvey v. Hiliard*, Id., 551; *Fogate v. Thompson*, 54 N. H., 455; *Hoit v. Russell*, 56 N. H., 559; *Bailey v. Harvey*, 60 N. H., 152; *Burns v. Madigan*, Id., 167; *Cochran v. Langmaid*, Id., 571; *Lord v. Lord*, 58 N. H., 7.

If, before the evidence closed, appellees withdrew their objection and appellant had the opportunity to testify, but did not avail himself of it, and the appellees had introduced incompetent evidence subject to exception, the court could permit it to be withdrawn, giving proper instructions to the jury to disregard it. *Hamblett v. Hamblett*, 6 N. H., 848; *Deerfield v. Northwood*, 10 N. H., 269; *Judge of Probate v. Stone*, 44 N. H., 607; *Zollar v. Janvrin*, 47 N. H., 326.

Where the admission of the question and answer is purely discretionary, the decision of the judge is not subject to reversal or revision. 1 Greenl. Ev., secs. 431, 446; and so, of the latitude allowed on cross-examination. *Free v. Buckingham*, 59 N. H., 219.

In the examination of witnesses how far a tribunal should go from the issue, for trial of collateral questions, the time to be spent thereon, the evidence which may be excluded, are often questions of fact to be determined at the trial. *Watson v. Trembly*, 60 N. H., 498.

A verdict will not be set aside because of the introduction of immaterial evidence, unless the court can see that it tended to prejudice the case with the jury. *Cook v. Brown*, 84 N. H., 460; *Perley v. Marshall*, 57 N. H., 206; *Martin v. Towle*, 59 N. H., 81.

The case of *Daniels v. Foster*, 26 Wis., 686, is not in point, as it was a case upon a probate of a will.

Questions invoking the judgment of the witnesses were allowable under the practice existing just previous to the decision, in *Hardy v. Merrill*, 56 N. H., 227; see op. Foster, C. J., C. C., in *Boardman v. Woodman*, 47 N. H., 120.

A copy of a public record, properly authenticated, is admissible as evidence without further proof or authentication. Bull. (N. P.), 229.

So, of a copy given by a public officer whose duty it is to keep the original record. *Ferguson v. Clifford*, 37 N. H., 95; 1 Greenl. Ev., secs. 488-5; *Homans v. Corning*, 60 N. H., 418.

A new trial should be limited to the single point covered by the exception. *Lisbon v. Lyman*, 49 N. H., 553, 556.

As it happens that the error on this point was in a matter addressed to the court and not to the jury, the deficiency may now be supplied; the copy may now be duly authenticated, and the decree of the probate court may be affirmed as of this term. *Whittier v. Varney*, 10 N. H., 291; *Janvrin v. Fogg*, 49 N. H., 340, 357.

The instructions given were correct, appropriate and full. *Boardman v. Woodman*, 47 N. H., 120; *Redfield, Wills*, ch. 4; *Jarman, Wills*, sec. 37.

The law having been correctly given, the appellant cannot object that the charge was not given in the language of his requests. *Clark v. Wood*, 84 N. H., 447; *Tucker v. Peaslee*, 36 N. H., 167; *Walcott v. Keith*, 22 N. H., 196.

The law having been once declared by the court need not be repeated. *State v. Buzell*, 59 N. H., 61.

If a request is in part good and part bad, it should be refused. It should be good in its totality. *Larrabee v. Sewall*, 66 Me., 376.

The third request should not have been given in its broad language, as it does not appear that it was applicable to the evidence. *Rice v. Porter*, 17 N. H., 137.

Whether "all infirmities" includes physical as well as mental infirmities.

Neither party shall testify in a case where the adverse party is an executor or administrator. Gen. Laws, ch. 228, sec. 16.

The appointment of an executor by the judge of probate, constitutes him an executor. Gen. Laws, ch. 207, sec. 12.

The question whether appellees are executors, not having been raised at the trial, nor ruled upon by the judge, cannot now be raised. *Nash v. Reed*, 46 Me., 168, 174.

Mr. Justice Smith delivered the opinion of the court:

The statute does not require a will to be signed or sealed in the presence of the subscribing witnesses, nor that they sign in the presence of each other, G. L. c. 193, s. 6, although this is usual and generally advisable. The testator may have sufficient reasons for not disclosing the fact that he has made his will. *Swinburne, Wills*, 27.

His acknowledgement that the seal and signature are his, with a request to the witnesses to attest the instrument, is sufficient. *Osborn v. Cook*, 11 Cush., 582.

The fact that the will in this case was signed, sealed and witnessed as such, in the presence of the testator and subscribing witnesses, was evidence from which the jury might find that the will was attested by the subscribing witnesses, at the request of the testator.

Prior to the passage of the Act of 1857, c. 1992, the contestant of a will was excluded from testifying on the trial of an appeal by reason of his interest. The general rule of the common law, then in force here, was, that a party to the record in a suit, and persons directly interested in the result of a suit, could not testify. The rule was founded partly on the general expediency of avoiding the multiplication of temptations to perjury. 1 Gr. Ev., s. 329.

Our statute, first enacted in 1859, reads thus: "No person shall be excused or excluded from testifying or giving his deposition in any civil cause by reason of his interest therein, as a party or otherwise." G. L., c. 228, s. 13. "Neither party shall testify in a cause when the adverse party is an executor, or administrator, or an insane person, unless the said executor, administrator, or the guardian of the insane party elects to testify, except as provided in the

following section." "When it clearly appears to the court that injustice may be done without the testimony of the party in such case, he may be allowed to testify; and the ruling of the court, admitting or rejecting his testimony, may be excepted to and revised." G. L., c. 228, ss. 16, 17.

In *Moore v. Taylor*, 44 N. H., 370, 375, we said, "The reason why the exception was made that where one party is an executor or administrator and did not elect to testify, the other party should not testify, was to place the parties upon an equal footing, and not to allow the living party to a trade or transaction to be a witness to it when the other party to the same transaction, being dead, cannot testify."

And in *Chandler v. Davis*, 47 N. H., 462, 464, decided in 1867, after the enactment of the amendment which now constitutes section 17, we said, "Where the deceased had personal knowledge of the matter in dispute, and might, if living, be a witness, it would be unequal and unjust to allow the survivor to testify, inasmuch as the other party, being dead, could not contradict or explain the evidence." Also (on p. 465), "But as a general rule, when the deceased had knowledge of the facts, and might, if living, be a witness, it would be unequal and unfair to allow the survivor to give his uncontradicted and unexplained account of the transaction. * * * But we think that for ordinary cases, the safe guide and the decisive test is found in the inquiry, whether the deceased, if alive, could testify to the same matters." These observations have been approved in numerous subsequent cases. *Harvey v. Hilliard*, 47 N. H., 551; *Brown v. Brown*, 48 N. H., 90; *True v. Shepard*, 51 N. H., 501; *Stearns v. Wright*, 51 N. H., 600, 611; *Foegate v. Thompson*, 54 N. H., 456; *Hoit v. Russell*, 56 N. H., 559; *Puge v. Whidden*, 59 N. H., 507, 511; *Bailey v. Harvey*, 60 N. H., 152; *Burns v. Madigan*, 60 N. H., 197; *Cochran v. Langmaid*, 60 N. H., 571; *English v. Porter*, ante, 206.

In these cases the matter in dispute, or the transaction about which the deceased, if living, might testify, was in relation to some contract entered into, or tort done or suffered by the deceased in his lifetime, the cause of action accruing in the lifetime of the deceased party. In the action prosecuted after his decease, his executor or administrator was a party in his representative capacity. But we think the reason which forbids the surviving party to testify in that class of cases, unless the executor or administrator elects to testify, is equally applicable in a trial of an appeal upon the probate of a will. The executor represents all the devisees and legatees, and prosecutes or defends the appeal in their interest. In a certain sense, also, he may be said to represent the testator who can no longer speak for himself. The right of a person to dispose of an estate at his pleasure, is destroyed or endangered unless some one shall act as his representative when it is offered for probate. It is the duty of the executor to cause the will to be proved, or file it in the probate office with his refusal in writing to accept the trust. G. L., c. 194, s. 8.

He has sufficient interest in the estate of the testator to give him a right under the statute to claim and prosecute an appeal from a decree of the probate court refusing to admit the will to

probate. *Shirley v. Healds*, 34 N. H., 407; *Richardson v. Martin*, 55 N. H., 45.

The probate of the will does not give him any interest or title either to things in action or possession, for he has the whole title and interest by the will and not by the probate. *Hensloe's Case*, 9 Coke, 38, a; *Webster v. Spencer*, 3 B. & Ald., 363.

The property in the goods is vested in him before probate. Comyn, Dig., Executor, B. Bacon, Abr. Executors, E. 14.

"Before probate of the will not only is the person named as executor seised as trustee of the legatees and others, but he is the representative of the whole estate disposed of by the will. He is not only the sole trustee for all persons having an interest under the will, but he is the only legal representative of the estate of the deceased. As such, it is his duty to cause the will to be proved, and he is aggrieved in his rights and in his property by any decree which divests him of his title in the estate of the deceased under the will." Fowler, J., in *Shirley v. Healds*, supra, 412; *Wiggin v. Sweet*, 6 Met., 197.

The testator must be represented in court by some one, and the executor is the person appointed by him to represent him in the execution of his will. He is necessarily made a party in the probate of the will, as executor. Unless he is regarded as executor for the purpose of establishing the will, he is not a party, and has no right to appear. The same injustice that the statute seeks to prevent in other actions in which the executor is a party, by excluding the surviving party from testifying, will often be done in the trial in an appeal upon the probate of a will, if the contestant can testify to matters about which the testator, if living, might testify, and perhaps contradict or explain the testimony of the contestant. A literal construction of the statute includes this case. "Neither party shall testify in a cause when the adverse party is an executor, * * * unless the executor elects to testify," etc. The contestant is a party, the executors are the other party, and the appeal is a cause. The spirit and reason of the statute being to prevent injustice, exclude the contestant because the testator's lips are closed in death. Even in matters of accounting, at common law, the admission of a party was not a matter of right. It was permitted in no case, where, from the position of the parties, an unfair advantage would be given by it to one party over the other. 8 Gr. Ev., s. 338; *Page v. Whidden*, 59 N. H., 507, 511.

Nash v. Reed, 46 Me., 188 decides that the heirs of a testator who contest the probate of his will are not excluded as witnesses "as heirs of a deceased party," as being within the exception in the statute which provides that "No person shall be excused or excluded from being a witness in any civil suit or proceeding at law, or in equity, including special proceedings before courts of probate, by reason of his interest in the event thereof as party or otherwise, except at the time of trial, the party prosecuting or the party defending, or any one of them, as an executor or an administrator, or made a party as heir of a deceased party." Me. R. S., c. 82, ss. 78, 83, 84.

Millay v. Wiley, 46 Me., 230, was an appeal from a decree of the probate court allowing the will of the testator. At the trial of the ap-

peal the executor was called by his counsel as a witness and was excluded. It was held that a person named in a will as executor is not "a party prosecuting or defending" within the meaning of the statute so as to exclude him as a witness. The court said "he [Wiley] never has been executor at any time and never may be."

In *McKeen v. Frost*, 46 Me., 289, which was an appeal from a decree of the probate court allowing a will, it was held that a person named as executor in a will is not really and legally such until the will is proved and he has given bond, and in a contest as to its execution he is not within the exception of the statute. The court said: "If the will should not be approved he never becomes an executor."

In Rhode Island under a statute which provides that "When an original party to the contract or cause of action is dead, or when an executor or administrator is a party to the suit, the other party may be called as a witness by his opponent, but shall not be admitted to testify upon his own offer, or upon the call of his co-plaintiff or co-defendant, otherwise than now by law allowed unless a nominal party merely." R. I. Gen. St., c. 203, s. 82, it has been held that a party appealing from a decree of a court of probate establishing a will and admitting it to probate is not disqualified from testifying upon his own offer. Among other reasons given for the decision is this, that the operation of the decree admitting the will to probate is suspended by the appeal except so far as it admits the executor on giving bond to collect, receive and take possession of the estate of the testator, and it is not therefore as an executor that the appellee is a party to an appeal, for he has no capacity as executor for any purpose except to collect, receive and take possession of the estate of the testator. *Hamilton v. Hamilton*, 10 R. I., 588.

The Massachusetts Statute, Mass. Gen. St., c. 181, s. 14, is materially different from ours, and the Missouri Statute is said to be identical with that of Massachusetts. *Shailer v. Bumstead*, 99 Mass., 112, 180, and *Garvin v. Williams*, 50 Mo., 206, are not, therefore, in point.

In Georgia, a legatee, on probate of a nuncupative will which is *caveated* by the heirs at law, is a competent witness in favor of the validity of the will. The term "other party to the contract," used in the statute, is held not to exclude an executor of a will. *Brown v. Carroll*, 86 Ga., 568; *Deupree v. Deupree*, 45 Ga., 415, 424.

In Pennsylvania by the express terms of the statute neither a party nor any person interested is excluded from testifying in this class of cases. *Bowen v. Gorauffo*, 78 Pa. St., 357; *Frew v. Clark*, 80 Pa. St., 170, 179.

In Tennessee, it has been held that a contest over a will is not a suit by or against an executor in such a sense as to bring the parties within the exception in the statute which provides that, "In actions or proceedings by or against executors, administrators or guardians in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other to any transaction with or statement by the testator, intestate or ward, unless called to testify by the opposite party." *Orr v. Cox*, 8 R. J. Lea (Tenn.), 617.

However much these cases and the reasoning

of the opinions may conflict with the views we have expressed, the question can hardly be regarded as an open one in this State.

In *Lord v. Lord*, 58 N. H., 7, this precise question, among others, was raised at the trial; but the law was regarded as so well settled that no mention was made of the point in the opinion or in the briefs on either side. In this case, the will was admitted to probate in the probate court and the appeal is by the contestant. The appeal does not vacate the decree of the probate court allowing the will nor the decree appointing the appellees executors. The decree remains in force from the time it was made unless reversed in this court. G. L., c. 207, s. 12.

This provision of our statute may perhaps constitute a sufficient reason why, in construing our own statute as to the competency of the contestant of a will as a witness we should not follow the decisions in other jurisdictions cited above. Our statute does not exclude a party when injustice would be done by the exclusion. He is not admitted as a matter of legal right. In this case it is found that injustice would be done by admitting the contestant to testify.

In *Drew v. McDaniel*, Admr., 60 N. H., 480, the defendant was a nominal party. The defense was made by the plaintiff's brothers, one of whom claimed title to the mortgaged premises in question, and the other was a creditor of the intestate, and both of whom elected to testify. The plaintiff was rightly allowed to testify under certain restrictions, it clearly appearing that injustice might be done without her testimony. The statute was made elastic that exact justice might be done in every case, and under the circumstances of each case. There was no error in excluding the contestant from testifying as to conversations and matters occurring between himself and the testator as to which the latter if alive could have testified.

8. For the same reason, the appellant's testimony in regard to copies of certain letters was properly excluded. If the letters were in the hands of the plaintiffs he might have called them to the witness stand and compelled their production if competent. If they were in the hands of persons without the jurisdiction, their depositions might have been taken. The testator if living might deny that he wrote the letters of which the papers offered purported to be copies.

4. The objection to the appellant's testifying to the condition of certain real estate in Boston having been withdrawn during the trial, the exception to the exclusion of the evidence was thereby removed.

5. The answer of a witness to the question whether the appellant wrote the will of the testator's widow, appears to have been wholly immaterial upon the issue tried, and as it does not appear that the jury was prejudiced by the evidence the verdict will not be set aside because the evidence was not ruled out.

6. Whether the testimony of Fitzsimmons was the statement of a fact or the expression of an opinion as to the sanity of the testator, it was admissible. *Hardy v. Merrill*, 56 N. H., 227.

7. The copy of the record in the Suffolk Registry of Deeds of a deed from the testator to the appellant, was admissible. *Homans v. Corning*, 60 N. H., 418; *Forreath v. Clark*, 21 N.

H., 409, 422; *Harvey v. Mitchell*, 31 N. H., 575, 582; *Wendell v. Abbott*, 43 N. H., 68, 77.

A document purporting to be a copy of a public registry of deeds kept in another State and purporting to be duly made and attested by the proper officer, is *prima facie* evidence that the person assuming to act as register was such in fact, and that the signature is genuine. For some purposes, common convenience regards as sufficient such proof as would come from a registry of this jurisdiction.

8. No exceptions were taken to the instructions given, and it must be presumed they were satisfactory. They were correct and appear to have been appropriate under the circumstances of this case. The first request related to the extent of mental capacity required for the valid execution of a will. The instructions given upon this point were full, and it is no ground for exception that the instructions were not given in the language requested. *Clark v. Wood*, 34 N. H., 447.

We have no occasion, therefore, to inquire whether the request was objectionable in any respect.

The second instruction requested was in itself correct, and was substantially given though not in the language of the request.

The third request may as a general proposition be correct, but if given without explanation or qualification might be misleading. It was not limited to mental infirmities, and it is possible there may be mental infirmities that would not "awaken caution." Whether the infirmities in any given case are such as require caution on the part of the jury is not a question of law. But the request, understood in the sense in which it was probably intended, was covered by the general scope and tenor of the instructions given.

The further request was included, in substance, in the instructions given.

The exceptions are overruled and the decree of the probate court affirmed.

Blodgett, J., did not sit; the others concurred.

Sampson LEVY *et al.*,

v.

Charles A. WOODCOCK *et al.*

1. **Third persons are not admitted to defend in a suit as a matter of right; they are only admitted to prevent an unjust diversion of property or some other wrong.**

2. Where a party obtains possession of goods, in pursuance of a conspiracy with the purchaser to defraud the vendors, he cannot be admitted to defend in an action of replevin for such goods brought by the seller.

(Cheshire—Decided July 31, 1885.)

REPLEVIN for ten cases of merchandise. The plaintiffs are assignees of Clarence B. Frost under the insolvent laws of Massachusetts. The defendants were defaulted and William A. Stone being admitted by the court to defend, pleaded that the goods were not the

property of the plaintiffs, but were his goods.

The plaintiffs' evidence tended to show that Stone and Frost obtained the goods by means of a fraudulent conspiracy, the plan of which was that Frost should pretend to buy from Stone a large stock of old and shop-worn goods which Stone had in a store in Clinton, Mass., and go to carrying on business there in his own name; that he should buy new goods in his own name and pay promptly for them until he established a credit sufficient for the purpose had in view; that then he should buy largely on credit in his own name; and then Stone should secretly remove the goods from the store for his own use without paying for them; and then Frost should fail and go into insolvency. All this business was to be entirely the business of Stone, although done in the name of Frost, and for his services and conduct in the matter Frost was to be paid by Stone \$12 a week and nothing more.

At the close of the plaintiffs' case the defendants moved for a nonsuit, on the ground that there was no evidence of property in the goods in the plaintiffs. The motion was denied and the defendants excepted, and afterwards consented to a verdict for the plaintiffs.

Messrs. Lane & Dole, for plaintiffs:

Where an insolvent entered into a conspiracy with another, to obtain a large amount of merchandise which was delivered to him, he thereby became liable to indictment. *Commonwealth v. Eastman*, 1 Cush., 189.

There is a broad line of distinction between the case at bar and the case of *Andenried v. Bettely*, 5 Allen, 382.

The cases of *Holmes v. Winchester*, 133 Mass., 140; and *Sibley v. Quinsigamond Nat. Bk.*, 133 Mass., 515, are the only cases where *Andenried v. Bettely* is cited, and they in no way conflict with the position of the plaintiffs in this case.

The court has authority to make such amendment in this case as this cause of justice requires. See, *Stebbins v. Insurance Co.*, 59 N. H., 143; *Buckminster v. Wright*, Id., 153; *Merrill v. Perkins*, 348.

Messrs. Rice & King, also for plaintiffs:

A sale, transfer or assignment of personal property in fraud of creditors by an insolvent is void, and the assignees may recover such property or its value. Stat. 1856, c. 284, sec. 27; see, *Holmes v. Winchester*, 133 Mass., 140; *Sibley v. Quinsigamond Nat. Bk.*, 133 Mass., 515; *Andenried v. Bettely*, 5 Allen, 382; which are cases essentially different from and no authority in this case.

This court has full authority to make such amendment in the cause of justice as may be required. *Stebbins v. Insurance Co.*, 59 N. H., 143; *Buckminster v. Wright*, Id., 153; *Merrill v. Perkins*, Id., 348.

Messrs. Hersey & Abbott, for defendants:

The right of stoppel in favor of the particular creditors who sold the goods replevied is personal to them and does not inure to the benefit of the general creditors whom plaintiffs represent. See, *Andenried v. Bettely*, 5 Allen, 382.

The "property never was the property of" the insolvent as in *Andenried v. Bettely*, *supra*.

The provisions of the Insolvent Law of Massachusetts were in force in 1862 when *Andenried v. Bettely*, 5 Allen, 382, arose, and no ad-

ditional rights are conferred on assignees beyond those conferred prior to that decision.

Smith, J., delivered the opinion of the court:

Third persons are not admitted to defend in a suit as a matter of right. They are only admitted to prevent an unjust diversion of property or some other wrong. *Reynolds v. Damrell*, 19 N. H., 394, 397; *Kimball v. Wellington*; 20 N. H., 439; *Clough v. Curtis*, 62 N. H.

In *Reynolds v. Damrell*, the motion of a subsequent attaching creditor to quash the writ for defect in mere form, was denied.

In *Kimball v. Wellington*, a subsequent attaching creditor was not allowed to file a plea in abatement at the second term, although that was the first term he appeared.

In *Clough v. Curtis*, a subsequent attaching creditor was allowed to show by evidence *alunde*, that the writ was fraudulently altered after service.

In *Blaisdell v. Ladd*, 14 N. H., 129, the trustee was discharged on motion of a subsequent attaching creditor, because the trustee was also one of the plaintiffs.

In *Davis v. Fogg*, 58 N. H., 159, a claimant of funds in the hands of a trustee was not allowed to defeat the plaintiff's prior right, his own title being shown to be invalid. In that case the appearance of a claimant, or of a subsequent attaching creditor to defend, was held to be an equitable proceeding, and that his right to resist the plaintiff's suit is not conclusively established by the interlocutory order permitting him to appear and defend. It was said his right must remain open to question, so that when it appears he has no right to resist the suit "He must retire from the field, which he is allowed to enter only for the purpose of showing that the right he maintains is the right of the case."

As against the plaintiffs, Stone may have a technically legal title to the goods replevined. How that may be we do not decide, for the plaintiffs' rights, equitably considered, are superior.

The ground upon which Stone claims to hold the goods is, that Frost was his agent. But it was not an agency for the transaction of an honest mercantile business. Their ultimate and principal object, as disclosed by the evidence, was the perpetration of a fraud not only upon the vendors of the goods, but upon as many other persons as they might be able to overreach. In the purchase of the goods, Stone was not known, and it was not intended he should be. The goods were bought upon the sole credit of Frost, and never paid for. It was never intended they should be paid for, or that Stone's credit should be pledged for them. In the sale of the goods the vendors understood they were dealing with Frost alone, and they gave credit to him alone, and both Frost and Stone intended they should so understand. As Stone never paid for the goods and never intended to pay for them, and as his credit was never pledged for the goods, and he never intended it should be, he is not entitled to the benefit of this equitable proceeding. He obtained possession of the goods, but it was in pursuance of a conspiracy entered into with Frost to cheat and defraud the vendors, and for which both might have been indicted. *Commonwealth v. Eastman*, 1 Cush., 189.

The means he used to acquire possession were illegal and criminal.

The vendors of the goods had their election to treat the sale as valid and go against Frost and Stone for their price, or recover their goods because of the fraud. Their election to treat the sale as valid, by proving their claims against the estate of Frost, is not a reason for extending relief to Stone in an equitable proceeding. They only accepted the position which both Stone and Frost intended they should take, that of creditors of Frost. The defendants have submitted to a default, and do not contest the plaintiffs' right to recover the goods. The vendors interpose no objection to the appropriation of the proceeds of the goods for the benefit of all the creditors of Frost, themselves included. By proving their claims against his estate they invite that result. Justice does not require that Stone be permitted to divert this property from the honest creditors of Frost, when Stone has conspired with him to swindle. At the trial term the leave granted to Stone to appear and defend will be revoked, and judgment will be rendered on the default of the defendants for the plaintiffs.

Case discharged.

Carpenter, J., did not sit; the others concurred.

ALDRICH, *Jiff.*,

2.

BENNETT.

The legal marriage of a female infant terminates the father's right to her custody and services.

(Cheshire — Decided July 31, 1885.)

CASE, for unlawfully enticing away the plaintiff's minor daughter on the 29th day of March, 1879, and depriving him of her services from that time until the 8th day of September, 1882, when she became twenty one years of age. The defendant pleaded that on said 29th day of March he was lawfully married to the daughter, and that the plaintiff was not thereafter entitled to her services. To this plea the plaintiff

NOTE.—At common law, marriages of minors, even without the consent of their parents, were good, 1 Bish. Mar. & Div., sec. 293, and cases cited, provided the infant parties had arrived at the age of consent. *Id.* But this rule has been modified in England, by statute. *Id.*, sec. 294.

In some States, the statutes make the marriage of minors who have passed the age of consent void, when the consent of the parents is wanting; in others the law is intended to operate merely as an obstruction to such marriages. See, 1 Bish. Mar. & Div., sec. 295. That the consent of the parents is not necessary to the validity of the marriage, sec. 1 Bl. Com., 348; 2 Kent, 78; Bright, Husb. & W., p. 4, sec. 317; 1 Gray, 119.

In New York, a marriage may be declared void where the female was at the time under the age of fourteen. Bennett v. Smith, 21 Barb., 490. See, Coleman's Case, 6 City Hall Rec., 3; Aymer v. Roff, 3 Johns. Ch., 49.

iff demurred, and the question thereupon raised was reserved for the opinion of the court.

Messrs. Lane & Dole, for plaintiff:

The marriage of a minor, against the father's consent, does not work emancipation. *White v. Henry*, 11 Shep., 581.

Messrs. Batchelder & Faulkner, for defendant:

That the claim of the father to the labor and services of his minor children is based upon his duty and obligation to support them, is well settled at common law, and in numerous decisions in this and other States. 2 Kent, Com., 183; *Lord v. Poor*, 23 Me., 569; *Stone v. Pulisifer*, 16 Vt., 428; *Hammond v. Corbett*, 50 N. H., 501, and cases cited.

When the duty to support a child no longer remains, the right to its earnings ceases also. *Jennings v. Emerson*, 15 N. H., 486.

It is admitted that the plaintiff's minor daughter was lawfully married to the defendant on the day of the alleged enticing away. This fact, of itself, works an emancipation of the minor, whether it took place with or without the father's consent. *Schouler*, Dom. Rel., 367, 368; *Dicks v. Grisson*, 1 Freem. Ch., 428; *Ream v. Watkins*, 27 Mo., 516.

Precisely the same point has been raised and decided in Massachusetts. *Hervey v. Moseley*, 7 Gray, 479.

Clark, J., delivered the opinion of the court:

The right of a parent to the earnings of his minor child, upon whatever principle it is founded (*Hammond v. Corbett*, 50 N. H., 501), is commensurate with the right of custody; and so long as the right to the services of the child remains, the right to control those services must exist. Whatever, therefore, operates as a release from parental control necessarily terminates parental right of service; and the emancipation of the minor from legal parental authority, either by the voluntary act of the parent or by operation of law, puts an end to the legal claims of the parent to the minor's earnings.

The marriage of a female infant, if above the age of legal consent, is valid, although contracted and entered into in defiance of parental wishes and authority. *G. L.*, c. 180, ss. 13, 14; *Parton v. Hovey*, 1 Gray, 119.

Being valid, the same legal consequences must follow from it, whether contracted in obedience to parental preferences or in opposition to them. In either case, the parent is no longer entitled to the services and earnings of the infant married daughter. The new relations created by the marriage, being inconsistent with the enforcement of parental rights, operate as an emancipation from them. The plaintiff's daughter, being above the statutory age of consent, had the legal capacity to form the relation of marriage, and although in strictness of law it should not be formed without parental consent, it is, nevertheless, sustained on grounds of public policy, and parental rights are made to yield to it. *Cooley*, Torts, 287.

The legality of the marriage is admitted by the demurrer, and the plea is a sufficient answer to the plaintiff's action. *Hervey v. Moseley*, 7 Gray, 479.

Demurrer overruled.

Carpenter, J., did not sit; the others concurred.

STATE, *ex. rel.*, Morris Cunningham, *Plff.*,

v.
John C. RAY.

1. A statute which authorizes a justice of the peace to commit to the industrial school, a minor under the age of seventeen years, upon a complaint charging a crime with respect to which the jurisdiction of the justice only extends to requiring the accused to recognize with sureties for his appearance at court, is in conflict with art. 15 of the Bill of Rights.
2. Where minors under sixteen years of age are brought before a justice of the peace, upon a complaint charging them with burglary, a crime punishable by imprisonment in the state prison for a term of years, an order requiring them to recognize for their appearance before the supreme court, exhausts the authority of the justice; and a further order committing them to the industrial school till respectively attaining their majority is null and void.

(Cheshire — Decided July 31, 1885.)

HABEAS CORPUS. The relator is father of John Cunningham, aged sixteen years, and of Eddie Cunningham, aged thirteen years, who were arraigned upon a complaint for burglary before a justice of the peace, June 10, 1884, and pleaded not guilty. After an examination, the justice ordered them to recognize in the sum of \$100 each, with sureties, for their appearance at the October Term of this Court, but immediately thereafter, upon the application of the State's counsel, under ch. 287, § 14, and without the consent of said minors or their friends, the justice revoked the order to recognize, refused to take bail, and sentenced John to the Industrial School for two years, and Eddie for three years, and issued a *mittimus* for their commitment, which was executed June 12.

At this Term, Ray, as Superintendent of the Industrial School, having produced them before the court, on a writ of *habeas corpus* issued upon the relator's petition, a hearing was had and they were discharged, on the ground that the justice had no jurisdiction to impose the sentence aforesaid, and the defendant excepted.

Messrs. Hoskins & Stoddard, for plaintiff:

A judgment, to have any binding force or validity, must have been rendered by a court having jurisdiction of the cause. *Thompson v. Whitman*, 18 Wall., 457 (XXI., Law. ed., 897); *Galpin v. Page*, Id., 350 (XXI., Law. ed., 959).

Where a justice of the peace had no jurisdiction to try and determine a case against certain minors, his order and sentence of commitment is void, and respondents may be discharged in *habeas corpus*. *State v. Shattuck*, 45 N. H.,

202; *State v. Toole*, 42 N. H., 541; *Ex parte Tracy*, 25 Vt., 98; *In Re Goodenough*, 81 Vt., 285.

Mr. E. P. Dole, for defendant:

The Constitution prohibits the making of any law that shall subject any person to a capital punishment, without providing for a trial by jury. Const. N. H., Bill of Rights, art. 16.

The right to life, liberty or estate, is not to be put out of the protection of the law. *Id.*, art., 15.

All penalties ought to be proportioned to the nature of the offense. *Id.*, art. 18.

Words used in a constitution, if susceptible of more meanings than one, are used in the meaning which was least favorable to the delegation of power, and most favorable to its retention. *Pudelford v. Mayor, etc., of Savannah*, 14 Ga., 488.

The Amendments of the Constitution of the United States were not intended to limit or control the proceedings of the state courts. *Cott v. Eves*, 12 Conn., 243.

The Fourteenth Amendment of the Constitution of the United States, does not forbid the States from restricting the trial by jury in the state courts, and the Seventh Amendment applies only to the United States. *Walker v. Sauvinet*, 92 U. S., 90 (XXIII., Law. ed., 678-9.); *Edwards v. Elliott*, 21 Wall., 582 (XXII., Law. ed., 487); *Pearson v. Yewdall*, 95 U. S., 294 (XXIV., Law. ed., 486).

The Fifth Amendment does not operate as a limitation of the power of the State Governments over their own citizens, but is exclusively a restriction upon federal power. *Prescott v. State*, 19 Ohio St., 184; *State v. Shumpert*, 15 C., 85.

The Constitution of the United States, which forbids that private property be taken for public use without just compensation, does not restrain the legislation of the general court of this State. *Concord R. R. Co. v. Greely*, 17 N. H., 48.

The provision in the Fifth Amendment of the Constitution of the United States, that private property shall not be taken for public use without just compensation, does not apply to the States, but only to the United States. *Barron v. Mayor, etc., of Baltimore*, 7 Pet., 243; *Livingston v. Mayor of N. Y.*, 8 Wend., 85; *Boyd v. Ellis*, 11 Iowa, 97; *Fox v. Ohio*, 5 How., 434; *Commonwealth v. Hitchings*, 5 Gray, 482; *Commonwealth v. Pomeroy*, 5 Gray, 486, *note*.

So of the Seventh Amendment, that in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved. *Livingston v. Mayor of N. Y.*, 8 Wend., 85; *Pearson v. Yewdall* (*supra*); *Horton v. Woodworth*, 5 Colo., 218.

The provision in the Constitution of the United States, that cruel and unusual punishments shall not be inflicted, does not extend to the State Governments, but was intended only for the Legislative and Judiciary Departments of the United States. *James v. Commonwealth*, 12 Serg. & R., 220; *Barker v. People*, 8 Cow., 686.

So of the Fourth Amendment of that Constitution, securing persons, houses, etc., against unreasonable searches and seizures, and requiring a particular description, in warrants, of the place to be searched, and the persons or things

to be seized. *Reed v. Rice*, 2 J. J. Marsh., 45.

The Rhode Island Revised Statutes (ch. 73) are not in conflict with the Fifth and Sixth Amendments of the Constitution of the United States securing to accused persons the rights of trial; these Amendments restrict the Government of the United States, and not the government of the States. *State v. Paul*, 5 R. I., 185; *State v. Keeran*, 5 R. I., 497.

The Fifth and Seventh Amendments to the Constitution of the United States, being designed as restrictions upon legislation by the Federal Government, and not upon State Governments in respect to their own citizens, cannot affect the validity of a state law imposing a tax upon the gross earnings of a railroad company. *North Missouri R. R. Co. v. Maguire*, 49 Mo., 490; *Twitcheil v. Commonwealth*, 7 Wall., 321 (XIX., Law. ed., 228).

The 16th Article of the Bill of Rights is the only restriction on the power to limit or abolish the right of trial by jury, and it recognizes such power in criminal cases, not capital. The express mention of one condition implies the exclusion of another. *Broom, Legal Maxims*; *Coke, Lit.*, 210 a.

American Legislatures have the same unlimited powers in legislation which reside in the British Parliament, except where they are restrained by written constitutions. *Thorpe v. Rut. & Bur. R. R.*, 27 Vt., 140.

No statute can be pronounced invalid, if it violates no constitutional provision. *Chenango Bridge Co. v. Paige*, 83 N. Y., 178.

Whatever is not expressly denied to the legislative power by a State Constitution is possessed by it, but as to the Constitution of the United States, being itself a mere grant of power, the opposite rule obtains. *Page v. Allen*, 58 Pa. St., 388.

In ascertaining the power of the Legislature, under the Constitution, we look, not to what the instrument authorizes to be done, but to what is prohibited. *McMillen v. Lee*, 6 Iowa, 391; *Twitcheil v. Blodgett*, 13 Mich., 127.

All subjects of legislation not affected by mandate or by prohibition, are within the discretion of the General Assembly. *Commonwealth v. Drevory*, 15 Gratt. (Va.), 1; *Walker v. Cincinnati*, 21 Ohio St., 14; *Lafayette, etc., R. R. v. Gregor*, 34 Ind., 185; *Leavenworth Co. v. Miller*, Kan., 479.

The Legislature has general powers, limited only so far as expressly or impliedly restrained by the Constitution. *People v. Rogers*, 18 Cal., 159; *Pattison v. Yuba*, 18 Cal., 175; *Bushnell v. Beloit*, 10 Wis., 195.

While courts cannot shun the discussion of constitutional questions when fairly presented, they will not seek to draw in such weighty matters collaterally, nor on trivial occasions. *Hoover v. Wood*, 9 Ind., 286; *Sheldon v. Miller*, 9 La., 189; *Clark v. Rochester*, 24 Barb., 446; 5 Abb. Pr., 107; 14 How. Pr., 197.

To justify a court in pronouncing a legislative Act unconstitutional, or a provision of a State Constitution to be in contravention of the Constitution of the United States, the case must be so clear that no reasonable doubt can be said to exist. *Blair v. Ridgley*, 41 Mo., 63; *Macomber v. Mayor of N. Y.*, 47 Abb. Pr., 35.

Upon a question of constitutionality of an Act where the court entertains doubt, if the

law may in any aspect be valid, it is the duty of the court to sustain and enforce the statute. *Chicago, etc., R. R. Co. v. Smith*, 62 Ill., 268; *Gutman v. Virginia Iron Co.*, 5 W. Va., 22; *Osborn v. Stanly*, 5 W. Va., 85.

Acts of the Legislature must be sustained by the courts, unless they are clearly and undoubtedly repugnant to the Constitution. *Lucas v. Comrs. of Tippecanoe Co.*, 44 Ind., 524.

The right of the judiciary to declare a statute void for unconstitutionality, is only to be exercised in clear cases. *Lothrop v. Siedman*, 42 Conn., 583.

Courts will not declare the action of the Legislature unconstitutional, unless the violation of the Constitution is entirely free from doubt. To hold otherwise, the courts would be assuming powers of legislation, and creating constitutional provisions not before existing. *Cheney v. Jones*, 14 Fla., 587.

Nothing but a clear violation of the Constitution, a clear usurpation of powers prohibited, will justify the judicial department in pronouncing an Act of the legislative department unconstitutional and void. *Penn. R. R. Co. v. Riblet*, 66 Pa. St., 164.

Courts will not declare a statute void as being unconstitutional, unless the invalidity of the Act is, in their judgment, placed beyond a reasonable doubt. *Rich v. Flanders*, 39 N. H., 305; *Dartmouth Coll. v. Woodward*, 1 N. H., 114.

State legislation is not to be held unconstitutional because, in its operation, it may incidentally and remotely have a bearing upon powers granted to and exercised by the general government. *Op. Ch. J. Parker, Pierce v. State*, 13 N. H., 574.

The Fifteenth Article of the Bill of Rights guarantying trial by jury, means just what it says. *Mayo v. Wilson*, 1 N. H., 58.

By the "law of the land" is meant "due process of law." *Id.*

All statutes not repugnant to any other clauses in the Constitution are considered as the law of the land. *Dartmouth Coll. v. Woodward*, 1 N. H., 130; *Hutchins v. Edson*, 1 N. H., 130.

Due process of law, in the Constitution, cannot require, in case of felony, a presentment or indictment by a grand jury. *Rowan v. State*, 30 Wis., 129.

Where there is an irreconcilable conflict, a subsequent statute is a repeal of a former one, so far as it contradicts it. *Sumner v. Steward*, 2 N. H., 89.

Where a former statute pertains to a final trial and conviction, and the latter only to preliminary hearing, there is no conflict between them. *State v. Thompson*, 20 N. H., 250.

The sending of a child to the industrial school is not an imprisonment; the sending is discretionary with the court, controlled by the welfare of the child. *Cutler v. Howard*, 9 Wis., 309; *Market Bank v. Hogan*, 21 Wis., 817; *Dutcher v. Dutcher*, 39 Wis., 651.

An Act authorizing commitment to such school is not an infringement upon the personal liberty of the citizen, as guarantied by the Constitution. *McLean Co. v. Humphreys*, 104 Ill., 378.

The power conferred on a justice of the peace, and upon the house of refuge, by the general

laws, is not in conflict with the declaration of rights of the Constitution. *Ex Parte Crouse*, 4 Whart., 9; *Roth v. House of Refuge*, 81 Md., 829.

The house of refuge is not a prison but a school where reformation, not punishment, is the end. *Ex parte Crouse*, 4 Whart., 9.

Statutes which mete out no penalty or punishment but are intended to subvert the public good and no individual injury, are not unconstitutional.

Prescott v. State, 19 Ohio St., 184; 5 Whart., 11; Story, Eq., sec. 1841.

Smith, J., delivered the opinion of the court:

"When any minor under the age of seventeen years charged with any offense punishable by imprisonment otherwise than for life, shall be convicted and sentenced accordingly, or shall be ordered to recognize for his appearance at the Supreme Court, the court or justice, upon application of such minor, his friends, or the State's counsel, may order that instead of such imprisonment or recognizance, the said minor may be sent and kept employed and instructed at the reform school for such term, not less than one year, nor extending beyond the age of twenty-one years, as said court shall judge most for his true interest and benefit, provided he shall conduct himself according to the regulations of said school; and a copy of such order shall be sufficient authority for his commitment and detention at such school," G. L., c. 287, s. 14. By Laws, 1881, c. 87, the name of the institution was changed to the industrial school. Under the authority of this statute, the relator's minor sons, one of the age of thirteen and the other of the age of sixteen years, have been sent to the industrial school for the terms of three and two years respectively, neither having been convicted of any crime or offense. They were brought before a justice of the peace upon a complaint charging them with having committed the crime of burglary,—a crime of the gravest character and punishable by imprisonment in the state prison for a long term of years. The crime was one which the magistrate had not jurisdiction to determine, but only to inquire if just cause appeared to hold the accused to answer at the Supreme Court. They were heard upon no other charge than that set out in the complaint, and were not in law required to defend against any other. An order was made requiring them to recognize for their appearance before the Supreme Court. So far the justice had jurisdiction. At this stage of the proceedings, the counsel for the State moved for an order that the accused be sent to the industrial school, and the justice, declining the offer of the accused to recognize agreeably to the order then just made by him, issued an order committing them to the school for the terms above mentioned. The commitment was not for the purpose of securing their appearance at the Supreme Court, for the shortest term for which they might be sent to the school would extend much beyond the next term of the Supreme Court. If they were committed as a punishment for having committed the crime of burglary, they have never been tried or convicted of that crime by the judgment of their peers. Article 15 of

the Bill of Rights provides that "No subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land." This clause in our Constitution is a translation from *Magna Charta*, and dates from 1215. Its meaning has become fixed and well determined "and asserts the right of every citizen to be secure from all arrests not warranted by law." *Mayo v. Wilson*, 1 N. H., 53, 57.

It guaranties the right of trial by jury in all cases where the right existed at common law in this State at the adoption of the Constitution. That a person charged with having committed the crime of burglary is entitled to a jury trial, has never been questioned. As the justice only had jurisdiction to inquire and not to convict, the accused have had no trial. Provision is, and ever since the adoption of the Constitution, has been made by statute for a trial by jury of every crime indictable by a grand jury, and of every offense where an appeal is taken from the judgment of a justice or police court. Final judgment cannot be enforced for the commission of any police offense however trivial, until the appellant has been convicted by a jury of his peers. If the relator's sons were sent to the industrial school for some other crime or offense, it was one of which they have never been convicted, and in violation of article 15 of the Bill of Rights, which provides that "No subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally described to him, or be compelled to accuse or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to himself, to meet the witnesses against him face to face, and to be fully heard in his defense by himself and counsel."

But the commitment and detention of the relator's sons is justified by the respondent upon the ground that the industrial school is not a prison; that the order of commitment was not a sentence; and that their detention is not a punishment. The contention is that the industrial school is a part of the school system of the State, and that the State as *parens patriæ* may detain in the school such scholars as may need its discipline. If it is a privilege to be admitted a member of the school, it is a privilege limited to "offenders against the law." At no time since its institution in 1855, have its doors been open to the admission of any other class of scholars. Its advantages have not been offered to every minor under the age of seventeen years who might desire to enter, or whose parents or guardian might seek to place him there. The relator's sons were sent to the school, either because they had committed some crime or offense, or because the justice judged it to be for their "interest and benefit" to be placed there. For whichever of these causes they were committed, the commitment was illegal. As already remarked, they have never been convicted of the crime of burglary, and they have not been tried or had any opportunity to defend against any other charge. If the order for their commitment was made because the justice judged it to be for their "interest and benefit,"

the answer is, that he had no authority by statute to commit them for that cause. Whenever a court or a justice may send a minor to the school, he may fix the term during which he may be kept at the school at not less than one year nor extending beyond the age of twenty-one years, as the court or justice "shall judge most for his true interest and benefit." The limit of his stay or confinement in the school is determined by the consideration of what shall be "most for his true interest and benefit;" but the statute does not confer upon the court or justice the power to send a minor to the school, solely for the reason that the court or justice may be of opinion that it may be for the interest or benefit of the minor to be sent there. The original name of the school—"House of Reformation for Juvenile and Female Offenders against the Laws," Laws, 1855, c. 1660, indicated the character of the institution. The Act provided that any boy under the age of eighteen years, or any female of any age, "Convicted of any offense known to the laws of this State, or punishable by imprisonment, other than such as may be punished by imprisonment for life," might be sentenced to the house of reformation. *Id.*, s. 4. At no period in its history could a person become an inmate of the institution, unless, being within the prescribed age, he or she had been convicted of a crime or offense. The only exception is the unconstitutional provision inserted in the revision of 1867 (Gen. Stats., c. 2, s. 14; G. L., c. 287, s. 14), authorizing a justice to send to the school a minor less than seventeen years of age whom he shall have ordered to recognize for his appearance at the Supreme Court. We cannot ignore the fact that in the public estimation the school has always been regarded as a *quasi* penal institution, and the detention of its inmates or scholars as involuntary and constrained. The great purpose of the institution was the separation of youthful offenders from hardened criminals of mature years, in the hope of their ultimate reformation, and of their becoming useful citizens. But the fact cannot be overlooked that the detention of the inmates is regarded to some extent as a punishment, with more or less of disgrace attached on that account. If the order committing a minor to the school, is not a sentence, but the substitute for a sentence, as claimed by the respondent, what is a substitute for a sentence but a sentence in and of itself? It is worthy of remark that the Legislature has not undertaken to authorize the commitment of a minor to the industrial school upon the mere presentment of the grand jury.

In this case, the relator, the natural guardian of his sons, has been deprived of their care, nurture, education and custody, against his consent, and without any trial or hearing to which he was a party, upon the ground, and only ground, that the justice found there was just cause to require them to appear at the Supreme Court to answer further. If he is not a suitable person to have the care and education of his children, that fact has not been found, nor does it appear that their education has been neglected. But how far he is entitled to be heard upon that question we do not decide. We have only alluded to the matter as showing what consequences may flow from the unlawful

commitment of a minor to this school. Where the commitment is lawful the loss by the parent of his custody of his child follows as one of the incidents for which there is no remedy, and perhaps in many instances, because of his unfitness, there ought to be none.

It is further deserving of consideration that the relator's sons, if indicted for the crime of which they were charged before the justice, cannot plead *autrefois convict*, although they may remain at the school the full term for which they were sentenced; and if their detention at the school is a punishment, they are liable to be punished twice for the same offense, in violation of the fundamental maxim, "*Nemo debet bis puniri*," etc. Broom Legal Max., 848. In coming to this conclusion we have not overlooked the decisions in other States. *Milwaukee Industrial School v. Supervisor Milwaukee County*, 40 Wis., 328; *S. C.*, 22 Am. Rep., 702; *M'Lean Co. v. Humphreys*, 104 Ill., 378; *Petition of Ferrier*, 103 Ill., 367; *S. C.*, 42 Am. Rep., 10; *Roth v. House of Refuge*, 81 Md., 329; *Ex Parte Crouse*, 4 Whart. (Pa.), 9.

In these cases, the detention of abandoned, or dependent, depraved children in houses of refuge or in industrial or reform schools, is upheld upon the ground that the power of magistrates and county courts to commit, and of such institutions to detain such children, is "Of the same character of the jurisdiction exercised by the Court of Chancery over the persons and property of infants, having foundation in the prerogative of the Crown, flowing from its general power and duty as *parens patrie* to protect those who have no other lawful protector. 2 Story, Eq. Jur., 1838" (Sheldon, J., in *Petition of Ferrier*, *supra*), or, as stated in *Ex Parte Crouse*, *supra*, "May not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patrie*, or common guardian of the community?" As to the soundness of the reasons given in these cases, we have nothing to say. No one of them is an authority for the commitment of a minor charged with the commission of a crime to such an institution, without some kind of a trial and conviction.

The *People v. Turner*, 55 Ill., 280; *S. C.*, 8 Am. Rep., 645, was an application by the father for a writ of *habeas corpus*, for the discharge from a reform school of his minor son. A Statute of Illinois authorized the commitment to a reform school of children between six and sixteen years of age, who are "vagrants, or destitute of proper parental care, or are growing up in mendicancy, idleness or vice," "to remain until reformed, or until the age of twenty-one years." The relator's son, committed to the school under this statute, was discharged, the commitment being held not to have been for any criminal offense, and the statute was declared unconstitutional. His confinement was held to be imprisonment without due process of law. Thornton, J., said: "Such a restraint upon natural liberty is tyranny and oppression. * * * If a father confined or imprisoned his child for one year, the majesty of the law would frown upon the unnatural act, and every tender mother and kind father would rise up in arms against such monstrous inhumanity. Can the State, as *parens patrie*, exceed the power of the natural parent, except in punishing crime?"

In *Commonwealth v. Horregan*, 127 Mass., 450, it was held that certain statutes relating to juvenile offenders, so far as they purport to give inferior tribunals jurisdiction of offenses punishable by infamous punishment, are unconstitutional.

A Statute of Ohio, authorizing the grand jury, where a minor under the age of sixteen years is charged with crime, and the charge appears to be supported by evidence sufficient to put the accused upon trial, instead of finding an indictment, to return to the court that the accused is a suitable person to be committed to the house of refuge, and directed the court thereupon to order his commitment without trial by jury. The statute was declared constitutional. *Prescott v. State*, 19 Ohio, St., 184; *S. C.*, 2 Am. Rep., 888.

The decision is put upon the ground that the case "Is neither a criminal prosecution nor a proceeding according to the course of the common law, in which the right to a trial by jury is guaranteed. The proceeding is purely statutory, and the commitment, in cases like the present, is not designed as a punishment for crime, but to place minors of the description and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they are reformed or arrive at the age of majority. The institution to which they are committed is a school, not a prison; nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent, who would otherwise be condemned to confinement in the common jail or penitentiary." The statute further provided that in case the cause for the child's detention shall be inquired into by a proceeding in *habeas corpus*, it shall be a sufficient return to the writ that he was committed to the guardianship of the directors of the school, and that the period for his discharge had not arrived. It is intimated, in the opinion of the court, that it is questionable whether this provision can operate to restrict the power of the court, invested by the Constitution with jurisdiction in *habeas corpus*, from inquiring fully into the cause of the detention of a person restrained of his liberty.

With due respect for the learned court who pronounced this opinion, we are not convinced of the soundness of the reasoning or conclusion. The proceedings by which the accused was adjudged a suitable person to be committed to the house of refuge were conducted in secret, without his knowledge or consent, or that of his parent or guardian, with no opportunity to be represented by counsel, to be confronted with and cross-examine the witnesses for the prosecution, or to produce witnesses in his own behalf. The liberty of the minor during the term of his minority, which might be for a period of many years, was made to depend upon the deliberations of a secret tribunal. A judgment rendered upon such an *ex parte* hearing is as little calculated to command the respect of the community as the proceedings of the ancient court of the Star Chamber. And so far as the other cases cited are like the Ohio case in legal effect, we cannot follow them. Whether what has been called a trial in other jurisdictions in cases of this class, is a trial within the meaning of our Constitution, and whether on any other

ground than that of a charge of crime, the Legislature can authorize minors or persons of age to be committed to the industrial school without a trial by jury, if it were claimed, and without the consent of parent or other guardian, are questions on which we give no opinion. Persons poor and standing in need of relief, may and must be cared for by the overseers of the poor, and may be sent to the almshouse for support; but their detention cannot be regarded as involuntary. They are in no sense deprived of their liberty without the judgment of their peers or against the law of the land. They are neither criminals nor charged with the commission of crime, and this provision of the Constitution was not understood by its framers as restricting the power of the Legislature to provide for the relief of the worthy poor. So children of profligate parents, or with vicious surroundings, may be taken from the custody of their natural guardians and committed to the guardianship of those who will properly care for their moral, intellectual and physical welfare. *Prim v. Foote*, supra, 52.

But this is a power exercised by the State as *parens patriæ*, in the welfare and interest of its citizens. 2 Story, Eq. Jr., 2, 1833.

The common-law principle of reasonable necessity has an extensive constitutional operation; (*Aldrich v. Wright*, 58 N. H., 398, 899, 400; *Hailey v. Colcord*, 59 N. H., 7, 8; *Hopkins v. Dickson*, 59 N. H., 235; *Johnson v. Perry*, 56 Vt., 703; *State v. Morgan*, 59 N. H., 322, 325); and in many cases authorizes the restraint of an insane person; (*Colby v. Jackson*, 12 N. H., 526; *Davis v. Merrill*, 47 N. H., 208; *O'Connor v. Bucklin*, 59 N. H., 589, 591; *Kelleher v. Putnam*, 60 N. H., 30; *Hinchman v. Richie*, Bright (Pa.), 143; *Fletcher v. Fletcher*, 1 E. & E., 420; *Bushnell, Insanity*, ss., 19, 24); even when he is committed to an asylum upon a defective process. *Shuttleworth's Case*, 9 A. & E. (N. S.), 651.

But a magistrate's power to commit to the industrial school, for detention during minority, every person under the age of seventeen years, charged with but not convicted of an offense punishable with imprisonment otherwise than for life, on the ground of the "true interest and benefit" of the accused, does not come within any constitutional idea of reasonable necessity that has prevailed in this State. For his interest and benefit, the magistrate might as well be authorized to send him to the state prison, as to the industrial school, or any other penal institution.

We are of opinion that so much of s. 14, c. 287, G. L., as authorizes a justice of the peace to commit to the industrial school a minor under the age of seventeen years, upon a complaint charging him with the commission of a crime of which the justice has jurisdiction only to require him to recognize for his appearance at the Supreme Court, on the motion of the State's attorney, and without the consent of any person authorized to bind the magistrate by consent, is in violation of article 15 of the Bill of Rights.

Exceptions overruled.

Blodgett, J., did not sit; the others concurred.

William H. CUMMINGS, *Plff.*,

Zadock B. REMICK.

The finding of a referee, that the evidence was so conflicting that he was unable to reach a satisfactory decision **legally, means** that the ground of plaintiff's claim to recover was not proved by a balance of the evidence, and defendant is therefore, entitled to judgment.

(Grafton — Decided July 31, 1885.)

WRIT OF ENTRY for the Stevens place in Lisbon. The defendant filed a brief statement disclaiming title in himself and alleging title in his wife. At the trial before a referee, the question was whether the demanded premises were bought with the defendant's money and the deed taken to his wife to defraud his creditors. Upon that point, the referee stated in his report that the evidence was so conflicting that he was unable to reach a decision that he felt satisfied to be correct. But he found generally for the defendant "Upon the ground that the burden of proof is on the plaintiff on this point." The court ordered judgment for the defendant on the report and the plaintiff excepted.

Messrs. Rand & Morse, for plaintiff.

Messrs. Bingham, Mitchell & Bachelor, for defendant:

Exceptions cannot reach the proceedings of a former term. *Lathrop v. Page*, 26 Me., 120.

Under these circumstances, there is no remedy for error in the judgment if there had been any in fact, except possibly by a petition for a new trial or appropriate motions at the next trial term. *Warner Bk. v. Clement*, 58 N. H., 533; *Gamsby v. Columbia, Id.*, 60; *Moore v. Carpenter*, 63 N. H., 65.

In the absence of a motion for judgment at the trial term, on referee's report, or objection to order of judgment for defendant, the latter had a right to assume plaintiff's claims were waived. *Pebbles v. Rand*, 43 N. H., 342; *Powler v. Fowler*, 49 N. H., 507; *Sawyer v. Gleason*, 59 N. H., 140.

Smith, J., delivered the opinion of the court:

The general finding or award, that the defendant did not disprove the plaintiff, includes the finding that there was no preponderance of evidence in favor of the plaintiff. The referee's statement that the evidence was conflicting and that he was unable to reach a satisfactory decision, is not a finding that there was a preponderance of evidence in favor of the plaintiff. If the case had been on trial before a jury, the defendant would have been entitled to the instruction that if there was a balance of evidence in his favor, or if the evidence was evenly balanced, the verdict must have been for him. He was only required to put in as much evidence as the plaintiff to keep the scales in equilibrium. The referee's statement that the evidence was so conflicting he was unable to reach a satisfactory decision, can have no other legal meaning than that the ground upon which the plaintiff claimed to recover was not proved by a balance of the evidence.

Exceptions overruled.

Mr. Justice Blodgett and Mr. Justice Carpenter did not sit; the others concurred.

CASES

DETERMINED IN THE

Supreme Judicial Court of Massachusetts,

FROM SEPTEMBER 1, 1885.

CHIEF JUSTICE,

HON. MARCUS MORTON.

ASSOCIATE JUSTICES,

HON. WALBRIDGE J. FIELD,
HON. CHARLES DEVENS,
HON. WILLIAM ALLEN,

HON. CHAS. ALLEN,
HON. WALDO COLBURN,*
HON. OLIVER WENDELL HOLMES, JR.

JOHN LATHROP, Esq., *Reporter*.

Rollin H. ALLEN, *Petitioner*.
v.
Julia A. A. LIBBEY *et al.*

1. A **tenant in fee** simple of land, subject to a life estate in an undivided half, may maintain a **petition for partition** under the statute against a tenant for life.
2. There is no way in which the value of the **widow's share** can first be set off to her, under this petition, without **making her a party**. It is in the discretion of the court, on her application, to allow her to obtain a partition, and for the court to determine whether a case is shown for the sale of the land.
3. The **petitioner is**, therefore, **entitled** to maintain the petition **against the widow**, as well as against the other respondents, for the half of his interests, in which he has an estate in possession, and the court has authority under the statute to order sale of the land.

(Suffolk ——— Decided September 3, 1885.)

PETITION for partition of land. The case appears in the briefs and opinions.

Mr. A. E. Pillsbury, for petitioner:

The statute under which Mrs. Libbey, defendant, holds half the estate of her late husband for life, is, in effect, a modification of the Statute of Descents, and by virtue of her right as tenant in common with the heirs, she may petition for partition in a common law court. Gen. Stat., ch. 124, sec. 15; Pub. Stat., ch. 124, sec. 3; *Sears v. Sears*, 121 Mass., 267.

The petitioner, a purchaser from certain heirs, is seised but not possessed of one half the lands as reversioner, and is seised and possessed of the other half as tenant in common, and his want of possession in the whole precludes him from proceeding against her. Pub. Stat., ch. 178, sec. 3.

The tenancy in the reversion and the tenancy in the other half, are to be regarded as separate tenancies, and this petition concerns only the

latter. *Taylor v. Blake*, 109 Mass., 513, 518; *Peabody v. Minot*, 24 Pick., 329.

The life estate is not in the nature of an estate in dower unassigned, which, while not a bar to partition among reversioners is not subject to partition with them. *Molloy v. Blake*, 12 Mass., 280; *Ward v. Gardner*, 112 Mass., 42.

Partition may be had by or against a tenant for life. Pub. Stat., ch. 178, secs. 3-5; *Mussey v. Sanborn*, 15 Mass., 155; *Hazard v. Little*, 9 Allen, 260; *Judkins v. Judkins*, 109 Mass., 181.

Even though entitled to her half first set off to her, she is properly made a party, as she would be bound by the partition. Pub. Stat., ch. 178, sec. 5.

The petitioner is entitled to partition of any share to which he appears to be entitled. Pub. Stat., ch. 178, sec. 19.

There are three methods prescribed by statute by which partition may be made. Pub. Stat., ch. 178, secs. 20-26, 65-67.

The statutes expressly confer the right of partition against a homestead estate; Pub. Stat., ch. 123, sec. 11, and the statutory estate in fee, in the lands of a deceased husband or wife. *Id.* Ch. 124, secs. 17, 18.

The commissioners, under order of court, may sell the whole estate and give a good title thereto. Pub. Stat., ch. 178, secs. 65, 66.

Messrs. Sohler and Welch, for respondents:

Under the general statutes, in force at the date of the death of the intestate, his widow was entitled to one half his estate during her life, and if any part taken by her was woodland, she had a right to clear and improve the same. Gen. Stat., ch. 90, sec. 15.

The proper probate court might set off and assign her interest to her, in like manner as dower; Gen. Stat., ch. 90, sec. 17; and by section 3, might set it off by metes and bounds.

The only modification in the law, as it now is, entitles her to \$5,000 in value of real estate in fee, and one half the remaining real estate for life. Stat., 1854, ch. 406; Stat., 1858, ch. 33.

A petition for partition might be maintained by anyone having an estate in possession; but

*Deceased, Sep., 1885.

not by one having only a remainder or reversion, except that such partition shall not prejudice the rights of the lessee. Gen. Stat., ch. 136, sec. 3; Pub. Stat., ch. 178, sec. 3; *Id.*, secs. 67, 68.

The rule that one tenant cannot have partition as to part of the common property, does not apply where there is an outstanding life estate in one parcel, as in case of dower. *Taylor v. Blake*, 109 Mass., 514.

The widow is not a proper party to such proceedings. Her dower cannot be set off by one tenant in common alone, and he can neither commence nor require her to commence proper proceedings for that purpose. *Ward v. Gardner*, 112 Mass., 42.

Proceedings brought by the widow to have her interest set off in the manner in which dower is set off, does not prevent her petitioning to have her life interest set off to her by proceedings in partition, her title is as absolute as if under a devise for life in all the lands of the estate. *Sears v. Sears*, 121 Mass., 267.

W. Allen, J., delivered the opinion of the court:

This is a petition for partition of land, of which Joseph Libbey died seised, brought by a purchaser of the shares of certain of his heirs, against the widow and other heirs. The widow alone defends. Joseph Libbey died childless and intestate, and his widow, by force of the statute, became seised as tenant for life of an undivided half of the land of which partition is sought. *Sears v. Sears*, 121 Mass., 267.

The other respondents and the petitioner hold the entire interest in the land except the life estate of the widow.

The widow could have her part set off in a petition for partition by her. *Sears v. Sears*, *ubi supra*.

The objection made to the maintenance of the partition against her is, that the petitioner has not an estate in possession. This objection goes to the root of the matter and, if valid, will prevent any of the heirs from maintaining a partition against the other heirs as well as against the widow.

If the widow had a life estate in the whole land, the estate of the petitioner would be only in reversion, and he could not have partition; if she had a life estate in an undivided half, with remainder to some person other than the petitioner, it is settled that the petitioner holding an undivided half could maintain the petition against her. *Taylor v. Blake*, 109 Mass., 513.

In this case, the petitioner, claiming the interest of an heir, has an estate in the reversion like all the other heirs, and the question must be decided as if all the other heirs were petitioners, or as if the petitioner were sole heir. The question then may be stated thus: can a tenant in fee simple of land, subject to a life estate in an undivided half, maintain a petition for partition under the statute, against the tenant for life?

We think he can. He has an estate in possession in an undivided half of the land, and an estate in remainder in the other half; expectant, on the termination of the life estate. The tenant for life is entitled to the possession of an undivided half, and the right of possession

of the other half must be in the tenant in fee simple; it can be in no one else.

This unity of possession makes them tenants in common as to their estates in possession, and carries with it the right of partition of such estates. *Taylor v. Blake*, *ubi supra*, and *Hazard v. Little*, 9 Allen, 260, are in point.

It is immaterial as to the estates in possession, whether the estate expectant on the life estate is in the tenant in fee or in some other person. In this case the petition alleges that the petitioner and the respondents other than the widow are seised in fee and are in possession of the whole land in common and undivided, and that the widow has a life estate in an undivided half of the land.

These allegations are inconsistent; as the widow has an estate in possession of one half of the land, the estate of each of the heirs must be one half in possession, and one half in reversion.

As to the estates in possession, the heirs or their assigns and the widow are tenants in common, and each has a right to a partition. The estates in reversion cannot be divided, and must be excluded from the partition. A partition between all of the estates subject to partition would give to the widow one half for her life estate, and divide the other half amongst the other parties in fee in proportion to their interests.

There is no way in which the share of the widow can first be set off to her, under this petition, without making her a petitioner.

It is in the discretion of the court, on her application, to order this petition to be continued, to allow her to obtain partition. It is also for the court to determine whether a case is shown for a sale of the land under Pub. Stat., ch. 178, sec. 65.

The petitioner is, therefore, entitled to maintain the petition against the widow, as well as against the other respondents, for the half of his interest in which he has an estate in possession, and that is for sixty-five six hundredths ($\frac{65}{100}$) of the land, and the court has authority, under the statute, to order a sale of the land.

Decree accordingly.

Leonard MORSE

v.

Irving CURTIS.

A mortgaged land to B, and subsequently gave a second mortgage to C, in which no reference was made to the existence of the first mortgage, although C had actual notice of its existence. C's mortgage was recorded first. B then recorded his mortgage. C assigned his mortgage to D, who took the same in good faith and with no actual notice of the prior mortgage. Held, in a writ of entry, that the title of D was valid; that the record of the first mortgage being made subsequent to that of the second mortgage was not constructive notice to him of its existence.

(Middlesex — Decided September 7, 1885.)

WRIT OF ENTRY. Plea, *nul disseisin*. Henry B. Hall being the owner of certain

premises, conveyed them by a mortgage deed containing a power of sale to the demandant to secure the payment of \$1,000 in ten equal payments of \$100 from the date of the mortgage and interest payable semi-annually, at nine per cent a year. This mortgage deed was made, dated and delivered August 8, 1872, and was recorded Sep. 8, 1876. The said Hall made a second mortgage deed of the same premises to one Edward Clark, Sep. 7, 1875, which was recorded January 31, 1876, and contained no reference to the previous mortgage from Hall, to the demandant. Clark, had, at the time he took the mortgage dated Sep. 7, 1875, actual notice of the said mortgage from Hall to the demandant. The tenant in October, 1881, purchased of Clark the mortgage and the mortgage note from Hall to Clark in good faith, and without notice of the first mortgage. On Oct. 4, 1881, an assignment of the mortgage from Hall to Clark, and of the note and claim thereby secured, was made, executed and delivered by Clark to the tenant, and was recorded in the registry of deeds January 12, 1883. January 9, 1883, the tenant made an entry in due form on the premises for breach of condition of the mortgage, and has been in possession of the premises since that time. The demandant made an entry on the premises Jan. 15, 1883, and had the property sold at public auction, bidding it in himself, his mortgage containing the clause allowing the mortgagee to be the purchaser. The presiding Justice in the Superior Court, upon these facts, directed a verdict for the demandant.

Mr. E. S. Mansfield, for tenant:

In examining a title it is not necessary to search the record as against an antecedent grantor of property, further than the registry of a deed duly executed by him; and a purchaser under the grantee will not be affected with notice of a prior deed, subsequently recorded, but before the period of his purchase. *Connecticut v. Bradish*, 14 Mass., 296; see, 2 White & T. L. Cas. Eq., 180, 3d Am. ed.; *Trull v. Bigelow*, 16 Mass., 419; *Webster v. Maddox*, 6 Me., 256; *Hewes v. Wiswell*, 8 Me., 94; *Tuttle v. Jackson*, 6 Wend., 213; *Flynt v. Arnold*, 2 Met., 619.

The fact of the interest on the mortgage note, secured by the mortgage purchased by the tenant in good faith for value and without notice, actual or constructive, of the prior mortgage, being then overdue, raises no equity in favor of the demandant. See, *Stansell v. Roberts*, 13 Ohio, 143; *Mayham v. Coombs*, 14 Id., 428; *Jackson v. Luce*, Id., 514; *Holliday v. Franklin Bank*, 16 Id., 533; *Lewis v. U. S.*, 92 U. S., 618 (XXIII., Law. ed., 513).

Mr. P. H. Cooney, for demandant:

The tenant cannot hold in the right of his assignor who took his mortgage deed with actual notice of demandant's prior mortgage; and he cannot hold in his own right, because when he took the assignment the demandant's mortgage was on record, and was constructive notice to him, the only notice required by the statute, in order to make the conveyance valid against all persons. *Flynt v. Arnold*, 2 Met., 619; *Adams v. Cuddy*, 13 Pick., 460; *Ford v. White*, 16 Beav., 120; *Bond v. Bond*, 7 Allen, 6; *Cleveland v. Bost. Five Cent Sav. Bk.*, 129 Mass., 37.

Such is the rule established in New York by numerous decisions. *Fort v. Burch*, 5 Den., 187; *Van Rensselaer v. Clark*, 17 Wend., 25; *Goelst v. McManus*, 1 Hun, 306; *Westbrook v. Gleason*, 79 N. Y., 23; *Jackson v. Post*, 15 Wend., 588; *Schutt v. Large*, 6 Barb., 373; *Ring v. Steele*, 3 Keyes, 450.

Such, also, is the rule finally established in Wisconsin, in *Fallas v. Pierce*, 30 Wis., 443; a case four times argued before the court, and in which an earlier case, *Ely v. Wilcox*, 20 Wis., 523, was overruled; see, also, *Erwin v. Lewis*, 32 Wis., 276.

The same rule has been established in Iowa. *English v. Waples*, 13 Iowa, 57; *Sims v. Hammond*, 33 Iowa, 368; and also in Illinois. *Bayles v. Young*, 51 Ill., 127. Also in California. *Mahoney v. Middleton*, 41 Cal., 41.

The same rule is laid down in the text books. 8 Washb. Real Prop., 3d ed., 291, 299; Jones, Mort., 3d ed., secs. 474, 475; 2 Pomeroy, Eq. Jur., sec. 760; Malone, Real Prop. Trials, 443, 444.

The cases of *Connecticut v. Bradish*, 14 Mass., 296, and *Trull v. Bigelow*, 16 Mass., 418, relied on by tenant, are no longer entitled to the weight of authority. *Flynt v. Arnold*, 2 Met., 619.

Neither the good faith nor value paid by the tenant for the mortgage is in itself any reason for depriving the demandant of his legal rights. The tenant is bound to take the whole registry if he relies on it at all, and the provision in the statute which he is presumed to know. See, *Ford v. White*, 16 Beav., 120; *Shaw v. Spencer*, 100 Mass., 332; *Bancroft v. Consen*, 13 Allen, 50; *Sturtevant v. Jaques*, 14 Allen, 523; *Connihan v. Thompson*, 111 Mass., 270; *Hayward v. Cain*, 110 Mass., 273.

The purpose of the provisions of the registry law cannot be defeated by a failure to search the record for knowledge important to the party purchasing. *Neelin v. Wells*, 104 U. S., 433 (XXVI., Law. ed., 804).

An assignee of a negotiable note, underdue, takes it discharged of equities attached to it in the hands of the original holder; but if non-negotiable or overdue, he stands in no better position than his assignor. *Wilcox v. Foster*, 132 Mass., 320, and cases there cited; *Taylor v. Page*, 6 Allen, 86; *Bush v. Lathrop*, 22 N. Y., 535; *Decker v. Boice*, 83 N. Y., 215; *Westbrook v. Gleason*, 79 N. Y., 23; *Schafer v. Reilly*, 50 N. Y., 61; 2 Pomeroy, Eq. Jur., sec. 714; 1 Jones, Mort., secs. 843-845.

The rule in equity under the recording Acts is also the rule of law as to notice of the equitable rights of a prior purchaser or mortgagor. *Jackson v. Burgott*, 10 Johns., 457; *Tuttle v. Jackson*, 6 Wend., 213; *Vinton v. King*, 4 Allen, 562, and cases cited.

Morton, Ch. J., delivered the opinion of the court:

This is a writ of entry. Both parties derive their title from one Hall. Hall mortgaged the land to the demandant August 8, 1872.

On September 7, 1875, Hall mortgaged the land to one Clark, who had notice of the earlier mortgage. The mortgage to Clark was recorded January 31, 1876. The mortgage to the demandant was recorded September 8, 1876. On October 4, 1881, Clark assigned his mortgage to the tenant who had no notice of the

mortgage to the demandant. The question is, which of these titles has priority? The same question was distinctly raised and adjudicated in the two cases of *Connecticut v. Bradish*, 14 Mass., 296, and *Trull v. Bigelow*, 16 Mass., 406.

These adjudications establish a rule of property which ought not to be unnoticed except for the strongest reasons. It is true that, in the late case of *Flynt v. Arnold*, 2 Met., 614, Chief Justice Shaw expresses his individual opinion against the soundness of these decisions; but in that case the decision of the court was distinctly put upon that ground, and his remarks can be only considered in the light of *dicta* and not as overruling the earlier adjudications.

Upon careful consideration, the reasons upon which the earlier cases were decided seem to us the more satisfactory because they follow the spirit of our registry laws and the practice of the profession under them. The earliest registry law provides that no conveyance of land shall be good and effectual in law "against any other person or persons but the grantor or grantors and their heirs only, unless the deed or deeds thereof be acknowledged and recorded, in manner aforesaid." Stat. 1783, ch. 37, § 4. Under this statute, the court, at an early period, held that the recording was designed to take the place of the notorious act of livery of seisin, and that though by the first deed the title passed out of the grantor as against himself, yet he could, if such deed was not recorded convey a good title to an innocent purchaser who received and recorded his deed. But the court then held that a prior unrecorded deed would be valid against a second purchaser, who took his deed with a knowledge of the prior deed, thus engrafting an exception upon the statute. 3 Mass., 575; *Marshall v. Fisk*, 6 Mass., 24.

This exception was adopted on the ground that it was a fraud in the second grantee to take a deed if he had knowledge of the prior deed. As Chief Justice Shaw forcibly says, in *Lawrence v. Stratton*, 6 Cush., 163, the rule is "Put upon the ground, that a party with such notice could not take a deed without fraud; the objection was not to the nature of the conveyance, but to the honesty of the taker; and therefore, if the estate had passed through such taker to a *bona fide* purchaser without fraud, the conveyance was held valid."

This exception by judicial exposition was afterwards engrafted upon the statute and somewhat extended, by the Legislature. R. S. 59, p. 28; Gen. Stat., ch. 59, sec. 31; Pub. Stat., ch. 120, sec. 4.

It is to be observed that in each of these revisions it is provided that an unrecorded prior deed is not valid against any person except the grantor, his heirs and devisees, "and persons having actual notice of it." The reason why the statutes require actual notice to a second purchaser in order to defeat his title is apparent; its purpose is that his title shall not prevail against the prior deed, if he has been guilty of a fraud upon the first grantee, and he could not be guilty of such fraud unless he had actual notice of the first deed.

Now in the case before us, it is found as a fact, that the tenant had no actual knowledge

of the prior mortgage to the demandant at the time he took his assignment from Clark. But it is contended that he had constructive notice because the demandant's mortgage was recorded before such assignment. It was held, in *Connecticut v. Bradish*, *supra*, that such record was evidence of actual notice, but was not, of itself, enough to show actual notice, and to charge the assignee of the second deed with a fraud upon the holder of the first unrecorded deed. This seems to us to accord with the spirit of our registry laws and the uniform understanding of and practice under them by the profession.

These laws not only provide that deeds must be recorded, but they also prescribe the method in which the records shall be kept and indexes prepared for public inspection and examination. Pub. Stat., ch. 24, §§ 14-26. There are indexes of grantors and grantees, so that in searching a title the examiner is obliged to run down the list of grantors or run backward through the list of grantees. If he can start with an owner who is known to have a good title, as in the case at bar he could start with Hall, he is obliged to run through the index of grantors until he finds a conveyance by the owner of the land in question. After such conveyance the former owner becomes a stranger to the title, and the examiner must follow down the name of the new owner to see if he has conveyed the land, and so on. It would be a hardship to require an examiner to follow in the index of grantors the name of every person who at any time, through, perhaps, a long chain of title, was the owner of the estate.

We do not think this is the practical construction which lawyers and conveyancers have given to our registry laws. The inconvenience of such a construction would be much greater than would be the inconvenience of requiring a person who has neglected to record his prior deed for a time, to record it and to bring a bill in equity to set aside the subsequent deed, if it was taken in fraud of his rights. The better rule, and the least likely to create confusion of titles, seems to us to be that, if a purchaser, upon examining the registry, finds a conveyance from the owner of the land to his grantor which gives him a perfect record title complete by what the law at the time it is recorded regards as equivalent to a livery of seisin, he is entitled to rely upon such recorded title, and is not obliged to search the record afterward made to see if there has been any prior unrecorded deed of the original owners.

This rule of property, established by the early case of *Connecticut v. Bradish*, *supra*, ought not to be departed from unless conclusive reasons therefor can be shown. We are, therefore, of opinion that, in the case at bar, the tenant has the better title.

Verdict set aside.

Henry W. LAMB, *Appt.*,

OLD COLONY RAILROAD CO.

1. Where the ruling excepted to was, that upon the whole evidence plaintiff could not recover, and the evidence is

not stated in the exception to such ruling and it does not appear upon what ground the ruling was placed nor what questions of law were intended to be presented, and no ruling was asked or given, in relation to what plaintiffs claimed the evidence tended to prove, the question of the **sufficiency of the facts** claimed to be proved is not before the court.

2. A **railroad company** has a right to run its train on its railroad adjoining the highway and is **not responsible to travelers** on the highway for the consequences of noise, vibration or smoke caused by the prudent running of its trains which is ordinarily incident to the moving of the train, and not of itself evidence of negligence.
3. The **firing up of the engine** and consequent generation of dense black smoke from the smoke stack, is one of the **ordinary and necessary incidents** of running the train, against which travelers on the highway must guard themselves.

(Suffolk——Decided September 3, 1885.)

THIS is an action of tort to recover damages for a personal injury alleged to have been occasioned by the negligence of the defendant.

The case is sufficiently stated in the opinion: **Messrs. J. G. Abbott and George A. Sawyer**, for the plaintiff:

A railroad authorized to take land and construct its railway upon it, the line crossing a natural stream, is bound to exercise due care and diligence, not to obstruct the stream more than is absolutely necessary for the passage of the railway. *Blood v. Nashua & L. R. R. Co.*, 2 Gray, 137; *Proprietors of Locks, etc., v. Nashua & L. R. R. Co.*, 10 Cush., 385; *Perry v. Worcester*, 6 Gray, 544.

Legislative sanction defines what must be accepted as a reasonable use of property and exercise of rights on the part of the railroad company, subject always to the qualification that the business must be carried on without negligence, or unnecessary disturbance of the rights of others. *Sawyer v. Davis*, 136 Mass., 239, 242.

The sanction of the Legislature carries with it this consequence: that if damage results from the use of such thing, independent of negligence, the party using it is not responsible. *Vaughan v. Taff Vale R. Co.*, 5 H. & N., 679, 685.

But for injuries occasioned by negligence, railroad companies, like natural persons, are responsible; nor is any excuse that the act was in itself lawful, or was done in the exercise of lawful right. *Penn. R. R. Co. v. Barnett*, 59 Pa. St., 259, 264.

There still remains the duty of so managing and operating them, as to do the least possible injury consistent with the fair attainment of their substantial benefit. *The Nevada*, 106 U. S., 158-9 (XXVII., Law. ed., 151).

So in the case of fire set by locomotives; a greater or less degree of diligence is required, according to the greater or less danger of communicating fire to the adjacent property. *Pero v. Buffalo R. R. Co.*, 22 N. Y., 209; *Kelsey v. Barney*, 12 N. Y., 425; *Webb v. R. R. Co.*, 49

N. Y., 420; *Wasmer v. Delaware, etc., R. R. Co.*, 80 N. Y., 212; *Voak v. Northern, etc., R. R. Co.*, 75 N. Y., 320; *Indianapolis, etc., R. R. Co. v. McBrown*, 46 Ind., 229; *Smith v. London, etc., R. R. Co.*, L. R., 6 C. P., 14.

The result of all the cases is, that everything must be done by a railroad company, in the exercise of any power or privilege granted to it by law, that reasonably can be done, to prevent injury to others. *Philadelphia R. R. Co. v. Stinger*, 78 Pa. St., 219; *Sneeshy v. R. R. Co.*, L. R., 9 Q. B., 263; *Hill v. R. R. Co.*, 55 Me., 488; *Gibbs v. Chicago, etc., R. R. Co.*, 26 Minn., 427; *Billman v. R. R. Co.*, 76 Ind., 166; *Hudson v. R. R. Co.*, 18 The Reporter, 429 (Ky.); *R. R. Co. v. Killip*, 7 The Reporter, 440 (Pa.); *Pollock v. East. R. R. Co.*, 124 Mass., 158; *Bradley v. Bos. & Me. R. R. Co.*, 2 Cush., 538; *Eaton v. Fitchburg R. R. Co.*, 129 Mass., 384; *Tycomb v. R. R. Co.*, 12 Allen, 254; *Norton v. R. R. Co.*, 113 Mass., 866; *Jones v. R. R. Co.*, 107 Mass., 261; *Shearman & Redf., Negligence*, sec. 486; *Manchester, etc., R. R. Co. v. Fullerton*, 14 C. B. (N. S.), 54.

Thus it was held in England that the blowing of steam through the mud-cocks, an absolutely necessary and indispensable act, if done near a public highway frequented by travelers with horses, was negligence that made the corporation liable for an injury by frightening horses. *Manchester, etc., R. R. Co. v. Fullerton*, 14 C. B. (N. S.), 54.

In the use of a common privilege, where there is a possibility of interference, each is bound to bring to the use of such privilege such reasonable degree of foresight, skill, capacity and actual care and diligence, as may be necessary to enable it to use the privilege with due regard to the safety of all others using like precautions, skill and care. *Shaw, C. J.*, in *Shaw v. B. & W. R. R. Co.*, 8 Gray, 66-7.

Mr. J. H. Benton, Jr., for defendant:

Travelers on the highway must take care to avoid any exposure that might be occasioned by the frightening of horses or other casualties occasioned by the noise of cars or escape of steam. *Tycomb v. Fitchburg R. R. Co.*, 12 Allen, 254, 260, 261.

The rule which governs in the exercise of a common privilege, and which is not essentially distinct in its nature from that which governs in case of contract relations, does not apply in such a case. *Shaw v. B. & W. R. R. Co.*, 8 Gray, 45-66.

The defendant being authorized to use steam on its road, the smoke from its engines is indispensable, and it is not liable for mere accidents arising from fright to horses occasioned by it. *Burton v. R. R. Co.*, 4 Harr. (Del.), 253.

The same rules should be applied as in other cases of the use of its location; where the corporation is held, in the exercise of an honest discretion, it is to be the sole judge of what is necessary. *Brainard v. Clapp*, 10 Cush., 11.

There was no evidence and no claim that the engine was not fixed in the ordinary manner and the court might properly refuse to submit to the jury the question whether such firing in the ordinary manner was negligence. *Phil. Wilm. & B. R. R. Co. v. Stinger*, 78 Pa. St., 218-227; *Flint v. Norwich & W. R. R. Co.*, 110 Mass., 222; *Norton v. Eastern R. R. Co.*, 113 Mass., 866; *Favor v. B. & L. R. R. Co.*, 114

Mass., 350; *Hahn v. S. P. R. R. Co.*, 51 Cal., 605.

W. Allen, J., delivered, the opinion of the court:

As the plaintiff was driving his horse along a highway parallel to and adjoining the defendant's railroad, his horse was frightened by the smoke from the engine of a train passing on the railroad in a direction opposite to that in which the plaintiff was going and the plaintiff was injured in consequence.

After the plaintiff's evidence was all in, the court ruled that there was no evidence for the jury, and the plaintiff excepted to the ruling.

The evidence is not stated in the exceptions but a full report of it is annexed to them. It does not appear upon what ground the ruling was placed or what questions of law were intended to be presented. It is not a case where a single question of fact, involving a single proposition of law is presented upon evidence stated in the exceptions; but all the testimony applicable to distinct questions of fact and involving in its application distinct propositions of law, is sent to us to examine and discover upon what questions and for what reason it was ruled or may be now held that the evidence was insufficient to prove the plaintiff's case. Nearly the whole bill of exceptions is taken up with statements of what the plaintiffs claimed the evidence tended to prove. No ruling was asked or given in relation to this.

As the rulings and exceptions are to the insufficiency of the evidence, the question of the sufficiency of the facts claimed by the plaintiff to be proved is not before us. The ruling was that upon the whole evidence the plaintiff could not recover. We think that this ruling was right, because the evidence was not sufficient to prove that the defendant was negligent. The defendant had a right to run its trains on its railroad adjoining the highway and was not responsible to travelers in the highway for the consequences of noise, vibration or smoke caused by the prudent running of its trains. *Flavor v. Boston & Lowell R. R. Co.*, 114 Allen, 850.

The smoke which frightened the plaintiff's horse was occasioned by firing up the engine; that is, mending the fire or adding coal to it, the ordinary effect of which is to occasion the emission for a short time of very black, dense smoke from the smoke stack. The plaintiff contended that there was evidence that it was practicable to run the train for the whole distance where the railroad adjoined the highway without firing up; and that the act of firing up in the stretch of railroad adjoining the highway was unnecessary for the ordinary running of trains and exposed travelers to an unnecessary danger and was, therefore, negligent, and might be found such by a jury.

Without considering the proposition of law involved, we think the court below might properly have ruled that there was no evidence to sustain the proposition of fact. The evidence showed that frequent firing up was necessary for the practicable running of trains. The exceptions state that the plaintiff also offered evidence which he claimed tended to prove, "That an engine drawing a train of cars could

be run from one half a mile to a mile without firing up, and that if any space of one half or three quarters of a mile was known in advance, where it was not desirable to fire up, it was entirely feasible and within the power of the engineer or fireman, to so arrange his firing as not to make it necessary to fire up in such a space, and to make such arrangements without interfering with the working of the engine, and that a quarter of a minute or a few seconds difference in the time of firing up could make no material difference in the running of the engine."

The evidence was uncontradicted that the railroad and highway were adjoining each other for more than a mile and that it would not be practicable to fire up immediately before entering upon that space, and that it would be necessary in the ordinary running of trains to fire up somewhere upon that space. Under such circumstances, the firing up near the highway and the smoke occasioned by it was an ordinary incident of moving the train, as much so as the smoke when not firing up, or the noise or vibration caused by the cars, was not of itself evidence of negligence. The plaintiff argues that even if it was necessary to fire up when running near the highway, it was not necessary to do so at the particular point where he was, and that the defendant was negligent in not observing him and avoiding firing up when it would endanger him. There was no evidence that the defendant's servants knew that the plaintiff was in the highway; but there was evidence that they would have seen him if they had been on the lookout for travelers on that part of the highway. If it was their duty to be on the watch for persons in the highway, and to avoid firing up when near them, there was evidence of negligence. The act of firing up, like that of sounding the whistle or blowing off steam, is one necessarily incident to the running of trains, not continuous, but occasional and so to some extent capable of being regulated in its use; and it may be negligent to do it in places where there are likely to be persons who may be endangered by it, and when its use can be avoided as at stations and highway crossings and in short portions of the railroad near a highway.

But we think the right to fire up an engine at any particular place must depend upon the character of the place, and not whether there happens to be a person near at the moment. If the defendant had a right to fire up its engine somewhere within the space where its road adjoins the highway, the firing up there is one of the ordinary and necessary incidents of running the train, against which travelers on the highway must guard themselves. The lawfulness of the act cannot depend upon whether a traveler happens to be at such a distance from the engine that he will not be endangered by the smoke caused by it, or in such a position that he cannot be seen by the fireman or the engineer. If it is their duty to see one traveler outside the locomotive of the railroad, it is their duty to see how many travelers are there, and to observe the position, direction and speed of each, the speed of the engine, the state of the atmosphere, the direction and force of the wind, the character of the coal used, and other circumstances which may determine whether all travelers are and will continue to be, until

the smoke shall be dissipated, in such positions that their horses will not be affrighted by it. Being under no obligation to watch for travelers in the highway, the defendants could not have been guilty of negligence in not seeing and avoiding the plaintiff.

Exceptions overruled.

Abraham BURBANK

v.

Charles W. CHAPIN.

1. In a suit by an innkeeper against a guest for accommodations, the guest can recoup for articles stolen from his room if the loss was not attributable to the failure of the guest to comply with the reasonable regulations of the inn.

2. The Pub. Stats., ch. 102, sec. 16, relieve an innkeeper from liability for only such loss by the guest as is actually attributable to non-compliance with the regulations; evidence merely of non-compliance, will not exonerate the innholder.

(Berkshire ——— Decided, September 21, 1885.)

CONTRACT.—This was an action of contract brought by the plaintiff, an innkeeper, against the defendant to recover for board and accommodations at his inn. The defendant who had certain articles of clothing stolen from his room at the inn, seeks to recoup in this action for the loss of the same.

At the trial before the court without a jury, the presiding justice ruled that the defendant could not recoup and gave plaintiff judgment for the full amount of his claim. Defendant excepts.

The facts found at the trial, and the rulings requested and refused, fully appear in the opinion.

Mr. John F. Noxon, for plaintiff:

The defendant must show that his property was lost while it was in the custody of the landlord, and while he was in the exercise of due care; both these facts are to be determined by all the circumstances of the case. Story, Bailm.,

sec. 488; *Oppenheim v. White Lion Hotel Co.*, L. R., 6 C. P., 515; *Purvis v. Coleman*, 21 N. Y., 116; *Piper v. Manny*, 21 Wend., 284; *Burges v. Clements*, 4 Maule & S., 306.

The regulation regarding locking the door and leaving the key at the office was reasonable; the defendant had knowledge of it and assented to it, and it became a part of the contract between the parties, and he was bound by it independently of the statute. *Grace v. Adams*, 100 Mass., 507; *Judson v. Western R. R. Corp.*, 6 Allen, 493; *Calve's Case*, 8 Coke, 82; *Piper v. Manny*, *supra*.

The facts being found, the court had the right, as matter of law, to rule that such facts constituted that degree of negligence as would defeat the defendant's claim. *Gavett v. Manchester & L. R. R. Co.*, 16 Gray, 507; *Trow v. Vt. Cen. R. R. Co.*, 24 Vt., 497.

The defendant being guilty of negligence cannot recover. *Murphy v. Deane*, 101 Mass., 455; 1 Pars. Cont., 624.

Mr. E. M. Wood, for defendant:

Innkeepers, like common carriers, are regarded as insurers, and answerable for injury or loss upon the property of their guests committed to their care, when not caused by the act of God or the neglect or fault of the owner. *Mason v. Thompson*, 9 Pick., 283.

This rule is only modified by statute in certain well defined particulars. Pub. Stat., ch. 102, secs. 12, 16.

They are required to have a printed copy of sections 12, 13, 24 of chap. 102, posted in a conspicuous place in each room in the inn. Pub. Stat., ch. 102, sec. 14.

"A guest at an inn is not bound to keep his door locked at all times, to entitle him to recover for a robbery." *Buddenberg v. Benner*, 1 Hilt., N. Y., 84.

And although he is provided with the key to his room, on retiring for the night, and does not lock the door, yet if his watch is stolen the innkeeper is liable for the loss. *Classen v. Leopold*, 2 Sweeney (N. Y.), 705.

Primarily, the innkeeper is responsible for the loss, and he must show contributory negligence on the part of the guest. *Fowler v. Dorlon*, 24 Barb., 384.

In a case of loss of goods of the guest, there is a presumption of want of proper diligence

NOTE.—Innkeeper's liability.—An innkeeper, like a common carrier, is liable as insurer, for the property of his guest. 2 Kent, Com., 584; Story, Bail., sec. 483; *Mateer v. Brown*, 1 Cal., 221.

He is liable at common law for theft. 2 Story, Contr., § 909.

Unless the negligence of the guest conduced to the loss. Id.

There is default in the innkeeper whenever there is a loss not arising from the guest's negligence. *Morgan v. Raney*, 6 Hurl. & N., 265; *Sassen v. Clark*, 3 Ga., 242; *Pinkerton v. Woodward*, 33 Cal., 557; *Cheesborough v. Taylor*, 12 Abb. Pr., 27; *McDonald v. Edgerton*, 5 Barb., 560; *Grinnell v. Cook*, 8 Hill, 486; *Wilkins v. Earle*, 44 N. Y., 172; *Fuller v. Costa*, 18 Ohio St., 343; *Jalie v. Cardinal*, 35 Wis., 118.

It is not necessary that the goods should be placed in the special keeping of the innkeeper; if they were within the inn it is enough. *Norcross v. Norcross*, 53 M., 168; *Burrows v. Trier* 21 Md., 320; *McDonald v. Edgerton*, 5 Barb., 560; *Packard v. Northcraft*, 2 Met. Ky., 459; *Bennett v. Mellor*, 5 T. R., 23; 2 Kent, Com., 583.

They are not bound to receive and keep property

of a person who is neither a traveler nor a guest. *Grinnell v. Cook*, 3 Hill, 485.

They are responsible for the well and safe-keeping and custody of the goods and chattels of their guests, and even the absence of negligence will not exempt them from liability. *Shaw v. Berry*, 31 Me., 478.

They are liable for the loss of goods of a boarder, only where they have been guilty of culpable negligence. *Manning v. Wells*, 5 Humph., 746.

Either case or *assumpsit* lies for the loss of baggage through negligence of the innkeeper. *Dickins v. Winchester*, 4 Cush., 114.

An innkeeper is liable for money stolen from his guest, the guest himself not having been negligent, and there being no evidence to show how or by whom it was stolen. *Dunbler v. Day*, 12 Neb., 596.

The liability of the innkeeper for money, etc., is not limited to what is reasonably necessary for traveling. *Berkshire Wool Co. v. Proctor*, 7 Cush., 417; *Wilkins v. Earle*, 44 N. Y., 172.

Who is a guest.—Is insurer of goods of a traveler who is his guest, but not of others. *Lusk v. Belote*, 22 M., 468.

The relation of guest does not depend on the time

by the landlord. *Johnson v. Richardson*, 17 Ill., 303; *Hill v. Owen*, 5 Blackf., 323.

When property has been stolen from a guest at an inn the innkeeper is liable, unless the guest has contributed by his own negligence to the loss; but not locking the door is not such negligence. *Filsipowski v. Merryweather*, 2 F. & F., 285; 5 Jacob & Fischer's Dig., col., 6538.

There is no obligation on the part of the guest at an inn, to lock or fasten the door of the room in which he sleeps; and the omission to do so, does not discharge the innkeeper from his liability to answer for goods of the guest stolen from the room in which he sleeps. *Mitchell v. Woods*, 16 L. T. (N. S.), 676; 5 Jacob & Fischer's Dig., col., 6539.

An innkeeper, although guilty of no negligence, but even diligent, is liable for the loss or injury of the goods of his guest, not arising from the negligence of the guest, the act of God, or the public enemy. *Morgan v. Ravey*, 6 H. & N., 265; 5 Jacob & Fischer's Dig., col., 6538.

Courts have been disposed to extend to the greatest length compatible with the rights of parties, the principle allowing evidence in defense or in reduction of damages, rather than to compel the defendant to resort to his cross action. *Harrington v. Stratton*, 22 Pick., 517; *Dorr v. Fisher*, 1 Cush., 271; *Lothrop v. Otis*, 7 Allen, 435.

It is not necessary that the opposing claims should be of the same character, in order that they may be adjusted in one action by recoupment. *Henion v. Morton*, 2 Ashm. (Pa.), 150; *Streeter v. Streeter*, 48 Ill., 155; *Carey v. Guilfoyle*, 105 Mass., 18; 7 Wait, Act. & Def., 547.

In order to be a subject of recoupment, the defendant's claim must arise out of the cause of action involved in plaintiff's suit. *Hubbard v. Rogers*, 64 Ill., 484.

Morton, Ch. J., delivered the opinion of the court:

the traveler remains, or on the contract to pay. *Jalie v. Cardwell*, 35 Wis., 118.

It is instantly established when he is received. *Jalie v. Cardwell*, 35 Wis., 118.

One coming to an inn as a traveler is presumed to continue such till the contrary appears. *Lusk v. Belote*, 22 M., 468. *Jalie v. Cardwell*, 35 Wis., 118.

It is not necessary that one should have food and lodgings to be a guest; the purchase of liquor makes him a guest, and if he is robbed while drinking the innkeeper is liable. *Bennett v. Mellor*, 5 T. R., 273; *McDonald v. Edgerton*, 5 Barb., 590; *Clute v. Wiggins*, 14 Johns., 176; 2 Kent, Com., 593.

Boarders are not travelers. *Lusk v. Belote*, 22 M., 468.

Regular boarders by the week are not guests. *Johnson v. Reynolds*, 3 Kan., 237.

Whether plaintiff is a guest or a boarder is a question for the jury. *Jalie v. Cardwell*, 35 Wis., 118.

The payment of a stipulated sum per week does not change the relation from that of guest to that of lodger. *Lima v. Dumelle*, 7 Alb. L. J., 44; *Betts v. Salisbury*, 12 Alb. L. J., 337; *Berkshire v. Wool*, Co. v. Proctor, 7 Cush., 417; *Hall v. Pike*, 100 Mass., 466; *Norcross v. Norcross*, 53 Me., 168.

In order to recover there must be some evidence that at the time of the loss plaintiff was a guest. *Strauss v. County Hotel and Wine Co.*, 49 L. T. Rep. (N. S.), 601.

Where a guest pays his bill and has his name stricken from the register, but leaves his valise in his room with a friend and it is stolen, the innkeeper is not liable. *Miller v. Peeples*, 60 Miss., 819; *Jelly v. Clerk*, Cro. Jac., 188.

Notice.—Unless brought home to the guest, will not absolve the innkeeper from liability. *Olson v. Crossman*, 31 M., 222.

The only question which appears to have been raised at the trial is, whether the plaintiff who is an innholder is liable for the value of certain wearing apparel of the defendant, which was stolen from his room while he was a guest at the plaintiff's inn. The case was tried by the presiding justice of the superior court without a jury. He found as facts, that the plaintiff was an innholder; that the defendant was a guest at the inn; that two coats of the defendant were stolen from his room; that before the theft certain printed regulations were posted in the rooms of the inn, one of which is in these words: "Lock the door when going out and leave the key at the office;" that the defendant knew of this regulation, that on the occasion when the coats were stolen he did not leave his key in the office, and that the regulation was a reasonable one. He thereupon ruled as a matter of law, that the defendant having failed to leave his key at the office at the time of the loss of the goods, he could not recover by way of recoupment for their value.

The defendant asked the court to rule that notwithstanding the printed regulation, the defendant could recover unless it should appear that the loss was occasioned by reason of the defendant's having failed to comply with said regulation, which the court refused. Construing the two rulings together, it appears that the learned judge intended to rule as a matter of law, that if the defendant knew of the regulation and failed to comply with it, the plaintiff was exonerated from responsibility, without any inquiry into the question whether the loss was attributable to the failure to comply with the regulation. We are of opinion that this is erroneous.

At common law, innholders, like common carriers, are regarded as insurers of the property committed to their care and are liable for any loss if not caused by the act of God, or by a public enemy, or by the neglect or fault of the guest. *Mason v. Thompson*, 9 Pick., 280; *Berk*

An innkeeper, keeping a safe, is not liable for loss of the guest's watch, if not deposited therein. *Stewart v. Parsons*, 24 Wis., 241.

Contributory negligence of the guest defeats recovery. *Jalie v. Cardwell*, 35 W., 118.

The innkeeper is excused by the guest's negligence, inevitable accident or superior force. *Jalie v. Cardwell*, 35 Wis., 118.

The negligence on the part of a guest which will relieve the innkeeper, must be gross. *Armistead v. Wilde*, 17 Q. B., 261.

If negligence of the guest contributes to the loss, it will excuse. *Chamberlain v. Masterton*, 26 Ala., 371; *Kelsey v. Berry*, 42 Ill., 469; *Fowler v. Dorlon*, 24 Barb., 384; *Hadley v. Upshaw*, 27 Tex., 547; *Hawley v. Smith*, 25 Wend., 642.

A guest consenting to be placed to sleep in a room with a stranger guest, is not guilty of negligence if his goods are stolen. *Olson v. Crossman*, 31 M., 222.

The mere fact of the guest omitting to lock his door is not of itself negligence, but an element to be considered with other facts. *Oppenheim v. White Lion Hotel Co.*, L. R., 6 C. P. 515; *Spice v. Bacon*, 36 L. T. (N. S.), 886; there being no duty on the guest to lock his door. *Mitchell v. Woods*, 16 L. T. (N. S.), 676.

It is error for the court to charge that it was the duty of the guest to lock his door, the question being for the jury. *Bohler v. Owens*, 60 Ga., 185; such omission does not relieve the innkeeper from liability. *Clason v. Leopold*, 2 Sweeney, 705.

The giving a key to a guest to lock his door, will not dispense with care on the part of the landlord. *Burgess v. Clements*, 4 Maule & S., 311; the object in giving him the key to his chamber, is to enable him to secure his own privacy at his pleasure. *Calve's Case*, 8 Coke, 32.

shire Woolen Co. v. Proctor, 7 Cush., 417. Our statutes have in some respects limited this extreme liability; Pub. Stat., ch. 102, secs. 12 to 16. Among other things, they provide that an innholder against whom a claim is made for loss sustained by a guest, may in all cases show that such loss is attributable to the negligence of the guest himself or to his non-compliance with the regulations of the inn, if such regulations are reasonable and proper and are shown to have been duly brought to the notice of the guest by the innholder. Pub. Stat., ch. 102, secs. 8 to 16.

The statute exonerates an innholder from his common-law liability for a loss sustained by a guest who has knowingly failed to comply with a reasonable regulation of the inn, if the loss is attributable to such non-compliance. The ruling of the superior court went further, and ruled that an innholder is exonerated by the fact of such non-compliance without any inquiry into the question whether the loss is attributable to such non-compliance.

The question is not whether an innholder may make an express contract with a guest, limiting his liability, but what contract will the law imply against the guest who fails to comply with a known regulation of the inn. The law will not imply a contract more extreme than the terms of the statute, and in a case like the one before us, in the absence of any express contract, an innholder is relieved from liability for a loss only where, in the words of the statute, such loss is attributable to the non-compliance with the regulations of the inn.

Exceptions sustained.

Mary A. HALEY *et al.*, *Exrs.*, *Plffs.*,
v.

Boston BELTING CO. *et al.*

The owner of a warehouse leased it, under seal, for a term of years individually to T., who was the treasurer of a manufacturing corporation not referred to in the lease, but which had authorized T., "to hire and pay for all necessary stores and warehouses," and which immediately went into possession, this being the intention of all the parties. T. underlet the building to other parties to whom the corporation surrendered possession. T. became bankrupt, and his assignees elected not to assume the lease. Upon a bill in equity by the lessor's representatives seeking to charge the corporation on the covenants of the lease as the beneficiary, it did not appear that the corporation ever did business in T.'s name or used his name as describing itself. Held, that the corporation's occupancy must be deemed to have been intended by the parties to be under T., and therefore the bill could not be maintained against the corporation; that the rent due from the sub-lessees at the time of T.'s bankruptcy belonged to T.'s assignees; and that the plaintiffs could recover, in equity, from the sub-lessees that which accrued subsequently.

(Suffolk — Decided September 3, 1885.)

IN EQUITY. Bill filed August 15, 1879, by the executors of the will of Charles L. Haley, seeking to hold a manufacturing corporation responsible as the party beneficially interested in, or as equitable assignee of, a lease of an estate in Boston, made by Haley to John G. Tappan as lessee. The treasurer and the manager of the corporation and certain sub-lessees of Tappan were also made parties defendant. Colburn, J., reserved the case for the consideration of the full court, upon the bill and answers, the master's report and the exhibits accompanying.

The master's original report, filed January 19, 1884, set forth, in substance, the following findings: Charles L. Haley died on August 4, 1877, leaving a will under which the plaintiffs are legal trustees of an estate on the northeasterly corner of Bedford and Chauncy Streets, Boston. On December 8, 1871, Haley executed, under seal, a lease of said premises to John G. Tappan (individually), for a term of ten years from January 1, 1882, at an annual rent of \$6,500 and the taxes, payable \$1,625, at the end of each quarter. On said December 8, 1871, and until July 15, 1878, Tappan was the treasurer of a Corporation styled the Boston Belting Company, having its usual place of business in Boston, and a capital of \$500,000, divided into five thousand shares, whereof, in January 1871, he held 1545 in his own right and two hundred and thirty-two as trustee; his children held one hundred and two, his brother two hundred and eighty; his sister, nephew and nephew's wife one hundred and twenty; making a total of 2279 shares. In 1878, Tappan and his relatives held 3214 shares thereof. Tappan, his brother and Henry F. Durant were the directors of the Corporation from 1867 to 1878. The original Company incorporated in 1845 (as the Good-year Rubber Company), by an agreement and power of attorney, under seal, dated June 28, 1853, appointed Tappan and two other agents to manage its affairs in its name. The by-laws of the Corporation, existing from December 19, 1860, to September 8, 1878, gave the directors the right to appoint agents of the Corporation with power, among other things, "To hire and pay for all necessary stores and warehouses." At a meeting of the stockholders, June 30, 1860, a vote was passed appointing Tappan and one McBurney such agents, "Agreeably to a contract bearing date, 30th June, 1860," but it was not proved that such contract was ever executed. On October 30, 1866, the directors annulled McBurney's agency, and thenceforth until July 15, 1878, Tappan was such sole agent with the knowledge and consent of the stockholders and the other officers, but without any official action on their part. Tappan managed the business, rendering semi-annual reports, which, with the vouchers, were examined by auditors appointed at the stockholders' meetings, who, until 1878, in every instance approved the same. His co-directors knew of the lease and of the fitting up of the unfinished building with reference to the business, but there was never any official vote or action on the subject. The duplicate lease was kept with the Corporation's other valuable papers, and accessible to the directors, but there was no evidence that they knew that it was in his name. From January, 1872 until 1876, all the commercial business of the Corporation was trans-

acted on the demised premises, its books kept there and its goods stored there. Until July 15, 1878, when Tappan resigned as treasurer, he kept a bank account in but one form, in the name of "John G. Tappan, Treasurer," and all the checks used by him were so signed, and in the margin had printed the words, "Boston Belting Company." He was also meanwhile treasurer of the Merriam Packing Company, and of the Manganese Mining Company, and executor of his father's estate, and all the funds of this estate and of the three corporations, and of himself individually, were mingled in one and the same bank account in the name of "John G. Tappan, Treasurer," and all checks drawn on any of his five accounts were in the form above stated. The rent bills of the demised premises up to and including April 1, 1878, were uniformly made out to the Boston Belting Company, and the rent paid by its clerks in said checks and entered in its expense account. In 1873 and 1874, a part of the premises were underlet by written lease in Tappan's individual name, and the rent regularly entered and posted in the Corporation's books among its receipts. In June, 1874, the Belting Company removed to Devonshire Street, after which all the demised premises were underlet by written leases in Tappan's name, and all the rents received up to April 1, 1878, were entered and posted in the Corporation's receipts, and formed part of the balances of its semi-annual statements of receipts and expenses, made by Tappan to the directors and stockholders.

The clerks of the Corporation kept, in books marked "J. G. T. & Co.," all its accounts and said other accounts of Tappan, and accounts of loans made by him from the fund deposited by him as "treasurer." The Corporation had occupied other estates, in every instance, under leases running in Tappan's name. In 1878 [Aug. 9], Tappan became bankrupt, and on July 15, 1878, when he resigned as treasurer and director of the Corporation, he was and still is indebted thereto, having largely overdrawn his account as treasurer. Except \$125, paid to the Corporation July 15, 1878, all the rents have been paid by the under-tenants respondents into the hands of disinterested third persons, by consent of the parties to await the decision of this cause. The total amount of rent and taxes due the plaintiffs under the lease, from July 1, 1878, to April 1, 1883, with interest, was \$81,101.19. The plaintiffs demanded the rent of the Corporation July 1, 1878, but it refused to pay.

At the first hearing before the master the Corporation objected to all evidence tending to control the terms of the lease, particularly as to the agreement of June 28, 1853, and as to the amount of capital stock and the shares controlled by Tappan, his reports to the directors, their knowledge of the lease, his mingling of the funds, the form of the checks, the entries of rent, and the execution of leases, in his name, of other premises occupied by the Corporation.

Messrs. Richard Olney, Francis I. Amory and W. Minot, Jr., for plaintiffs:

The acts and conduct of the parties, showing an undertaking and representation by the Belting Company, contemporaneous with the lease, that it would be the tenant under it for all purposes of liability as well as of benefit, showing

also that the lessor acted upon such undertaking and representation by recognizing the Belting Company as its tenant, and giving it possession of the premises, and that upon that basis the lessor and the Belting Company dealt with each other for more than six years afterwards, the Belting Company is now estopped to repudiate such undertaking and representation, and the plaintiffs are entitled to have the same specifically enforced. *Wright v. Pitt*, L. R., 12 Eq., 408; *Van Schaick v. R. R. Co.*, 38 N. Y., 346; *Same v. Same*, 49 Barb., 409; *Castellan v. Hobson*, L. R., 10 Eq., 47; *Hook v. Kinnear*, 3 Sw., 417, n.; *Touche v. Metropolitan R. Co.*, L. R., 6 Ch. Ap., 671; *Piggott v. Stratton*, 1 DeG. F. & J., 33; see, *Hall v. Tay*, 181 Mass., 192; *Kyle v. Roberts*, 6 Leigh, 495.

Upon a like ground, oral promises to grant leases on certain terms, are specifically enforced where the tenant has acted upon them by taking possession and occupying. See, *Pain v. Coombs*, 1 DeG. & J., 34; *Gregory v. Mighell*, 18 Ves., Jr., 328; *Wilson v. West H. R. Co.*, 2 DeG. J. & S., 475; *Lincoln v. Wright*, 4 DeG. & J., 16; *Coles v. Pilkington*, 19 Eq., 174; *Nunn v. Fabian*, L. R., 1 Ch., 85.

Even at law, an action may be maintained against a corporation for rent due under a lease not running to it nor executed by it, but adopted by it by acts and conduct, estopping it to deny its character as tenant under the lease. See, *Carroll v. St. John's Society*, 125 Mass., 565; *Lamson & Goodnow Mfg. Co. v. Russell*, 112 Mass., 387; *Clark v. Gordon*, 121 Mass., 330; *Haight v. Sahler*, 30 Barb., 218.

It being competent for a corporation to contract by any name it chooses to assume, and it appearing to be the habit of the Belting Company to rent and occupy premises in the name of John G. Tappan, the Company may well be regarded as having made the lease with Haley under the name of John G. Tappan. See, *McLledge v. Boston Iron Co.*, 5 Cush., 158; *Medway Cotton Manufactory v. Adams*, 10 Mass., 360; *Taunton & South Boston Turnpike v. Whiting*, 10 Mass., 327.

If the relations between Tappan and the Belting Company were not known to Haley at the inception of the lease, the Belting Company may be held liable under the lease as an undisclosed principal, a lease not being an instrument requiring a seal, and the seal of its agent, Tappan, being rejected as surplusage. *Browne*, Stat. Frauds, sec. 6; *Taylor, Land & Ten.*, sec. 27; *Sherman v. Fitch*, 98 Mass., 59; *Gowen v. Klous*, 101 Mass., 449, 454; *Blanchard v. Blackstone*, 102 Mass., 343; *Cutler v. Ashland*, 121 Mass., 588; *Cook v. Gray*, 183 Mass., 106.

In any event, whether the Belting Company was a disclosed or undisclosed principal, it ratified the acts of Tappan, its agent, by entering upon and paying rent for the premises.

Such ratification may be by parol, even if the contract made by its agent was under seal. *Cady v. Sheperd*, 11 Pick., 400; *McIntyre v. Park*, 11 Gray, 102; *Columbia Bank v. Patterson*, 7 Cranch, 299; *Lawrence v. Taylor*, 5 Hill, 107.

Upon its face it appears to be the contract of the agent only. *Wright v. Pitt*, L. R., 12 Eq., 408; *Van Schaick v. 8d At. R. R. Co.*, 38 N. Y., 346; *Borell v. Newell*, 3 Daly, 234; *Schaefer v. Henkel*, 75 N. Y., 385; *Evans v. Wells*, 22 Wend., 345.

The sub-tenants being in possession under contracts with Tappan, and Tappan being insolvent and his assignees disclaiming all liability under the lease, the plaintiffs were entitled to apply to a court of equity to have their rights declared and enforced, by a bill to which Tappan, as well as the sub-tenants, should be made a party. 1 Story, Eq. Jur., sec. 687; Taylor, Land. & Ten., sec. 659; *Borell v. Newell*, 8 Daly, 238.

The lease, being an instrument *inter partes* under seal, the plaintiffs were without remedy, at law, against the Belting Company. *Fullam v. West Brookfield*, 9 Allen, 1; *Boston, etc. Smelting Co. v. Smith*, 13 R. L., 27, 37.

The plaintiffs' bill is brought since the Statute of 1877, ch. 178, sec. 1. It seeks discovery from the defendants to which the plaintiffs were clearly entitled, and being well brought for discovery, and the final relief claimed being in the nature of the specific performance of a contract, the appropriate relief will be afforded under the bill without remitting the plaintiffs to any remedies they may possibly have at law. 1 Story, Eq. Jur., secs. 64-74; *Andrews v. Brown*, 3 Cush., 130; *Peabody v. Tarbell*, 2 Cush., 226, 231; *Milkman v. Ordway*, 106 Mass., 232.

Mr. E. Avery, for the Boston Belting Company:

The rights of the parties who executed the lease are to be determined by the contract, unaided by extraneous facts, there being no ambiguity nor averment of accident, mistake or fraud. *Fiske v. Eldridge*, 12 Gray, 475; *Bray v. Kettell*, 1 Allen, 83; *Huntington v. Knorr*, 7 Cush., 374; Taylor's, Land L. & Ten., sec. 129; so, also, in equity; 3 Greenl. Ev., secs. 250, 255, 360; *Manning v. Lechmere*, 1 Atk., 458.

This case is distinguishable from *Melledge v. Boston Iron Co.*, 5 Cush., 158, the agreement of 1853 requiring the business to be done in the name of the Company, and the general business being so conducted; no decree can be entered against the Belting Company on the ground that Tappan was acting as its agent or trustee. 1 Greenl. Ev., sec. 385 and n. 1.

Mr. G. M. Hobbs, for assignees in bankruptcy of John G. Tappan.

Mr. J. F. Colby, for John G. Tappan.

Mr. T. C. Lincoln, for Walter S. Barnes.

Messrs. T. P. Proctor, H. R. Brigham & E. Tappan, for William Lowry & Co.

W. Allen, J., delivered the opinion of the court:

Haley, in 1871, executed a lease for ten years, of a building in Boston, to Tappan. Tappan was the general agent and treasurer of the Boston Belting Company, with authority to hire buildings for it. Tappan took the lease with the intention that the building should be occupied by the Belting Company, and his agency and purpose were known to the lessor. The plaintiff seeks in this bill to charge the Belting Company on the covenants of the lease, on the ground that it was the real or beneficial lessee, under obligations which can be enforced either at law or in equity, to perform the covenants of the lease.

The Belting Company clearly is not liable at law. The lease under seal and the Company is not named or referred to in it. *Seaver v. Colbur*, 10 Cush., 324; *Barlow v. Congregational Society*,

in Lee, 8 Allen, 460; *Schaefer v. Henkel*, 95 N. Y., 378.

It is not shown that the Company did business in the name of Tappan, and used that name as describing itself in the lease. The plaintiff argues that the lease was procured by the Company, and taken for its benefit, and that the Company entered under it and that it is therefore bound by its provisions either as having authorized its execution in the name of Tappan, or by force of a resulting or constructive trust in Tappan. See, *Wright v. Pitt*, 12 Eq., 408; *Van Schaick v. Third Avenue R. R. Co.*, 38 N. Y., 346; *Lees v. Nuttall*, 1 Russ. & M., 53.

Tappan's authority was "To hire and pay for all necessary stores and warehouses." He had no special authority, and there was no act of the Company respecting the lease except so far as his acts were those of the Company.

That he took a lease to himself with the intention that the Company should occupy the premises, shows that he intended that it should occupy under him, and not as the lessee in the lease. There is no evidence that when the lease was executed, either party, the lessor, the lessee or the Belting Company, understood that the Company were to occupy as the lessee under the lease; on the contrary, the inference is that the lease was made to Tappan in order that the Company might occupy under him and not as lessee.

There is no evidence that the Company entered as lessee, or occupied otherwise than under Tappan. The subsequent conduct of the parties, such as the payment of rent by the Company on bills, rendered to it by the lessor, and the sub-letting by Tappan, and payment by sub-tenants to the Company, are material only as they may tend to characterize the original transaction. They are not inconsistent with holding Tappan to be the lessee under the lease, especially in view of the evidence that he had almost the entire management of the affairs of the Company, and mingled his accounts and cash with those of the Company. Certainly there is nothing in the subsequent conduct of the parties which can control the terms of the lease or show that the Company is bound by the covenants. As Tappan became a bankrupt, and his assignees elected not to assume the lease, the rent due from the sub-lessees at the time of the bankruptcy belongs to the assignees. That which has accrued subsequently can be reached in equity by the lessor, Tappan, his assignees in bankruptcy, and his executors, being proper parties, and the plaintiff is entitled to a decree that it be paid to him. Story, Eq. Jur., § 687; *Goddard v. Keate*, 1 Vern., 87. The bill should be dismissed as to the Boston Belting Company, Converse and Furber.

Decree accordingly.

Berthia G. BAGNALL, *Plf.*,

v.

Amity B. DAVIES.

Where a deed for a lot of land contained the restriction that "no building shall be erected thereon, within twenty feet" of a certain street, a wooden

building erected thereon, having its main front wall not less than twenty feet from the street, with an open porch sustained by posts supported by a brick pier, the front line of its floor and the cap of the dormer window in the roof thereof being within twenty feet of the street, is an extension of the building and a part of it, and is within the meaning of the restriction in the deed.

(Suffolk ——— Decided September 3, 1885.)

BILL IN EQUITY, filed August 22, 1888, alleging in substance that, before August 22, 1872, the plaintiff was the owner of a parcel of land, described, between Clifford and Warren Streets, Boston, and caused it to be laid out in lots, one of which, numbered 18, with certain others, she then conveyed to one Learned, by a deed which was duly recorded, containing a restriction that within twenty years after its date "No building shall be erected thereon within twenty feet of said Clifford Street"; that Learned conveyed this lot to one Badger, who, September 16, 1882, conveyed it to the defendant with the same restriction; that said lot 18 was triangular, measuring eighty-two and eight tenths feet on Clifford Street, ninety-two and five tenths on the southeasterly side on lot 17, which the plaintiff still owns and resides upon, and one hundred twenty-four and seventeen hundredths feet on the westerly side; that there is a restriction against erecting, on lots 15, 16 and 17, any building within twenty-eight feet of Clifford Street; that the defendant is erecting a building on lot 18 in violation of the restriction, a portion thereof seventeen feet wide, six feet deep and thirty feet high, being within twenty feet of Clifford Street; and the plaintiff prayed an injunction to restrain the same.

The defendant answered, admitting the conveyances and restrictions alleged, but averred that the whole of the building "which she was erecting on lot 18 was not less than twenty feet from Clifford Street, except such projections therefrom as are customarily connected with all houses in the neighborhood of said house; that the front foundation wall and the front side of said house are within twenty feet from said street"; that for ingress and egress she had erected an "open porch consisting of a floor covered by a roof, said roof supported by three posts each less than six inches in diameter, and each post supported by a brick pier resting on the ground; said porch is sixteen and one half feet wide and the floor extends from the front line of said building six feet towards Clifford Street; the roof of said porch begins at a point twenty feet from the ground on the main building and slopes downward to a point which is thirteen and one half feet from the ground, and fourteen feet from the street on the side of said floor nearest to Clifford Street"; that she had caused a dormer window to be made "with a roof or cap projecting from said building to a point which is seventeen feet from the line of Clifford Street; that neither said porch nor dormer window can be seen from the house owned by the plaintiff, nor do they occasion the plaintiff any damage whatever; that my said house and all the houses in the vicinity are

wooden houses; that roofed porches and ornamental roofs or caps for windows are usual projections from wooden dwelling-houses; that owing to the shape of my lot and its small size, it would be impossible to erect a house thereon of the same general character with the houses in the vicinity, unless the usual projections from wooden dwelling-houses were allowed to extend within twenty feet of Clifford Street"; that, when the plaintiff caused the division into lots and conveyed lot 18 to Learned, it was contemplated by the parties to the deed that a wooden house should be built thereon with the usual projections; and that these, if constructed "in a reasonable manner nearer to Clifford Street than twenty feet, should not be a violation of the restriction."

The case was heard on the bill and answer before Devens, J., who, upon an agreed statement of facts as to the conveyances and restrictions, and the distances of the projections, substantially as above set forth, reserved the case for the consideration of the full court.

Messrs. H. C. Hutchins & A. S. Wheeler, for plaintiff:

As the defendant took the property with notice of the restriction, and subject thereto, she is bound by it, and the plaintiff can enforce it against her by means of a bill in equity. *Whitney v. Union R. Co.*, 11 Gray, 359; *Peck v. Conway*, 119 Mass., 546; *Mann v. Stephens*, 15 Sim., 377.

The building of the porch and projecting portion of the second story within twenty feet of Clifford Street, was the erection of a building within the forbidden space and, therefore, a violation of the restriction in the deed. *Sanborn v. Rice*, 129 Mass., 387; *Lord Manners v. Johnson*, 1 Ch. D., 673; *Child v. Douglas*, Kay, 560; *Morris v. Grant*, 24 W. R., 55.

Messrs. C. W. Turner & S. L. Scaife, for defendant:

A restriction upon the use of property granted must be reasonable, in order to be enforced, and is always given a liberal construction as distinguished from a narrow or literal one; and as affected by considerations of the neighborhood, the size and shape of the lot and the object for which purchased. *Sanborn v. Rice*, 129 Mass., 387; *Linzee v. Mizer*, 101 Mass., 526; *Whitney v. Union R. Co.*, 11 Gray, 359; *Atty-Gen. v. Gardiner*, 117 Mass., 500; *Nowell v. Academy of Notre Dame*, 180 Mass., 210; *Lord Manners v. Johnson*, 1 L. R., Ch. D., 673.

W. Allen, J., delivered the opinion of the court:

It is admitted that the plaintiff has a right to enforce the restrictions in the defendant's deed, that no building shall be erected on her lot within twenty feet of Clifford Street. The only question is whether the defendant's house is within twenty feet of the street.

The front of the house is toward Clifford Street, and the front wall is twenty feet from the street. A part of the roof which sloped toward the street is extended to within less than fourteen feet of it, covering a piazza and supported by posts six feet from the front wall of the house. In this part of the roof is a dormer window by which a room in the second story is extended to within seventeen feet of the street. We think that this portion of the roof and of

the dormer window which extend beyond the front wall towards the street, are extensions of the building and a part of it within twenty feet of the street within the meaning of the restrictions. See, *Sanborn v. Rice*, 129 Mass., 387; *Lord Manners v. Johnson*, 1 Ch. D., 673.

Decree for the plaintiff.

John T. DOOLEY, Complainant,

v.

Arnold G. POTTER.

P. D. gave to W. in 1869 a mortgage on certain lands in Massachusetts and Vermont. P. became assignee of the mortgage in 1876; in 1871, P. D. gave a second mortgage to E. on the Massachusetts lands, and E. assigned the same to J. T. D. by deed dated Nov. 30, 1876, and recorded Feb. 8, 1879. Previous to the assignment, P., as assignee of the first mortgage had been put in possession of the Massachusetts lands under a writ of entry and conditional judgment. In 1876 P. obtained a decree to the lands in Vermont which would become absolute in Dec., 1879. In Nov., 1879, P. brought a bill in Vermont to foreclose the equity under the mortgage, setting forth the decree rendered against P. D., and alleging that J. T. D. claimed some interest in the lands by virtue of a deed made to him by P. D., in 1872, but not recorded until after the decree against P. D. The court in Vermont held that the decree against P. D. was binding on J. T. D. The bill in the case at bar was brought by J. T. D. to redeem the lands in Massachusetts from the first mortgage.

Held, that the judgment in Vermont was not conclusive evidence as to the sum due on the mortgage and that plaintiff might show that there was nothing due to defendant, on the notes given him, at the time of the conditional judgment.

Held, that when a debt is secured by a mortgage on two tracts of land and the mortgagee enters for condition broken and proceeds to foreclose, he is deemed to have taken it in payment, and if the value of land equals or exceeds the debt, the debt is extinguished and the other tract is relieved from the incumbrance. If it fails to liquidate the debt entirely, it inures by way of payment *pro tanto*, and the other tract is to that extent relieved.

(Berkshire—Decided September 7, 1885.)

NOTE.—A judgment constitutes an absolute bar to a subsequent action, but if the subsequent action be upon a different claim or demand, the prior judgment is an estoppel only as to matters in issue on points controverted in the original action. *Cromwell v. Sac County*, 94 U.S., 351 (XXIV., Law. ed., 195); *Davis v. Brown*, 94 U. S., 423 (XXIV., Law. ed., 204).

MASS.

BILL IN EQUITY to redeem mortgaged land.

The facts of the case are sufficiently stated in the opinion.

Messrs. Parkhurst & Couch, for complainant:

Neither Edmunds, the second mortgagee, nor this complainant, the assignee of said mortgage, were parties to, or had any notice of, the suit in which said judgment was rendered, *i. e.*, were strangers to it. *Bigelow v. Winsor*, 1 Gray, 299, 302; *Greene v. Greene*, 2 Gray, 361, 366.

Neither were they privies in estate to that judgment, since they obtained their title five years previous to the commencement of said suit. *Adams v. Barnes*, 17 Mass., 368; *Hunt v. Haven*, 52 N. H., 162; *Campbell v. Lovel*, 35 N. H., 16; *Flanders v. Davis*, 19 N. H., 149.

The cases of *Hunt v. Hunt*, 17 Pick., 118; *Sparhawk v. Wills*, 5 Gray, 423, and *Stevens v. Miner*, 5 Gray, 429, note, upon which respondent relies, do not sustain the master's ruling.

This complainant, being neither party nor privy, is not concluded by said conditional judgment. *Adams v. Barnes*, 17 Mass., 368; *Hunt v. Haven*, 52 N. H., 162; *Hall v. Hall*, 46 N. H., 240, 243, 244; *Warren v. Cochran*, 7 Foster (N. H.), 339; *Leonard v. Bryant*, 11 Met., 870, 373; *Campbell v. Hall*, 16 N. Y., 575.

The subject-matter in this suit was drawn in question, within the issue of the former proceeding in Vermont, which terminated in a regular decree or judgment on the merits, so that the whole question involved in this suit to redeem might have been determined. *Bigelow v. Winsor*, 1 Gray, 299, 302; *Arnold v. Arnold*, 17 Pick., 4, 13.

The litigation in Vermont was between the same parties litigating in the same right or capacity as in this suit to redeem, and the court had jurisdiction to hear and decide on the whole matter.

The fact that complainant, during the continuance of this proceeding, had purchased a second mortgage of the land in Massachusetts, subject to respondent's mortgage, would have been no defense to said suit, the rights under said second mortgage being not in issue. *Gerrish v. Black*, 122 Mass., 76, 78, 79.

The complainant being neither party nor privy in his present right or capacity, to said judgment, can impeach said mortgages collaterally in this suit for fraud. *Downs v. Fuller*, 2 Met., 135; *Leonard v. Bryant*, 11 Met., 372; *Greene v. Greene*, 2 Gray, 361, 366; *Warren v. Cochran*, 7 Foster (N. H.), 339.

The respondent having now become absolute owner of the land in Vermont by reason of said decree of foreclosure, must allow its value as payment *pro tanto* on said mortgage. *Hedge v. Holmes*, 10 Pick., 380; *George v. Wood*, 11 Allen, 41.

Mr. A. Potter, for defendant:

The decree of the Court of Chancery in Ver-

To constitute an estoppel by judgment, four conditions must exist, viz.: there must be an identity of the cause of action, of the parties, of the character in which they sue, and of the thing in controversy. *Smith v. Turner*, 1 Hughes, 373; *Blackwell v. Dibrell*, 17 Am. L. Rev., 516.

mont, is conclusive between the parties, not only as to the amount due upon the Wiley mortgage, but upon all questions raised or which might have been raised and determined in that suit. *Sparhawk v. Wills*, 5 Gray, 423, and cases cited.

The judgment of the Superior Court of Berkshire County, in the case of this defendant against Peter Dooley to foreclose the Wiley mortgage, was conclusive against this orator as to the amount due. *Hunt v. Hunt*, 17 Pick., 119; *Stevens v. Miner*, 5 Gray, 429, n.

The Court of Chancery in Vermont having jurisdiction of the parties, had power to make the decree, and upon failure of Dooley to comply with that decree, he is now barred of all right of redemption in Massachusetts. *Spurr v. Scoville*, 3 Cush., 578, and cases cited; *Jackson v. Petrie*, 10 Ves. Jr., 164; *Lowry v. Fulton*, 9 Simons, 104; *Lord Cranston v. Johnston*, 3 Ves. Jr., 170.

Devens, J., delivered the opinion of the court:

In 1869 Peter Dooley gave to one Wiley and others a mortgage on certain lands in this State and in the State of Vermont, the condition of which was the payment of certain notes made by him. Of this mortgage Potter, the defendant, became the assignee in 1876. In 1871 said Peter Dooley gave a second mortgage, which was on the Massachusetts land, to one Edwards, who assigned the same to the plaintiff, John T. Dooley, by deed dated Nov. 30, 1878, and recorded Feb. 8, 1879. Previous to this assignment, the defendant, as assignee of the first mortgage, had brought, in 1876, a writ of entry against Peter Dooley, the mortgagor, to foreclose his equity in the land in Massachusetts, had obtained conditional judgment thereon, and was put into possession thereunder June 29, 1877.

In 1876, after the assignment to him of the first mortgage, the defendant brought a bill in equity in Vermont against Peter Dooley, to foreclose his right of redemption of the lands in that State, and in Dec., 1878, obtained a decree which would become absolute in Dec., 1879, upon failure then to pay the notes which the mortgage was given to secure. In November, 1879, the defendant brought another bill in Vermont to foreclose the equity under the same mortgage to redeem the Vermont lands against the present plaintiff, setting forth the decree rendered against Peter Dooley, and alleging that John T. Dooley claimed some interest in the land by virtue of a deed made to him by Peter Dooley in 1872. In that suit it appeared that such a deed had actually been made to John T. in 1872, but had not been recorded until after the decree against Peter Dooley, before stated, was rendered. It was, therefore, held that the decree against Peter Dooley was binding upon John T., and in Dec., 1882, a conditional decree was thereupon rendered against John T., founded upon the former decree against Peter. This decree has now become absolute by the failure to pay the sum found due for the redemption of the lands in Vermont within the time named.

The bill in the case at bar was brought in 1879 by the plaintiff as assignee of the second mortgage to redeem the lands in Massachusetts from the first mortgage. At the hearing before

the master, the plaintiff offered to prove that there was nothing whatever due on the notes, and that they had been fraudulently obtained, which was known to defendant at the time the conditional judgment was rendered in Massachusetts. He further contended that he was not bound by the decree in Vermont as settling as against him the amount then due on the mortgage, as he was not then allowed to show it; because it was then held that he was bound by the decree against Peter Dooley (his deed from Peter not having been recorded when the decree against Peter was rendered), so far as the Vermont lands were concerned. He further contended that in any computation of the account on the mortgage notes in this State, he was entitled to have deducted therefrom the value of the lands in Vermont embraced in the mortgage, which lands defendant had obtained by the decree of foreclosure then made, which decree had now become absolute.

For the purposes of the hearing, the master ruled:

1. That the conditional judgment heretofore rendered in this State upon the writ of entry brought by defendant against Peter Dooley, was conclusive against the plaintiff as to the amount then due on the mortgage.

2. That the plaintiff was further concluded as to the amount due on such mortgage by the decree in Vermont, rendered in the suit to which he was a party, and that neither this decree nor the judgment could be impeached in the manner proposed by the plaintiff.

3. That the value of the land in Vermont could not be deducted from the amount now due on the mortgage.

These questions may perhaps be conveniently disposed of in their order.

The writ of entry was brought against the mortgagor after he had made the second mortgage on the land in this State. It is not suggested that the second mortgage, whose rights the plaintiff has, was a party to it or had notice of it. The foreclosure and redemption of mortgages is regulated by statute. Foreclosure is worked by three years' possession, and the possession for that purpose may be attained by a writ of entry or by entry *in pais*. Under a writ of entry, the amount due on the mortgage is ascertained by the court, and the judgment is conditional, that if the amount due on the mortgage is not paid within a certain time, the plaintiff shall have possession. After possession obtained in either mode, the right of redemption continues for three years, and after that time the foreclosure becomes absolute. It may be that possession acquired by action is under the statute as conclusive upon every right of redemption as possession acquired by entry *in pais*. *Robbins v. Rice*, 7 Gray, 202.

The action may be brought by statute against whoever is tenant of the freehold.

But the question whether the finding of the amount to be paid to redeem is conclusive upon a prior purchaser from the mortgagor not a party to the action is a very different one from whether the possession obtained under the judgment is a possession against him.

The action may be brought by statute against whoever is tenant of the freehold, and though he be such only by disseisin at the election of the mortgagee, and although possession acquired

in such action may limit the time within which the owner of the equity may redeem as possession acquired by an entry *in pais* would, that action cannot fix the amount he must pay to redeem. He is a stranger to the action and may have no notice of it and has no right to be heard in it and to hold him concluded by it as to the amount of the incumbrance upon his land is against first principles. It makes no difference that the action is against the mortgagor and original debtor, if the owner is concluded when the action is against the mortgagor, he must be when it is against a mere disseisor. There is no authority for holding that a purchaser of the equity of redemption is concluded in a bill by him to redeem, by the amount of the conditional judgment in an action against the mortgagor after he had conveyed his equity. *Sparhawk v. Wills*, 5 Gray, 423, decided that the judgment is conclusive as to the amount between the parties to it. *Stevens v. Minor*, 5 Gray, 429, is a more reliable authority. See, *Minor v. Stevens*, 1 Cush., 482.

1. The case is reported only in a note to *Sparhawk v. Wills*, *ubi supra*. No opinion was given therein and it does not appear whether the assignment to the plaintiff was made before or after the action brought against the party under whom he claimed.

In the case of *Minor v. Stevens*, 1 Cush., 482, it did appear that the defendant, Ensign D. Stevens, received his assignment from J. C. Stevens, previous to the action brought against the latter. The case was decided against Ensign D. Stevens on a distinct ground, and the question now before us was not passed upon, but the opinion given by Mr. Justice Wilde contains a strong intimation that the judgment was not binding on Ensign D. Stevens as he had received his assignment before the action brought against his grantor. If by *Stevens v. Minor*, *ubi supra*, it was intended to hold otherwise, it is certainly strange that the case was not regularly reported and a statement thereof made which would have shown that this point was involved. For other cases in regard to the effect of a writ of entry for foreclosure, see *Keeth v. Swan*, 11 Mass., 216; *Hunt v. Hunt*, 17 Pick., 18; *Shelton v. Atkins*, 22 Pick., 71; *Wheelwright v. Freeman*, 12 Met., 154.

We are brought therefore to the result that whether or not possession obtained upon a writ of possession on a conditional judgment in a writ of entry against a mortgagor in possession who had conveyed his equity before the commencement of the action may be sufficient to work a foreclosure against the prior purchaser of the equity, the judgment is not evidence against him in a suit by him to redeem unless as showing the fact of possession taken.

2. The question as to the conclusiveness of the decree in the second bill in equity in Vermont, so far as it determined the amount then due on the mortgage, presents quite a different inquiry. The suits in Vermont related to lands in another State, but the terms and conditions were the same upon which they were conditionally transferred, and they were included in the same mortgage. The defendant contends, that the question involved in the suit in Vermont was the same as that here in issue, *viz.*: what was the amount due on the mortgage, and was it settled there, as it would have been under the

general principles which apply by the law of contracts; that if there were deductions as from profits in Massachusetts, or for any other reason, by which the mortgage was reduced, it was the duty of the Vermont courts to have noticed and allowed for them as if payment had there been made; that there is no distinction between contracts purely personal and those which may impose a charge upon real estate; when rights to the real estate depend upon a contract the obligation of which may have been wholly or partially discharged by the laws of another (State not purely local such as the insolvent laws), such discharge should be recognized by the tribunals of the State where the land against which a remedy is sought, is situated. He further contended that certainly in the absence of any evidence that the law in Vermont was different from that in Massachusetts, or that, in making its computation of the amount which the plaintiff (who was in that suit defendant) should pay in order to prevent the foreclosure of his right in equity in Vermont, the court in that State had passed upon and erroneously decided any law of Massachusetts, it must be held that the judgment there rendered is conclusive against the plaintiff as to the amount then due from him upon the mortgage, in any subsequent action, both parties being here the same as those in Vermont. This contention requires us to act as in the case of two distinct tracts of land in which the plaintiff had title as in the present case, that both were situated in Massachusetts, and that two suits similar to those brought in Vermont had been brought in Massachusetts. Assuming the contention of the defendant, without accepting it, it by no means establishes his position that the amount found due and necessary to be paid in order to relieve one tract from foreclosure, is conclusive evidence of the amount necessary to be paid in order to relieve another therefrom. If a mortgagor should bring an action against the assignee of a mortgage of two distinct tracts of land in Massachusetts, included in the same mortgage, but situated in different counties, for the possession of one of these tracts, and to foreclose the equity in the same, and conditional judgment were rendered against the assignee for the full amount of the mortgage notes upon the ground that, in a former proceeding referring to the same tract, it had been adjudged as against the assignor that this amount was due and that the assignee had taken his title after such adjudication, it is not easy to see that when a subsequent writ of entry is brought for the second tract, the title to which had been assigned previous to any adjudication against the assignor, there is any reason why the assignee should be affected by any judgment which applied only to the first tract.

If an action were brought for two tracts of land included in the same mortgage, an estoppel in regard to the amount due, which might apply as to one could not apply as to the other, where title to that was taken under different circumstances, and the decree would be moulded accordingly. It cannot be made to do so by bringing actions for the two tracts consecutively instead of including them in a single action. Even if in the first action a recital that so much is due which the plaintiff is bound to pay or to have his equity foreclosed, is not an

adjudication. The finding as to the amount due is limited to the case, and is collateral to the inquiry whether there shall be a foreclosure, and determines on what terms the tenant shall redeem the tract demanded, and extends no further than that.

The suit for the second tract of land is not one for the same cause of action as the first. The previous suit is, therefore, not an absolute bar. That there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action is well established. In the latter case the estoppel operates only as to the matters in issue or points controverted, on which the judgment was rendered, and the inquiry must always be what was actually litigated and determined in the original action. That, in the case we are supposing, which is actually determined in the suit as to the first tract is, that as to that tract the tenant is bound by the decision rendered in relation thereto previous to his attaining his title against his grantor. It is only incidental to that, that the amount due on the mortgage is determined by the former decree and only so far as the first piece of land is concerned. The plaintiff in this case was the assignee of the equity in the lands in Vermont when suit was brought against him to foreclose the mortgage on the lands in that State. It was later that he became assignee of the second mortgage on the lands in Massachusetts, by virtue of which he now seeks to redeem the first mortgage. The Vermont court did not undertake to decide what was due upon the mortgage by the general principle of contracts. The question before it was as to the foreclosure of the equity owned by the plaintiff, and as to the amount he should pay for the redemption of the same in the circumstances in which he stood. Before the bill against Peter Dooley was brought, John T. had become the assignee of his rights to the land in Vermont as mortgagor, but had failed to record his deed, and judgment had been recorded against Peter. It was held that John T. was bound by the decree against Peter, and in order to redeem the Vermont lands he must pay the amount then found due, and a decree was entered against him based on the former decree. He was not permitted to show that nothing was due on the mortgage because he was bound by a decree which would not permit his grantor to show it. While the decree recites that so much is due on the mortgage notes, its meaning obviously is, that so much is due if the defendant desired to redeem the mortgage on the parcel of land the equity in which was sought to be foreclosed. It is to give it too broad an interpretation to hold that it decides that under all circumstances this amount may be demanded on the mortgage against the then defendant. The plaintiff, John T. Dooley, was not the signer of the notes. He was under no obligation to pay them even if they were due. There was no adjudication that he owed the sum found due, unless he sought to redeem and as a condition of his redemption of the tract then in question.

The earlier decision against Peter Dooley had no relation to the Massachusetts lands, nor has the reason why John T. Dooley was bound

by it so far as the land in Vermont was concerned any application to the mortgage security, so far as it affects the Massachusetts land. When John T. Dooley undertakes to redeem the Massachusetts land, a suit in Vermont in which the amount due on the mortgage was determined only because of the relation in which he stood as to those lands, should not have affected him. It seems even more clear that if should not when he brings a suit against the assignee of the first mortgage on both the lands in Massachusetts and Vermont as the holder of the second mortgage which is on the Massachusetts lands only. The plaintiff was not the holder of the second mortgage on the Massachusetts lands when the first suit in Vermont was brought against Peter. The holder of it was not and could not have been made a party to it, nor should he be in any way affected by it. Whatever might be the effect of the second suit in Vermont on the plaintiff as the owner of lands in that State it should not affect him as a subsequent assignee from a second mortgagee who had no relation to the first suit, which suit in no way affected lands in which such mortgagee was interested. The object of the proceeding in Vermont (the second suit) was to foreclose the equity which the plaintiff had as grantee of Peter to redeem the first mortgage so far as the lands in Vermont were concerned. Had the plaintiff, John T. Dooley, attempted to oppose this foreclosure on the ground that even if he was bound by that which bound Peter so far as the first mortgage was concerned, he had a title from a second mortgagee of the Massachusetts lands, who was not bound by the first suit against Peter as he had previously received title from Peter and had been in no way a party to that suit, he would have presented a defense entirely irrelevant and one which the court in Vermont would not have recognized. The reason why a prior judgment between the same parties is conclusive in a second proceeding, is because each had had full opportunity to maintain his defense or establish his claim. A prior judgment between parties cannot be binding in a subsequent proceeding unless it has been possible to put in issue therein the same alleged claim or the same defense, as in the subsequent proceeding. If this proceeding were by Wiley (the second mortgagee) it certainly would not be contended that he could be affected by the Vermont judgment.

Even if John T. held the Wiley title as second mortgagee in Massachusetts when the second Vermont judgment was rendered, he should not be affected thereby, as, so far as that was concerned he could not have had his rights adjudicated. When the substantive question was as to the terms upon which he should redeem one parcel of land he could not have it decided upon what terms he should redeem as to which an entirely different state of facts existed.

A majority of the court are, therefore, of the opinion that the judgment in Vermont as to the sum due on the mortgage and which plaintiff must pay to redeem the lands there situate, was not conclusive evidence of the sum then due and which would be payable in order to redeem the Massachusetts lands, and that the plaintiff may show, if he can, that there is nothing due upon the mortgage notes.

3. The remaining question will require but

brief discussion. It has long been the law of Massachusetts that when a debt is secured by mortgage on two tracts of lands, and the mortgagee enters upon one for condition broken and proceeds to foreclosure, he is deemed to have taken it in payment, and if the value of the land equals or exceeds the debt, the debt is extinguished and the other tract is relieved of the incumbrance. If it fails to liquidate the debt entirely it inures by way of payment *pro tanto*, and the other tract is to that extent relieved. *Newall v. Wright*, 3 Mass., 150; *Amory v. Fairbanks*, 3 Mass., 562; *Hedge v. Holmes*, 10 Pick., 380; *George v. Wood*, 11 Allen, 41. It cannot make any difference that the tract of land, of which the defendant now has full ownership by the expiration of the plaintiff's right to redeem, is in the State of Vermont. To the extent of its value (over and above the legal costs for which the present defendant recovered judgment, if these have not been otherwise collected) the debt which the defendant holds has been paid. Any other result would involve the injustice of compelling the plaintiff, if he shall redeem, to pay the same debt to the extent of that value twice.

Exceptions to master's report sustained, and report recommitted.

Jonathan R. GAY *et al.*, Plffs.,
v.

C. M. RAYMOND *et al.*

Where, before the Act of 1885, ch. 59, a discharge in insolvency was relied on as a bar to an action on a demand, secured by attachment made before the proceedings in insolvency had been instituted; the plaintiff might have a special judgment and an execution against the attached property only. Such judgment is final, and the court could not, at a subsequent term, allow a judgment and execution for the residue.

(Suffolk—Decided September 3, 1885.)

CONTRACT upon four promissory notes, each for \$250, made by the defendants, payable to the order of the plaintiffs. Writ dated September 30, 1881, returnable at the January Term of the Superior Court, 1882. Another action between the same parties had been entered in the same court, at the October Term, 1881, in which the plaintiffs had attached certain personal property. A second attachment of the same property was made on the writ in this action. More than four months after these attachments, the defendants filed a petition in insolvency, whereon a warrant issued against their estate, publication was duly made, and the insolvency proceedings are pending.

In both actions the answer was a general denial. Both were sent to an auditor, who, at the July Term, 1883, reported in each in favor of the plaintiffs. Thence the actions were continued to the October Term, and on October 4, 1883, the defendants were defaulted in both. On October 10, 1883, the plaintiffs made a motion in both actions, suggesting the insolvency proceedings, and "That, by virtue of the writ in said action, the plaintiffs, more than four

months prior," etc., "procured the defendants' property to be attached, which attachment has not been dissolved; wherefore, plaintiffs move that judgment be entered on said default against the property so attached as aforesaid," which motion the court allowed.

The clerk, thereupon, made an entry on the docket in each case: "Special judgment v. property attached on writ on mo." On October 12, executions were issued in both actions; the one in the prior action recited entry of judgment for plaintiff for \$668.64 debt, and \$100.16 costs; the one in this action recited entry of judgment for plaintiffs for \$1,185.99 debt, and \$28.97 costs. Each execution contained the further recital, "Which sums are to be levied only on the goods, chattels and lands of defendants, attached on the plaintiffs' writ, as to us appears of record;" and the direction to levy was limited to the goods, chattels or lands, "Attached on the writ in this action, and not otherwise." The property had been properly sold on *meane* process, and the proceeds levied on by force of said executions, which were returned into court January 1, 1884, the former satisfied in full, and the latter satisfied in the sum of \$378.40, leaving \$786.56 due and unpaid.

There was no motion for continuance to await the result of the insolvency proceedings, nor did the court order such continuance.

On December 21, 1883, the court, by general order, rendered judgment "On all defaults, nonsuits, verdicts, etc., where judgment has not already been entered," and "that all actions not reserved and not acted on, stand continued."

At the return of the latter execution, the plaintiffs' attorneys signed an indorsement thereon: "This execution has been satisfied in the sum of three hundred seventy-eight $\frac{1}{100}$ (dollars), and no more, and an execution (for the balance) on the general judgment is requested." But the clerk refused to issue any further process.

At the January Term, 1884, the plaintiffs made successively four motions, on due notice to the defendants, who appeared and objected to the allowance thereof. These four motions were disallowed, and ruled, as matter of law, that the court had no authority to allow any of them; that one judgment having been entered, no other could be entered in the action; that no further process could be issued on the judgment entered; and that said judgment could "not be amended at this Term." The plaintiffs alleged exceptions.

Messrs. H. J. Boardman & S. H. Tyng, for plaintiffs:

An attachment lien is not extinguished by insolvency proceedings. Pub. Stat., c. 157, § 46; *Davenport v. Tilton*, 10 Met., 326.

Where defendant has secured and pleaded his discharge, resort must sometimes be had to a special judgment and a limited execution. *Bates v. Tappan*, 99 Mass., 376; *Johnson v. Collins*, 116 Mass. 392; see, *Sullings v. Gunn*, 131 Mass., 479.

The special judgment lacks the essential quality of concluding others than the parties. *Freem. Judg.*, 3d ed., 657, §§ 606, 607 a.

It is simply process in the form of a judgment to enforce the lien. *Bump, Bkcy.*, 10th ed., 514.

The insolvency laws apply equally to all liens. *Peck v. Jenness*, 7 How., 612 (XII., Law. ed., 841.)

The lien is a right in addition to his other rights and not a substitute for them. *Herman, Exec.*, 280 and note 2; *In Re Nounnan*, 6 N. B. R., 579.

If by its enforcement, his claims be not fully satisfied he may pursue his other remedies including proof against insolvent's estate. *Ex parte D'Obree*, 8 Ves., Jr., 82; *In Re Brand*, 3 N. B. R., 324; *Morris v. Briggs*, 3 Cush., 843.

The right to enforce the attachment lien must, unless deferred by statute, accrue as soon as its age and validity are determined, the first by inspection of the record, the latter by default. *Coolidge v. Cary*, 14 Mass., 115; Pub. Stat., ch. 171, § 2; ch. 167, § 45; and the only statute deferring the right is Pub. Stat., ch. 171, § 1, limiting the period at which judgment may be entered that the creditor may prove the claim at the third meeting. Pub. Stat., ch. 157, § 103.

A general judgment would deprive plaintiffs of their right so to prove the balance. *Fazon v. Baxter*, 11 Cush., 35; *Zimmer v. Schlehauf*, 115 Mass., 52.

The special judgment was final only to so much as might be satisfied thereunder. *Boyce v. Wheeler*, 133 Mass., 554; *Thompson v. Dean*, 7 Wall., 342 (XIX., Law. ed., 94); 1 Kent, Com., 12th ed., 299, 316.

Plaintiffs should not be deprived of further remedies. *Commonwealth v. Pejepcut Proprs.* 7 Mass., 414; *Batchelder v. Putnam*, 13 N. B. R., 404.

The court has authority to amend or extend the temporary record; *Parsons v. McMasters*, 6 Dane, Abr., 279; *Blanchard v. Ferdinand*, 132 Mass., 389; *Cowley v. McLaughlin*, 138 Mass., and this, too, after the Term; *Freem. Judg.*, 3d ed., sec. 38; *King v. Burnham*, 129 Mass., 598.

Messrs. O. T. Gray and W. C. Cogswell, for defendants:

No statutory method is provided for enforcing a lien acquired by attachment, made more than four months before the first publication. Pub. Stat., ch. 137; sec. 46.

The special judgment and award of execution are not unknown to the common law of England, when the rights of the parties require it. *Davenport v. Tilton*, 10 Met., 320, 330; *Peck v. Jenness*, 7 How., 613, 623; *Bosworth v. Pomeroy*, 112 Mass., 293; *Barnstable Bk. v. Higgins*, 124 Mass., 115.

There is no legal necessity to await the discharge of the debtor by virtue of the proceedings in insolvency, at least in cases where it is agreed that the debtor stands as if he had received his discharge. *Bosworth v. Pomeroy*, 112 Mass., 293; *Ray v. Wight*, 119 Mass., 426; *Sullings v. Ginn*, 131 Mass., 479.

Such agreement need not be a matter of record in the case. *Bosworth v. Pomeroy*, *supra*.

Parties to a contract may stipulate therein, that only certain specified property shall be answerable in case of default in performance, and a special judgment will be entered on such agreement. *Chickering v. Greenleaf*, 6 N. H., 51.

Final judgment having been entered without any error or mistake, in accordance with the order of the court when all parties were before it, the court had no authority, on motion, after the Term at which the judgment was entered, to enter a new judgment. *Mason v. Pearson*, 118 Mass., 61.

W. Allen, J., delivered the opinion of the court:

The proceedings in insolvency of themselves, had no effect upon the plaintiff's attachment nor upon the action; they did not dissolve the attachment, and the defendant could have no benefit of them in the action except of pleading a discharge obtained during its pendency, and in aid of that, by obtaining a continuance of the action before a discharge was granted, on a representation of the pendency of the proceedings. The defendant, after having answered in the action by a general denial, and having made no representation of insolvency, was defaulted. The action and the attachment then stood as if there had been no proceedings in insolvency, and if nothing more had been done, judgment against the defendant would have been entered at the close of the Term under the general order, and the property attached might have been taken on the execution without regard to the insolvency. But after the defendant had been defaulted the plaintiff himself suggested the pendency of the insolvent proceeding, and moved "That judgment be entered in said default against the property so attached," which motion was allowed, and the entry on the docket made "special judgment against the property attached on motion." The property proved insufficient to satisfy the full amount of the debt; the plaintiff now seeks for a judgment or an execution against the defendant for the unsatisfied balance, contending that the judgment may be taken as a general judgment against the defendant upon which the plaintiff is entitled to an *alias* execution; or that the judgment against the property was an interlocutory judgment, leaving the action against the defendant pending for further proceedings, and that the entry of the judgment should be amended in conformity therewith. We think that the judgment was in effect against the property only and that it was final.

An attachment on *meane* process is a proceeding in a suit by which property is held that it may be taken on an execution to be issued on a judgment which may be recovered in the action. It constitutes a lien on the property which can be enforced only by judgment and execution in the suit. Insolvent proceedings commenced more than four months after an attachment do not dissolve it, but they may result in a discharge of the defendant from the debt which will prevent the plaintiff from recovering judgment against the defendant, and so obtaining an execution upon which the property may be taken. To prevent this result the special judgment against the property attached was devised, so that where a defendant pleaded a discharge in insolvency and showed a defense to the suit so that no judgment could be had against him, the plaintiff was enabled to enforce his lien under the form of a judgment against the defendant enforceable only against the property attached. The precise form of the proceedings is not material; the substance of it is a judgment for the amount of the debt, to be executed only in preserving and enforcing the lien on the property.

The same judgment may be entered while the question of discharge is pending on a suggestion of insolvency and on motion of either party.

In this case, after the defendant had been defaulted, upon a suggestion of the insolvency of the defendant by the plaintiff and upon his motion; judgment was entered against the defendant for the amount of the debt and costs to be enforced only against the property attached, and execution was issued reciting the judgment against the defendant for said sums to be levied only on the property attached. We think that the judgment was a final disposition of the case. It was a final judgment, and it authorized an execution only against the property attached and cannot be treated as a general judgment against the defendant. After the defaults, the plaintiff had his election to take a general judgment against the defendant or the special judgment to hold the property, which would be the only judgment he could have in case the defendant had pleaded a discharge in insolvency. One would be equally with the other a final judgment, and the plaintiff having elected to take the special judgment, and judgment having been entered, there was no opportunity or occasion for the defendant to plead his discharge, and no authority in the court at a subsequent term to change the judgment into a general judgment or to issue execution on it as such. Stat. 1885, c. 59, having been enacted after the judgment was entered, can have no effect upon it.

Exceptions overruled.

Albert BAKER
v.
Betsey KIMBALL *et al.*

1. In an action of trespass for mesne profits tried without a jury, the finding by the court of a peaceable re-entry for possession by mortgagee, justified by the evidence, will not be disturbed.

2. A lessor not injured in the reversionary rights cannot maintain trespass against one peaceably entering into possession as mortgagee.

(Berkshire ——— Decided September 21, 1885.)

TRESPASS for mesne profits.

The case is sufficiently stated in the opinion.

Mr. A. Potter, for plaintiff:

This entry and the threat to expel the tenant were equivalent to an actual and complete eviction of the tenant and of the plaintiff. *Smith v. Shepard*, 15 Pick., 147; *Northampton Paper Mills v. Ames*, 8 Met., 1.

If the mortgage of Mrs. Kimball had been a valid mortgage, such entry would have been lawful and would have authorized all that was done in the premises. *Reed v. Davis*, 4 Pick., 216; *Welch v. Adams*, 1 Met., 494; *Smith v. Shepard*, 15 Pick., 147.

Defendants undertook to justify their entry

NOTE.—Evidence of the record of an action by defendant against a third person for use and occupation of the premises, where defendant, under oath, fixed the value at a certain sum, is admissible in an action for mesne profits, as an admission of a party to the records. *Shafter v. Richards*, 14 Cal. 125; *Citing 1 Greenl., Ev. Sec. 174, 527.*

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under this mortgage, but the defense failed leaving defendants in the position of disseisors. *Northampton Paper Mills v. Ames*, 8 Met., 1; *Haven v. Adams*, 8 Allen, 363; see, *Baker v. Garitt*, 128 Mass., 93.

Mrs. Kimball having no right to make said entry, could confer no authority on Bond. *Darling v. Kelly*, 113 Mass., 29.

This action in the nature of trespass for mesne profits, is the proper form of action for this wrong. *Sargent v. Smith*, 12 Gray, 426; *Merrill v. Bullock*, 105 Mass., 486, 493; *Northampton Paper Mills v. Ames*, 8 Met., 1. And the costs, *Baker v. Garitt*, can be recovered as part of the damages. *Pond v. Harris*, 113 Mass., 114; *Philpot v. Taylor*, 20 Am., 241.

Messrs. Parkhurst & Couch, for defendants:

The finding of the Judge that defendants did nothing more than make an open and peaceable entry, cannot be revised in this court. *Sheffield v. Otis*, 107 Mass., 282, 283.

The entry was a mere disturbance of the possession of the tenant, for which the plaintiff can maintain no action. *French v. Fuller*, 23 Pick., 104, 107.

Plaintiff, being a lessor at will, cannot maintain this action as there was nothing tortious in the entry. *French v. Fuller*, 23 Pick., 104, 107; *Munroe v. Luke*, 1 Met., 459, 472.

Without a permanent injury to the freehold, plaintiff cannot maintain this action. *Sparhawk v. Bagg*, 16 Gray, 583, 584; *Cushing v. Kenfield*, 5 Allen, 307.

The record and judgment in the case of *Baker v. Garitt*, are not conclusive upon defendants, nor competent nor sufficient proof of the title of plaintiff to the *locus in quo*. *Hunt v. Haven*, 52 N. H., 162, 169; *Chamberlain v. Carlisle*, 26 N. H., 540, 551; *Bigelow v. Winsor*, 1 Gray, 299, 302; *Freem. Judg.*, 3d ed., sec. 189.

The legal title is in Mrs. Kimball, the condition in her mortgage having been broken and there being no evidence of a reconveyance to plaintiff. *Howe v. Lewis*, 14 Pick., 331.

Until the premises be reconveyed, the remedy of the mortgagor is in equity. *Parsons v. Welles*, 17 Mass., 419, 427; *Wade v. Howard*, 11 Pick., 289, 297.

Per Curiam:

We are at a loss to see what question of law is presented by this report. The action is tort in the nature of trespass for mesne profits, and was tried before the Judge without a jury. Upon the meager evidence presented by the plaintiff, the presiding Justice found that "Nothing more was proved than an open and peaceable re-entry for possession by the mortgagee without opposition." This was justified by the evidence, and is a finding of fact which we cannot review. There was no evidence to show any actual possession, or any reception of the rents and profits, or any ouster of the plaintiff, by the defendants or either of them. Even if the mortgage under which the defendants claimed was invalid, their formal entry was, at most, a violation of the right of the tenant, and the plaintiff, who was lessor, was not injured in his reversionary rights, and cannot maintain trespass.

Judgment for defendants.

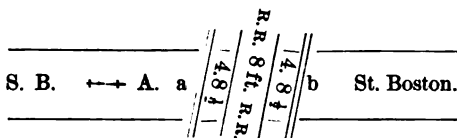
Patrick SCANLAN
v.
The City of BOSTON.

1. The provisions of the Public Statutes requiring **railroad companies** whose **road is crossed by a highway** or other way, to secure a **safe and easy passage across its road**, relieve the city from **liability** for injury to a traveler caused by the obstruction from the rails on the highway. These provisions **apply** as well to **ways located after the railroad is constructed**, as to pre-existing ways.
2. Where at the crossing there were **two tracks**, the **obligation** imposed by statute on the railroad company is to **keep both tracks and the intervening space between them in repair**.

(Suffolk—Decided September 3, 1885.)

TORT. Action to recover damages for personal injury caused by a defect in a street of defendant City.

Said street crosses or is crossed by the tracks of the New York and New England Railroad at the same grade. The crossing is the same which is described in the case entitled *N. Y. & N. E. R. R. v. Boston*, reported in 127 Mass., page 229, and the facts which are there cited in the opinion of the court and the statement of the reporter may, so far as material, be considered in this case. It was agreed that, since the decision in that case, the planking was put in and kept in repair by the railroad company. The railroad crossed the street obliquely, at an angle of about forty-five degrees, with a double track. Each track was four feet eight and one half inches wide; the clear distance between the two tracks, from inside rail of one track to the nearest rail of the other track, was about eight feet.



The entire crossing from curbstone to curbstone, and from eight inches on the outside of the outer rail to a similar distance on the outside of the farthest rail from it, or from a to b, was covered with oak planks, originally three and one half inches thick, laid parallel with the iron rails and spiked to railroad ties laid in the ground to support the rails and planking; the construction was the same from a to b, except that the cross-ties in the space eight feet wide between the tracks did not support any iron rails, and could, with the planks upon them, be removed without disturbing the rails.

The plaintiff was in his grocery wagon driving his horse along A Street in the direction indicated by the arrow. While upon the planking of the crossing he was thrown from his wagon and received the injuries complained of. There was evidence tending to show that the planks were much worn, and that at places the planks were so worn as to leave deep depressions much lower than the tops of the iron rails.

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There was a conflict of testimony, as to whether the planking had broken through at any place, but one witness testified that somewhere between the two tracks there was a hole where a part of a plank was out, and that the wheel went into this hole and jolted the plaintiff out. There was evidence tending to show that somewhere between the two tracks the wheels of the plaintiff's wagon went down, and the plaintiff was jolted out of and fell from his wagon. There was also evidence tending to show that the alleged defect was in the middle of the crossing, and that the plaintiff had driven down to about the center of the crossing when he was jolted out of his wagon. The court ruled that the liability, if any, was on the railroad company; that the entire planking within the location of the railroad was a part of the construction of the railroad, with which the City could not lawfully interfere, and which reasonable care and diligence did not require it to change or repair.

The plaintiff contended that the case should be sent to the jury, to determine, among other things, whether the defendant could have repaired the planking, without interfering with the running of the cars or the operation of the railroad. But the court refused to allow the case to go to the jury and ordered a verdict for the defendant, to which ruling the plaintiff excepted.

Messrs. Crowley & Maxwell, for plaintiff:

The location and construction of the railroad preceded the location and construction of the highway.

The highway was constructed by the City across the railroad at the same level therewith, without the authority of the county commissioners, as required by Stat. 1874, ch. 372, sec. 92. Pub. Stat., ch. 112, sec. 125.

The City established the grade of the highway in 1877, and constructed it across the railroad in 1878. In Dec., 1878, the City undertook to lay planks or timbers between the rails of the railroad at the crossing, and to do such work as might be necessary to make the highway at the crossing safe and convenient for public travel. *R. R. Co. v. Boston*, 127 Mass., 282.

The fee in the soil of a street, including the crossing, is owned by the City, and the railroad company has only an easement of way. *R. R. Co. v. Boston*, *supra*, and Statutes, 1850, ch. 268 and 1873, 289.

There is no express provision of law that railroad corporations shall keep and maintain the way for ordinary travel where the highway and railroad cross each other on a level; and the general liability of a town to keep the way safe and convenient cannot be limited by implication. *Davis v. Leominster*, 1 Allen, 182; see, *Pollard v. Woburn*, 104 Mass., 84.

A city escaped a verdict against it because it had erected a fence "Up to a railroad, and as far as it could be maintained without impeding the passage of cars on the railroad." *Jones v. Waltham*, 4 Cush., 299.

The question is not what party made repairs, but, upon what party did the law place the duty of repair? *Rouse v. Somerville*, 180 Mass., 361.

It has even been said that a town may be liable for defects of repair, although another per-

son may be also liable. *Woburn v. Henshaw*, 101 Mass., 193; *Gillett v. Western R. R. Co.*, 8 Allen, 560; *Johnson v. Salem, etc.*, 109 Mass., 522.

Cases relating to crossings not on the same level, are not in point, and throw no light on the case at bar. 7 Cush., 490; 117 Mass., 509; 130 Mass., 361.

Mr. T. M. Babson, *Asst. City Solicitor*, for defendant:

Towns and cities are not obliged to keep ways in repair where other provision is made therefor, Pub. Stat., ch. 52, sec. 1; and the N. Y. & N. E. R. R. Co., and not the City, was obliged at its own expense, to plank its rails so as to secure a safe and easy passage across its road. Pub. Stat., ch. 112, sec. 124; *R. R. Co. v. Boston*, 127 Mass., 285.

Sufficient provision having been made by law for the repair of this crossing by the railroad company, the City of Boston was not liable for any defect in the way at that point. *Saenger v. Northfield*, 7 Cush., 496; *White v. Quincy*, 97 Mass., 430; *Rouse v. Somerville*, 130 Mass., 361.

The ruling of the Judge in the Superior Court, "That the entire planking within the location of the road was a part of the construction of the railroad, with which the City could not lawfully interfere, and which reasonable care and diligence did not require it to change or repair," was decisive of the case, and was in harmony with the decisions in *Jones v. Waltham*, 4 Cush., 299; *Davis v. Leominster*, 1 Allen, 182; *Young v. Yarmouth*, 9 Gray, 386.

W. Allen J., delivered the opinion of the court.

A highway in the defendant City crossed a railroad at grade. There were two tracks of the railroad, the inner rails of which were eight feet apart and the railroad company planked the whole space between and eight inches outside of the outer rails. The plaintiff claimed that he was injured in consequence of the defective condition of the planking between the two tracks. The question is, whether a ruling that the defendant was not responsible for the condition of the planking, was correct. The defendant was bound to keep the highway in repair and was responsible for defects in it where other provision was not made therefor. Pub. Stat., ch. 52, secs. 1-18. By Pub. Stat., ch. 112, sec. 124, "A railroad corporation whose road is crossed by a highway or other way on a level therewith, shall, at its own expense, so guard or protect its rails by planks, timber or otherwise, as to secure a safe and easy passage across its road." So far as this provides for keeping the surface of the highway in repair by the railroad company, the defendant is not liable therefor. *Rouse v. Somerville*, 130 Mass., 361, and cases cited. The plaintiff contends that the provision applies only to preexisting ways over which a railroad is located, and not to ways located over a railroad after its construction. We think it applies to both cases. As originally enacted it was limited to the latter; the change since has been to make it more general so as to include both. Stat. 1857, ch. 287, secs. 4-6; Gen. Stat. 643, secs. 60-57; Stat. 1874, ch. 872, secs. 90-93; Pub. Stat., ch. 112, secs. 124-128.

The plaintiff further contends that the statute

does not apply to the space between the two tracks; that the statute should be construed as requiring such guards and protection as will secure a safe and easy passage over each rail, and that a single plank on each side of each rail would meet the requirement. This construction is not only inconsistent with the language of the statute but with any reasonable application of it to the subject-matter.

The rails are required to be guarded because they constitute the obstruction to be provided against, but they are to be so guarded as to make a safe and easy passage over the railroad. The effect of the construction contended for is obvious; it would limit the obligation and the right of the railroad company to a narrow space at the sides of each rail, and require the city or town to make the space between the rails to conform to this. The cross-ties and ballasting, which must be kept in repair by the railroad company, must constitute a considerable portion of the bed of the highway, and the impracticability of requiring alternate sections of the surface of a railroad track across a highway to be kept in repair by the municipality and the railroad company respectively, is too obvious to need illustration. The difficulty is no less in respect to a railroad consisting of several tracks. The number of alternating sections would be increased and their forms changed, where different tracks converge as may often happen near stations. If the superstructure of the railroad and the surface of the highway where they are the same, should be divided into sections to be kept in repair by different authorities independent of each other, the safety of passengers upon the railroad and the highway would not be promoted, and the practical remedy of a person injured would be seriously impaired; he would have to mark out upon the land the sections allotted to municipal and railroad authorities and locate in one or the other the defect which caused his injury.

Without deciding that the railroad company is to keep the whole of the highway within its location in repair, or that under all circumstances the obligation would extend to the whole of the space between separate tracks upon the same location, we think that in this case there can be no question of the obligation of the railroad company to keep both of the tracks and the space between them in repair. The distance between the tracks from rail to rail was about eight feet; the distance between the ends of the ties is not stated, but must have been considerably less. The railroad corporation adopted a proper method of guarding the rails by planking uniformly the whole crossing. In planking the whole space between the rails and tracks, the company did no more than was needful so to protect and guard its rails by plank as to secure a safe and easy passage across its road, and the obligation to keep the planking in repair was upon it. The ruling of the court was correct.

Exceptions overruled.

Ambrose W. HODGE, Admr.,

v.

John M. COLE.

In a suit by the holder of a note for a

valuable consideration, not, indorsed by the payee in her lifetime, a bill in equity is the proper remedy to compel the payee's administrator, who is also the maker of the note, to indorse it.

(Berkshire——Decided September 15, 1885.)

EQUITY. This was a suit in equity heard on the bill, answer and demurrer, brought by the plaintiff, the administrator of the estate of Mary E. Jenks, against the defendant, to compel him to indorse a certain promissory note, of which the follow ing is a copy:

"\$3,142 Cheshire, March 23, 1874.

On demand, for value, I promise to pay Sarah Jenks or order, \$3,142 dollars with interest."

(Signed) John M. Cole."

The case was referred to a master and reported to the full court, and submitted on an agreed statement of facts, in which it appeared that the note was given to the plaintiff's intestate for a valuable consideration, but that the payee omitted to indorse it, and that the defendant, who was the maker of the note, was appointed administrator with the will annexed of the payee, and that he made partial payments on the note, and afterwards refused to pay the balance or to indorse it.

Mr. A. Potter, for plaintiff:

The situation and relationship of the parties, the purpose of the gift and their subsequent conduct, show conclusively that a complete transfer of the ownership was intended and, inferentially, that the omission to indorse was an accident. 1 Greenl. Ev., § 83, *et seq.* *Huntley v. Whittier*, 105 Mass., 891.

The gift was to Mary E. alone, coupled, perhaps, with a trust in favor of her daughter to share in it; but this would not render it a joint gift. *Clough v. Clough*, 117 Mass., 85; *Davis v. Ney*, 125 Mass., 590.

By transfer the payee and afterwards her administrator, became trustee of the transferee and upon his refusal to indorse, she could maintain the bill against both or against him alone. 2 Story, Eq., §§ 1057 a, 1250 note. *Townsend v. Carpenter*, 11 Ohio, 21.

The equitable title being in the plaintiff, she could not avail herself of the gift except by the aid of a court of equity, either to compel indorsement of the note or payment thereof. Story, Notes (5th ed.), § 120, n. 3; Story, Bills, § 199; 1 Story, Eq., §§ 99 b., 100; 1 Parsons, Notes & Bills, 160; *Malbon v. Southard*, 36 Me., 147.

No action at law would lie, the defendant never having expressly promised to pay the note. *Royce v. Nye*, 52 Vt., 372; *Mowry v. Todd*, 12 Mass., 281.

Mr. Thomas P. Pingree, for defendant:

The transfer and delivery of the note was valid without indorsement, and enabled the complainant, the donee, to maintain an action at law against the maker, in the name of the donor's administrator, and against his consent. *Sessions v. Moseley*, 4 Cush., 87; *Grover v. Grover*, 24 Pick., 261; *Bates v. Kempton*, 7 Gray, 882; *Norton v. Piscataqua Ins. Co.*, 111 Mass., 535-6; *Pierce v. Boston Sav. Bk.*, 129 Mass., 430, *et seq.*

Defendant recognized the transfer and promised to pay it to the complainant, the holder,

obviating thereby any necessity to sue in the name of the payee of the note, or of the administrator of the payee, and thereby giving to the complainant a right to sue in her own name therefor. *Mowry v. Todd*, 12 Mass., 288; *Curtis v. Norris*, 8 Pick., 282; *Bourne v. Cabot*, 3 Met., 305-8; *Dennis v. Troitchell* 10 Met., 183-4; *Kingsley v. N. E. Ins. Co.*, 8 Cush., 393, 400; *Grant v. Wood*, 12 Gray, 220; *Burrows v. Glover*, 106 Mass., 324, 325.

The complainant having an adequate and complete remedy at common law, was not entitled to bring this bill in equity. Pub. Stat., ch. 151, sec. 2; *Frue v. Loring*, 120 Mass., 507, and cases cited.

The master's report finds there was no accident or mistake proven or attempted to be proved, and finds only the simple case of the gift of a note without indorsement, which is valid at common law. *Pierce v. Boston Sav. Bk.*, 129 Mass., 430, 431.

Morton, Ch. J., delivered the opinion of the court:

The only question presented to us is, whether, upon the facts alleged and proved, the court has jurisdiction in equity. The note in suit was made by the defendant payable to the order of Sarah Jenks. A short time before her death Sarah Jenks gave the note to Mary E. Jenks, the original plaintiff in this action, but for some reason omitted to indorse it. Ordinarily, Mary E. Jenks, being the owner of the note, would be entitled to enforce it against the maker by a suit at law in the name of Sarah Jenks, her administrator or executor. But the defendant, who is the maker of the note, is also administrator of Sarah Jenks. Mary E. Jenks could not bring a suit at law in her own name. A suit in the name of the administrator of Sarah Jenks would involve the anomaly of being a suit at law in which the same person is both plaintiff and defendant. Under such circumstances a suit in equity is the proper remedy. Sarah Jenks made an absolute transfer of the note to Mary E. Jenks; the only admissible inference from the facts is, that she omitted to indorse it, by accident or mistake. As she had not an adequate remedy at law this bill was properly brought. 1 Story, Eq., sec. 99.

Decree for plaintiff.

The BOSTON & ALBANY RAILROAD COMPANY, *Petitioner for Certiorari*,

v.

City of **BOSTON** *et al.*

1. The **Legislature**, in the exercise of its right of eminent domain, has authority to grant franchises for highways and railroads, delegating in the one case to public officers, and in the other to individuals; and in doing so, may so grant to either as to interfere with a previous grant to the other, on providing for compensation when private rights are impaired.
2. The **appropriation of land** to the use of a railroad, is not so inconsistent with its public use as a highway crossing, as

to prohibit its subsequent appropriation for that purpose.

3. A statute giving authority to county commissioners to lay out a highway or townway, is to be interpreted as including the power to lay out a footway, also; the word "townway" includes a footway, and by common law the term "highways" includes townways.

(Suffolk — Decided September 4, 1885.)

CERTIORARI. This is a petition for a writ of *certiorari* by which the plaintiff seeks to quash the proceedings of the Board of Street Commissioners of the City of Boston in laying out a footway over the petitioner's railroad in the Town of Brighton.

The petitioner claimed that the laying out of the footway was illegal and void: First, because no town or city or board of street commissioners is authorized by law to lay out a footway over or across a railroad.

Second, because the petitions of individuals, on which the proceedings of the city council and board of street commissioners are founded, do not warrant the laying out of a footway.

Third, because the order for the laying out of said footway does not require the same to be constructed in such manner as not to injure or obstruct your petitioner's railroad.

Fourth, because there is no authority in the said board of street commissioners to take the land of your petitioner within its location, for the purpose of constructing a footway across the same.

Fifth, because the proceedings in laying out a footway are not in accordance with the provisions of law with reference to laying out footways.

It was agreed that if the footway should be constructed, it would cause substantial damage to the petitioner.

Mr. A. L. Soule, for petitioner, cited:

Springfield v. Conn. River R. R. Co., 4 Cush., 63; *Boston & Maine R. R. Co. v. Lowell & Lawrence R. R. Co.*, 124 Mass., 369; *Com. v. Roxbury*, 9 Gray, 55; *Com. v. Coombs*, 2 Mass., 489; Pub. Stat., ch. 112, § 125; *Blackstone v. Wor. Comrs.*, 108 Mass., 68; *Valentine v. Boston*, 22 Pick., 80; Stat., 1876, ch. 67; R. S., ch. 24; Gen. Stat., ch. 43; Pub. Stat., ch. 49.

Authority to lay out footways was not given to any tribunal by general statute until the year 1874. *Gould v. Boston*, 120 Mass., 800; *Tyler v. Sturdy*, 108 Mass., 196; Stat., 1874, ch. 299.

As to meanings of "highway" and "townway." *Blackstone v. Wor. Comrs.*, *ubi supra*; *Valentine v. Boston*, *ubi supra*; *Com. v. Boston*, 16 Pick., 444; *Monterey v. Berkshire Comrs.*, 7 Cush., 400.

Mr. A. J. Bailey, City Solicitor, for respondents:

Street commissioners have the power to lay out, alter and discontinue streets, ways, lanes and alleys in said City. Stat., 1799, ch. 31, sec. 3; Stat., 1804, ch. 78; Stat., 1821, ch. 110, sec. 13; Stat., 1854, ch. 448, sec. 33; Stat., 1870, sec. 337.

These words "streets, lanes and alleys," when used as applicable to Boston, are synonymous with "highways." *Com. v. Boston*, 16 Pick., 442; *Gould v. Boston*, 120 Mass., 805.

A "highway" may be laid out across a railroad previously constructed. Pub. Stat., ch. 112, sec. 125; and this word includes foot-paths and all other ways authorized by general or special statute to be laid out by municipal authority for any kind of public travel. *Gould v. Boston*, *ubi supra*.

All cities and towns may now lay out footways under the same rules and principles of law, so far as applicable, as govern the laying out of townways. Pub. Stat., ch. 49, sec. 88; *Williams v. Taunton*, 125 Mass., 42.

W. Allen, J., delivered the opinion of the court:

This is a petition for a writ of *certiorari* by which the plaintiff seeks to quash the proceedings of the Board of Street Commissioners of the City of Boston, in laying out a footway over the petitioner's railroad. Several objections to the proceedings of the commissioners are stated in the petition, but the only one which has been argued, and which it is necessary to discuss, is in these words: "Because no town or city, or board of street commissioners, is authorized by law to lay out a footway over or across a railroad." Public Statutes, ch. 112, sec. 125, provides that "A highway or townway may be laid across a railroad previously constructed, when the county commissioners adjudge that the public convenience and necessity so require." The petitioner contends that the authority to lay out such a way is derived from the statute and not merely restricted and regulated by it; and that a footway is neither a highway nor a townway within the meaning of the provision. We think that neither proposition can be sustained. By the common law a public footway is a highway, and the town highway includes a footway. *Tyler v. Sturdy*, 108 Mass., 196, and authorities cited. Bacon, Abr., Highway, A.

Townways are within the common law definition of a highway, and the word "highway" is sometimes used in the statute to include townways. *Jones v. Andover*, 6 Pick., 59. The difference in the meaning of the words when used distinctively in the statute, is that highway designates a public way, original jurisdiction to lay out which is in the county commissioners; and townway, a highway laid out, or proceedings in which a town or city has original jurisdiction. *Inhabitants of Blackstone v. County Commissioners*, 108 Mass., 68; *Butchers' Slaughtering and Melting Association v. Boston*, 138 Mass.

Valentine v. Boston, 22 Pick., 75; *Denham v. County Commissioners*, 108 Mass., 202. This distinction does not exist in the City of Boston, as its Board of Street Commissioners is the only tribunal authorized to lay out ways, and the statutes prescribe a uniform manner in which all ways shall be laid out. Pub. Stat., ch. 49, sec. 84; *Com. v. Boston*, 16 Pick., 442.

A public footway would be a highway within the general meaning of that word, and would be either a highway or a townway, within the distinctive meanings of those words as used in the statutes, according as proceedings for laying it out should be required by law to be commenced before the county commissioners or the municipal authorities.

The Statute of 1874, ch. 299, provided that towns and cities might lay out footways, and that the proceedings should be in conformity

with the provisions of law applicable to the laying out of townways. If there was authority, under general laws, to lay out public footways, before this statute, they would be highways or townways according to the manner in which they should have been laid out. If there was no prior authority, which is by no means clear, the statute established them as the species of highways called townways, except in the City of Boston where that species is unknown, and all ways are technical highways, and they would come within the purview of Pub. Stat., ch. 112, § 125, by which highways or townways could be laid out across railroads. We do not regard that statute as an enabling Act, authorizing highways and townways to be laid out across railroads, but as recognizing and regulating an existing right. Highways and railroads are both established by the legislative exercise of the right of eminent domain, delegated in the one case to public officers and in the other to private persons. Both are franchises, the one delegated to public officers to be exercised for the public good; the other granted to individuals to be exercised for their emolument, because the public good will be thereby subserved. The Legislature has authority to grant either so as to interfere with a previous grant to the other, providing for compensation when private rights are impaired. When both are granted, under general laws as well as when one is made a special Act, the question whether the one will be controlled or limited by the prior exercise or grant of the other must depend upon the intention of the Legislature, and the question we are considering is, whether the appropriation of the land to the public use of a railroad is so inconsistent with its public use as a highway crossing, as to prohibit its subsequent appropriation for that purpose. We think it is very clear that it is not. See language of Shaw, *C. J.*, in 23 Pick., 397. It is sufficient to refer to the cases of *Willington, Petr.*, 16 Pick., 87, and *Boston Water Power Co.*, 23 Pick., 361. The charter under which the petitioner claims its exclusive right (Stat., 1831, ch. 72; Stat., 1833, ch. 116), contains no reference to the laying out of highways across the railroads, and there was no general Act upon the subject when the charter was granted. The Legislature did not intend by authorizing the taking of land for a railroad to divide the State from its western boundary to the sea, by a strip of land five rods wide, over which no public way could be laid. There is nothing in the nature or relation of the two public uses to indicate such an intention; and the first legislative utterance on the subject assumes the right to lay out public ways across railroads and regulate it. Rev. Stat., ch. 89, § 69, the section referred to, was the only statute upon the subject for twenty years. Stat., 1837, ch. 287, was the first Act making full regulations for laying out ways across railroads. We think this statute was a legislative recognition and restriction and regulation of the right of the county commissioners and towns and cities to lay out public ways across railroads. This statute

is substantially re-enacted in Gen. Stat., ch. 63, ss. 57-60, and in its revision of the railroad Acts in Stat., 1874, ch. 372, § 92. In the latter the words "a highway or townway" are substituted for the words "a turnpike road or other way," in the earlier statutes, and so in Pub. Stat., ch. 112, § 125. From a consideration of the subject-matter and an examination of the statutes referred to, it seems that prior to the Revised Statutes there was authority to lay out public ways across railroads. The Revised Statutes, ch. 89, § 69, as construed in *Boston & Maine R. R. Co. v. Lawrence*, 2 Allen, 107, required that ways laid out across railroads should pass over or under the railroad, and provided that they should be so made as not to obstruct or injure the railroad; Stat., 1857, ch. 287, required that the crossing should be, with the consent of and in the manner prescribed by the county commissioners. The re-enactment of this in Gen. Stat., ch. 63, §§ 57-59, providing for the manner in which a "turnpike road or other way" should be laid out across a railroad, was in force when Stat., 1874, ch. 229, authorized towns and cities to lay out footways in the manner provided for laying out townways took effect, and under it, footways came, even if they were not before, within the designation of "turnpike road or other ways." Certainly after the enactment of that statute until Stat., 1874, ch. 372, took effect, there was authority for laying out a footway across a railroad, and there is no ground for the argument that the change in the latter statute was intended or can operate to take away that authority. The words "other ways," used in the earlier statute, included every public way, whether laid out by the county commissioners or by towns or cities, and whether a carriageway or a footway, and the words "highway or townway" in the revision has the same meaning. A footway laid out by a town or city under the Statute of 1874, ch. 299, comes within the strict definition of a townway. There can be no doubt of the authority of the street commissioners of Boston to lay out a footway, and whether the authority was given by Stat., 1874, ch. 299, or was vested in them in common with the county commissioners and towns and cities by earlier general authority to lay out ways, or is derived from special provisions relating to the Town and City of Boston (see *Gould v. Boston*, 120 Mass., 300), is immaterial. The authority, however derived, must be exercised in the manner prescribed by the statutes relating to laying out ways in Boston. A way so laid out, whether a foot or carriageway, may be a highway within the meaning of that word in the statute rather than a townway. That, however, is immaterial. Every public way laid out by the county commissioners, or by a city or town, or by the Board of Commissioners of Streets of the City of Boston, must be either a highway or a townway, within the meaning of those words in Pub. Stat., ch. 112, sec. 125, and the authority to lay it out across a railroad is recognized and regulated by, if not derived from, the statute.

Petition dismissed.

SUP. CT. OF MASSACHUSETTS.

The County of BRISTOL,

v.

Franklin GRAY.

1. The Statutes of this State provide that the county commissioners shall receive annual salaries which shall be in full for their compensation for services as such commissioners, including their traveling expenses.
2. A sheriff is responsible for the safe keeping of prisoners under his charge, and it is the duty of the county commissioners, to provide necessary supplies, materials and implements, establish rules for employing and governing the prisoners, make contracts for their employment and settle accounts for the productions of their labor with the masters who employ them.
3. It is the duty of the master to dispose of articles manufactured through the labor of the prisoners, and the necessary and reasonable expenses of making sales thereof should be allowed the master.

(Bristol—Decided September 6, 1886.)

PROCEEDING on agreed statement of facts to test the right of a County Commissioner to charge for the sale of articles manufactured in the House of Correction.

Mr. Edgar J. Sherman, Atty-Gen., for plaintiff.

Messrs. Morton & Jennings, for defendant.

Pub. Stat., ch. 22, § 14, only restores the provisions of Stat. 1864, ch. 280. It is clear, therefore, that the annual salary is intended to be in full for the services rendered and expenses incurred as County Commissioners and not otherwise. *New Haven & Northampton Co. v. Hayden*, 117 Mass., 488.

The articles manufactured are to be sold by the master or keeper of the House of Correction who is not subject to the direction or control of the County Commissioners, being appointed by the sheriff and not by the County Commissioners. Pub. Stat., ch. 220, §§ 24, 56.

Upon the death of the sheriff, the master appointed by him retains charge until a sheriff is appointed or the Governor and Council appoint a master. Id., § 88.

Field, J., delivered the opinion of the court: Public Statutes, ch. 22, sec. 14, provides that "The commissioners and special commissioners of the several counties shall receive from the respective county treasuries, in full payment for all their services and travel, the following annual salaries to be divided among the county commissioners in proportion to the services rendered, the travel performed, and the expenses incurred by each; and no other or additional compensation shall be paid to them for any service performed by them for their respective counties." By the Revised Statutes, ch. 84, § 4, they were to be paid \$1 for every ten miles traveled and \$3 a day "For the time employed in discharging the duties of their office." By Statute 1859, ch. 163, § 1, they were to be

paid "Out of the treasury of each county, a fixed annual salary which shall be in full payment for all services rendered and travel performed by them in discharge of their duties in their respective counties." See, also, Gen. Stat., ch. 17, § 29 and Stat. 1863, ch. 185, § 1; Stat. 1864, ch. 280, sec. 1, provides that "The salaries provided for the county commissioners of the several counties by chapter one hundred and eighty-five of the Acts of the year eighteen hundred and sixty shall hereafter be taken to be in full payment for all services rendered, travel performed and expenses incurred, etc.," "and no other additional compensation shall be paid them for any service performed by them for their respective counties." Stat. 1867, ch. 340, provided that "The commissioners and special commissioners of the several counties of the commonwealth shall receive, etc.," "in full payment for all their services and travel payable as now provided by law the following annual salaries, etc." See, Stat. 1871, ch. 286, Stat. 1872, ch. 151 and Stat. 1879, ch. 295.

We think these statutes and the Public Statutes mean that the annual salaries shall be in full payment for all their services and travel as county commissioners, and that no other compensation for such services and travel shall be paid to them.

The county commissioners provide a house or houses of correction for the counties, Pub. Stat. ch. 220, § 7, and suitable materials and implements and establish needful rules, etc., *Ibid.*, § 11, and examine all accounts of the master "Relating to the earnings of the prisoners and all expenses of the institution, etc.," *Ibid.*, § 12. They may make contracts for work to be done or for letting out to hire the prisoners, *Ibid.*, secs. 13, 14. The sheriff, except in the County of Suffolk, has "the custody, rule and charge" of the house of correction and of all prisoners therein "and shall keep the same by himself or by his deputy as jailer, master or keeper, for whom he shall be responsible," *Ibid.*, §§ 28 and 33. The county commissioners "without extra charge or commission to themselves or to any other person" procure the necessary supplies for the house of correction, *Ibid.*, § 58. The charges and expenses, etc., "shall be paid from the county treasury, the accounts of the keeper or master being first settled and allowed by the commissioners, etc.," *Ibid.*, § 54. By § 356 it is provided that each master or keeper shall cause the articles manufactured by the prisoners in his custody, or the produce of their labor, to be disposed of to the best advantage, and under the direction of said commissioners "shall cause accounts to be kept of such accounts to them for settlement semi-annually, etc." "He shall pay into the treasury the amount of sales and the proceeds of the labor and earnings of the prisoners in his county or the balance thereof." These provisions are derived from Stat. 1834, ch. 137, § 18.

The general scheme is that the sheriff, by his deputy as master, shall be responsible for the safe-keeping of the prisoners and that the county commissioners shall furnish the necessary supplies, material and implements, establish rules for employing, reforming, governing and punishing the prisoners, make contracts for the work of the prisoners and settle the accounts of the master. But it is the duty of the master to

dispose of the articles manufactured, to the best advantage, and in this the statutes do not make the master the agent or servant of the commissioners. The commissioners do not appoint him and they cannot remove him, although they may ask the Superior Court to remove him, *Ibid.*, sec. 24, and we cannot see that it is any part of the duty of the commissioners to make sales of the articles produced by the labor of the prisoners. The necessary and reasonable expenses of making such sales should of course be allowed the master. The defendant, therefore, in making the sales, was not acting as county commissioner and whatever may be the propriety of forbidding by law any such employment of a commissioner by the master, a majority of the court think it is not forbidden by existing statutes.

Judgment affirmed.

Joseph M. GIBBENS, *Admr.*,

v.

Frances M. GIBBENS *et al.*

Under the provision in a will that "At the decease of my wife all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of its parent," who died after the testator and before the wife, has a vested interest, assignable in the child's lifetime.

(Suffolk — Decided September 12, 1885.)

BILL IN EQUITY by the administrator *de bonis non*, with the will annexed, of the estate of Daniel L. Gibbens, against the children of the testator by his second wife; the children of Daniel L. Gibbens, Jr., a deceased child of said second marriage; a child of Samuel H. Gibbens; son of the testator by his first wife; the children of Mary K. Sherwin, a child of the first marriage; the children of Ann E. Frobisher, a child of the first marriage; and the executor of the estate of Harriet L. Gibbens, a child of the first marriage, praying for the construction of the will.

The case, as it appeared from the bill and answer, was as follows: The will of Daniel L. Gibbens contained the following provisions:

"I give to my wife, Mary R. Gibbens, the use of all my household furniture, plate, pictures, books and utensils; also all the family stores which shall be in the house at the time of my decease and destined for family maintenance. All such articles as are not consumed in the use, and shall remain in existence at my wife's marriage or decease, shall then go to my children, they to share the same equally. I also devise and bequeath to my said wife to hold during her widowhood, all my estate, real, personal and mixed, upon the trust and for the intent and purpose, that by and from the net income and produce thereof she may maintain herself and our family as now composed.

* * * In case my said wife shall marry after my decease, then upon such event happening, she shall receive only one third part of

the net income of my real estate and one fourth part of the net produce of my personal property; the residue of such income and produce shall thereafter, during the continuance of my wife's life, be equally distributed to and among my children. At the decease of my wife all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of the parent."

The testator died August 16, 1853, leaving said second wife, Mary R., him surviving, and as his heirs the four children of the first marriage, and the five children of the second marriage.

The widow, Mary R., died January 9, 1884.

Harriet L., a child of the first marriage, died April 11, 1858, leaving a will containing the following provision: "The residue and surplus of my property, after payment of my debts and the above legacies and satisfying the above provisions, I give and bequeath to the children of my father by his first marriage. I make this provision in consideration that the children of his second marriage may probably receive the property of their mother on her decease."

The bill alleged that the children of the second marriage claimed that the testator's estate should be divided into eight equal parts and no part be payable to the executor or devisees under the will of Harriet L. Gibbens, she having died before the testator's wife. But the issue of the first marriage claimed that the estate should be divided into nine equal parts, eight to go to the surviving children of the testator and the ninth share to the devisee under the will of Harriet L., this being a vested interest and not contingent upon her surviving the widow.

Mr. Alfred D. Foster, for Joel Wheeler, Exr. of will of Harriet L. Gibbens and Frederick H. Gibbens *et al.*, grandchildren of Daniel L. Gibbens, by his first marriage:

A gift shall not be deemed to be an executory devise, if it is capable of taking effect as a remainder; and it is equally well settled that no remainder will be construed to be contingent, which may, consistently with the intention, be deemed vested. *Blanchard v. Brooks*, 12 Pick., 68; 4 Kent, Com., 6th ed., 202; *Shattuck v. Stedman*, 2 Pick., 468; *Doe v. Perry*, 3 T. R., 484.

We must then consider whether there is anything in the language of this devise, which shows an intention to postpone its vesting until the death of the mother. *Blanchard v. Blanchard*, 1 Allen, 225.

There must appear in the will itself a clear intention that the vesting of the estate should be postponed until after the death of the life tenant. *Doe v. Considine*, 6 Wall, 458 (XVIII., Law. ed., 869).

Whenever, during the duration of the precedent estate, the remainder man is entitled to any part of the income of the estate, the remainder is always vested. *Hanson v. Graham*, 6 Ves. Jr., 289; *In Re Peck's Trusts*, L. R., 16 Eq., 221; *Fuller v. Winthrop*, 3 Allen, 51.

A remainder is always vested, where there is a person in being having a present right to the future possession, and where the event of the termination of the precedent estate is certain.

and is alone necessary to give effect to the remainder in possession. *Hawley v. James*, 5 Paige Ch., 380.

The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues. *Doe v. Considine*, *supra*; *Doe v. Prigg*, 8 Barn. & C., 231.

A devise for life, and "After his decease the premises should be equally divided among and between his sons to be their property," was held a vested interest, and the children of a son who died during the lifetime of the devisee, were entitled to their father's share. *Dingley v. Dingley*, 5 Mass., 535; *Bates v. Webb*, 8 Mass., 458.

Where the words "at her decease I give and bequeath" were used, held that representatives of a son dying in the lifetime of the widow were entitled to share. *Shattuck v. Stedman*, 2 Pick., 468.

A gift for life to a daughter, "And in the event of her death I do give," etc., does not express a continuancy, but an event; and define not the time when remainder men are to be ascertained, but when they are to receive possession. *Pike v. Stephenson*, 99 Mass., 188; *Hill v. Bacon*, 106 Mass., 578; *Wilmarth v. Bridges*, 113 Mass., 407; *Kimball v. Tilton*, 118 Mass., 811.

The words "At her decease," "After her decease," "From and after her decease," and adverbs of time, as when, thereafter, from, etc., in a devise of a remainder, are always construed to refer merely to the time of the enjoyment of the estate and not to the time of the vesting. *Corbett v. Palmer*, 2 Eq. Cas. Abr., 548; *Monkhouse v. Holme*, 1 Bro. Ch. Cas., 296; *Smither v. Willock*, 9 Ves. Jr., 233; *Gray v. Garman*, 2 Hare, 268; *Salisbury v. Petty*, 3 Hare, 86; *In Re Wood*, 29 W. R., 171; *In Re Jackson's Will*, 13 Ch. D., 189.

Mr. Edmund H. Bennett, for Frances M. Gibbens and others:

By the use of the words, "Then to go to my children," testator indicates, that devise was not to vest until after his wife's marriage or death. This word "then" was considered of much importance in *Olney v. Hull*, 21 Pick., 811, in which the language, "Should my wife marry or die, the land then shall be equally divided among my surviving sons," was held to vest only a contingent interest. See, also, *Smith v. Rice*, 130 Mass., 441; *Thomson v. Ludington*, 104 Mass., 194.

Had this devise been, to "My children or the survivors of them," unquestionably in this Commonwealth, that would have constituted a contingent remainder, because of the uncertainty of persons who would be in existence to take at the widow's death. *Denny v. Kettell*, 135 Mass., 188.

"If at that time she is married, her share shall be transferred and conveyed to a trustee, to hold for her use," etc. If one ninth of the real estate had already vested in her, how could it be transferred and conveyed to a trustee, at the widow's death? *Hunt v. Hall*, 87 Me., 363, is in point.

If the estate were to be construed as vesting at the death of the testator, an heir might convey by deed his share of the estate, and if he

should decease before the termination of the life estate, leaving heirs, his conveyance would defeat the estate of such heirs. This would be against the express provision of the will. So, if Mrs. Gibbens' will should be in force, and she had died leaving children alive at the widow's death, the clause in her father's will, that her children should take her share would be defeated. See, also, *Hall v. Nute*, 38 N. H., 422.

The rules applicable to and affecting real and personal property are somewhat different. *Emerson v. Cutler*, 14 Pick., 115.

For a chattel, there can be no contingent remainder to let in after born children; the interests must be contingent until time for distribution, in order that they may take. *Emerson v. Cutler*, 14 Pick., 115; see, also, *Dingley v. Dingley*, 5 Mass., 537; *Hunt v. Hall*, 87 Me., 363.

A gift to a wife of the use of certain bank shares, to be divided at her decease "equally between my heirs," applies only to such heirs as survive the widow. *Rich v. Waters*, 22 Pick., 563.

A gift of the use of personal property, to his wife, and if she marry or die before her brother, then, thereafter, "to and among all the children of my brothers and sisters, to be equally divided between them," only the children who survived the wife, took any part in the estate. *Denny v. Allen*, 1 Pick., 148.

The fact that the widow had the right to dispose of a part of the real property and all of the personal, tends to show that the remainder men had a contingent and not a vested interest. *Johnson v. Battelle*, 125 Mass., 490, and cases cited; *Taft v. Taft*, 130 Mass., 461.

Mr. R. D. Smith, for D. L. G. Frobisher.

C. Allen, J., delivered the opinion of the court:

The only clause of the will under which any question arises, is the following: "At the decease of my wife all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of the parent." Other portions of the will are referred to merely as they may aid in showing the intention of the testator in using the above language.

While the meaning of the testator is certainly open to some doubt, which has been shown with much ingenuity and force in the argument, we are of the opinion, on the whole, that the case falls within the general rule, that a vested remainder will be held to have been intended in the case of a devise to the testator's children, unless there is something sufficient to show the contrary. There are no words of contingency, as to the children, who shall take; the devise is general to the testator's children, the issue of a deceased child standing in the place of the parent. The will does not say that the estate shall go to his children then surviving, or make any provision that the interest of any one of them shall cease in case of his or her death.

In the devise, the meaning of which is immediately under consideration, the testator does not even reject the word "then;" that is, that the estate shall then go to and be equally divided among my children. This word is only used in the earlier clause, providing that such articles of furniture and other specified articles

as may not be consumed in the use and shall remain in existence at his wife's marriage or death, shall then go to his children.

But in all the cases referred to in the argument where stress was laid upon such a use of the word "then," as showing that the remainder was to be held contingent rather than vested, it was accompanied with words of survivorship; as in *Olney v. Hull*, 21 Pick., 311, where the words were "Should my wife marry or die the land then shall be equally divided among my surviving sons;" in *Thomson v. Ludington*, 104 Mass., 198, where the remainder was given "to such of my children as shall then be living," and in *Smith v. Rice*, 130 Mass., 441.

The argument from the use of the word "then" in the earlier clause does not materially aid in the consideration of the meaning of the clause immediately to be determined and it is certainly open to too much doubt whether the earlier clause would not bear the same meaning, if the word "then" was omitted.

In *Denny v. Kettell*, 135 Mass., 138, the word "then" was not inserted, but the words were "All the residue of said trust fund in equal portions to my surviving nephews and nieces." These being plain words of survivorship, the only question was to what period of time these words should be referred; and it was held, in view of all the phraseology of the will, that they should be referred to the period of distribution.

That decision, however, throws no light upon the present case which falls rather within the rule favoring vested remainders as declared in *Blanchard v. Blanchard*, 1 Allen, 223, and *Abbott v. Bradstreet*, 3 Allen, 587.

An argument in favor of contingency is drawn from the use of the words "The issue of a deceased child standing in the place of the parent." It is urged that such issue, if there were any, would take at all events and that the parent could not have disposed of his or her share to their exclusion, and that, therefore, the interest of the parent was not an absolute vested one.

It is contended on the other hand, that the interest of Harriet was a vested remainder, subject only to be divested by her death in the lifetime of her mother, leaving issue. It is true that there may be such a thing as a vested interest which is determinable upon the happening of a contingency. *Blanchard v. Blanchard*, *supra*. But in the present case we do not find it necessary to consider whether Harriet's interest was liable to be divested by the birth and survivorship of issue or not. It is quite as natural and probable to infer that the words above quoted were used for the purpose of showing clearly that the testator did not intend the devise to lapse in the case of the death of one of his children, leaving issue.

By the statutes in force at the time the will was made, Rev. Stat., ch. 62, § 24, it was provided as follows: "When a devise of real or personal estate is made to any child or other relation of the testator, and the devisee shall die before the testator, leaving issue, who survive the testator, such issue shall take the estate so devised in the same manner as the devisee would have done if he had survived the testator, unless a different disposition thereof shall be made or required by the will."

The words used in the will may have a le-

gitimate effect, as showing that the testator did not intend any different disposition from that contemplated by the general provision of the statute. Besides this, we are well aware that words to the effect that the issue of deceased children shall take by right of representation are not uncommon in wills; when strictly speaking, they are entirely unnecessary and do not in any respect change the result provided by the Legislature, which has been in force since 1793. The use of so familiar and common an expression does not carry with it a strong inference that the testator thereby designed to express some peculiar intention with reference to the vesting or contingency of the interest devised.

It is further contended that, inasmuch as the gift in the will embraces personal as well as real estate, it might more readily be inferred that the testator intended that his children should take only a contingent interest, and that some of the earlier Massachusetts cases countenance this. *Dingley v. Dingley*, 5 Mass., 535; *Denny v. Allen*, 1 Pick., 148; *Emerson v. Cutler*, 14 Pick., 115; *Rich v. Waters*, 22 Pick., 563. In the later cases, however, the above decisions have been overruled or questioned; see *Wright v. Shaw*, 5 Cush., 56, 60, 61; *Abbott v. Bradstreet*, 3 Allen, 587; *Bowditch v. Andrew*, 8 Allen, 339, 342, 343; and gifts over of real and personal property at the expiration of widowhood to the testator's children, have usually been held to convey a present vested interest to the child.

On the whole, looking at all parts of the will, considering the repetition in a later portion of substantially the same idea in different phraseology; in view of the absence, in either of these provisions, of any words of contingency such as "My children surviving," and if the fact that nothing was wanting to put the children in full possession except the mere efflux of time; regarding, also, the provisions that in case of the remarriage of the testator's wife the whole income of both real and personal estate was at once to go to his children, we are brought to the conclusion that the children took vested interests and that the share of Harriet L. Gibbens passed by the will. See, also, *Doe v. Consideine*, 6 Wall., 458 (XVIII., Law. ed., 869); *Parker v. Converse*, 5 Gray, 336.

Decree accordingly.

S. DAVIS HALL
v.

James CARNEY.

1. **Railroad cars are, for the purposes of attachment, personal property.**
2. **They may be attached without being taken into manual possession by the officer.**

(Worcester—Decided October 6, 1886.)

TORT by a deputy-sheriff, to recover of a constable for conversion of a passenger car. Writ dated November 23, 1883. Trial in the Superior Court, without a jury, before Barker, J., who allowed a bill of exceptions, in substance, as follows:

The evidence showed that on November 22, 1883, the plaintiff, a deputy-sheriff, having in his hands, for service, a writ against the Grafton Center Railroad Company, owner of a narrow gauge road located entirely within the Town of Grafton, made a demand upon the president and superintendent thereof for property other than a railroad car upon which to make an attachment, but they refused to comply; whereupon, the plaintiff went with his writ to a passenger car, a part of the rolling stock of the company, then on the track in Grafton Center, with intent to attach as personal property, declared that he attached the car, and asked the conductor if he would run the car off on a siding, and upon the latter's assenting, went away, leaving no keeper in charge of the car. The conductor did not run the car upon a siding as he had agreed to do, but made a trip with it to the other end of the line, where, about an hour later, it was taken possession of by the defendant, a constable qualified to serve civil process, who undertook to attach it on another writ, and who retained possession personally or by keeper until it was sold by him under Pub. Stat., ch. 161, § 89, to one Allen, who has not removed the car from the track.

Four hours after the defendant's attempted levy, the plaintiff deposited in the town clerk's office an attested copy of his writ and of so much of his return as related to the car, and afterwards returned the writ to the court, certifying said demand, refusal and seizure. The plaintiff made no attachment of real estate on his writ. The defendant had also made a like demand, which was refused, and a correct return thereof made on the writ held by the defendant.

The Judge refused to rule, as requested by the defendant, that the plaintiff had no such title to the car that he could maintain this action, or that the car was a fixture and could not be attached as personal property; but ruled that the car was not able to attachment as personal property, and that the plaintiff's attachment was valid; and the defendant alleged exceptions.

Mr. John Hopkins, for plaintiff:

The weight of authority sustains the position that railroad cars are personal property. *Stevens v. Buffalo & N. Y. City R. R. Co.*, 81 Barb., 590; *Beardsley v. Ontario Bank*, 81 Barb., 619; *Randall v. Elwell*, 52 N. Y., 521; *Williamson v. N. J. So. R. R. Co.*, 29 N. J. Eq., 311; *Boston, C. & M. R. R. Co. v. Gilmore*, 37 N. H., 410; *Howe v. Freeman*, 14 Gray, 566.

Bulky and heavy articles, like railroad cars, may be attached without removal. See, as to cord wood, *Reed v. Howard*, 2 Met., 36; millstones, etc., *Arnold v. Stevens*, 11 Met., 258; heavy boxes of glass, *Polley v. Lenox Iron Works*, 4 Allen, 329; pig iron, *Scovill v. Root*, 10 Allen, 414; tobacco hanging in a barn on poles, in process of curing, *Cheshire Nat. Bk. v. Jewett*, 119 Mass., 241.

A deputy-sheriff has such a special property in goods attached by him, that he may maintain trover against a person intermeddling with them. *Badlam v. Tucker*, 1 Pick., 389; *Polley v. Lenox Iron Works*, 4 Allen, 329; *Arnold v. Stevens*, 11 Met., 258.

Messrs. D. B. Hubbard and W. T. Forbes, for defendant:

According to the weight of authority, the rolling stock is a fixture or accessory to the realty. *Jones, Rail. Secu.*, §§ 147, 148, 154; 2 Redf. R. R. Cas., 667; 2 Redf. R. R., 501, 502, n. 25, 26; *Rorer, R. R.*, 245; *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb., 484; *Farmers' L. & T. Co. v. St. Joseph, etc., R. Co.*, 8 Dill., 412; *Minnesota Co. v. St. Paul Co.*, 2 Wall., 609, and note (XVII., Law. ed., 886); *Galveston R. R. Co. v. Condney*, 11 Wall., 481 (XX., Law. ed., 206); *Williamson v. N. J. S. R. R. Co.*, 29 N. J. Eq., 311; *Pierce v. Emery*, 32 N. H., 484; *Titus v. Ginheimer*, 27 Ill., 462.

By the Court:

Railroad cars are, for the purposes of attachment, personal property. Our statutes clearly treat them as such and provide a special mode of attaching them. Pub. Stat., ch. 161, § 38-39. In the case at bar, the attachment by the plaintiff was made in exact compliance with the statute, and the Superior Court rightly ruled that it was a valid attachment.

Exceptions overruled.

Hugh QUINN

v.

LOWELL ELECTRIC LIGHT CO.

1. The words "**Called for that purpose**" in Pub. Stat., ch. 102, sec. 47, providing for the adoption of ch. 74, Acts of 1862, are limited to action taken by the inhabitants of a town, and do not apply to a city council.
2. A license, under a statutory provision, to operate a stationary engine, is not a defense to an action for a nuisance arising from attached machinery, as distinct from the engine.

(Middlesex—Decided September 4, 1885.)

TORT for continuance of nuisance.

The declaration alleged, in substance, that the defendant, at its works on Middle Street, Lowell, within 500 feet of the plaintiff's dwelling house, maintained and used a steam engine, boilers and heavy machinery for generating electricity for lighting purposes, the noise and vibration whereof was a nuisance to the plaintiff. The answer was a general denial and, further, that whatever the defendant did, it was authorized by law to do, and was duly licensed by the mayor and aldermen of Lowell to do. Trial in the Superior Court, before Rockwell, J., who reported the case for the determination of this court in substance as follows:

It appeared in evidence that the defendant was a Corporation authorized to generate electricity and furnish light thereby, and in the time and at the place complained of was so engaged conformably with its charter, and ran a stationary engine, boilers and heavy machinery, all necessary for the purpose; that the noises and vibration complained of were incidental to the reasonable use of the defendant's works; that on the defendant's application the board of aldermen of Lowell granted to the defendant a license to set up and run an engine for the pur-

pose of driving machinery used for its business; that a portion of the noise and vibration complained of was caused by the machinery aside from the engine and fixtures connected therewith.

It appeared that the Statutes of 1862, ch. 74, entitled "In Relation to Stationary Engines," had been adopted by the city council, at a regular meeting and not at a special one called for the purpose.

The Judge ruled, against the plaintiff's objection, that the license was sufficient and explicit enough to relieve the defendant from liability for a nuisance; that it justified the defendant in running not only the engine but also the other machinery; and that the action could not be maintained. The jury, as directed, returned a verdict for the defendant; and thereupon the Judge reported the case for the determination of this court.

Messrs. W. H. Anderson and C. S. Lilley, for plaintiff.

Messrs. D. S. & G. F. Richardson, for defendant:

In the Statutes of 1862, ch. 74, sec. 3, the qualifying clause, "Called for that purpose," should be restricted to the last antecedent, "Inhabitants of the town." *Cushing v. Worrick*, 9 Gray, 382.

The defendant, so long as it complied with the terms of the license, might run the engine and other machinery, and no action will lie for damages occasioned thereby. *Commonwealth v. Rumford Chemical Works*, 16 Gray, 233; *Call v. Allen*, 1 Allen, 187; *Saltonstall v. Banker*, 8 Gray, 195; *Sawyer v. Davis*, 17 Law Rep., 308.

An action of tort cannot be maintained by one who sustains a private injury, by the exercise of powers given by an Act of the Legislature. *Perry v. Worcester*, 6 Gray, 544; *Commonwealth v. Rumford Chemical Works*, 16 Gray, 233; *Walker v. O. C. R. Co.*, 103 Mass., 14; *London & N. W. R. Co. v. Bradley*, 3 Macn. & G., 336; *Brand v. Ry. Co.*, L. R., 1 Q. B., 130; *Vaughan v. R. Co.*, 5 Hurl. & N., 679; *Rez v. Pease*, 4 Barn. & Ad., 30; *Struthers v. Ry. Co.*, 87 Pa., 282; *Monongahela Nav. Co. v. Coons*, 6 Watts & S., 101; *Watson v. R. R. Co.*, 1 Wright, (37 Pa. St.) 479.

The right to set up an engine imports the right to use machinery therewith, and to make the noise incidental to its reasonable use. *Call v. Allen*, 1 Allen, 187.

A judgment in a former action is conclusive, only when it appears that the subject-matter in the former suit was the same as in the present, and that the verdict therein was rendered upon an inquiry into the merits of the present claim. *Eastman v. Cooper*, 11 Pick., 239; *Gilbert v. Thompson*, 9 Cush., 348; *Burien v. Shannon*, 99 Mass., 200; *Tracy v. Merrill*, 103 Mass., 280.

W. Allen, J., delivered the opinion of the court:

The license was under Pub. Stat., ch. 102, sec. 47, which prohibits the erection of a stationary engine within five hundred feet of a dwelling house or public building, without a license, in any city or town in which ch. 74 of the Acts of 1862, had been adopted at a legal meeting of the city council of the city, or of the inhabitants of the town, called for that purpose. The Act

of 1862, ch. 74, was adopted at a regular meeting of the city council and not at a special meeting called for the purpose. We think that the requirement that the adoption shall be at a meeting called for the purpose is limited to an adoption by the inhabitants of a town, and does not apply to the action of a city council, which is usually composed of different bodies acting at regular meetings and under prescribed rules of procedure. The license was in this case, "to set up and run a stationary steam engine for the purpose of driving machinery used in generating electricity at their works on Middle Street." The court ruled, in substance, the license extended to the use of the machinery as well as to the use of the engine, and that the plaintiff could not recover on account of noise, jarring and vibration, caused by the machinery, which, but for the license, would give him a right of action for a private nuisance.

This ruling involves the proposition that nothing which is licensed under the statute can be a nuisance for which an action will lie, and that the use of the machinery was duly licensed. The second only of these, is before us. The language of the license may well be construed as descriptive of the engine only, but if it was intended to license the defendant's works and the business carried on there, as well as the engine, the license exceeds the authority given by the statute. The provision of the statute under consideration was first enacted in the Statutes of 1862, ch. 74, which merely prohibits the erection, for use, of an engine in circumstances mentioned, without a license from the municipal authorities and declares such an unlicensed engine a public nuisance, which can be summarily abated by the authorities. The obvious intention of the statute is to restrict the use of engines by declaring their use without a license a public nuisance. The construction contended for would not only evolve from the provision that every unlicensed engine should be a common nuisance, the enactment that no licensed engine could be a nuisance, but also authority to license and legalize every work in which an engine might be used, giving to municipal authorities absolute authority to determine beforehand and without trial by jury and without revision, the lawfulness, as regards private as well as public rights, of any business or operation in which an engine should be used. We cannot infer from a prohibition to use steam power without a license from the selectmen, a grant of authority to them to license any manufactory or business, in itself a nuisance, in which steam power may be used. The statute was intended to regulate the use of a dangerous power, by forbidding the use of an engine unless specially authorized, and not to regulate other nuisances which an engine might aid in levying. In *Saltonstall v. Banker*, 8 Gray, 195, it is intimated that an engine may be a nuisance in consequence of its location, construction or employment, although licensed; but that case is decided on other grounds.

Call v. Allen, 1 Allen, 187, which is relied on by the defendant, comes under Stat., 1845, ch. 197, sec. 2 (Pub. Stat., ch. 102, sec. 42).

The statute prohibits the future erection of a steam engine in a mill for planing, sawing or turning wood, without a license; it provides, as to an engine in use in such a mill, that if it

was adjudged dangerous and a nuisance, an order might be made for such alterations in the building, etc., as might be required for the safety of the neighborhood, and gave to the owner a right of trial by jury. Under this provision, an order was made requiring certain alterations in the defendant's building, and prescribing regulations for carrying on the mill. It was decided that the mill, while carried on in accordance with the order, was not a nuisance, and that the plaintiff could not maintain an action for a private nuisance on account of it. All that need be said of that decision is, that it has no application to the case at bar. It decided that in a statute specifying engines in use in a particular kind of mill, the power given to the selectmen to make an order, prescribing rules, restrictions and alterations, as to the building and the mill, with the right given to the owner to have a revision of the order by a jury, implied a right to the owner to carry on his mill according to the order. This is no authority for the proposition that a statute which makes any engine used without a license a common nuisance, authorizes the licensing so that it cannot be a private nuisance. We think the license is no bar to an action for a nuisance to the plaintiff caused by the machinery, as distinct from the engine.

Other questions presented in the report are considered in the case of *Quinn v. Middlesex Electric Light Co.*, [post.]

For the reason stated, *there must be a new trial.*

Hugh QUINN

v.

MIDDLESEX ELECTRIC LIGHT CO.

1. A party by appearing at the hearing on a petition to a board of aldermen for a license, and objecting to the granting thereof, waives objections to insufficiency of the notice of the hearing.
2. A license under the statute, to put up for use in a city, a stationary steam engine, is not a personal trust, and even without assignment, it passes to a transferee of the property.
3. A license to set up and run a single stationary steam engine of a specified power, does not import authority to set up and run a greater number of engines, although their combined capacities amount to no greater power.

(Middlesex—Decided September 4, 1885.)

TORT for a nuisance caused by the noise and vibration of the defendant's engines and machinery.

In September, 1883, the Lowell Electric Light Company, to which the license had been granted, sold and conveyed the real and personal property owned and occupied by it on Middle Street, on which this nuisance was alleged to exist, to the defendant Company, by

a bill of sale of the personal property in common form and a deed of the real estate, its privileges and appurtenances, but there was no sale, transfer or assignment of said license except what passed by the sale of said real and personal estate. After the conveyance the Lowell Electric Light Company retired from business. Except, as before stated, the defendant Company had no license from the mayor and aldermen, to set up and run stationary steam engines.

It also appeared in evidence that during the time complained of in the present writ, the defendant ran three stationary steam engines not exceeding 250 horse power, boilers and heavy machinery for generating electricity at said works, within 500 feet of the plaintiff's dwelling-house; that the Lowell Electric Light Company had erected a double cylinder Corliss engine, whose capacity, when fully completed, was 250 horse power, but having only one cylinder attached, its capacity was 125 horse power; that during the time covered by the present writ, the defendant ran, besides said original engine, two others, all three necessary for the business.

It also appeared that the order of the board of aldermen granting a hearing on the petition of the Lowell Electric Light Company for license, was passed February 27, 1883, and was that the hearing be held on March 13, at 8 o'clock, and that notice be given by publishing a copy of said petition and this order, three times in the Lowell Morning Times, the first publication to be at least fourteen days before the date assigned for the hearing; but that the petition and order were published in said newspaper on the first, second and third days of March, 1883; that at the hearing on March 13, the plaintiff was present in person and by counsel and objected to the granting of the license, but not to the sufficiency of the notice; and that the license was granted on March 20.

The Judge, against the plaintiff's contention, ruled that the license was valid, and even without formal assignment, justified the present defendant in running, not only, its engines but also its machinery connected therewith; and that the defendant, complying with the terms thereof, would not be liable for a nuisance. And thereupon the plaintiff excepted.

Messrs. W. S. Anderson and C. S. Lilley, for plaintiff:

For want of fourteen days' public notice, the license was invalid. Pub. Stat., ch. 102, § 41.

The board could not legally act until this requirement had been complied with. *Commonwealth v. Peters*, 3 Mass., 229.

The license was no justification to the present defendant, to whom there had not even been an attempt to assign it; it was a personal trust. *Commonwealth v. Hadley*, 11 Met., 71.

Messrs. D. S. & G. F. Richardson, for defendant:

Where no objection was made at the hearing to the granting of the license on the ground of insufficiency, the party is estopped from making the objection at this time. *Lawrence v. Bassett*, 5 Allen, 140; *Oahoon v. Harlow*, 7 Allen, 151.

Statutes are to be construed according to the intention of the makers, if this can be ascertained with reasonable certainty, although such

construction may seem contrary to the ordinary meaning of the letter of the statute. *Stanleys v. Raymond*, 4 Cush., 816.

C. Allen, J., delivered the opinion of the court:

1. The object in giving notice of an application for a license is, that persons interested may have an opportunity to be heard therein. The plaintiff in the present case had actual notice and attended the hearing, and by making no objection to the insufficiency of the notice, he waived longer notice to himself. Under these circumstances it is nothing to him whether other persons had due notice or not. He cannot be heard to object that they did not. *Hingham & Quincy Bridge, etc., v. Norfolk Co.*, 6 Allen, 353-357.

2. The present defendant may avail itself of the license given to its predecessor in title. The license is not to be regarded as a personal trust, like a license to sell liquors or to keep an inn. *Commonwealth v. Hadley*, 11 Met., 71. Looking at all the provisions of the statute, it appears rather that whatever authority is conferred by the license, passes with the property.

3. A license to set up and run a stationary steam engine not exceeding 250 horse power, will not authorize the use of three such engines, which together do not exceed that amount of power. We cannot say that the use of these engines may not be more dangerous than the use of one engine of the same amount of power, or that the municipal authorities who were willing to grant a license for the latter, would also have been willing to grant one for the former. This is the case of a license to do an act which, without such license, would be a common nuisance. Pub. Stat., ch. 102, § 48. If a license for three engines was desired, it should have been asked for and obtained, if the mayor and aldermen saw fit to grant it. They constituted the proper tribunal to determine, in the first instance at least, how many engines might be used in a particular place. We think it safer and better in this particular, to adhere to the letter of the statutes, and to hold that a license to set up and run a single stationary steam engine, does not, by a fair implication, carry with it an authority to set up and run a greater number, though of no greater power.

Other questions involved in this case are determined in *Quinn v. Lowell Electric Light Co.* [*ante*, 101].

Exceptions sustained.

COMMONWEALTH

v.

Jonathan R. HASKELL.

On the trial for burning a shop used by defendant and Y., it appeared that Y. was at the shop half an hour before the burning but was, at the time of the trial, absent in a distant State. The district attorney, in his argument, commented adversely upon defendant's omission to call Y. as a witness or get his deposition. Held, that an instruction to the jury, requested by the defendant, that "if Y. was a mate-

rial witness, it was the duty of the Government rather than the defense, to hold him as a witness," was properly refused.

(Worcester—Decided October 6, 1885.)

INDICTMENT charging the defendant with feloniously burning a certain building in Fitchburg, owned by one Cushing and used by the defendant and his partner, one York, as a candy manufactory.

It appeared in evidence offered by the Government, that the defendant and York were at the candy shop on the night of the fire, about one half hour before the burning and that York had that afternoon taken away to Ayer a load of candy, and had returned to Fitchburg that evening for a sample case; that York was arrested for participation in the burning and discharged after a hearing before the Fitchburg Police Court; that York, thereafter, testified as a witness for the defendant at his first trial, but at two subsequent trials was absent from the State; and that at a former trial the defendant testified that York and his wife were both at the shop on the evening before the burning.

The district attorney, in his argument before the jury, commented on the fact that the defendant had not called York as a witness or had his deposition taken, asserting that he dared not do either. The defendant thereupon requested an instruction to be given to the jury that "if York was a material witness, it was the duty of the Government rather than the defense, to hold him as a witness;" but the Judge refused, and the defendant excepted.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth:

The indictment followed the language of the statute, and the motions to quash were properly refused. Pub. Stat., ch. 203, §§ 1-5; *Commonwealth v. Brailey*, 184 Mass., 527.

It was not error for the district attorney to comment upon the absence of one of the defendant's former witnesses. The instructions asked for by the defendant were properly denied. *Commonwealth v. Harlow*, 110 Mass., 411; *Learned v. Hall*, 138 Mass., 417; *Woodward v. Leavitt*, 107 Mass., 453, 458.

Messrs. J. W. Corcoran and J. W. Welch, for defendant:

No subject shall be compelled to accuse or furnish evidence against himself. Dec. of Rts., art. 12; *Commonwealth v. Maloney*, 113 Mass., 214.

The Government has the burden of proof throughout and cannot require the defendant to explain or justify. *Commonwealth v. McKie*, 1 Gray, 84; *Chaffee v. United States*, 18 Wall., 516 (XXI., Law. ed., 906); *State v. Flye*, 26 Me., 312.

It did not appear that York's residence abroad was known to the defendant; and the case is distinguishable from *Commonwealth v. Clark*, 14 Gray, 873; Pub. Stats., ch. 213, § 35.

By the Court:

Whether any inference could be fairly drawn from the failure of the defendant to produce the testimony of York, his partner, under the circumstances of the case, was for the jury to determine. The court rightly refused to rule

as matter of law, as requested by the defendant, that "it was the duty of the Government, rather than the defense, to hold him as a witness." There is no law which required the Government, rather than the defendant, to hold or call him as a witness.

The exceptions taken to the other rulings at the trial, are waived and the rulings were clearly right.

Exceptions overruled.

COMMONWEALTH

v.

George HOGENLOCK.

1. Where a person makes an attempt to do a harm to another, it is an assault, although he does not touch her person.
2. Whether a person making an assault, was so far intoxicated as to be unable to form a guilty intent, is a question for the jury.

(Hampshire—Decided September 18, 1885.)

INDICTMENT for an assault upon one Fanny Hill.

Mr. Edgar J. Sherman, Atty. Gen., for complainant:

The ruling of the court was correct. The defendant was properly convicted of the assault. Any attempt with intent to do harm to another's person, is an assault. Any act by which one is put in present bodily fear, is an assault. *Morton v. Shoppee*, 8 Carr. & P., 873; *Stephen v. Myers*, 4 Carr. & P., 349; *S. C.*, Bigelow, Torts and note; *Tuberville v. Savage*, 1 Mod., 3; 8 Greenl. Ev. (Redfield's ed.), § 59; 2 Bish. Cr. L., § 23, et seq.; *Commonwealth v. White*, 110 Mass., 408; *State v. Davis*, 1 Ired., 125.

It is well settled that intoxication is no extension of or defense to an assault. *Commonwealth v. Malone*, 114 Mass., 295.

Mr. John B. O'Donnell, for defendant.

By the Court:

It was competent for the jury to find from the evidence, that the defendant made an attempt to do harm to the person of said Fanny Hill with intent to injure her. This was an assault, although he did not, in fact, touch her person. It was a question of fact for the jury to determine whether he was so far intoxicated as to be unable to form a guilty intent.

Exceptions overruled.

NOTE.—Physical touch is not essential to constitute an assault. *Smith v. State*, 7 Humph., 43; *State v. Rollins*, 8 N. H., 550; *State v. Benedict*, 11 Vt., 636; *Bird v. Jones*, 7 Q. B., 742; *Bloomer v. State*, 8 Sneed, 66; *State v. Taylor*, 8 Sneed, 662.

But words alone will not constitute an assault. *People v. Bransby*, 82 N. Y., 526; 1 Hawk. P. C., 110 (Curw. ed.)

Where a specific intent is regarded as an element of the offence, whether his being intoxicated at the time so as not to be able to form the guilty intent is a question for the jury. *People v. Harris*, 29 Cal., 678; *Dawson v. State*, 16 Ind., 438.

MAGE.

Michael ROBERTS

v.

Inhabitants of DOUGLAS.

A notice to the selectmen of a town simply stating that the injury was sustained "on account of a defect in a highway" and "caused by an obstruction in the highway," does not sufficiently set forth the cause of the injury within the intentment of the statute, and proof of oral statements to the selectmen that would supply the needed specifications, is inadmissible in an action to recover for the injury.

(Worcester — Decided October 6, 1885.)

TORT to recover for injuries to the plaintiff's horse occasioned by a defect in a highway in the defendant Town. Writ dated February 4, 1882. Trial in the Superior Court before Barker, J., who allowed a bill of exceptions.

It appeared by the plaintiff's evidence that his house is situated on a country road in the southerly part of Douglas, about one third of a mile southerly from the corner of the road westerly of the Wallum Pond schoolhouse; that between his house and the corner there are two other dwelling-houses; that on January 31, 1881, he started from his house for Worcester with a load of charcoal, and a short distance southerly from the corner his horses plunged into a snow drift, in consequence whereof one of them received the injuries complained of; that the drift was twenty rods long and from three to four feet deep of solid snow; and had been there for several days before the accident; that on February 15, 1881, the plaintiff's attorney served on two of the selectmen of the Town a notice in the following terms:

"You are hereby notified that I claim damage in the sum of \$150 of the Town of Douglas for injury to one of my horses sustained on one of the townways of Douglas on account of a defect in the highway, to wit: on the road between my dwelling-house and the corner of the road westerly of the Wallum Pond schoolhouse; said injury occurred on the thirty-first day of January last and was caused by an obstruction in the highway; which obstruction had remained there for more than forty-eight hours next previous to said injury."

It also appeared that within a few days after the service of the notice, the selectmen called upon the plaintiff at his house in reference to the matter, and he went with them to the place of the accident and pointed out to them the spot where his horse was hurt and explained to them how it happened. He also offered to prove that his attorney saw the selectmen before the giving of the notice; and orally told them of the accident, and explained to them when, where and how it occurred. The Judge ruled that the plaintiff's evidence and the proposed evidence

NOTE.—Notice of defect, may sometimes be inferred from lapse of time. See, *City of Madison v. Baker*, 1 West. Rep., 116, and note.

The neglect of police to report as prescribed by ordinance will not relieve from liability. See, *Goodfellow v. The Mayor*, 1 Cent. Rep., 21.

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would not show a sufficient notice to the Town under the statute, and ordered a verdict for the defendant; and on rendition thereof, the plaintiff alleged exceptions.

Mr. Burton W. Potter, for plaintiff:

The written notice states the time with sufficient certainty. *Donnelly v. Fall River*, 132 Mass., 299; *Welch v. Gardner*, 133 Mass., 529.

Notice is sufficient, which gives the town officers information sufficient to enable them to investigate the cause of the accident; as collision with a stone, on the highway directly in front, etc., *Savory v. Haverhill*, 132 Mass., 324; or the defect being large stones at or near the seminary, *Welch v. Gardner*, 133 Mass., 529; or a stump four inches above the sidewalk between the residences, etc., *Loise v. Clinton*, 133 Mass., 526; or, on the right hand side of C Avenue, coming toward the railroad crossing, etc., *McCabe v. Cambridge*, 134 Mass., 484; what the statute requires is not that the place shall be given with absolute, but with reasonable and substantial certainty, and under some circumstances, it would be sufficient to merely state the name of the street. *Larkin v. Boston*, 128 Mass., 521.

It is sufficient if it gives the officers information with substantial certainty so as to be of aid to them in investigating the question of liability of the Town. *Spellman v. Chicopee*, 131 Mass., 443.

Notices were insufficient, because they stated causes which were not in themselves defects. *Lyon v. Cambridge*, 136 Mass., 419; *Cronin v. Boston*, 135 Mass., 110.

So, where the cause of the injury was not mentioned in the notice as intended under the statute. *Post v. Foxborough*, 131 Mass., 202.

Considering the time of the year, notice that the walk was out of repair, was coated with ice and very slippery and unsafe, was held sufficient. *Spellman v. Chicopee*, 131 Mass., 443; *Dalton v. Salem*, 136 Mass., 278; *Bailey v. Everett*, 132 Mass., 441.

Mr. John R. Thayer, for defendant:

The notice required by Pub. Stat., ch. 52, §§ 19, 21; Stat., 1882, ch. 36, cannot be partly written and partly oral; its sufficiency must be determined by the court. *Miles v. Lynn*, 130 Mass., 398; *Shea v. Lowell*, 132 Mass., 189.

It would violate the provisions and defeat the purposes of the statute, if plaintiff were permitted to supply deficiencies in the written notice by proof that the Town or its officers had oral information of the time, place and cause of the injury. *Shea v. Lowell*, 132 Mass., 189; *Post v. Foxborough*, 131 Mass., 202.

Where the notice stated, that the defect was "on Windsor Street in Boston," and the evidence showed Windsor Street was half a mile in length, such description was held insufficient. *Post v. Foxborough*, 131 Mass., 202; *Donnelly v. Fall River*, 130 Mass., 115; *Shallow v. Salem*, 136 Mass., 186.

In the notice, there is no such relation between the place of the accident and the cause thereof, that one can be invoked to aid deficiencies in the other. *Miles v. Lynn*, 130 Mass., 401.

The term "obstruction," as applied to a defect in a highway, is vague and unmeaning. *Spellman v. Chicopee*, 131 Mass., 443.

In *Larkin v. Boston*, 128 Mass., 521, the injuries were caused by a defect and want of re-

pair in the street. To say that the injury was caused by an obstruction in the road, gives no such information as is contemplated by the statute. *Miles v. Lynn*, 130 Mass., 398; *Post v. Foxborough*, 131 Mass., 202.

By the court:

The injury to the plaintiff happened on January 31, 1881, at which time the Statute of 1877, ch. 234, as amended by the Statute of 1874, ch. 244, was in force. Under these statutes the notice must be in writing, must contain a statement of the time, place and cause of the injury or damage, and any deficiencies in it cannot be supplied by oral statements to the officers of the Town.

In the case at bar, the notice does not sufficiently state the cause of the injury. It states that the injury "was caused by an obstruction in the highway." This is very little more than saying that it was caused by a defect, and conveyed no information to the officers of the Town, which would enable them to ascertain the locality and nature of the alleged defect. *Miles v. Lynn*, 130 Mass., 398; *Shea v. Lowell*, 132 Mass., 187.

Exceptions overruled.

Eliza A. MASON

v.

Herbert N. MASON et al.

A wife in the lifetime of her husband, can bar her right of dower, in no other mode than as prescribed by statute; and any conveyance of the right, void at law, cannot operate against her, by way of estoppel, in equity.

(Bristol—Decided September 24, 1885.)

WRIT OF DOWER, brought by Eliza A. Mason, widow of Noah Mason, against his six children, to recover a third part of certain homestead premises in Attleborough. Trial in the Superior Court before Brigham, Ch. J., who reported the case for the determination of this court in substance as follows:

At the trial the following facts appeared in evidence and were not disputed. Noah Mason was married to the defendant, November 15, 1881, and died September 14, 1882, possessed of real estate, which by his will, executed September 8, 1882, he devised in equal shares to four of his children. The will contained this clause: "I give and devise to my wife, Eliza A. Mason, one dollar, she having in my lifetime received full compensation from my estate, both real and personal, by agreement, and having signed a full acquittance of the same by quitclaim deed." On February 13, 1883, the demandant filed, in the probate office, a waiver of the provisions of the will. On Sep-

NOTE.—A widow's right, before assignment of dower, is a mere chose in action, and courts of equity, in the absence of statute, cannot subject it to payment of her judgment debts. Her refusal to have it assigned is not a fraud on her creditors. See, *Maxon v. Gray*, ante, 27.

tember 6, 1882, the demandant executed and delivered to Herbert N. Mason, a warranty deed, referred to in the will, and which was recorded two days afterwards, the grantee paying her at the time \$300, in consideration therefor. The deed conveyed all her right, title and interest in the estate, both real and personal, as dower or otherwise, more particularly in the homestead buildings and lot, releasing all claim to dower or third interest therein, and all her claim to any legacy that might be given to her in said will, and giving the grantee full possession. Noah Mason, the husband, signed the deed September 7.

Certain issues were submitted to the jury, whereon they found that the deed was executed freely, voluntarily and understandingly, and without fraud, duress, restraint or undue influence, and with the authority and assent of the husband; that the demandant did not receive from Herbert Mason a full, adequate, fair and equitable consideration for the rights which she would have in her husband's estate upon his death, in view of the value of that estate, her age, physical condition, and her life interest in it; that the consideration of \$300 was paid to her by Herbert Mason on his personal account; and that the provision in the will for her was made with the testator's full knowledge of the settlement with her made by Herbert Mason through said deed.

On these facts and findings the Judge ruled that the demandant was entitled to her dower, and directed the jury to render a verdict in her favor. Thereupon the tenants, reserving all rights to except any rulings in law, prayed for a decree under their answer in equity, restraining the demandant from having her judgment for dower until she had repaid to Herbert N. Mason the \$300 paid to her by him, which prayer was refused; and after verdict in her favor the case was reported for the consideration of this court upon all the questions of law and equity that had arisen therein.

Messrs. Reed & Dean, for demandant:

A married woman can bar her right of dower in the lands of her husband during his lifetime, only as is specially provided by statute. Pub. Stat., ch. 124, § 6; see, also, § 3; Gen. Stat., ch. 90, §§ 8-11; R. S., ch. 60, §§ 7-10; Stat. 1783, ch. 36, §§ 4, 5; Stat. 1905, ch. 90, § 1.

Her separate deed of land held by her husband given by her during his lifetime and not conveyed by him, is *ipso facto* void, as are all the covenants contained in it. *Fowler v. Shearer*, 7 Mass., 21; *Page v. Page*, 6 Cush., 198.

The same rule of law applies to the release of homestead rights, and illustrates her power to release her dower. *Greenough v. Turner*, 11 Gray, 382.

During the lifetime of her husband she has nothing to convey, nor can she enter into a valid contract concerning her husband's estate, in which, after his decease, she may claim dower. *Moore v. New York*, 8 N. Y., 110; *Gunnison v. Twitche*, 38 N. H., 68.

The statutes enabling a married woman to contract as a *feme sole*, do not affect the relations of husband and wife in reference to dower, homestead and the obligations as to their children. *Harnden v. Gould*, 126 Mass., 411.

As to her separate property, her contracts

are now valid and the covenants in the deed of her separate property may operate as an estoppel as though she were a *feme sole*. *Knight v. Thayer*, 125 Mass., 25.

The wife had no interest belonging to her to operate upon at the date of this deed. It was, therefore, absolutely null and void, and cannot operate to estop her from claiming dower. *Gibson v. Gibson*, 15 Mass., 106; *Create v. Ingraham*, 12 Pick., 35; *Lowell v. Daniels*, 2 Gray, 161; *Wales v. Coffin*, 13 Allen, 213; *Merriam v. B. C. & F. R. R. Co.*, 117 Mass., 244.

Equity cannot give effect to a deed, void under the statutes, which declare the specific method by which a married woman may release the possibility of dower in lands of her husband during his lifetime. *Townesley v. Chapin*, 12 Allen, 476; *Jewett v. Davis*, 10 Allen, 68.

The acceptance or receipt, during her husband's lifetime, of a sum of money which was not a fair, equitable and adequate consideration for her rights in expectancy in her husband's estate, received by her from Herbert Mason by the authority of her husband, in full compensation from her husband's estate, was in equity her husband's advancement to her. *Sullings v. Richmond*, 5 Allen, 187; *Townesley v. Chapin*, 12 Allen, 476; *Merriam v. B. C. & F. R. R. Co.*, 117 Mass., 241; *Townsend v. Townsend*, 2 Sandf., 711; *Carson v. Murray*, 3 Paige, Ch., 483; *Crain v. Cavana*, 36 Barb., 410; *Powell v. M. & R. Mfg. Co.*, 3 Mason, 847.

Mr. W. H. Fox, for the defendants:

The demandant's deed conveyed, with warranty of title, whatever interest she might thereafter have in her husband's estate, expressly referring to her right of dower; and under the Pub. Stat., ch. 147, § 1, she was estopped by the deed from asserting an interest in the land. *Knight v. Thayer*, 125 Mass., 25; *Somes v. Skinner*, 3 Pick., 52; *Russ v. Alpaugh*, 118 Mass., 369, 376.

A woman may, by deed, bar and release her dower even while inchoate. 2 Scrib. Dower, ch. 11, 12; *Thatcher v. Howland*, 2 Met., 41; *LaFramboise v. Grou*, 56 Ill., 197.

A release with warranty by an heir apparent of his estate in expectancy, will bar his claim by descent on the death of an ancestor. *Trull v. Eastman*, 3 Met., 121; *Curtis v. Curtis*, 40 Me., 24.

After a divorce, the wife may release to the husband her right of dower. *Savage v. Crill*, 19 Hun (N. Y.), 4.

The deed being voluntary and for good consideration, she ought not in equity now to have dower. *Baker v. Hathaway*, 5 Allen, 103; *Bullock v. Griffin*, 1 Strob. Eq., 60; *Rosenthal v. Mayhugh*, 33 Ohio St., 155; see, also, *Herm. Estop.*, § 494.

If the deed is good neither in law nor in equity, she must return the consideration before having dower. *White v. Wieland*, 109 Mass., 291.

Devens, J., delivered the opinion of the court:

The demandant, by her deed made in her husband's lifetime, undertook to convey to H. N. Mason, a son of her husband and one of the devisees under his will subsequently made, all rights, title and interest which she then had or

might thereafter have in her husband's estate, expressly referring to her right of dower therein. It is the contention of the defendants that under the present existing right of married women to hold, manage and dispose of their separate property in the same manner as if they were sole, the demandant is now estopped from making demand for dower or from asserting any interest in the husband's land. Pub. Stat., ch. 147, § 1.

While the inchoate right of dower is a vested right of value dependent on the contingency of survivorship, it is not that separate property which passes by conveyance, but a right which one entitled thereto may, under certain circumstances, release. It is of a peculiar character and before assignment the wife has no seisin. The right to be endowed from the real estate of the husband is an ancient provision made by the common law for the comfort of the wife upon his decease. Now, while she alone is entitled thereto, is it that separate property which during coverture she may manage or dispose of at pleasure as distinct from that of the husband?

The Pub. Stat., ch. 124, § 6; ch. 147, § 16, carefully provide for certain modes by which a woman may bar her right of dower in the estate of her husband during his lifetime. They are by release which is only to be made to him who holds the estate in which the right might otherwise be asserted. Those modes we must hold to be conclusive.

The homestead right bears, in many respects, an analogy to the right to be endowed. It is provided in terms that no conveyance of an estate in which a homestead exists, or release or waiver thereof, shall operate "To defeat the right of the owner or his wife and children to have a homestead therein unless the conveyance is by a deed in which the wife of the owner, if he has any, joins for the purpose of releasing her right in the manner in which she may release her dower." See, ch. 123, § 7. This statute certainly treats the homestead right of the wife as something different from that separate property which she may dispose of at her own discretion, and recognizes the modes of releasing dower as those prescribed by the statute.

Before the Statute of 1874, Pub. Stat., ch. 147, § 2, it could hardly have been contended that an inchoate right of dower could have been conveyed except in these modes. That statute did in terms give to a married woman the further power to make contracts. But it was not designed to repeal or affect the provisions as to barring dower and was enacted *alio intuitu*. In the revision of 1880 the old provisions as to bar-

ring dower were re-enacted *uno flatu* with the provisions giving to a married woman the general power to contract. The Legislature could not have thought that the earlier provisions were repealed by the later. Both must be construed together as parts of one system and harmonized.

The statute, Pub. Stat., ch. 147, § 2, must be limited in construction so as to include the right of a married woman to make contracts for the conveyance of her right of dower. Such contracts, if upheld, would make the inchoate right of dower a separate estate from that of the husband and would contravene the long established policy of our law. Now, if the inchoate right of dower could be transferred to any third person by the deed in the ordinary form, can any sufficient reason be suggested why the provisions on this subject should be re-enacted and remain on the statute-book?

The instrument signed by the plaintiff, whether considered as a conveyance or as a contract, is therefore void at law. If such be the case, it cannot operate against the demandant by way of estoppel in equity. A court of equity cannot take jurisdiction to give effect to and recognize instruments, which under the statute law are inoperative. *Merriam v. B. C. & F. R. R. Co.*, 117 Mass., 244.

Nor does the case present upon the facts any equitable considerations in favor of an estoppel. By a bargain made between the wife and Herbert N. Mason, in which Herbert acted by the authority and with the assent of the husband, she was induced to agree to relinquish her dower for an inadequate price. The sum was paid to her by Herbert, but the will of her husband recognizes it as paid from his estate, so that it was anticipated by the father that it would be repaid therefrom. She not only relinquished her right to dower but her share of the personal property, and agreed to give up the home within ten days.

The defendant, Herbert N. Mason, further claims that he is entitled to receive the \$300 paid by him before the demandant can assert her right of dower. The question as to her repayment of this sum does not here arise and is to be settled elsewhere. Even if equitable defenses when complete may be set up in a court of common law, all the powers of a court of equity are not imported into its proceedings. Stat., 1883, ch. 223. The existence of this claim should not prevent the recovery in a writ of dower.

A majority of the court, for these reasons, is of opinion that there should be,

Judgment on the verdict.

SUP. CT. OF NEW HAMPSHIRE.

GILMAN Bros.,
v.
STEVENS.

1. A time note given in payment of an account due to a foreign creditor, the contract made and to be performed in this State, is governed by the laws of this State.
2. A note given in this State for a pre-existing debt, unless specially agreed, is not payment, and no additional force or effect can be acquired, in the absence of special agreement by their acceptance as such by a foreign creditor.

(Belknap—Decided July 31, 1885.)

ASSUMPSIT, upon an account. Facts found by the court. The defendant was defaulted, and the defense is made by subsequent attaching creditors.

September 6, 1883, the defendant was indebted to the plaintiffs in the sum of \$822.87, upon account for goods sold to him in Boston. On that day, Burr, the plaintiffs' traveler, called upon the defendant for money on account; the defendant was unable to pay, but offered his notes amounting to \$500, payable to the plaintiffs, \$200 in fourteen, \$150 in thirty, and \$150 in forty-five days. Burr had no authority to accept notes, but received and forwarded them to the plaintiffs in Boston, who, on September 12, procured them to be discounted. September 14, this suit was commenced. September 17, the defending creditors commenced their suits. After September 17, the plaintiffs paid to the bank the amount of the notes, took them up, and at the trial produced and offered them to the defendant.

There was no agreement or mutual understanding that the notes were or were not given and received in payment of the account *pro tanto*. There was evidence tending to show, and it is found, that by the law of Massachusetts, a promissory note constitutes payment of a pre-existing debt for which it is given in the absence of any stipulation on the subject. The plaintiffs did not intend to extend the time for the payment of the account, and did not do so, unless such extension results as the legal effect of receiving the notes and disposing of them in the manner stated.

Messrs. C. C. Rogers and Bernard & Bernard, for plaintiffs:

As between the indorser and indorsee, the law of the place of indorsement must govern, but the indorsement and discounting in another State, cannot change the liability of the promisor. *Dow v. Rowell*, 12 N. H., 51; see, *Ward v. Howe*, 38 N. H., 85.

Where the agent has no authority to accept notes in settlement of accounts, but where he did take them, and his acts were ratified, it is as if he possessed the authority at the time they were made. *Hatch v. Taylor*, 10 N. H., 538; *Dispatch Line v. Belamy Co.*, 12 N. H., 232; *Davis v. School District*, 44 N. H., 399; *Clough v. Davis*, 9 N. H., 503; *Backman v. Charlestown*, 42 N. H., 125; *Warren v. Wentworth*, 45 N. H., 564; *Langd. Cont.*, sec. 8; *Story, Ag.*, § 239.

N. H.

By the law of New Hampshire, a note is not payment, unless the parties intended otherwise, and a suit can be brought on an account, even if time notes are given to the creditor by the debtor. *Moore v. Fitz*, 59 N. H., 572.

In general, the law of the place where the contract is made and not where the action is brought is to govern, in enforcing and expounding the contract, unless the parties have a view to its being expounded elsewhere, in which case it is to be governed according to the law of the place where it is to be executed. *Prentiss v. Savage*, 13 Mass., 20; *Smith v. Smith*, 2 Johns., 285; *Thompson v. Ketcham*, 4 Johns., 285; *Scotfield v. Day*, 20 Johns., 102; *Cox v. United States*, 6 Pet., 172; *Boyle v. Zacharie*, 6 Pet., 685; *Bank of U. S. v. Daniell*, 12 Pet., 32; *Strother v. Lucas*, 12 Pet., 436; *Andrews v. Pond*, 13 Pet., 65; *Bell v. Bruen*, 1 How., 170; *Cook v. Moffat*, 5 How., 295, 315; *Bulkeley v. Holdn*, 19 How., 390; *Renner v. Bk. of Columbia*, 9 Wheat., 588; 2 Pars., Cont., pp. 95-98; *Dyer v. Hunt*, 5 N. H., 401; *Thayer v. Elliott*, 16 N. H., 102; *Whitney v. Whitney*, 35 N. H., 457, and cases cited p. 463; *Little v. Riley*, 43 N. H., 109; *Chase, Admr., v. Dow*, 47 N. H., 405; *Howard v. Fletcher*, 59 N. H., 151.

Messrs. Bingham & Mitchell and W. D. Hardy, for defendant.

The debt due Sep. 6, 1881, was due and payable in Massachusetts. The contract implied by the acceptance of the notes is one contract, while that expressed in the promise to pay them is another and different contract. The contract of acceptance was made in Massachusetts; and by the law of that State it is characterized, and by that law it must be governed. *Ward v. Howe*, 38 N. H., 85; *Milliken v. Pratt*, 125 Mass., 374; *Burchard v. Dunbar*, 25 Am. Reports, 334; *S. C.*, 82 Ill., 450; *Scudder v. Union Nat. Bk.*, 91 U. S., 406; *Whiston v. Stodder*, 13 Am. Dec., 281; 1 Add. Cont., sec. 241; *Douglas v. Oldham*, 6 N. H., 150.

Clark, J., delivered the opinion of the court:

The notes were made and payable in this State, and in determining their validity and effect they must be regarded as New Hampshire contracts. *Dow v. Rowell*, 12 N. H., 49; *Bank v. Colby*, 12 N. H., 520; *Dyer v. Hunt*, 5 N. H., 401; *Thayer v. Elliott*, 16 N. H., 102; *Little v. Riley*, 43 N. H., 109; *Chase v. Dow*, 47 N. H., 405. The contract of the maker with the payees and with any indorser of the notes, was to be performed in this State and is governed by the law of New Hampshire. *Story, Conf. Laws*, sec. 332; *Woodruff v. Hill*, 116 Mass., 310.

In this State, a note is not payment of a pre-existing debt unless specially agreed to be received as payment. *Moore v. Fitz*, 59 N. H., 572.

The defendant, being unable to pay when called upon by the plaintiffs' agent, offered his notes and delivered them to the agent. That the agent had no authority to accept them does not alter the case. It does not appear whether he assumed to accept them, or whether he informed the defendant that he was not authorized to receive them; and whether he did or not is immaterial. The agent's lack of authority did not change the nature and effect of the contract between the maker and the payees of the notes. Under the law of New Hampshire, the notes, ex-

ecuted and payable in New Hampshire, did not operate as payment of the indebtedness for which were given, and no additional force or effect they was acquired by the acceptance in Massachusetts. In the absence of any agreement of the parties, the acceptance was an acceptance of the notes as New Hampshire notes; contracts to be performed in New Hampshire, and governed by the law of New Hampshire; and by the law of New Hampshire the notes were not a payment of the plaintiffs' account. The defendant cannot set up the defense that the notes were payment of the plaintiffs' claim; and subsequent attaching creditors can make no defense which the defendant cannot make.

Judgment for the plaintiffs.

Carpenter, J., did not sit; the others concurred.

Peter E. O. MURPHY

v.

N. H. Savings BANK.

In a decree for the plaintiff on a bill for the redemption of land from a mortgage, a year from the date of the decree is the time ordinarily given for redemption.

(Merrimac——Decided July 31, 1885.)

BILL IN EQUITY to redeem from mortgage. Peter Murphy, the grandfather of the plaintiff, and the father of Eugene O. Murphy, the father of the plaintiff, owned a lot of land in the City of Concord, and mortgaged it to the defendant to secure his note for \$320. on interest after four months.

The plaintiff is a minor and brings this action by his next friend.

Peter Murphy died in 1875, leaving a will in which he gave the land for life to Eugene, and the remainder to the plaintiff, subject to the mortgage.

The defendant brought its bill in equity against Eugene and the plaintiff to foreclose. The bill was served on Eugene but not on the plaintiff, entered in court, no appearance, taken *pro confesso*, a decree made against both, and on January 20, 1880, under process of law issued on the decree, the defendant entered on the land and continued in the actual possession of it for one year. The defendant admitted that there was no foreclosure as to this plaintiff, and the plaintiff claimed that there was none as to either. There was due on the mortgage debt, January 20, 1881, \$1,047.69.

On the 27th day of September, 1881, the defendant made a notice stating that it was in possession of the mortgaged premises, and that it would hold the same for the purpose of foreclosure, from and after October 1, 1881, and published it in *The People*, a newspaper published at Concord, on the 6th, 18th and 20th days of October, 1881, and the defendant remained in the peaceable possession of the premises for a year thereafter.

The defendant claims a foreclosure of the mortgage, under Gen. Laws, ch. 187, sec. 14, Subd. 3, which the plaintiff denies, and claims: first, that he has the right to redeem the mortgage by paying the sum due on the

debt, and asks for an accounting to determine the amount; second, that if the mortgage is foreclosed as to the life estate, so that he has no right to redeem as to it, he says that the value of the life estate, taken January 20, 1881, was sufficient to pay the debt and discharge the mortgage; and further asks to have the value of the life estate determined, and if it was insufficient to pay it, to have leave to redeem. The sum due on the debt May 20, 1885, if no foreclosure had been had, is \$1,175.

Eugene was thirty-two years of age January 20, 1881, of good health and constitutional vigor, and his after life is found to be thirty-five years.

The value of the fee January 20, 1881, was \$1,700. Subject to the plaintiff's exception, evidence was received, other than tables of mortality, such as the opinions of witnesses, the uses to which the land could be put and the income derived from it, to be considered in connection with the tables, on the question of the value of the life estate.

The life estate in the land found from the tables, was worth more than the mortgage debt at the date of the foreclosure. Considering the evidence taken subject to exception, in connection with the tables, the value of the life estate at the time of the foreclosure was \$900, leaving a balance of \$147.69 due on the mortgage debt at that time.

Messrs. Bingham & Mitchell, and A. F. L. Norris, for plaintiff:

These proceedings were all absolutely void as against the plaintiff, for want of notice, and the decree being entire against the said Eugene and the plaintiff, and being void as to the plaintiff, is void as to both. *Rangely v. Webster*, 11 N. H., 299, 306, and cases there cited.

The opinion of witnesses as to the present value of a life estate, is never admissible. *Abbott's Trial Ev.*, 724, and note *note* authorities cited; *Alexander v. Bradley*, 3 Bush (Ky.), 667; *O'Donnell v. O'Donnell*, Id., 216.

In determining the present worth of a life estate, Dr. Wigglesworth's table of mortality was adopted long ago as the rule in Massachusetts. *Estabrook v. Hapgood*, 10 Mass., 313.

The necessity for the use of such a table and the origin of that use in courts, is considered in a Maryland case. *William's Case*, 3 Bland, Ch., 186, 281, 283, 288.

Mr. Samuel C. Eastman, for defendant: The proceedings in the equity suit were regular and complete, so far as Eugene Murphy, who had the life estate, was concerned. The judgment was not a joint judgment. One of the separate judgments was rendered without jurisdiction, and void. The other was and is valid and binding. *Buffum v. Ramsdell*, 55 Me., 252. The value of the life estate being applied on the mortgage, the Bank will hold the unpaid balance as a claim on the remainder. Before the present value of a life estate can be solved mathematically, the annual income must first be fixed. (*Simonton v. Gray*, 34 Me., 50.) And next, how long it will last, and as a result must be reached, the mortality tables are taken, as a guide but not as an inflexible rule. *Van Vronker v. Eastman*, 7 Met., 157-163; 1 Wash. R. P., 248.

The annual product of a life estate must be ascertained to make a proper estimate of its

value; the whole estate may be estimated as equivalent to so many years of its income paid at the time of its purchase. *William's Case*, 8 Bland, Ch., 242; *Russell v. Austin*, 1 Paige, Ch., 192-196.

There can be no arbitrary rule for the valuation of a life estate, because dividing the estate into a life estate and remainder often diminishes the value. *William's Case*, (*supra*.)

Allen, J., delivered the opinion of the court:

By agreement of the parties there is to be a decree for the plaintiff; and the question is, what shall be the time of redemption, at the expiration of which, without payment of the debt, the mortgage will be foreclosed. 4 Kent, Com., 186; Jones, Mort., 1106, 1563, 1564, 1566; *Perine v. Dunn*, 4 Johns. Ch., 140; *Stevens v. Miner*, 110 Mass., 57. By the rule in the English Chancery Court, six months are allowed; *Clark v. Reyburn*, 8 Wall., 818, 823, 824, and generally, in the absence of a statute upon the subject, a reasonable time according to the circumstances and justice of the case, is given. *Clark v. Reyburn*, *supra*; *M'Kinstry v. Meroin*, 3 Johns. Ch., 486; *Perine v. Dunn*, *supra*; Jones, Mort., 1658.

By the statutes of this State (G. L., 186), the mortgage is decreed to be discharged on a petition brought within a year after performance of the condition and the payment or tender of damages and costs and refusal by the mortgagee (§§ 4, 5, 12), and the amount due upon the mortgage is determined and redemption decreed upon petition brought within a year after demand upon the mortgagee for an account, and his unreasonable refusal and neglect to make and deliver the same. Secs. 8, 9, 10, 12. By section 14 of the same chapter, the mortgagee, in possession, by publishing notice that from a day named, he will hold the possession for the purpose of foreclosing the right to redeem, and by retaining the actual, peaceable possession for a year from the day named, holds the estate barred against the right of redemption. Although the statute gives the right of petition for an accounting, redemption and decree of discharge after payment or tender, the equity jurisdiction of the court in matters relating to the foreclosure and redemption of mortgages, remains, and questions touching these subjects can be determined by bill in chancery. *Wendell v. New Hampshire Bank*, 9 N. H., 404, 415; *Bellows v. Stone*, 14 N. H., 175, 199. If demand for an accounting be made within the year of possession, and be not reasonably complied with, or if payment or tender be made and the mortgagee refuses to discharge the mortgage and yield the possession, the mortgagor or person having his right to redeem, will be given his time in which to bring his petition or bill for that purpose. *Wendell v. N. H. Bk.*, *supra*. The defendant, being in possession as mortgagee, at the date of the decree for redemption, the reasons for a time certain in which the plaintiff may redeem or be forever foreclosed, may be the same as those in the case of a mortgagee's published declaration, that he holds possession from a day named for the purposes of foreclosure, in which case redemption may be made within a year. In the case of the incumbrance of land by statutory liens in various ways, as in case of land sold for taxes, or taken

upon execution, a year from the date of enforcing the lien is given for redemption. The Legislature having in so many ways recognized a year as a reasonable time for the redemption of land from sale or seizure made to satisfy an incumbrance, have established a rule that may be properly applied in other ordinary and analogous cases of redemption, and a year from the date of the decree is given in which the plaintiff may redeem the land from the mortgage.

Case discharged.

Bingham, J., did not sit; the others concurred.

Emma F. SPRAGUE,
v.
Town of BRISTOL.

1. In an action for injury to a traveler upon the question of the condition of the highway at the place of the accident, evidence that the traveler encountered no difficulty in passing, is competent.
2. Evidence of plaintiff's habit of driving in places similar to the place of the accident is admissible; and upon the question whether plaintiff's horse was a stumbler and whether plaintiff knew it, it was competent to show that the horse was shod as a stumbler, and that plaintiff's agent had directed the horse to be shod in a way to remedy the fault.

(Grafton — Decided July 31, 1885.)

CASE, for injuries upon a highway. Trial by a referee, who returned a general finding for the defendant with a statement of several exceptions taken by the plaintiff to his rulings at the trial, one of which was as follows:

The defendant claimed that the plaintiff's horse had the habit of stumbling, and that the accident was caused by his stumbling and not by any defect in the highway.

It appearing in fact that the plaintiff's husband was her agent for the purpose of getting the horse shod and that the horse was shod as a stumbling horse, the defendant was permitted to put in evidence in connection therewith, that on one occasion the plaintiff's husband directed the blacksmith to shoe the horse so as to prevent stumbling; and on another occasion that he directed the blacksmith to pare the horse's hoofs down, because he was a "stumbling old cuss."

The other exceptions appear in the opinion of the court.

Messrs. Frank N. Parsons & Pike, Barnard & Barnard, Chase & Street-er, Bingham, Mitchells & Batchellor, and Dearborn, for plaintiff:

Where one of two innocent persons must suffer, he ought to suffer who has misled the other

NOTE.—Injury to traveler at a railway crossing; degree of care required; proof of contributory negligence. C. H. & I. R. R. Co. v. Butler, 1 West, Rep., 110 and note, 115.

into a false confidence in his agent, by clothing him with apparent authority to act and speak in the premises. *Peto v. Hague*, 5 Esp., 184; *Story*, Ag., secs. 185, 189, 2d ed.; *Betham v. Benson*, Gow., 45; *Hannay v. Stewart*, 6 Watts, 489.

"If any fact material to the interest of either party rests in the knowledge of an agent, it is to be proved by his testimony, not by mere assertion." *Story*, Ag., 2d ed., sec. 186, p. 155, and note; *Fairlee v. Hastings*, 10 Ves., Jr., 123, 126, 127; *Hannay v. Stewart*, 6 Watts, 489; 2 Starkie, Ev., secs. 60, 61, 2d Am. ed.; 1 Greenl. Ev., sec. 114, 2d ed.

In case of a servant sent out to sell a horse, he may affirm that the horse is unsound and has been so for a long time, and that his master bought him for an unsound horse, and if the master be sued for the fraud, this may be shown to defeat the action, but it is otherwise if he be sued by vendee on a false warranty. *Underwood v. Hart*, 23 Vt., 120, 129.

Messrs. Fling & Chase and W. S. Ladd, for defendant :

It is always competent to impeach a witness in matters relevant to the issue, by showing that he made statements out of court, contrary to his testimony at the trial. 2 Phil. Ev., 398, 430-437; 1 Greenl. Ev., 6th ed., 592, sec. 462; *Hathaway v. Crocker*, 7 Met., 265; *Brigham v. Clark*, 100 Mass., 430; *Queen's Case*, 2 Brod. & B., 313, 314.

It was competent for the defendant to show the plaintiff's manner of driving down similar hills to the one on which the accident was said to have happened, near the time of the accident. *State v. B. & M. R. R. Co.*, 58 N. H., 410; *Plummer v. Ossipee*, 59 N. H., 55; *Bank v. Sinclair*, 60 N. H., 110; *Nutter v. B. & M. R. Co.*, 60 N. H., 483.

It is the general rule that a witness may be impeached by proof tending to contradict him on material matters. 1 Greenl. Ev., 6th ed., § 461.

Testimony as to the condition of the road was admissible, as bearing upon the question of its sufficiency and suitability for usual travel. *Darling v. Westmoreland*, 52 N. H., 401.

The declarations or admissions of an agent, accompanying acts done by him within the scope of his authority and during the period of his agency, are admissible in evidence against his principal as a part of such acts. *Cooley v. Norton*, 4 Cush., 98; *Thompson v. Co.*, 58 N. H., 108; *Bank v. Sinclair*, 60 N. H., 100-110; *Story*, Ag., secs. 134-137; 1 Greenl. Ev., sec. 112, and notes; also, *Burnside v. R. R. Co.*, 47 N. H., 554; *American Fur Co. v. U. S.*, 2 Pet., 358; *Alb. Law Journal*, Aug. 8, 1885, p. 114.

Clark, J., delivered the opinion of the court :

1. The evidence tending to show that the witness had made statements inconsistent with his testimony at the trial was competent and relevant as affecting the credit of the witness.

2. There was no error of law in receiving evidence of the plaintiff's habit of driving in places similar to the place of the accident. *State v. R. R. Co.*, 52 N. H., 528; *State v. R. R. Co.*, 58 N. H., 410; *Plummer v. Ossipee*, 59

N. H., 55; *Aldrich v. Monroe*, 60 N. H., 118.

3. Evidence that the plaintiff was driving rapidly before reaching the place of the accident tended directly to contradict her testimony that she drove slowly.

4. Upon the question of the condition of the highway at the place of the accident, evidence that travelers had encountered no difficulty in passing was competent, as tending to show that the highway was suitable for the public travel.

5. Upon the question whether the plaintiff's horse was a stumbler, and whether the plaintiff knew it, it was competent to show that the horse was shod as a stumbler; and it would be competent to show that he was shod in a peculiar manner to prevent interfering, if it was a question whether he was addicted to that fault. It was also competent and material to show that the horse was shod as a stumbler by direction of the plaintiff and for this purpose it was competent to show that it was done by direction of the plaintiff's agent who was charged with the duty of getting the horse shod. "Whatever is done by an agent in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as a civil case, in all respects, as if the principal were the actor and the speaker." *Cliquot's Champagne*, 8 Wall, 114 [Book XVIII. Law. ed., 116]; *Burnside v. G. T. Railway*, 47 N. H., 554.

In this case the declarations of the agent were competent, not as admissions of the plaintiff, but as showing that the shoeing was by the direction of the plaintiff's agent and that the direction was emphatic and not a mere casual or frivolous remark; and the fact that the horse was shod as a stumbler by direction of the plaintiff's agent was an evidentiary fact tending to prove that the horse was in fact a stumbler and that the plaintiff knew it.

6. This exception is frivolous. The plaintiff having inquired of the witness the price at which he sold the horse, could not object to the question being answered correctly.

Exceptions overruled.

Allen, J., did not sit; the others concurred.

Town of ERROL

v.

W. BRAGG.

On a trial of an issue of fraudulent concealment before a referee, where the exceptions to the referee's report do not seem to have been of sufficient importance to warrant a transfer to the law term, the case will be discharged.

(Cooe — Decided July 31, 1885.)

ASSUMPSIT. Pleas, the general issue, Statute of Limitation, and a brief statement. Replication to plea of Statute of Limitations, that defendant fraudulently concealed the cause of action. Plaintiff seeks to recover the amount of two notes signed by the defendant and other selectmen of Errol, called the Rich note and the West note. Facts found by the referee,

who, in his first report, dated Jan. 18, 1879, awarded that plaintiff recover \$1,704.12. Appended to his report is a "Special Report" dated Aug. 13, 1880, made in compliance with the order of the court. To this "Special Report" is affixed an order of court made on defendant's motion at the August Term, 1880, recommitting the report for a statement of all exceptions taken by defendant to the referee's rulings; and this order is followed by the third report of the referee. All questions of law raised by these reports are reserved.

Messrs. Ladd & Fletcher, for plaintiff:

The fraud by which a cause of action is concealed, need not be other than that which caused the original injury, to prevent the operation of the Statute of Limitations. *Quimby v. Blackey*, 63 N. H., 77.

Willful silence is a fraudulent concealment of a cause of action, and constitutes a sufficient answer to the plea of the Statute of Limitations. *Way v. Cutting*, 20 N. H., 187, 193; *Bowman v. Sanborn*, 18 N. H., 205; *Douglas v. Elkins*, 28 N. H., 26, 32; *Coolidge v. Alcock*, 30 N. H., 329; and other authorities cited in *Quimby v. Blackey*, *supra*.

It is to be presumed that the referee found all the facts necessary to warrant his award. *Noyes v. Patrick*, 58 N. H., 618.

Messrs. Aldrich & Remick, for defendant:

When a party suppresses documents or facts, which are competent to be considered in a case, there is a presumption amounting to an admission, that they are unfavorable to the party suppressing them. 1 Greenl. Ev., secs. 37, 32, 194.

The cases of *Way v. Cutting*, 20 N. H., 187; *Quimby v. Blackey*, 63 N. H., 77, do not support the position, that the finding that the defendant acted fraudulently defeats the statute; they simply hold that "The fraud by which concealment is accomplished, need not be other than that which constitutes the cause of action, if it actually has the effect of so concealing the cause of action from the plaintiff."

There was no evidence of concealment in the case. *Coolidge v. Alcock*, 30 N. H., 353.

The statute is put in motion as soon as the fraud is discovered, although its full extent or all the facts are not known. *Wood, Lim. Act.*, 587; *Ferris v. Henderson*, 12 Pa. St., 49; *Bricker v. Lightners*, Executor 50 Pa. St., 169; *Coolidge v. Alcock*, 30 N. H., 352.

Mere ignorance of one's rights does not prevent the operation of the statute. *Wood, Lim. Act.*, 598, and note; *Hoyt v. Sprague*, U. S. C. C., R. I., 1879.

Concealment must be alleged by proper replication and proved by affirmative evidence. 2 Greenl. Ev., sec. 448, and cases in note; *Wood, Lim. Act.*, 590; *Jackson v. Buchanan*, 59 Ind., 290; *Trotter v. McLean*, 42 Eng. L. T. Rep., (N. S.), 118; *Wood v. Carpenter*, 101 U. S., 135, (XXV., Law. ed., 807).

In all cases the plaintiff takes the burden of establishing concealment. *Wood, Lim. Act.*, 598, and note.

Smith, J., delivered the opinion of the court:

The defendant's cause for complaint seems, from the way the case has been argued, to be that the referee has not returned a specific finding, as requested, upon the question whether

there was any concealment by him of his dealings with the Rich and West notes, and that he has not reported the evidence upon that point. The report of the referee, twice recommitting, was returned into court at the September Term, 1881. No exception was taken to the report by reason of the omission of the referee to make a specific finding upon the issue of concealment. Both parties moved for judgment on the report, and the defendant also elected a trial by jury. The court was not asked to rule and made no ruling upon the report, but reserved all questions of law raised by the report. The only questions raised by it relate to the admissibility of certain evidence at the hearing before the referee.

1. Upon the hearing, the defendant was a witness, and was asked this question: "Did you at any time inform the Town of Errol, or the selectmen of the Town, that you had used securities of the Town to raise money which you had appropriated to your individual use and which you had not accounted for to the town, and if so, when, and to whom was that information communicated?" Ans. "I never did at any time, or to any body." To the admission of this evidence, the defendant excepted. The ground of the exception has not been pointed out. Upon the issue of concealment the evidence was relevant.

2. The defendant was required, subject to exception, to testify in regard to a note for \$300, included in a former suit between these parties, and to give a history of the note. The particular grounds of this exception have not been stated. The case does not show that the evidence was incompetent.

3. The defendant was asked whether one Sanborn testified in a former suit that he paid a certain sum of money to the defendant. The question was excepted to. The answer of the witness that he did not know what Sanborn testified to, rendered the testimony harmless.

4. One question tried was, whether the claim of the Town for the proceeds of the Rich and West notes had been adjudicated in a former suit. If this did not appear from the record, parol evidence was admissible to prove it. It appears that this claim was included in the specification in the former suit. The plaintiffs contended that it was withdrawn during the trial. It is not claimed that the withdrawal appeared from the record. The testimony of Jordan was therefore competent. For the same reason the paper "J" produced by him was competent, it having been used on the former trial.

5. The defendant moved for a nonsuit upon the ground that the plaintiff had not shown that the defendant had any of the Town's money in his hands. The referee denied the motion and the defendant excepted. The evidence upon this branch of the case not having been furnished us, we cannot say the motion was not properly denied.

The exceptions are overruled. They do not seem to have been of sufficient importance to warrant the delay and expense of a transfer to the law term.

Case discharged.

Doe, Ch. J., and **Bingham, J.**, did not sit; the others concurred.

Frederick B. OSGOOD

v.
James S. EATON.

1. It is **not error** for the court to **decline to instruct** the jury that a **deed conveys a title**, when its delivery is a pending question of fact.
2. When the **vendor remained in possession** of land conveyed, his **declarations** showing under what claim he holds possession, are **admissible** upon the **good faith** of the transaction.
3. **Whether facts exist**, upon which the law allows **leading questions** to be put to a witness by the party calling him, is a **question of fact**, to be determined at the trial.

(Carroll—Decided July 31, 1885.)

WRIT OF ENTRY. The plaintiff claimed the demanded premises under a deed from John B. Eaton to Elizabeth R. Eaton, dated Jan. 2, 1878. The defendant claimed title under a deed from John B. Eaton, to Abel E. Eaton, dated Sep. 10, 1877.

The conveyance from John B. to Elizabeth R. was made and accepted in part satisfaction of a decree for alimony entered in a proceeding for divorce by her against him in December, 1877, and at the time of its execution, he was in possession, claiming to be the owner of the land. There was no evidence that Abel E. Eaton ever entered or took possession of the land, or that the deed to him was ever delivered. At the time of its execution he lived in Oregon, and has ever since lived there, and he was not in New Hampshire at the time the deed was recorded. It was claimed by the plaintiff that this deed was a voluntary conveyance, invalid as against the grantees of Elizabeth R. Eaton, and also that the same was never delivered.

The defendant requested the court to charge the jury that the title of John B. Eaton to the premises passed to Abel E. Eaton by the deed of Sep. 2, 1877. This request was refused, and the jury was instructed that if Abel E. Eaton, by the deed to him, took any title to the land, it did not pass by the deed of release to Elizabeth; if Abel E. Eaton took no title by his deed from John B. Eaton, by reason of no delivery, or because it was designed as a mere make-shift, the title was in John B. at the time of the deed of release, and passed by it to Elizabeth, and that, among other evidence, the declarations of John B. Eaton, at the time of the deed of release, were evidence on the subject. The defendant excepted to the refusal of his request, and to that part of the instructions given making John B. Eaton's declarations evidence on the question of title in Abel E. from the deed of John B. to him.

Messrs. Copeland & Edgerly, for plaintiff:

The evidence shows that John B. was in possession at the time he executed the deed of release, and any declaration made by him against his interest while in possession was competent. *Little v. Gibson*, 39 N. H., 505; *Hurlburt v. Wheeler*, 40 N. H., 73.

It was within the discretion of the court to allow the interrogatories excepted to, to be read. *People v. Mather*, 4 Wend., 229.

The exercise of the discretion of the court in allowing leading questions will not be revised

unless the question is reserved for this court. *Hunt v. Haven*, 56 N. H., 87.

When and under what circumstances leading questions may be allowed, is in the discretion of the court. *Greenl. Ev.*, art. 435; *Moody v. Rowell*, 17 Pick., 498.

Mr. E. A. Hibbard, for defendant.

Bingham, J., delivered the opinion of the court:

The defendant requested the court to instruct the jury that the title of John B. Eaton to the premises passed to Abel E. Eaton in the deed to him, so John B. had no title January 2, 1878.

The plaintiff claimed and the evidence tended to prove that the deed to Abel E. was never delivered, and that it was a make-shift of John B. to enable him to procure better terms from his wife, as to alimony, in her libel for divorce. These were questions of fact for the jury. The title did not pass, if the deed was not delivered, and if made to defraud his wife, it might be void as to her, even if delivered. The request to charge was properly refused.

The court, subject to exception, charged the jury that the declarations of John B. Eaton made at the time of the deed of release were evidence on the question of fraud. The exception is not that the question of fraud was submitted to the jury, nor that the defendant was an innocent purchaser holding under Abel E. (this question does not appear to have been raised at the trial), but to the competency of the evidence on the issue on trial.

There was evidence that John B. was the equitable if not the legal owner of the land, at the date of the release to his wife, and that he was in possession. The deed to Abel E. had been made, it is true, but John B. remained in possession, and claimed to be in possession, as owner. The question was whether the deed to Abel was without consideration, fraudulent and void as to the wife.

When a vendor remains in possession of the property after the conveyance, and it is claimed to be in fraud of creditors, his declarations as to the way he holds the possession are evidence on the trial of that issue. *Blake v. White*, 13 N. H., 267, 272, 273; *Merrill v. Gould*, 16 N. H., 347, 353, 354; *Babb v. Clemson*, 12 Serg. & R., 828; *Eckert v. Wilson*, 12 Id., 398; *Wilbur v. Strickland*, 1 Rawl., 458; *Pomeroy v. Bailey*, 43 N. H., 125, 126.

The question whether the facts exist upon which the law allows leading questions to be put to a witness by the party calling him, is a question of fact to be determined at the trial. *Hunt v. Haven*, 56 N. H., 88.

Judgment on the verdict.

Allen, J., did not sit; the others concurred.

CROSS v. CROSS.

1. A **judgment** ordered for the defendant **upon an agreed statement of facts**, which showed that the **mortgage** in

NOTE.—Though the verdict is against the wife, on the husband's bill for adultery, she is entitled to her temporary alimony up to the final decree. *Stanford v. Stanford*, 1 Ewd., 317; *Moncrief v. Moncrief*, 15 Abb. Pr., 187; 1 Phill. Eccl. Law, 203.

suit was given to secure the payment of a sum of money by a husband to his wife, under a collusive agreement for obtaining a divorce in her favor, is not conclusive against the right of the wife, after such divorce has been decreed, to recover alimony from the husband.

2. Nor is the adultery of the wife, both before and after such divorce, a legal bar to the granting of alimony upon her petition, subsequently brought.

(Cros ——— Decided July 31, 1885.)

PETITION for alimony filed Aug. 20, 1880.

Facts found by a referee. July 28, 1875, the parties agreed that the plaintiff should have \$900 as her share of the property, and on that day the defendant gave to one Moore, as trustee, his five promissory notes, one for \$100, payable September 30, 1875, and four of \$200 each, payable September 30, 1876, 1877, 1878 and 1879, with a mortgage of his farm to secure them. July 31, 1875, the plaintiff filed her libel charging extreme cruelty, but containing no prayer for alimony, and at the August Term, 1875, a divorce was decreed to her for that cause.

The defendant paid the first note but refused to pay the second. Moore assigned the notes and mortgage to the plaintiff, who, January 18, 1877, brought a writ of entry against the defendant, and one Heath, for the mortgaged land. The declaration was in common form, making no mention of the mortgage. In this suit, upon an agreed statement of facts stating, among other things, that a part of the consideration of the above named agreement and notes was "That the plaintiff should bring a libel for divorce against the defendant, on the ground of extreme cruelty, and that the defendant should accept service of the libel and make no defense," judgment was rendered for the defendant, by order of the law court (58 N. H., 373), at the August Term, 1878. The defendant contended that this judgment was conclusive, that the divorce was obtained by collusion, but the referee ruled that it was not conclusive in this proceeding, and subject to the defendant's exception, heard the evidence and found that there was no agreement that the plaintiff should bring a libel for divorce, or that the defendant should accept service, or that he should not resist a libel if brought, and, in substance, that there was no collusion between the parties.

The defendant introduced evidence before the referee, tending to show that the plaintiff was guilty of adultery both before and after the decree of divorce, but the referee made no finding upon that question. The defendant moved that the report be recommitted to the referee with instructions to make a finding. The court held that adultery committed by the plaintiff, either before or after the decree, is not a bar to this petition, and being of the opinion and finding upon all the facts and circumstances reported by the referee, and the further fact of adultery, assuming it to be established, that the prayer of the petition ought to be granted, denied the motion and the defendant excepted.

Messrs. Bingham, Mitchells and Batchellor, for plaintiff.

N. H.

Messrs. Ladd & Fletcher, for defendant:

Where the foundation of her claim in the divorce suit, was divorce proceedings which were a fraud upon the court, any contract which had for its foundation such a collusive and illegal consideration would not be enforced by this court. *Cross v. Cross*, 58 N. H., 373.

The agreed case to be found on page 373, in *Cross v. Cross*, shows that the rankest and most flagrant collusion was practiced by the plaintiff upon the court in obtaining her divorce.

The principle is that no court shall aid men who found their cause of action upon illegal acts. *Roby v. West*, 4 N. H., 290.

The agreed case was signed by her attorneys, but she would be bound by it to the fullest extent. *Everett v. Bank*, 58 N. H., 340.

The law of the case has been settled and established, and the case cannot be reheard here in this proceeding, but there should be a motion for a rehearing. *Amoskeag Co. v. Head*, 59 N. H., 332.

The court exercises with caution, the authority to give alimony in cases where the party asking it, is proven to have committed adultery, or is the party against whom the divorce is decreed. 2 Bish. Mar. & Div., 4th ed., secs. 378, 379. *Sheafe v. Sheafe*, 24 N. H., 364.

Clark, J., delivered the opinion of the court:

Cross v. Cross, 58 N. H., 373, was a writ of entry, and the matter in issue was the title to the demanded premises, which depended upon the validity of the plaintiff's notes and mortgage. Upon an agreed statement of facts that the notes and mortgage were made in pursuance of a collusive agreement for obtaining a divorce, it was held that the notes and mortgage were illegal and void, and the defendant had judgment.

This proceeding is a petition for alimony, and the matter in issue is whether the plaintiff is entitled to a share of the property. The cause of action and the matter in controversy are not the same as in the former action, and the former judgment is neither a bar to the plaintiff's right of recovery in this proceeding nor is it conclusive that the divorce was obtained by collusion. A former judgment is conclusive only as to facts in issue. It is not conclusive as to facts which are merely evidence. *Metcalf v. Gilmore* [not yet reported]; *King v. Chase*, 15 N. H., 9. The referee now finds that the assumed statement of facts in the former trial was erroneous, and that there was, in fact, no collusion between the parties in obtaining the divorce, and the evidence was properly received.

There is no question as to the power to grant alimony in this case. Upon proper application and notice the court may revise and modify any order made, and make such new order as may be necessary respecting alimony. G. L., ch. 182, sec. 15; *Ela v. Ela* [not yet reported].

Adultery committed by the plaintiff before or after the decree of divorce is not, as matter of law, a bar to this petition. The plaintiff may have earned the property and justice may require a division of it although both parties are corrupt. Whether the plaintiff is entitled to alimony, is a question of fact.

Exceptions overruled.

Carpenter, J., did not sit; the others concurred.

LAKE

v.

PAGE.

The right of a widow in premises set out to her as a homestead, under the Act of 1868, is an estate for life.

(Rockingham—Decided July 31, 1885.)

WRIT OF ENTRY, for land in Deerfield. Facts agreed. November 15, 1882, the demanded premises were set out to Sarah W. Lake, widow of John Lake, by the probate court, as her homestead, and she continued to occupy the same until October 8, 1883, when she purchased another place in Deerfield, where she has lived from that time to the present. April 24, 1884, she conveyed her interest in the demanded premises to the defendant, who has since been in possession.

John Lake left a will whereby, among other things, he gave to his wife, Sarah W., one undivided half of his real estate for life, with remainder to a residuary legatee, and to the plaintiff the other undivided half of the same premises for life, to be held in common with his wife. The widow waived the provisions of the will and the question is whether the plaintiff is entitled to the possession of the demanded premises during her life.

Messrs. Marston & Eastman, for plaintiff.

The right of homestead is personal, and belongs to the widow alone, who could not transfer her right to another; when she ceased to occupy it in person, her estate terminated. *Judge of Probate v. Simonds*, 46 N. H., 368; *Abbott v. Abbott*, 97 Mass., 186.

Homestead, means the residence or dwelling place of a family. *Barney v. Leeds*, 51 N. H., 265.

When she purchased a new home she, of necessity, lost the old one. *Horn v. Tufts*, 39 N. H., 478; *Nims v. Bigelow*, 45 N. H., 347; *Drury v. Bachelder*, 11 Gray, 214; *Lazell v. Lazell*, 8 Allen, 576.

The meaning of the will is unmistakable, and in construing it, the court is bound by the testator's intention, to be gathered from the whole instrument. *Hall v. Chaffee*, 14 N. H., 215; *Healey v. Tappan*, 45 N. H., 264.

Messrs. Briggs & Huse, for defendant.

Clark, J., delivered the opinion of the court: The question in this case is, whether the estate vested in the widow by an assignment of a homestead in the estate of her deceased husband, is conditional or absolute; whether it is a mere personal right of occupancy or an unconditional life estate which she may convey.

The homestead law of 1851, provided that the homestead should not be assets in the hands of an administrator, for the payment of debts, nor subject to the laws of distribution or devise, so long as the widow or minor children, or any or either of them, should occupy the same. Under the Act of 1851, the homestead right of the widow was held to be no more than a conditional life estate—a mere right of occupancy—a right to use and occupy for life. *Norris v. Moulton*, 34 N. H., 892, 897. In *Judge of Pro-*

bate v. Simonds, 46 N. H., 368, 369, *Perley, C. J.*, says of the widow's right of homestead under the Act of 1851: "Her interest was a mere personal right to occupy during her life. It was no estate that she could transfer to another."

* * The purchaser at an administrator's sale of land subject to a homestead right of the widow, when she ceased to occupy in person, would hold the land discharged of her right."

By the Act of 1868, the homestead law was materially changed. Under this Act the homestead right is secured to the wife, widow and children of every person owning and occupying a homestead, for and during the life of such wife or widow, and the minority of such children. Laws of 1868, ch. 1, sec. 83. Instead of being limited to "so long as the widow or minor children, or any or either of them, shall occupy the same," as in the Act of 1851, the homestead right, under the Act of 1868, extends during the life of the wife or widow and the minority of the children, without any condition as to actual occupancy. The omission of the limitation as to occupancy by the widow and children, and the substitution of the words "for and during the life of such wife or widow and the minority of such children," in its stead was designed to abolish the condition of actual occupation upon which the continuance of the estate of the widow and minor children in a homestead set off and assigned to them out of the estate of the husband and father, was made to depend under the Act of 1851.

The homestead right is merely an inchoate right which is not assignable until the homestead is set out and assigned in specific property. It then becomes a vested estate. The interest of the widow in the homestead premises, bears some analogy to her right of dower. The language of the Act of 1868, is similar to the statute relating to dower. "The widow of every person deceased, shall be entitled to her dower in the real estate of which her husband died seised" * * * G. L., ch. 203, sec. 2. "The * * * widow * * * of every person who is owner of a homestead * * * shall be entitled to so much of said homestead * * as shall not exceed in value five hundred dollars, * * * for and during the life of such widow." * * * G. L., ch. 188, sec. 1. "The judge of probate, on petition, * *

* may cause such homestead to be set off in the same manner as dower may be assigned by him." G. L., ch. 188, sec. 4. And where a homestead is set off and assigned to the widow, her inchoate and imperfect right becomes a vested estate for life in the premises set off, which she may occupy as a homestead; or, if she chooses, she may sell her estate therein or exchange it for other premises better adapted to her wants and convenience.

By the assignment of the demanded premises to her as a homestead out of the estate of her deceased husband, Sarah W. Lake acquired a vested life estate therein, which was not defeated by her ceasing to occupy, nor by her conveyance to the defendant, and the defendant has a valid title to the demanded premises during the life of Sarah W. Lake.

Judgment for the defendant.

Smith, J., did not sit; the others concurred.

SUP. CT. OF RHODE ISLAND.

William HAMPSON, *Plff.*,

v.

John B. TAYLOR, Town Treasurer of the
Town of Bristol.

1. When a traveler on a highway is injured and the injury results from a combination of two causes, both proximate, one a defect in the highway and the other a natural cause or a pure accident, the town is liable in damages to the injured traveler, provided his injury would not have been sustained but for the defect in the highway.
2. A, injured by falling on a highway which had been washed away in gullies and was slippery with frozen sleet, brought an action for damages against the town. At the trial the presiding Judge charged the jury: "If the sidewalk where the accident happened was so defective as to render the town liable in case an accident had happened by reason of the defect, in the absence of the obstruction caused by the ice, and this accident happened by reason of such defect, and would not have happened but for it, then the town is liable even though the ice was one of the proximate causes of the accident. Held, no error.

(Bristol — decided July 2, 1885.)

EXCEPTIONS to the Court of Common Pleas.

The case is stated in the opinion.

Mr. Henry W. Hayes, for plaintiff:

Where two causes combine to produce the injury, both in their nature proximate, the one being the defect in the highway, and the other an occurrence for which neither party is responsible, the corporation is liable, provided the injury would not have been sustained but for the defect in the highway. Dill. Mun. Corp., ed. 1881, sec. 1007.

In New England, the Maine decisions have been opposed to this view; but in one of the later reports, 51 Me., 127, in the case of *Moulton v. Sanford*, while a later decision was rendered in accordance with the Maine precedents, by four judges, yet the other three Judges, including Chief Justice Appleton, dissented.

In nearly all others of the United States, where this question has been raised, and in Canada, the decisions have supported the rule in Dillon. *Vide* cases cited below. *Toms v. Whitby*, 37 U. C. Q. B., 100; *Sherwood v. Hamilton*, Id., 410; *Alger v. Lowell*, 3 Allen, 402; *Rowell v. Lowell*, 7 Gray, 100; *Kidder v. Dunstable*, Id., 104; *Palmer v. Andover*, 2 Cush., 600-9; *Ring v. Cohoes*, 77 N. Y., 83; *Payne v. Lowell*, 10 Allen, 147; *Barton v. Montpelier*, 80 Vt., 650-3; *Lyman v. Amherst*, 107 Mass., 359; *Dreher v. Fitchburg*, 23 Wis., 675, and cases on 679-80, *Houfe v. Fulton*, 29 Wis., 296; *Bassett v. St. Joseph*, 53 Mo., 290; *Kelsey v. Glover*, 15 Vt., 706-16; *Cassedy v. Stockbridge*, 21 Vt., 391; *Aichison v. King*, 9 Kan., 550; *Joliet v. Verley*, 35 Ill., 58; *Bloomington v. Bay*, 42 Ill., 503;

NOTE.—Liability of municipal corporations for injury by defects in highway. See, *Madison v. Baker*, 1 West. Rep., 116, and note.

Aurora v. Pulfer, 56 Ill., 270; *Hume v. New York*, 74 N. Y., 264-76; *Crawfordsville v. Smith*, 79 Ind., 308; *Clark v. Barrington*, 41 N. H., 44; *Winship v. Enfield*, 42 N. H., 197; *Hunt v. Pownal*, 9 Vt., 411; *Baldwin v. Greenwood's Turnpike Co.*, 40 Conn., 288; *City of Lacon v. Page*, 48 Ill., 499; *City of Rockford v. Russell*, 9 Ill. App., 229; *Fletcher v. Barnet*, 43 Vt., 192; *Hull v. Kansas City*, 54 Mo., 598, 14 Am., 487.

"If the injury would have been prevented, had the road not been sufficient or out of repair, the loss, in justice, ought to fall upon the corporation, unless the plaintiff has conducted in such a way as to increase the hazard." *Hunt v. Pownal*, 9 Vt., 411; see, *Moree v. Richmond*, 41 Vt., 448, and note.

Messrs. Samuel Norris, Jr., and Samuel P. Colt, for defendant:

No action for damage for injuries by reason of defective highways lies at common law, in this country, against a township. Angell & D., High. 2d ed., 289, 297.

The remedy given is purely statutory and the statute, being in its nature penal, must be strictly construed. *Id.*, 341.

So the "means whereof, is of the essence of the charge and must be strictly proved." *May v. Inhab. of Princeton*, 11 Met., 442, 444.

Upon a true construction of the statute, towns are responsible only for the direct and immediate loss occasioned by a defect in the highway. *Marble v. City of Worcester*, 4 Gray, 395; *Jenks v. Wilbraham*, 11 Gray, 142; *Sherman v. Favour*, 1 Allen, 193; *Davis v. Dudley*, 4 Allen, 560; *Randall v. Hazeltown*, 12 Allen, 416; *McDonald v. Snelling*, 14 Allen, 292; *Bemis v. Arlington*, 114 Mass., 509; *Amstein v. Gardner*, 184 Mass., 11; *City of Greenacastle v. Martin*, 74 Ind., 458; *City of Rockford v. Tripp*, 88 Ill., 250; *Murdock v. Inhab. of Warwick*, 4 Gray, 178; *Fogg v. Inhab. of Nahant*, 98 Mass., 598, and in 106 Mass., 278; *Moore v. Abbot*, 32 Me., 46; *Moulton v. Inhab. of Sanford*, 51 Me., 127; *Perkins v. Inhab. of Fayette*, 68 Me., 152; *Merrill v. City of Portland*, 4 Cliff., 138.

The degree of repair of a highway of a town depends on various conditions, as route, nature of ground, amount and kind of travel, and ability and means to improve. *Hubbard v. City of Concord*, 35 N. H., 52.

What constitutes a defect, depends upon facts and circumstances. *Johnson v. Town of Haverhill*, 35 N. H., 74; *Raymond v. City of Lowell*, 6 Cush., 525; *Crocker v. City of Springfield*, 110 Mass., 135; *Chicago v. McGroven*, 78 Ill., 347; 2 Dill. Mun. Corp., sec. 1019.

Before a town can be made liable for injuries incurred from slipping upon ice on a sidewalk, notice in writing must be given to the surveyor of highways. Angell & D., Highways, 2d ed., 301, n. 1; consult, *City of Providence v. Clapp*, 17 How., 161 (Book XV., Law. ed., 72), and see note.

If the injury was occasioned wholly or in part by plaintiff himself, he cannot recover. *Hyde v. Jamaica*, 27 Vt., 466; *Walker v. Town of Westfield*, 39 Vt., 253.

The burden of proving ordinary care is on the plaintiff. *Murphy v. Deane*, 101 Mass., 455; *Sedgwick, Meas. Dam.*, 467-469; 2 Greenl. Ev., 14th ed., sec. 230, n. a, and sec. 232 a, n. a; *Walker v. Town of Westfield*, 39 Vt., 253; Angell & D., Highways, 2d ed., 348.

This point, however, never has been passed on in this State. See, *Adams v. Inhab. of Carlisle*, 21 Pick., 146; *Raymond v. City of Lowell*, 6 Cush., 524, 535; *Hyde v. Jamaica*, 27 Vt., 465.

Where plaintiff knew of the defect and deliberately walked over it, he did so at his own risk. *Wilson v. Charlestown*, 8 Allen, 187.

In such case, he cannot look to the town for indemnity. *Horton v. Inhab. of Ipswich*, 12 Cush., 488; *Durkik v. City of Troy*, 61 Barb., 437.

The duty of the passenger in such case is to avoid the obstruction and not encounter its dangers. *Craig v. City of Sedalia*, 68 Mo., 417; *City of Centralia v. Krouse*, 64 Ill., 19; *Raymond v. City of Lowell*, 6 Cush., 526, 624; *Hubbard v. City of Concord*, 35 N. H., 52.

The rule of law is, that a traveler is acting without a proper degree of prudence in attempting to pass, when men of ordinary prudence would not pass at their own risk. *Aurora City v. Brown*, 12 Ill. (App.), 122; *Richmond v. Courtney*, 32 Gratt., 792; *Denhardt v. Philadelphia*, Feb. 4, 1884; *Fleming v. City of Lockhaven*, Oct. 6, 1884; Sup. Ct. Pa. Alb. Law J., Feb. 28, 1885, Vol. XXI., 179.

Durfee, Ch. J., delivered the opinion of the court:

This is an action on the case to recover damages from the Town of Bristol for injuries to the plaintiff alleged to have been received by him while walking in one of the streets of said town, in consequence of the neglect of the town to keep said street safe and convenient for travel. The case was tried to a jury in the Court of Common Pleas, when the plaintiff received a verdict for \$3,500 damages. The case comes here on exceptions to the rulings of the court taken by the defendant. The accident occurred February 5, 1884. The plaintiff left his house between 8 and 9 o'clock A. M. to carry some tea to his wife who worked in a mill. The street was covered by a thin film of ice caused by rain falling and freezing the previous night. The plaintiff's route was through Thames Street, along the west side, which the plaintiff selected as the safer side. Testimony was adduced by the plaintiff tending to show that Thames Street, on its west side, where it corners on State Street, was washed and gullied, with cobble stones left exposed in the gully, some part of which was nearly a foot deep. The plaintiff made his visit to the mill and was returning when, stepping on one of the stones so exposed, he slipped and fell, dislocating his right hip and injuring his foot. He adduced testimony to show that the fall would not have occurred but for the gully, or if it had occurred would not have seriously injured him. The defendant moved for a nonsuit, which was refused. The defendant alleged exceptions, but upon our intimation that exceptions do not lie for a refusal to nonsuit, they are not pressed. *Wentworth v. Leonard*, 4 Cush., 414; *Priest v. Wheeler*, 101 Mass., 479; *Culler v. Currier*, 54 Me., 81, 90; *Girard v. Gettig*, 2 Binn., 234; *Providence County Savings Bank v. Phalen*, 12 R. I., 495. The court below, among other instructions to the jury, gave the following, to wit: "If the sidewalk where the accident happened was so defective as to render the town liable in case an accident had happened by rea-

son of the defect in the absence of the obstruction caused by the ice, and this accident happened by reason of such defect and would not have happened but for it, then the town is liable, even though the ice was one of the proximate causes of the accident." The defendant excepted to this ruling. In support of the exception he cites numerous cases, chiefly from Massachusetts and Maine, which hold that the action will not lie where the injury is not the result solely of the defect, but of the defect and another cause, for which the town is not liable, concurring with it. There is, however, a line of cases that maintain a different doctrine, which has been tersely stated thus: "Where two causes combine to produce the injury, both in their nature proximate, the one being the defect in the highway, and the other, some occurrence for which neither party is responsible, the corporation is liable, provided the injury would not have been sustained but for the defect in the highway." Dill. Mun. Corp., ed. of 1881, § 1007. It seems to us that this doctrine, at least where the concurring cause is a natural cause or a pure accident for which no person is responsible, is the more reasonable doctrine. Indeed, we think it is the duty of the town, in making and mending its highways, to consider the natural effects of rain and snow and ice as affecting the safety and convenience of travel thereon, except so far as the statute exonerates them from duty in that regard. *Houfe v. Town of Fulton*, 29 Wis., 296; *City of Atchison v. King*, 9 Kan., 550; *Kelsey v. Glover*, 15 Vt., 708; *Winship v. Enfield*, 42 N. H., 197; *Bassett v. City of St. Joseph*, 53 Mo., 290; *Hull v. City of Kansas*, 54 Mo., 598; *City of Joliet v. Verley*, 35 Ill., 58; *City of Lacon v. Page*, 48 Ill., 499; *Baldwin v. Greenwood's Turnpike Co.*, 40 Conn., 238; *King v. City of Cohoes*, 77 N. Y., 88; *City of Oranfordville v. Smith*, 79 Ind., 306; *Palmer v. Inhabitants of Andover*, 2 Cush., 600; *Sherwood v. Corporation of Hamilton*, 87 U. C., Q. B., 410. We do not find any error in the instruction complained of.

Exceptions overruled.

Henry LIPPITT

American WOOD PAPER CO.*

1. The legal title to shares of corporate stock which are "assignable only on the books" of the corporation will not pass by an assignment of the shares, neither made nor recorded on the books of the corporation.
2. In Rhode Island an equitable or executory right to or interest in corporate stock is not attachable.
3. A was the record owner of corporate stock. He assigned it to B. Afterwards B assigned it to C and this assignment was made on the books of the corporation. The stock never stood on the books of the corporation in the name of B. Held, that the stock was not attachable as the property of B.

(Providence—Decided July 25, 1885.)

*See Lippitt v. American Wood Paper Co. 14 R. I., 301.

TRESPASS on the case to recover damages for the defendant's refusal to transfer certain corporate stock.

The facts are stated in the opinion.

Messrs. A. & A. D. Payne and **Benj. N. Lapham**, for plaintiff:

Statutes authorizing attachment of stock or shares of a defendant, do not mention stock or shares standing in his name on the books of the company. Gen. Stat., 1872, ch. 196, sec. 21, p. 458; ch. 212., sec. 19, p. 497.

The stock of a defendant may be attached, though not standing in his name on the books of the company, if the transfer from his name be tainted with fraud. *Beckwith v. Burroughs*, 14 R. I., 366, Index T., 95.

The deed of the sheriff vests not only the legal title, but the equitable title as well. Gen. Stat., 1872, ch. 212, sec. 19, p. 497.

The return of the sheriff on the execution is sufficient. 3 Minn., 277; 5 Minn., 338.

Where statutes are directory merely, compliance is not necessary to give authority to sell. Freem. Exec., sec. 355; Freem. Judg. Sales, sec. 28; *Hubbard v. Barnes*, 29 Iowa, 239.

No precise form of return is required. The term "levied" imports seizure. *Byer v. Etnyre* 2 Gill (Md.), 150; *Cooper v. Sunderland*, 8 Iowa, 114.

In construing official returns, the construction will be adopted which most accords with the hypothesis that the officer performed his whole duty. Freem. Exec., sec. 362; *Whittlesey v. Starr*, 8 Conn., 184; *Cogswell v. Warren*, 1 Curtis, 223.

The court is bound to give the weight, at least, of *prima facie* evidence to the officer's return, and it is noticeable that there is not a particle of evidence offered to rebut such *prima facie* evidence. *Foster v. Berry*, 14 R. I., 601.

Defects and irregularities, if there be any, cannot be taken advantage of in this proceeding, which is collateral, and not direct; *i. e.*, not against the officer or his sureties. Rorer, Jud. Sales, sec. 466; *Thompson v. Tolmie*, 2 Pet., 157 (VII., Law. ed., 881); *Wheaton v. Section's Lessee*, 4 Wheat., 508 (IV., Law. ed., 626).

The purchaser's title depends solely on the judgment, the execution, and the sale. Freem. Exec., secs. 274, 341; Rorer, Jud. Sales, secs. 589 886; *Lawrence v. Speed*, 2 Bibb, 401; *McEntire v. Durham*, 7 Ired., 151; *Brooks v. Rooney*, 11 Ga., 425; *Blood v. Light*, 38 Cal., 649.

Mr. C. P. Robinson, for defendant:

An interest purely equitable, is not attachable, nor subject to levy upon execution, in the proceeding at law. *Scott v. Pequonnock Nat. Bk.*, 21 Blatchf., 208.

The damages for refusal to record a transfer would be simply dividends, of which, if he had good title to the stock, he had been deprived. *Lippitt v. Am. Wood Paper Co.*, 14 R. I., 301.

A proceeding for transfer of stock, account and dividends should be in equity, not in law, and other parties claiming should be parties. *Id.* See, also, *Weiser v. Smith*, 22 La. Ann., 156.

Even if this suit were rightly brought at law, the damages could not be as plaintiff claims. See rule in *Scott v. Peg. Nat. Bk.*, before cited; also, *Bond v. Mt. Hope Iron Co.*, 99 Mass., 505.

To make title to the stock and maintain this suit, plaintiff must show levy of execution, sale

and deed, as law provides, and the return of the sheriff on the execution is plainly insufficient according to our well settled law. *Wilcox v. Emerson*, 10 R. I., 270.

A levy does not imply doing all necessary to be done; the statute must be strictly pursued. See, *Childs v. Ballou*, 5 R. I., 537; *Perry v. Dover*, 12 Pick., 211; *Pullen v. Haynes*, 11 Gray, 379; *Benson v. Smith*, 42 Me., 415; *True v. Emery*, 67 Me., 28; *James v. P. & G. Plank Road Co.*, 8 Mich., 91; *Ruddrow v. Hodges*, 12 Phila., 422; *Hustick v. Allen*, 1 Coxe (N. J.), 168; *Watson v. Hoel*, 1 Coxe, (N. J.), 186; *Todd v. Philhower*, 4 Zab. (N. J.), 799, 800.

No distinction exists between real and personal property, particularly as to shares in corporations. *Hove v. Starkweather*, 17 Mass., 240 and *Titcomb v. Union M. & F. Ins. Co.*, 8 Mass., 326, 333, *et seq.*

Durfee, Ch. J., delivered the opinion of the court:

This is an action on the case to recover damages of the defendant Corporation for refusing to the plaintiff the rights of a stockholder in the Corporation. The plaintiff claims to be entitled to one hundred shares of stock formerly attached as the property of one Morton C. Fisher in an action against him, and sold on execution under a judgment recovered against Fisher in said action, the plaintiff being the purchaser. The defendant contests the right of the plaintiff on the ground, among other grounds, that Fisher had no legal and, therefore, no attachable interest or title. Prior to February 8, 1875, said shares belonged to Isaac Hartshorn and stood in his name on the Corporation books. On February 8, 1875, Isaac Hartshorn, by his attorneys in London, transferred said shares by deed of assignment to Morton C. Fisher, then in London. The shares were attached as aforesaid as the property of Fisher, February 16, 1875. At that time they stood in the name of Hartshorn on the books of the Corporation. They were never afterwards transferred into the name of Fisher on the books; but on September 4, 1876, they were, at the request of Fisher, transferred on the books of the Corporation to George Earl Church, the transfer being signed "Morton C. Fisher by William S. Slater, Treasurer." The sale on execution to the plaintiff took place March 20, 1882. The charter of the Corporation provides that the "shares shall be transferred in such manner as shall be prescribed by the by-laws of said Corporation." One of the by laws enacts: "The stock shall be assignable only on the books of the company by the person in whose name the same appears or by his legal representative; but no transfer shall be made or certificate issued thereupon until the certificate originally issued be surrendered and canceled." The defendant contends that, by force of this provision and by law, the legal title of the hundred shares was, on February 16, 1875, when the attachment is claimed to have been made, in Hartshorn, and that Fisher had under the assignment to him only an equitable or beneficial title which, however good it may have been between him and Hartshorn, was not attachable. The question, therefore, is, whether the shares were attachable as the property of Fisher on February 16, 1875.

The plaintiff contends: *first*, that Fisher had the legal title; and *second*, that the shares were attachable even if he had only an equitable or executory title. We do not think he had the legal title. It seems to us that it is impossible to hold that shares which are "assignable *only* on the books" can be assigned so as to pass the legal title by an assignment neither made nor recorded on the books. This is the view which has generally prevailed in the courts where the question has arisen. *Fisher v. Essex Bank*, 5 Gray, 873; *Blanchard v. Dedham Gas-Light Co.*, 12 Gray, 213; *Marlborough Manufacturing Co. v. Smith*, 2 Conn., 579; *Northrop v. Newton & Bridgeport Turnpike Co.*, 3 Conn., 544; *Shipman v. Aetna Insurance Co.*, 29 Conn., 245; *Naglee v. Pacific Wharf Co.*, 20 Cal., 529; *State Insurance Co. v. Sax*, 2 Tenn. Ch., 507; *Williams v. Mechanics' Bank*, 5 Blatchf., 59; *Brown v. Adams*, 5 Biss., 181; *Broadway Bank v. McElrath*, 13 N. J. Eq., 24; *Black v. Zacharie*, 8 How., 488 (Book XI., Law. ed., 690); *Otis, Admr., v. Gardner*, 105 Ill. 436; *Furners' Nat. Gold Bank v. Wilson*, 58 Cal., 600; *Application of Thomas Murphy*, 51 Wis. 519; *Union Bank v. Laird*, 2 Wheat., 390 (IV., Law. ed., 269); *Pittsburg & C.R.R. Co. v. Clarke*, 29 Pa. St., 146.

Some of these cases hold that an attachment of shares of stock, as the property of the person in whose name they stand, will prevail over a prior *bona fide* transfer for value not made nor recorded on the books, though others hold that the transfer is entitled to priority, notwithstanding that it carries only its equitable title. The case of *Fisher v. Essex Bank*, *supra*, is a case in which the attachment was sustained with great force of reasoning, the opinion being delivered by Chief Justice Shaw.

The attachment here, therefore, was not good unless an equitable or executory right or interest in stock is attachable under our statute. At common law, an equitable right or interest in personal property is not attachable, *Freem. Exec.*, sec. 116; and it is natural to suppose that the intention of the statute, in subjecting corporate stock to attachment and levy, was simply to put it on a par with other personal property. This view accords with the language of the statute. It is "the shares of the defendant," or his "stock or shares," and not his right or interest in the stock or shares, which, in the words of the statute, may be attached or levied upon. *Gen. Stat. R. I.*, cap. 196, sec. 21; cap. 197, sec. 9; cap. 212, secs. 18, 19, 20. *Pub. Stat. R. I.*, cap. 207, sec. 22; cap. 208, sec. 9; cap. 228, secs. 20, 21, 22. The officer with process is authorized to make attachment or levy by leaving a copy of the writ or execution with an officer of the corporation. Evidently the idea is that the copy shall operate by way of notice or garnishment to designate and hold the stock in the charge of the corporation for the purpose of the attachment or levy; and it can accomplish this effectually only when the stock stands in the name of the defendant on the books of the corporation. If the defendant does not appear on the books as a stockholder, the copy conveys no knowledge of what stock is intended to be attached, unless the corporation happens to be otherwise informed that the defendant is a transferee by transfer not on the books. The statute, moreover, makes it the duty of an

officer of the corporation served with a copy of the writ, to render an account, on oath, of what stock or shares the defendant had in the corporation when the writ was served. It cannot be supposed that it was the intention of the statute to make it the duty of the officer to render this account from information obtained otherwise than officially or from the books. For how can the officer render an account of what stock or shares the defendant had, if by "stock or shares" the statute means not only the stock or shares standing in the name of the defendant on the books, but also stock or shares transferred in any other manner so as to vest in him an equitable or executory title? Certificates of stock are often issued with blank assignments with power printed on their backs. A stockholder, in order to transfer the equitable title to the stock, has only to indorse and deliver such a certificate, leaving the blanks to be filled by the holder. A certificate so indorsed will pass from hand to hand carrying the equitable title with it, like a note payable to bearer. Now suppose that A, a stockholder of record, so transfers his shares to B, and that a creditor of B issues a writ against him directing the attachment of the stock or shares of the defendant, which is served by leaving a copy with the corporation. The copy will only inform the corporation that the stock or shares of B are attached, but not what stock or shares B has, if he can have any not shown by the books, nor what stock or shares are intended to be reached by the attachment. But directly B passes the certificate to C, and C filling the blanks perfects his title by transfer on the books, the corporation having no knowledge that the shares transferred are the shares intended to be attached. Now, can it be that the corporation is bound by the attachment? It is if the plaintiff's construction is correct. It seems to us that if the General Assembly had intended such a construction it would have shown its intention by providing some surer and more efficient procedure. It seems to us, too, that such a construction is repugnant to the clear indications of the statute. It may be said that the corporation might protect itself by inquiry of the attaching creditor. Sometimes it might, perhaps, but certainly not always; and we see no reason to think that it was ever intended to subject the corporation to the burden and risk of such an inquiry. An attachment, to be really such, ought to operate as a taking and holding of the thing attached.

The plaintiff cites no case to this point. The only cases bearing upon the point which we have found are *Foster v. Potter*, 37 Mo., 525, and *Middletown Savings Bank v. Jarvis*, 33 Conn., 372. In those cases it was held that an equity of redemption in stock, transferred on the books of the corporation by way of mortgage to the mortgagee, was liable to levy or to attachment and levy under the statutes of those States. But the decisions were largely influenced by the language of the statutes, the statutes recognizing the right to take stock under incumbrance and providing a carefully contrived procedure for the identification of the rights or shares taken and sold and for the protection of all concerned. See *Gen. Stat. of Missouri*, cap. 160, secs. 25, 26, 53; *Gen. Stat. of Connecticut*, cap. 2, sec. 19; cap. 14, sec.

287. It would seem, moreover, that in both States, certainly in Connecticut, the statutes in express terms extend not only to "stock or shares," but to "rights or shares," and in the Connecticut case the court say, "The language is broad and expressly includes not only the shares of stock but the rights in them" as a reason for holding that equitable rights are subject to attachment and levy. We do not think the cases are entitled to much weight here, our statute being so different. The plaintiff directs our attention to Gen. Stat., R. I., cap. 212, sec. 19, which provides that the officer's deed of stock sold on execution "Shall vest in the purchaser all the defendant's right, title and interest in such shares so sold," and contends that the language covers *all* interests, equitable as well as legal. This argument, it seems to us, involves the fallacy known as arguing in a circle or begging the question; for it is a deed given in pursuance of a valid levy and sale which is to have this effect, and therefore, unless an equitable right is subject to levy and sale, a deed to carry out such levy and sale is of no avail. It is clear that if such rights were subject to levy and sale, a sale of them without identification or any disclosure in regard to them, as the sale if authorized might be made, would generally be nothing but a most unconscionable sacrifice. In *Beckwith v. Burrough*, 14 R. I., 366, we decided that shares of stock were liable to attachment and execution sale as the property of the defendant, notwithstanding his previous transfer of them on the corporation books, if the transfer was made in fraud of the attaching creditor. We so decided, not without a good deal of hesitation, being pressed by the language of the statute, on the ground that the transfer being fraudulent and void as against the creditor, might be treated as to him as a mere nullity. In the case at bar we are asked to go further and hold that shares, which are assignable only on the Corporation books, are liable to attachment and execution sale, as the property of a defendant, when they have not been so assigned to him and do not stand in his name, if they have been assigned to him by transfer not on the books so as to vest in him an equitable title. We have come to the conclusion, after a careful study and consideration of the subject under the statute, that we cannot so decide. See, also, *Beckwith v. Burrough*, 13 R. I., 294, 298.

The circumstances of this particular case are such as appeal to us strongly in favor of the plaintiff, but we do not find that they are such as will entitle us to decide in his favor without holding what we are not prepared to hold, namely: that merely equitable rights in stock are liable to attachment and execution sale. We do not think the Corporation is subject to any estoppel; for though the writ issued against Fisher directing the attachment of his stock and shares in consequence of information received partly from William S. Slater, who was the treasurer of the Corporation, that the shares had been transferred to Fisher, it does not appear that the information was, or that it was understood to be, that the shares had been transferred upon the Corporation books. Whether, if the information given had been that the shares had been transferred upon

the books, it could have created an estoppel which would avail the plaintiff, we need not decide.

Judgment for defendant for costs.

STATE

v.

Patrick MCGUIRE.

A defendant in proceedings, civil or criminal, who testifies in his own behalf, **may be impeached** like any other witness, by showing his previous conviction of a felony.

(Providence—Decided May 22, 1885.)

EXCEPTIONS to the Court of Common Pleas.

The case is stated by the court.

Mr. Samuel P. Colt, Atty-Gen., for plaintiff.

Mr. Geo. J. West, for defendant.

Per Curiam:

The only question raised by the exceptions is, whether, if a defendant on the trial of an indictment against him testifies in his own behalf, it is competent for the State to introduce the record of his previous conviction of a felony to impeach his credibility as a witness. We think there can be no doubt that such testimony is admissible. At common law, a person after such conviction was incompetent to testify and, upon production of the record, was utterly excluded. Our statute modifies the common law by providing that such a person "Shall be admitted to testify like any other witness, except that such conviction or sentence may be shown to effect his credibility." Pub. Stat. R. I., cap. 214, § 38. Under this provision, the credibility of any ordinary witness who has been convicted of felony can be impeached by the production of the record of his conviction. The only question, therefore, is, whether a defendant in a criminal or civil case who takes the witness stand in his own behalf, is privileged beyond ordinary witnesses from impeachment in this manner. We can see no reason why he should be.

The enabling provision is simply, "No respondent in a criminal prosecution, offering himself as a witness, shall be excluded from testifying because he is such respondent." Pub. Stat. R. I., cap. 214, § 39.

We think that when he testifies as a witness on his own offer he becomes liable to impeachment like any other witness.

Exceptions overruled.

STATE

v.

Nellie SMITH.

At the trial of an indictment for keeping a house of ill-fame it appeared that the defendant owned the house, lived in it as its mistress and let rooms to female

lodgers who used them for purposes of prostitution. The presiding Justice instructed the jury that the defendant was guilty if she let her rooms to prostitutes for prostitution, or knowingly permitted them to be used and resorted to for that purpose, though the occupants were merely boarders or lodgers, and were not employed, to ply their business, by her as mistress of the house. **Held**, no error.

(Providence — Decided May 28, 1886.)

EXCEPTIONS to the Court of Common Pleas.

The facts appear in the opinion.

Mr. Samuel P. Colt, Atty-Gen., for plaintiff.

Mr. Geo. J. West, for defendant.

Durfee, Ch. J., delivered the opinion of the court.

The defendant was indicted in the Court of Common Pleas for keeping and maintaining "a building, place and tenement used as a house of ill-fame, resorted to for prostitution and lewdness * * * and for the habitual resort of intemperate, idle, dissolute, noisy and disorderly persons." On the trial, the Government offered testimony tending to prove that dissolute women lodged and lived at the house of the defendant and brought men with them to the house and solicited men on the streets for purposes of prostitution. The defendant offered testimony tending to prove that she let her rooms to female lodgers at \$3 per week and that she did not know what the character of the lodgers was and that no one to her knowledge resorted to her house for the purposes of prostitution. The jury found the defendant guilty. The case comes here on exceptions for alleged error in the charge of the court below.

The charge is reported *in extenso*. In the course of it, the court referred to testimony of the defendant to the effect that the house complained of was her house and that, to obtain a livelihood, she took a few boarders and let her rooms occasionally as she had opportunity, and instructed the jury that the defendant had a right to let her rooms in a legitimate way; but that if she let her rooms to women for the purposes of prostitution, then she was as guilty as if she had herself employed the women for those purposes; and also that while it was not necessary for the State to prove specific acts of immorality, it was necessary for the State to satisfy the jury that such acts were committed in the rooms and that the defendant knew or had reason to know they were committed there, or let her rooms to the end that they might be committed there, or that she knowingly permitted her house to be used for the habitual resort of intemperate, idle, dissolute, noisy and disorderly persons. At the close of the charge, the defendant requested the court to instruct the jury that if they believed that the persons who frequented the house were boarders or visitors, the defendant was not responsible. The court refused to grant the request without modification. In making the modification, the court used some expressions which, disconnected from the rest of the charge, might be understood to mean that the defendant, if she simply let her rooms

to prostitutes, knowing them to be such, or if she suffered her house to be frequently visited by the disreputable classes of people mentioned in the indictment, might be convicted. If the court meant to be so understood, it was doubtless error. It is not a crime for a person to let his rooms to such women, simply as he would let them to reputable women, for quiet and decent occupation. Neither is it a crime for a person to suffer his house to be visited by disreputable people, if they only visit it for innocent and proper purposes. For instance, the keeper of a restaurant would not be indictable for keeping and maintaining a building, place or tenement used for the habitual resort of intemperate, idle, dissolute, noisy and disorderly persons, merely because such persons are accustomed to come to his restaurant to get their meals, if while there they behave in a proper manner. Taking the language in connection with the rest of the charge, however, we think the court did not intend the broader meaning. Doubtless, what the court meant and what it was understood to mean, was, that the defendant was guilty if she let her rooms to prostitutes for prostitution, or knowingly permitted them to be used and resorted to for that purpose, though the occupants were merely boarders or lodgers, and were not employed, to ply their business, by her as mistress of the house. The question is, therefore, whether there is error in such an instruction, and this is the question which was argued by the counsel for the defendant.

The counsel, to show that there is error, cites *Reg. v. Stannard*, Leigh & Cave (C. C.), 349, and *Commonwealth v. Churchill*, 136 Mass., 148. These were cases in which the owners of the houses complained of leased them to tenants. In *Reg. v. Stannard* the owner let his whole house in parts to women as weekly tenants, who, with his knowledge and assent, used their respective rooms for the purposes of prostitution. The owner, however, retained no part of the house for himself, nor did he keep a key or reserve a right of entry. The house was left wholly in the control of the tenants.

In *Commonwealth v. Churchill*, the owner had given a written lease of the house. The cases differ materially from the case at bar; for in the case at bar the owner continued to live in her house as the mistress of it, the women who occupied her rooms being merely boarders or lodgers. She had power to eject them, at any time, if they were using her rooms for the purposes of prostitution. And see, *Pub. Stat. R. I.*, cap. 80, § 4.* We think, therefore, that if the defendant, while so living in her house and remaining the mistress of it, knew that her boarders or lodgers were using the rooms for the purposes of prostitution, and continued to let them for such uses, she was properly convicted of keeping and maintaining a tenement used as a house of ill-fame, resorted to for prostitution and lewdness. She must be held to have

*As follows:

Sec. 4. If any person, being a tenant or occupant under any lawful title, of any building or tenement not owned by him, shall use such premises or any part thereof for any of the purposes enumerated in section 1 of this chapter, such use shall annul the lease or other title under which said occupant holds and, without any act of the owner, shall cause the right of possession thereof to revert and vest in him, and said owner may make immediate entry thereon without process of law.

kept her house for that purpose, when, remaining the mistress of it, she let her rooms to women who paid her for the use of them for that purpose, as much as if, instead of a stipulated price, they had paid her a percentage of their illicit gains.

The other exceptions were not pressed and are overruled.

Exceptions overruled.

George W. YEAU

v.

Edward B. WILLIAMS, Treasurer of Town of Coventry.

1. On the concave side of a slight curve in a highway were three posts, the curve making the middle post stand out somewhat beyond the line of the other two posts. The horse of a traveler driving along the highway was frightened by a team behind, the traveler was injured by a collision with the middle post, and sued the town for damages, charging that the highway was left in a dangerous state by the town authorities. **Held**, that whether the town was negligent in allowing the post to stand was a question for the jury. **Held**, further, that though there might have been ample room in the roadway, yet if the post was so placed with reference to the general course of travel, as to be dangerous, the town was liable. **Held**, further, that the jury should decide as to concurring causes of accident under proper instructions from the court, which were presumably given.
2. The surveyor of highways was called as a witness for the defense, and stated that he thought the position of the post did not make it dangerous. In cross-examination he was asked if he did not, after the accident, remove the post. **Held**, that the question was admissible in cross-examination to show that his conduct was inconsistent with his expressed opinion.
3. Another highway surveyor was called for the defense and asked whether, in his

opinion as an expert, the highway was safe, convenient and in good repair. **Held**, that his evidence was rightly excluded, the question of the highway defect being one of plain fact for the jury, not one of expert skill.

(Providence — Decided May 15, 1885.)

PETITION for a new trial.

The plaintiff in this action, while driving along a highway, was injured by his wagon striking a post. He brought suit against the town in which the highway was situated, charging that the highway was dangerous owing to the negligence of the town authorities, and obtained a verdict.

The defendant then petitioned for a new trial on the grounds that the verdict was unsupported by the evidence, and that the presiding justice erred in his rulings at the trial.

Messrs. Page & Owen, for plaintiff.

Mr. Dexter B. Potter, for defendant:

Towns are not required to render the roads passable for their entire width; their duty is accomplished by making a sufficient width in a smooth condition so as to be safe and convenient for travelers. *Perkins v. Inhab. of Fayette*, 28 Am. Rep., 84 (68 Me., 152).

The defect of the post in the road, to which the accident is attributed, is denied, but even if it was a defect, and the accident was the combined action of both causes, the fright of the horse and the defect, the plaintiff cannot recover. *Moore v. Abbott*, 32 Me., 46; *Marble v. Worcester*, 4 Gray, 395, 397, 400; *Moulton v. Sanford*, 51 Me., 127; affirmed in *Perkins v. Inhab. of Fayette*, *supra*; and see, *Macomber v. Taunton*, 100 Mass., 255.

The admission of evidence tending to show a removal of the post, the defect complained of, or a repair of the highway, was erroneous. *Sweetland v. Tel. Co.*, 27 Iowa, 433, 458; *Cramer v. Burlingame*, 45 Iowa, 627; *Hudson v. Railway Co.*, 59 Iowa, 581.

Such evidence is inadmissible, not only generally, but for the reason that it was not contemporaneous with the injury complained of nor a part of the *res gestæ*; *Sweetland v. Tel. Co.*, 27 Iowa, 433, 458; *Cramer v. Burlingame*, 45 Iowa, 627; *Robinson v. R.R. Co.*, 7 Gray, 92.

Durfee, Ch. J., delivered the opinion of the court:

NOTE—Where a horse is frightened by a moving street car and runs away, and the driver is injured by collision with a dangerous obstruction in the street, the obstruction is the proximate cause. *Campbell v. Stillwater*, 32 Minn., 308.

Whether an injury sustained in a particular case was the natural and proximate result of the wrong complained of, is for the determination of the jury. *Weick v. Lander*, 75 Ill., 93; *Hill v. Winsor*, 118 Mass., 251; *Savage v. Chicago, M. & St. P. R.R. Co.*, 31 Minn., 419; *Johnson v. Same, Id.*, 407; *Lake v. Milliken*, 62 Me., 240; *Sheridan v. Brooklyn, etc., R. R. Co.*, 26 N. Y., 30.

The general rule of law is, that where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether without concurrence the accident would have happened, a recovery cannot be had, because it cannot be judicially determined that the damage

would not have been done without such concurrence. *Marble v. Worcester*, 4 Gray, 395; *Dubuque, W. & C. Association v. Dubuque*, 30 Iowa, 166.

Where a horse took fright at a hole in a culvert, and by the conduct of the horse the wagon was thrown into the ditch, the hole in the culvert must be considered as the remote cause, its connection with the accident being casual and not causal. *Spaulding v. Winslow*, 74 Me., 533; *O'Brien v. McGlinchy*, 68 Me., 557.

If the horse by fright became unmanageable, causing the upset, it (the horse) should be regarded as the proximate cause. See *Perkins v. Fayette*, 68 Me., 152; *Page v. Bucksport*, 64 Me., 53; *Moulton v. Sanford*, 51 Me., 127; *Titus v. Northbridge*, 97 Mass., 296; *Wright v. Templeton*, 132 Mass., 49; *Nichols v. Brunswick*, 3 Cliff., 81; *Kennedy v. New York*, 73 N. Y., 365; *Hey v. Philadelphia*, 81 Pa. St., 50.

First. We think the question whether the town was chargeable with culpable neglect in leaving the post where it was, before the plaintiff was injured by it, was a question of fact for the jury. Doubtless, a hitching post might be located near the traveled part of the road, and just out of it, in a position where it would be so unexposed or so protected that the town would evidently not be at fault for leaving it there, and that the court might properly so instruct the jury. The case at bar was not such a case. In the case at bar, the plaintiff's testimony tended to show that the post complained of was the middle one of three, and stood eighteen inches further out into the road than the other two; that the road was level from fence to fence except a shallow gutter, and was traveled throughout its width except where the posts were; that the plaintiff was driving in the dark at night, keeping well to the right, i. e. the side of the posts, for fear of running into something; that a team coming up behind started his horse quickly, and that while he was engaged in reining in his horse he collided with the post. The plaintiff testified that he had long been familiar with the posts, and had had to look out for them even in the daytime. On the other side, testimony was submitted to show that the posts stood on a position of the highway intended for and used as a sidewalk, at the edge of which there was a gutter four or five inches deep; that the road curved a little at the posts, which made the middle post appear to be further out than the other two; and that the wrought or traveled part of the road was about twenty-seven feet wide at the posts. In view of this testimony, and especially in view of the testimony that the middle post was eighteen inches further out than the other two or on a curve where it would be more exposed, we are not prepared to say that the verdict was against the evidence. It is not enough that there was ample room for travel within the post if the post was so situated with reference to the general course of travel, as to be dangerous and require unusual precaution. *Snow v. Inhabitants of Adams*, 1 Cush., 448; *Chamberlain v. Enfield*, 43 N. H., 356; *Cassedy v. Stockbridge*, 21 Vt., 391; *Willey v. Portsmouth*, 35 N. H., 306.

Indeed, a post may be a dangerous defect even when it is entirely out of the limits of the highway. *Cogswell v. Inhabitants of Lexington*, 4 Cush., 307; *Warner v. Holyoke*, 112 Mass., 362; *Hayden v. Inhabitants of Attleborough*, 7 Gray, 338.

In *Macomber v. City of Taunton*, 100 Mass., 255, cited for the town, it did not appear that the post, which caused the accident, protruded beyond the others, or that there was any bend in the road, and the court, moreover, which sustained the nonsuit, seems to have been a good deal influenced by a Massachusetts statute which expressly provided that in the towns the owners of adjoining land, and in the cities the municipal authorities, might construct sidewalks, indicating their width by trees, posts or curbstones, set at reasonable distances apart, or by a railing erected thereto.

Second. The defendant contends that the post was only a concurring cause of the accident, the primary cause being the running of the plaintiff's horse, and that, therefore, the plaintiff ought not to have recovered a verdict. The question of concurring causes was a question

for the jury, under proper instructions from the court, which we must presume were given. We, therefore, cannot set the verdict aside unless it is palpably against the evidence. We do not think it is so. It does not appear that the person who came up behind the plaintiff was in any fault, or that the plaintiff was at fault in his driving, and the mere fact that the plaintiff's horse broke into a quiet trot, or even into a run would not, necessarily, defeat the plaintiff's right to recover, if the horse did not escape his control or started from it only for the moment. *Stone v. Inhabitants of Hubbardston*, 100 Mass., 49; *Babson & Hartwell v. Inhabitants of Rockport*, 101 Mass., 93.

Third. The surveyor of the highway was called as a witness by the town, and testified in behalf of the town that, in his opinion, the situation of the post was not such as to make the highway unsafe or out of repair. In cross-examination, he was asked if he did not order the post removed. The question was objected to, allowed, and exception taken. The witness answered that he did. The object, apparently, was to discredit the witness by showing that his conduct was inconsistent with his testimony; for, as the matter would be put to the jury, if that witness honestly thought the post was no defect, why should he remove it? In this view, we do not think the admission of the testimony affords ground for a new trial; though, if the testimony had been offered by the plaintiff as testimony in chief for the purpose of proving that the post was a dangerous defect, we think it should have properly been excluded. *Cramer v. Burlington*, 45 Iowa, 627.

Fourth. Another highway surveyor was called by the town to testify as an expert that, in his opinion, the highway was safe, convenient and in good repair, at the place of the accident when the accident occurred. The testimony was objected to and rejected. We think it was rightly rejected. The question regarding the alleged defect was not a question of science or expert skill. It was a plain question of fact for the jury to decide, under instructions from the court, in view of the particular circumstances of the case.

Petition dismissed.

Bridget McGRATH, Admr.,

v.

New York and New England R. R. CO.*

1. Where the employe of a railroad company voluntarily assumes the risk of the accident, by which his life is lost, the company is not liable.
2. In such case, if the employe is killed, his death is attributable to his own fault rather than to the company's negligence and the company would not be liable even if there were negligence on its part.

(Providence — Decided July 2, 1885.)

TRESPASS on the case. Heard by the court, jury trial being waived.

The case is sufficiently stated in the opinion. *Mr. Charles E. Gorman*, for plaintiff.

* The decision in this case, heretofore given, reported in 14 R. I., 367, affirmed.

The interpretation of the statute providing that common carriers shall be liable in case of the death of a person resulting from their negligence or the negligence of their servants or agents, claimed by the plaintiff, is the one given to it, in legal literature. *Am. L. Rev.*, Jan., 1883.

A similar statute was so interpreted in Missouri. 2 Thomp., Negligence, 1004(7); *Schultz v. Pacific R. R. Co.*, 86 Mo., 18; *O'Connor v. Chicago, etc., R. R. Co.*, 59 Mo., 285; *Proctor v. Hannibal, etc., R. R. Co.*, 64 Mo., 112.

It is the duty of a servant, acting under directions of his superior, to obey the orders of such superior, and in so doing, in case of injury, he is not guilty of contributory negligence. *King v. Ohio & M. R. R. Co.*, per Gresham, J., Nov. 29, 1882.

As to the rule of damages in such cases, see, *Sherm. & Redf. Dam.*, sec. 612.

In a case of injury from the use of a hand-car, although negligence was shown on the part of the company, the plaintiff was non-suited. *Coon v. S. & N. R. R. Co.*, 5 N. Y., 492; see, also, *Farwell v. Boston & W. R. R. Co.*, 4 Met., 49.

A man employed on a new track on which no regular train had been run, could not recover for injury occasioned by the negligence of those running the train. *Boldt v. N. Y. C. R. R. Co.*, 18 N. Y., 432.

One employed in widening a track, is a fellow-servant with the brakeman. See, 2 Am. & Eng. R. Cas., 94, and cases cited.

Persons in the employment of the same master, engaged in the same common enterprise, are fellow-servants, however their grades may differ. *Wright v. N. Y. C. R. R. Co.*, 25 N. Y., 565.

So, a carpenter repairing fences along the road and injured while being carried without paying fare, from place to place, cannot recover, where the accident was caused by negligence of the engineer. *Seaver v. Boston & M. R. R. Co.*, 14 Gray, 466.

So, one brakeman cannot recover from the company for an injury caused by negligence of another brakeman. *Hayes v. Western R. R. Corp.*, 3 Cush., 270.

So, where the person running a passenger train, knows the employment and character of a switchman, the company is not answerable to him for an injury caused by the carelessness of such switchman. *Farwell v. Boston & W. R. R. Co.* (*supra*).

Workmen do not cease to be workmen because they are not all equal in station or authority. *Wood, Master & Serv.*, 857.

A foreman is a fellow-servant of those he controls or superintends. *Gallagher v. Piper*, 33 L. J. C. B., 335; *Feltman v. England*, L. R. 2 Q. B., 33; *Beaulieu v. Portland Co.*, 48 Ne., 236; *Hurd v. Vermont Cent. R. R. Co.*, 32 Vt., 473.

A yard master is a fellow servant with the one he employs to assist him. *McClosker, Admr., v. Long Isl. R. R. Co.*, 84 N. Y., 77; see notes to *Fuller v. Jewett*, 5 Am. & Eng. R. R. Cas., 528; see, *Rose v. Boston & A. R. R. Co.*, 58 N. Y., 217.

A servant or employé assumes the risk of all dangers in his employment, however they may arise. *Pittsburg & A. R. R. Co. v. Sentmeyer*, 92 Pa., 276.

The engineer and fireman are fellow-servants with the road master who negligently misplaced a switch causing injury to the engineer and fireman. *Walker, Admr., v. Boston & M. R. R. Co.*, 128 Mass., 8.

All those engaged in the same general business, though in different grades and departments, are fellow-servants, each taking the risk of the other's negligence. *Vouder v. Ball & O. R. R. Co.*, 32 Md., 417; *Hurd v. Vermont Cent. R. R. Co.*, 32 Vt., 473.

Messrs. Wm. P. Sheffield and Frank S. Arnold, for defendant:

A knowledge of the dangerous character of the tool which an employé uses, is fatal to his recovery for injury from its use. *Bell v. Atlantic & G. W. R. R. Co.*, Alb. L. J., Apr. 10, 1883.

If on entering the master's service, he finds things in a certain state, he must take the consequences, if any, of what may occur owing to that state of things. *Symonds v. Maddox*, 16 Q. B., 326; see, also, *Seaver v. Boston & M. R. R. Co.*, 14 Gray, 466.

The public policy which protects employers against the negligence of co-employés is the incentive to all employés to the exercise of greater care. *Russell v. Hudson Riv. R. R. Co.*, 17 N. Y., 187.

Durfee, Ch. J., delivered the opinion of the court:

This is the case in which we granted a new trial at a former term on the ground that the verdict was against the evidence, 14 R. I., 857. The parties have waived a jury trial and now submit the case to us on the same evidence, the purpose of the plaintiff being to urge upon us certain considerations, not before urged, in regard to the statute under which the action was brought. Gen. Stat. R. I., cap. 193, sec. 16, Pub. Stat. R. I., cap. 204, sec. 15. The language of sec. 15 is: "If the life of any person, being a passenger in any stage-coach or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroads or steamboats, * * * shall be lost by reason of negligence or carelessness of such common carrier, proprietor or proprietors, or by the unfitness or negligence or carelessness of their servants or agents, in this State, such common carriers, proprietor or proprietors, shall be liable to damages," etc. The plaintiff invites our attention particularly to the words, "whether a passenger or not," and contends that the provision extends, in the case of railroad and steamboat companies, to persons in their employ, as well as to persons simply in their "care," and, consequently, that such a company becomes liable under the statute, if the life of one of its servants or employés is lost by the carelessness of his fellow servants, though at common law a master is not liable to his servant for an injury resulting from the carelessness of a fellow-servant, if he has used reasonable care in selecting his servants. The question raised by the argument is an important one and, when it becomes necessary to decide it, will merit a very careful consideration. We do not think it is necessary to decide it in this case. The ground on which we thought the plaintiff was not entitled to recover, when the case was be-

fore us on the motion for new trial, was not that intestate was a servant killed by the carelessness of a fellow-servant, but that he had voluntarily assumed the risk of the accident by which his life was lost. If the statute does extend to servants as well as to passengers, it will not be contended that it imposes a greater liability for servants than for passengers, and we are very clearly of opinion that a railroad company would not be liable for the death of a passenger, if the passenger voluntarily exposed himself to the casualty by which his life was lost. In such a case, if the passenger were killed, his death would be attributable to his own fault rather than to the company's negligence, even if there were negligence on the part of the company. The intestate, as we stated in the former opinion, knew the risk he was running by riding on the handcar. The plaintiff contends that the intestate was under the foreman and, therefore, it must be presumed that he rode on the car at the foreman's command for the purpose of returning the car. The testimony was that the intestate was one of a gang of men who were employed on Thanksgiving Day to do a job of work, shoveling coal, which would take about half a day and have a full day's pay for it. The men had finished the job by about 11:15 o'clock A. M. Soon afterwards, the foreman took out his watch and said, "It is twenty minutes past eleven. We have ample time to get home before the regular train leaves." The time for that train to leave was 11:40 A. M. The remark was not a command, but a suggestion, apparently put interrogatively, to ascertain if the men wanted to take the car without precautions before the passing of the regular train. The men took the car, so far as appears, without hesitation or objection, the intestate as willingly as the others. There is nothing to show that the foreman would have refused to take the proper precautions, *i. e.*, to leave a man with a red flag behind and send another before, if the men had wished him to do so; but it would have necessitated delay and, according to the testimony, they were in a hurry to get home for Thanksgiving. Doubtless the intestate would have been permitted to walk if he had preferred to do so, but probably would have felt himself aggrieved if he had not been permitted to ride. The hand-car was overtaken and run into, soon after starting, by a special train, which came as unexpectedly to the foreman as to the others, though both he and they knew that under the regulations such a train might come upon them unsignaled and, therefore, that they ran that risk when they started without sending out the red flags. The foreman may have been more to blame than the others because he was foreman, but the carelessness was common to all. The case is not similar to *Mann v. Oriental Print Works*, 11 R. I., 152; for there an *employé* was suddenly called upon by his superior to do a dangerous work out of his sphere, without knowing the danger or how to guard against it. Being ignorant of the risk, he could not, under the circumstances, be held to have accepted it. This case, in respect of the principles which ought to govern it, is more like *Kelly v. Silver Spring Co.*, 12 R. I., 112.

Judgment for defendant for costs.

Connecticut Mutual Life INSURANCE CO.

v.

Charles F. BALDWIN, Admr., *et al.*

1. F. took out a **life insurance policy** payable to M. and the children of F. When the policy was taken out M. was his wife and he had four children living by a former wife. Subsequently a child was born to F. and M. Afterwards F. and M. **transferred** their right, title and interest in the policy by an unsealed instrument signed by them as **collateral security** for a debt of F., and the instrument and the policy were **delivered to the creditor**. No question was made as to the validity of the transfer.
2. On a bill of interpleader brought by the insuring company after the deaths of F. and M., held, that the **policy was an executed, irrevocable, voluntary settlement** in favor of the wife and the children in being when it was taken out: That F. and M. **could pledge or assign the policy** to the extent of their interests in it.
3. The policy being for \$5,000, that one fifth of this amount was due to the creditor and one fifth to each of the four children. One of the four children having died a minor before F., that the one fifth due this child should be paid to his legal representative, if any, and if none, to the administrator of F., the child's father, and next of kin.

(Providence——Decided July 18, 1885.)

BILL of interpleader. The facts are stated in the opinion.

Messrs. Bosworth & Champlin, for complainant.

Mr. Rollin Mathewson, for respondent, Fifth National Bank:

The gift of a life policy is in the nature of a testamentary disposition and, if the rules for interpretation of wills apply, the children living at the death of the insured are those meant. *Hawk. Wills*, 68; *O'Hara, Wills*, 289.

The wife and children take in equal shares. *Gould v. Emerson*, 99 Mass., 154.

Her interest was a vested interest from the issuing of the policy and assignable. *Clark v. Allen*, 11 R. I., 439; *Libby v. Libby*, 37 Me., 359; *Burroughs v. S. M. L. A. Co.*, 97 Mass., 359; *Knickerbocker L. Ins. Co. v. Weitz*, 99 Mass., 157; *Baker v. Young*, 47 Mo., 458.

The only case opposed is *Eadie v. Skimmon*, 26 N. Y., 9, which has not been followed but is commented on. See *Bliss, Life Ins.*, 341; *Kerman v. Howard*, 23 Wis., 108; *Baker v. Young*, 47 Mo., 456.

So, there are cases where the interest of the wife is, by express provisions, made contingent upon her surviving her husband. See, *Conn. Mut. L. Ins. Co. v. Burroughs*, 84 Conn., 305; *L. Ins. Co. v. Weitz, supra*; see, also, *Swan v. Snow*, 11 Allen, 224, where her power to assign was not mentioned.

Mr. C. F. Baldwin, for the other respondents:

A policy of life insurance for the benefit of the wife and children, cannot be disposed of so as to defeat the interest of the children. *Gould v. Emerson*, 99 Mass., 154.

An assignment of such policy by a married woman, is defeated by her death before payment. *Conn. Mut. L. Ins. Co. v. Burroughs*, 34 Conn., 805; *Sean v. Snow*, 11 Allen, 224; *L. Ins. Co. v. Weiss*, 99 Mass., 157.

A policy made in Connecticut, payable in Connecticut, must be construed under the laws of that State. *St. John v. Am. Mut. L. Ins. Co.*, 2 Duer, 419; *Ruse v. Mut. Ben. L. Ins. Co.*, 23 N. Y., 516; *Western v. Genesee Mut. Ins. Co.*, 12 N. Y., 258; *Wright v. Sun Mut. Ins. Co.*, 6 Am. Law Reg., 485; Gen. Stat. Conn., tit. 14, ch. 11, sec. 7.

The object of such contracts is the protection of the family, and not the benefit of the children. *Ballou v. Gile*, 50 Wis., 618.

The interest of the wife is contingent on her surviving her husband and, on her death, the interest of the children becomes vested. *Bliss, Life Ins.*, 345; *Sean v. Snow*, 11 Allen, 224, *Chapin v. Fellowes*, 36 Conn., 132.

The wife's interest terminates at her death before payment. *Kerman v. Howard*, 23 Wis., 108; *Clark v. Allen*, 11 R. I., 439.

She cannot, in the lifetime of her husband, make an assignment of such policy. *Eudie v. Simmon*, 26 N. Y., 9.

Durfee, Ch. J., delivered the opinion of the court:

This is a bill of interpleader, the object of which is to ascertain the rights of the interpleading parties in the sum of \$5,000, insurance money, payable under a policy on the life of William S. Fifield. The policy was issued by the complainant, a Connecticut Corporation, January 26, 1865. The premiums, which were to be paid in ten years, were all paid by William S. Fifield, the last on January 26, 1874. The agreement of the Company was as follows, to wit: "The said Company do hereby promise and agree to and with the said assured, his executors, administrators and assigns, well and truly to pay or cause to be paid, at the City of Hartford, the said sum insured to the said assured, his executors, administrators and assigns, ninety days after due notice and proof is given of the death of the said William S. Fifield, for the benefit of and payable to Mary T. Fifield and the children of the said William S. Fifield, deducting therefrom all indebtedness for premiums unpaid at that date." At the time the policy issued, William S. Fifield had a wife, to wit: Mary T. Fifield, named in the policy, and four children by a former wife. On March 17, 1867, a son was born to said William S. and Mary T. Fifield. On March 1, 1875, the said William S. and Mary T. delivered said policy to the Fifth National Bank, under the following instrument, namely: "Providence, March 1, 1875. In consideration of the sum of one dollar to us in hand paid and for other valuable consideration, we hereby assign and set over all our right, title and interest in policy No. 42778, in the Connecticut Mutual Life Insurance Company of Hartford, to A. G. Stillwell, Cashier of the Fifth National Bank of Providence. R. I." The instrument was signed by William S. and Mary T., but

was not under seal. The instrument and policy were delivered as collateral security for an indebtedness of about \$8,000 from William S. to the Bank, by promissory notes, which were subsequently paid in part by said William S. No consideration moved to the separate estate of Mary T. One of the older children died July 22, 1877. Mary T. died intestate in August, 1884. William S. died October 18, 1884.

No question is made in regard to the validity of the contract. The principal question is, whether the Bank is entitled to all or any part of the insurance money. We see no reason why it was not competent for William S. and Mary T. to pledge or assign the policy to the extent of their interests in it (see, *Clark v. Allen*, 11 R. I., 439); nor why such pledge was not effected by the delivery of the policy and instrument, however it might have been if only the instrument had been delivered. The question then is: did the pledgeors have any interest which passed by the pledge, and if so, what? On the one hand, the contention is that the entire policy passed, and if not, the interest of Mary T. at least. On the other hand, the claim is that only the interest of Mary T. could have passed in any event, but that, she having died before the assured, nothing passed, her interest being contingent on her surviving him.

In support of the latter position the case of the *Conn. Mut. Life Ins. Co. v. Burroughs*, 34 Conn., 805, is cited. But there the policy was, by its terms, payable to the wife, or, if she died before the insured, to her children. The interest was clearly contingent. The policy here contained no words of contingency. It is argued that it necessarily imports contingency because it was intended as a family provision. We do not think that is clear. The child that died might have died having children, in which event it could not have been intended that the surviving children of the assured should take all, to their exclusion. The policy was expressed to be for the benefit of "Mary T. Fifield and my children." If the policy had been expressed to be for the benefit of "Mary T. Fifield and my four children," we think there can hardly be a doubt that Mary T. and the four children would have taken each a vested fifth, payable at the death of the assured. It is said, in *May on Insurance*, "If the policy, when issued, expressly designates a person as entitled to receive the insurance money, such designation is conclusive, unless some question arises as to the rights of the creditors of the person who paid the premium and procured the insurance." *May, Ins.*, § 317.

It has been said of a policy similar to the policy here, that the taking of it "Was in the nature of an irrevocable and executed voluntary settlement upon the wife and children." *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn., 193, 196.

We think this is sound law. It follows, it seems to us, that the policy, when issued, vested in the wife and children then in being, the \$5,000, to be paid at the death of the assured; *i. e.*, \$1,000 to each of them. This construction is open to the objection that it excludes the after born child. Possibly, if the policy had been expressed to be for the benefit of the children only, the doctrine in respect of testamentary

bequests to children payable *in futuro*, namely: that the bequests are payable to them as a class, and that the class will open to let in after-born children to participate in the bequests. 2 Jarman, Wills, 5th Am. ed., 704, and *n.* 11. But even if this doctrine of the law of wills can ever be applied to this sort of family provision, we are not prepared to apply it here; for here the beneficiaries are not a single class, the children only, but the wife and the children, and the children, for anything we can see, were intended to take *pari passu* with the wife. Construing the policy, then, as an executed and irrevocable voluntary settlement for the benefit of Mary T. Fifield and the children in being when it was issued, the question of what interest passed to the bank, as pledgee, is easily answered. The bank, as pledgee, is entitled to and only to the share of Mary T. Fifield, one fifth of the insurance money; the other four fifths being distributable as follows, to wit: one fifth to each of the three surviving children and the remaining fifth to the legal representative of the deceased child, if he has any legal representative; but if, on account of his having died a minor, he has no legal representative, then to the administrator on the estate of William S. Fifield, his father, and next of kin. And see, *Foster v. Gile*, 50 Wis., 608; *Baker v. Young*, 47 Mo., 458.

Decree accordingly.

Mary WHITTIER
v.
Isaac P. COLLINS.

1. **A recovered judgment in *assumpsit* against B for money loaned.** A afterwards brought case against B for alleged fraudulent and false statements, made to obtain the loan. B pleaded in bar, the judgment against him in *assumpsit*. Held, that the plea was not good; that the value of the judgment in *assumpsit* was to be considered as *pro tanto* reducing the damages recoverable, in the action on the case.
2. **To the action on the case, B also pleaded in bar that he had, after the judgment in *assumpsit*, taken the poor debtor's oath, which was administered notwithstanding A's objection of the alleged fraudulent and false statements.** At the trial, the presiding justice excluded the evidence offered to sustain this plea. On petition for a new trial: held, that as the evidence was not set out in the record, the court, not knowing what the evidence was, must assume it to have been rightly excluded.
3. **Query. Whether the allowance or the refusal of a poor debtor's oath has any effect as a judgment estoppel, beyond the effect given by the statute.**

(Providence—Decided July, 9, 1886.)

DEFENDANT'S petition for a new trial.
The case appears in the opinion.

Mr. Warren R. Perce, for plaintiff:

An unsatisfied judgment obtained by plaintiff against defendant in *assumpsit* on a contract is not a bar to a subsequent action for deceit practiced by defendant in procuring said contract. 1 Hill., Torts, 4 *n.*; *Wanzer v. De Baun*, 1 E. D. Smith, 261.

Where a party discovers for the first time, after execution returned unsatisfied, that the judgment obtained by him was utterly worthless, he is entitled to a tort action for the fraud perpetrated on him, in procuring the loan on which judgment was awarded. *Whitney v. Allaire*, 1 N. Y., 305; *Kerr, Fraud & M.*, 330; *Whitney v. Allaire*, 4 Denio, 554; *Herrin v. Libbey*, 36 Me., 350, 357; *Peck v. Brewer*, 48 Ill., 65.

The judgment in the action of contract does not by merger extinguish the fraud by which the debt was created. *Young v. Grau*, 14 R. I., 340; *Freem. Judg.*, 244.

The fraud is not waived, by simply recovery of judgment. *Young v. Grau (supra)*, and cases cited. *Broom, Leg. Max.*, 888.

Messrs. Colwell & Barney, for defendant.

Durfee, Ch. J., delivered the opinion of the court:

Two questions are raised by the petition. The first is this: the plaintiff lends the defendant money on the faith of the defendant's representation that he has property. The defendant failing to repay the money when due, the plaintiff sues him for it in *assumpsit* and recovers judgment which remains unsatisfied. The plaintiff afterwards sues the defendant in case, for deceit on account of the representation, alleging it to have been false and fraudulent. The defendant pleads the judgment in *assumpsit* in bar of the action. Is the plea good? We think it is not. The two actions are neither identical nor inconsistent. The plaintiff, when he sues in *assumpsit*, affirms the contract and sues to recover for a breach of it. The plaintiff, when he sues in case for deceit, also affirms the contract and sues for damages for the fraud by which he was led to enter into it. The case is clearly distinguishable from the case when A sells goods to B, being induced to sell them by B's false and fraudulent representation that he has property and, suing B for the price, recovers judgment therefor and then sues B in trover for the conversion of the goods. Here the two actions are inconsistent; for A when he sues B in *assumpsit* affirms the contract and treats B as the purchaser; whereas, when he sues B in trover he is obliged to disaffirm the contract, claiming that the goods were not sold but fraudulently obtained, the sale being void, and that he is still the owner; and this, after he has prosecuted the contract to judgment, the law will not permit him to do, because the judgment in *assumpsit* conclusively affirms the title of B. In the case at bar, if the false representation instead of having been made by the defendant, had been made by a third person, the unsatisfied judgment against the defendant would evidently not bar an action on the case for deceit against such third person. But we can see no difference in principle between such a case and a case in which the false representation is made by the defendant himself. *Wanzer v. De Baun*, 1 E. D. Smith, 261.

The plaintiff in such case, of course, would

not necessarily be entitled to recover the full value of the goods sold or money lent, but it would be the duty of the jury, in assessing the damages, to consider the value of the judgment in *assumpsit*, and if the judgment were thought to have any value, to reduce the assessment accordingly.

The second question arises under a special plea in bar pleaded by the defendant, which sets up that the defendant, after the judgment in *assumpsit*, applied to take the poor debtor's oath; that the plaintiff, being cited, appeared and opposed the application, alleging, among other objections, the making of the representation as aforesaid; that issue was joined on said allegation; that the magistrate, after full hearing, decided said allegation in favor of the defendant and allowed him to take the oath, etc., "as by the record, etc., more fully appears." The plaintiff replied *nul tiel record*. The defendant in his petition asks for a new trial because the court erred in excluding the evidence offered by the defendant under said plea. The petition is accompanied by an agreed statement of facts which sets forth that the defendant offered evidence in support of the allegations of said plea and of the decision of the magistrate, which was excluded; but neither the petition nor the statement shows what the evidence was which was offered. We doubt whether an allowance or a refusal to allow the taking of the poor debtor's oath is a judgment, entitled to effect as such by way of estoppel, beyond the effect which the statute gives; but if so, we still think the defendant does not show that he is entitled to a new trial, for we cannot, without knowing what the evidence was, which was offered, decide that it was improperly rejected. We must presume that the court decided correctly until the contrary appears.

We do not think the defendant is entitled to a new trial on the other grounds assigned.

Petition dismissed.

David WEAVER, Complainant,
v.
Perry ARNOLD.

1. A lot of land in Providence was devised to A for life, remainder to B and C in fee. Pending the life estate, B mortgaged his interest to D. While the title remained thus, the collector of taxes levied on the lot and after advertisement sold the right, title and interest of A, B and C in and to an undivided seven eighths part, and subsequently for another tax levied again and after advertisement, sold the right, title and interest of A, B and C in and to three undivided eighth parts. No notice

of the sales was given by the collector to D, and D was the purchaser at both sales. Held, under the provisions of Pub. Stat., R.I., cap. 42, §§ 4, 6, and cap. 44, §§ 8, 10, 12, that the sales were void. As to annual taxes the estate of the life tenant is first liable. As to both tax levies the effect of the course pursued was to throw a disproportionate charge on A and C and to relieve *pro tanto* B and D, thus selling one man's estates for another's taxes.

2. C filed a bill in equity against D to obtain a reconveyance. Held, that the bill could not be sustained. Equity will not interfere to remove a cloud upon title in favor of a party out of possession, claiming under a legal title against one who is in possession under the written title which makes the cloud. The remedy at law is sufficient.

(Kent—June 20, 1885.)

BILL IN EQUITY for a reconveyance of B's realty and the removal of a cloud upon title, on demurrer to the bill.

The facts appear in the opinion.

Messrs. Wilson & Jenckes, for plaintiff.

Mr. Benj. N. Lapham, for defendant:

If taxes are illegally assessed or the sale therefor is illegal, the remedy is at law, and no relief can be awarded in equity. *Greene v. Mumford*, 4 R. I., 813; *S. C.*, 5 R. I., 473; *Sherman v. Seward*, 10 R. I., 469; *Sherman v. Benford*, 10 R. I., 559; *People's Sav. Bk. v. Tripp*, 13 R. I., 621; *St. Mary's Church v. Tripp*, 14 R. I., 307; *Swan Point Cemetery v. Tripp*, 14 R. I., 199.

The tax was assessed, as it legally might be. Pub. Stat., 121, sec. 7.

The estate could be legally sold for its non-payment. *Id.*, 128, sec. 12.

The notice required by statute was given. *Id.*, 121, sec. 7.

The tax was assessed directly on the estate itself, without regard to owners. City Ord., p. 184, secs. 4-6.

Durfee, Ch. J., delivered the opinion of the court:

This is a suit in equity to vacate a tax title which the defendant claims to have acquired in a lot of land in the City of Providence. The case set forth in the bill, which is demurred to, is as follows, to wit: the land formerly belonged to one Solomon Arnold, who died in 1878, leaving a will by which he devised it for life to his widow, Phoebe Arnold, and after her in fee simple in remainder to the complainant and one Olin S. Aldrich. Phoebe Arnold, after the death of Solomon, had used and enjoyed the land until her death, March 10, 1884.

NOTE.—A court of equity has jurisdiction to remove a cloud on title, at the suit of an owner of real estate in possession, against the holder of a tax title who refuses to prosecute the same. *Sharpleigh v. Surdam*, 1 Philp., 472.

It is the intention of statutes, in providing this remedy, to give the person in possession of land, the power to institute a suit, in a case proper for the consideration of the court, against any person setting up a claim to the land, to settle the question of title; although no attempt by such person be made to disturb the one in possession. *Hart v. Smith*, 44 Wis., 220; *Maxon v. Ayres*, 28 Wis., 612; *Clark v. Drake*, 3 Pin., 228; *Pier v. Fond Du Lac*, 38 Wis., 470; see, *Middleton Sav. Bk. v. Bacharach*, 46 Conn., 513; *Cowles v. Woodruff*, 8 Conn., 35; *Frink v. Branch*, 16 Conn., 260; *Alden v. Trubee*, 44 Conn., 455; see, 2 *Desty, Tax.*, 978.

ting up a claim to the land, to settle the question of title; although no attempt by such person be made to disturb the one in possession. *Hart v. Smith*, 44 Wis., 220; *Maxon v. Ayres*, 28 Wis., 612; *Clark v. Drake*, 3 Pin., 228; *Pier v. Fond Du Lac*, 38 Wis., 470; see, *Middleton Sav. Bk. v. Bacharach*, 46 Conn., 513; *Cowles v. Woodruff*, 8 Conn., 35; *Frink v. Branch*, 16 Conn., 260; *Alden v. Trubee*, 44 Conn., 455; see, 2 *Desty, Tax.*, 978.

Olin S. Aldrich mortgaged his interest prior to 1878, to the amount of \$2,100, to the defendant by five different mortgages which were all duly recorded. After the death of Solomon Arnold the annual taxes on the lot were assessed to "Solomon Arnold, Phœbe Arnold, executrix," and previously to 1880 had been paid by her. In 1880, a sewer tax and the usual annual tax were assessed on the lot and were allowed to remain unpaid. On the last day of March, 1881, the collector of taxes, on account of the non-payment of the sewer tax, after advertisement and notices to Phœbe Arnold, Olin S. Aldrich and David Weaver the complainant, sold at public auction "all the right, title and interest of the said Phœbe Arnold, Olin S. Aldrich and David Weaver in and to an undivided seven eighths part" of said lot to the defendant for \$195.21, being the amount of sewer tax with interest and expenses, and afterwards, April 5, 1881, gave the defendant a deed purporting to convey the estate sold to him in fee simple. And on June 16, 1881, the collector of taxes, on account of the non-payment of the annual tax, after advertisement and notices, sold at public auction "all the right, title and interest of the said Phœbe Arnold, David Weaver and Olin S. Aldrich, in and to three undivided eighths part," of said lot to the defendant for \$97.67, being the amount of the tax with interest and expenses, and afterwards, June 18, 1881, gave the defendant a deed purporting to convey the estate sold to him in fee simple. At the time of these sales, the complainant was living, in sickness and extreme poverty, in Wyndham, Connecticut, having removed from the City of Providence, where he had previously lived, in 1880, and he received no notice of the sale, though it is not alleged that notices were not mailed to him as required by the statute. The defendant is now in possession of the land, claiming it under the tax titles, and denying that the complainant has any right therein, though the complainant has offered to reimburse him for the sums paid by him for taxes, as aforesaid, or for his equitable portion thereof, and to pay any other legal charges on the estate incurred by him.

The first ground on which the complainant asks relief is, that the sales were illegal and void. The statute in regard to the assessment of the usual annual taxes provides, "Taxes on real estate shall be assessed to the owners." * * * "Estates in possession of a tenant for life may be taxed to the tenant for life, who, for the purposes of taxation, shall be deemed the owner." Gen. Stat. R. I., cap. 39, §§ 4, 6; Pub. Stat. R. I., cap. 42, §§ 4, 6. The statute in regard to the collection of such taxes by sale, provides, "In case of a life estate, the interest of the tenants for life shall first be liable for the taxes." Gen. Stat. R. I., cap. 41, § 8; Pub. Stat. R. I., cap. 44., § 8. The statute authorizing assessments for sewers in the City of Providence, provides that the assessments "Shall be collected as the ordinary taxes of the city are collected." The complainant contends that in pursuance of these provisions the

interest of the life tenant ought to have been first sold for the satisfaction of the taxes, the interest of the remainder men being liable only in case of a deficiency."

We think there can be no question but that the complainant's claim is correct in regard to the ordinary taxes. The provisions recited clearly show that it is the intention of the General Assembly that the life tenant, who enjoys the use or income of the land, shall pay the taxes on it during the continuance of his estate, and that if he neglects to pay them, his life estate shall be sold for their payment before any resort is had to the reversion or remainder. The provision in regard to the sale is not directory merely, but imperative, being manifestly intended for the benefit of the reversioners or remainder men and, therefore, if it be disregarded, the reversioners or remainder men have a right to insist that as to them the sale is illegal and void. It is not so clear, however, in regard to the sewer tax, that the life estate must first be sold; for there is no provision that sewer taxes shall be assessed to the life tenants, the direction being that the assessments shall be on the estates themselves at the rate of sixty cents for each front foot and one cent for each square foot, extending back not exceeding one hundred and fifty feet. It may be argued that, inasmuch as the assessment is for a permanent benefit, it cannot have been intended that it should fall primarily on the life tenant. We do not find it necessary, however, to decide this point; for if the life estate is not to be sold first, then the sale is to be according to the general provisions which we think was not duly observed in the case at bar. The general provision is that "In all cases when any parcel of real estate is liable for payment of taxes, so much thereof as is necessary to pay the tax, interest, cost and expenses shall be sold by the collector," etc., in the manner there prescribed. Gen. Stat. R. I., cap. 41, § 10; Pub. Stat., R. I., cap. 44, § 10. It will be observed that what is authorized to be sold is so much of any parcel of real estate, liable for payment of taxes, as is necessary to pay the taxes, etc. Under this authority, the collector might, if he had given notice to the defendant as mortgagee as provided by § 12,¹ have sold so much of the entire estate, including the mortgagee's interest, as was necessary to pay the tax and assessment. If he had so sold, the burden would have fallen proportionately on all interests, and the sale without doubt would have been valid. He did not so sell, but advertised to sell only the right, title and interest of Phœbe Arnold, Olin S. Aldrich and the complainant, and sold at the two sales their entire right, title and interest only, the mortgagee's interest remaining intact. Now we have seen that the mortgages, which were duly recorded, covered only the undivided moiety in remainder of Olin S. Aldrich. Manifestly,

2. As follows; Pub. Stat. R. I., cap. 44, § 12.

"In case the collector shall advertise for sale any property, real, personal or mixed, in which any person other than the person to whom the tax is assessed has an interest, he shall, provided the interest of such other person appears upon the records of the town, leave a copy of the notice of such sale at the last and usual place of abode, or personally with such other person, if within this State, twenty days prior to the time of such sale."

1.—Pub. Laws R. I., cap. 313, § 6, of March 28, 1873, "An Act Establishing a Board of Public Works in the City of Providence."

therefore, if this moiety was no more than sufficient to pay the mortgages, the effect of the sale if sustained was to throw the burden of the entire tax upon the interests of Phoebe Arnold and the complainant. And if this moiety was more than sufficient, nevertheless, the effect was to charge the other interests disproportionately and *pro tanto* to exonerate said moiety of a part at least of its proper share of the burden. In other words, the effect was to sell one man's estate to pay more or less of another man's taxes. We do not think the statute authorizes this, or that it would be constitutional if it did authorize it. The statute in section 10 as we construe it, authorizes sales for taxes subject to two limitations, namely: *first*, that the only estate which is liable for the taxes shall be sold; and *second*, that only so much thereof shall be sold as is necessary to pay the taxes for which it is liable. We think, therefore, the collector exceeded his authority when he adopted a mode of sale by which, in consequence of its exemption of the mortgagee's interest, the complainant's estate was sold for more than its own taxes. The injury to the complainant is patent. It is impossible to say that if the mortgagee's interest had been included, it would have been necessary to sell his entire estate. Indeed, it is scarcely conceivable that in such a sale such a result would have occurred, if there had been other bidders than the defendant, without collusion. Our conclusion is that the sales and consequently the conveyances under the sales were, as against the complainant, illegal and void.

The complainant contends that, notwithstanding the invalidity of the sales, the conveyances under the sales create a cloud upon the estate which he is entitled to have removed. The defendant, on the other hand, contends that if the sales and conveyances were void, the complainant has an adequate remedy at law and cannot maintain his suit. We think the defendant is right. We think it is well settled that a court of equity will not entertain a suit for the removal of a cloud in favor of a party out of possession claiming under a legal title against a party in possession under the deed or other written or record title which is supposed to constitute the cloud. In such a case there is no necessity for the exercise of the equitable jurisdiction, as the validity of the disputed title can be determined at law. *Apperson v. Ford*, 23 Ark., 746, 756, and cases there cited; *Orton v. Smith*, 18 How., 268, [Book XV. Law. ed., 398]; *Herrington v. Williams*, 31 Tex., 448; *Clark v. Covenant Mut. Life Ins. Co.*, 52 Mo., 272; *Gage v. Schmidt*, 104 Ill., 106; *Gould v. Sternburg*, 105 Ill., 448; *Polk v. Pendleton*, 31 Md., 118, 124.

The defendant here is in possession keeping the complainant out, and there is, therefore, nothing to prevent the complainant from vindicating his title at law.

In this view it is unnecessary to consider whether the complainant would still have a right to redeem the estate if the sales had been valid; for very clearly, if the estate did not pass to the defendant, the complainant cannot redeem it from him. *The bill will, therefore, be dismissed, with costs.*

Town of PAWTUCKET, *Appt.*,

v.

Elias S. BALLOU, Executor.

In Rhode Island the witnesses to a will must subscribe their names in the presence of the testator. Acknowledgment by a witness in the presence of the testator of the witness' signature affixed in the testator's absence, is a nullity.

(Kent—Decided June 20, 1885.)

APPEAL from the Court of Probate of the Town of Pawtucket.

This case was tried on an agreed statement of facts, as follows:

Ballou took his will written by himself and previously subscribed by him, to the persons who signed as witnesses. He declared to them that the paper was his will and asked them to sign. Previous to their signing, Ballou went out of the building for a few minutes and the witnesses signed in his absence. On his return they handed the paper to him, saying they had signed it; he unfolded it, examined the signatures and said "it was all right," in the presence of the witnesses.

All other necessary facts are in the opinion.

Mr. Thomas F. Barnefield, *Town Solicitor*, for appellant.

Mr. Benjamin M. Bosworth, for appellee.

Durfee, Ch. J., delivered the opinion of the court:

The question is, whether, under the agreed statement of facts, the paper offered for probate is entitled to probate as the will of Otis J. Ballou. We think not. Our statute provides that an instrument intended to be a devise of real estate "shall be attested and subscribed in the presence of the deviser by two or more witnesses, or else shall be utterly void and of no effect," and that personal property may be disposed of by will in the same manner as real estate. Pub. Stat. R. I., cap. 182, secs. 4, 8. The paper was not subscribed by the witnesses in the presence of Otis J. Ballou. It was subscribed by them while he was absent where he could not see them subscribe it. The execution is, therefore, clearly invalid unless the acknowledgment of subscription by the witnesses was equivalent in law to an actual subscription in the presence of Otis J. Ballou. We do not think it was. Our statutes prescribe the manner in which property, real and personal, shall descend or be distributed, when not disposed of by will. A will may, this paper if admitted to probate would, make an entirely different disposition. An instrument purporting to be a will, therefore, ought not to be allowed to have effect as a will unless it fully answers the requirements of the statute. The declaration of our statute that such an instrument shall be attested and subscribed in the presence of the testator "or else shall be utterly void and of no effect" is very significant, and demonstrates an

NOTE.—As to the rule in New Hampshire for execution of wills, see *Welch v. Adams*, ante 69.

intention on the part of the General Assembly to make subscription by the witnesses, in the presence of the testator, of the very essence of the execution. We are unwilling to speculate upon the possibilities of human action and to take the responsibility of holding that an acknowledgment of subscription by the witnesses in the presence of the testator answers all the purposes of actual subscription in his presence, and that it, therefore, shall have the same effect. Acknowledgment of subscription is not the same, in fact, as actual subscription and, in view of the statute, we do not think we have any right to decide that it is the same in law.

The only case in which acknowledgment of subscription has been held to be equivalent to subscription itself in the presence of the testator, is *Sturdivant v. Birchett*, 10 Gratt., 67, which was decided by the Court of Appeals of Virginia by a divided court. On the other hand the cases which, more or less strongly, support the view which we have expressed, are numerous. Most of them are cited and reviewed by Judge Gray in an elaborate opinion in *Chase v. Kittredge*, 11 Allen, 49. In that case one of the witnesses subscribed the will in the absence of the testator and before it was signed by him and, after it was signed, acknowledged his signature in the presence of the testator and the other witnesses. The court decided that the execution was invalid, both because the witness subscribed the will before it was signed by the testator and because he subscribed it in the absence of the testator, the subsequent acknowledgment in his presence being unavailing. See, also, *Hindmarsh v. Charlton*, 8 H. L., 159; *In Re Downie's Will*, 42 Wis., 66; *Compton v. Milton*, 12 N. J. Law, 70; *Den dem. Mickle v. Matlack*, 17 N. J. Law, 86; *Pope's Will*, Roberts, Vt. Dig., 748, 17.

We have treated this case as if the acknowledgment was made in the presence of Otis J. Ballou by both witnesses, or by one of them, the other standing by and assenting. The case has been argued as if such was the acknowledgment. The agreed statement, however, does not show that more than one of the witnesses took part in the acknowledgment. Such an acknowledgment by one of the witnesses only, the other being absent, is not, so far as we know, supported by any authority, and it would be without question ineffectual.

Our conclusion is, that the decree of the Court of Probate of the Town of Pawtucket, refusing to admit said paper to probate, must be affirmed.

Order accordingly.

William L. CLARK, *Admr.*,

v.

George R. RICE.

1. An action of debt on a judgment of a court of magistrates for \$40.09 and \$3.45 costs was brought in the court of common pleas, the writ being served by attachment of real estate; held, that the action was rightly brought under Pub. Stat. R. I., cap. 193, § 8.
2. The cancellation of an administrator's bond by the court of probate does not revoke the appointment of the ad-

ministrator nor does it disqualify him from bringing suit as administrator.

3. Evidence was offered by a defendant, on his motion to dismiss, to show that the action was brought without the plaintiff's consent. This evidence was rejected by the presiding justice, who ruled that the plaintiff, knowing of the action, should himself appear and object; held, error, and that the evidence should have been received.
4. Further, that this court would hold the case and hear the evidence, the motion to dismiss being a question for the court.
5. Justice courts are the successors of courts of magistrates, and the clerk of a justice court is the proper person to certify records and papers of the court of magistrates to which his justice court succeeded.

(Washington — Decided July, 1885.)

EXCEPTIONS to the Court of Common Pleas.

The case is stated by the court.

Mr. Thomas H. Peabody, for plaintiff:

Letters of administration are legally efficient until revoked; and in an action by the administrator evidence which tends to impeach and nullify them cannot be admitted. *Pishwick v. Sewell*, 4 Har. & J., 393; *Roger's Ears. v. Duval*, 28 Ark., 77.

They are presumed to have been regularly issued and to qualify the holder to sue and be sued. *Abbott, Trial Ev.*, 56-7.

A motion to dismiss, made after pleas filed and issue joined thereon; after demurrer to first two pleas sustained; after copy of record of judgment on which suit is brought had been offered in evidence; after the third plea had been withdrawn, and while issue on the fourth plea was being tried, comes too late. *Potter v. Smith*, 7 R. I., 55; *Cooker v. Universalist Society*, Id., 17; *Potter v. James*, Id., 812; *Gardiner v. James*, 5 R. I., 235.

Where a court has been abolished and all its records, papers, etc., were ordered delivered to the justice court, a true copy under the seal of such justice court, attested by its clerk, is sufficient to admit the record in evidence. *Capen v. Emery*, 5 Met., 436; 1 Greenl. Ev., sec. 506; *Comm. v. Ford*, 14 Gray, 399; *Abbott, Trial Ev.*, 535-6, 542.

Messrs. Crofts & Tillinghast, for defendant.

Durfee Ch. J., delivered the opinion of the court:

This is a debt on a judgment for \$40.09 debt and \$3.45 costs, recovered against the defendant in the Court of Magistrates of the City of Providence by the plaintiff's intestate, April 7, 1864. The case was commenced in the Court of Common Pleas by attachment of real estate, and comes here, after trial in said court, resulting in a judgment for the plaintiff for \$91.88 and costs, on exceptions for error in the rulings of the court.

The first question raised by the exceptions is whether the Court of Common Pleas had original jurisdiction of the action, the amount in suit being less than \$100. We think it had,

original jurisdiction being expressly given to the court of all civil actions at law "which shall be commenced by attachment of real estate."

It does not matter, in our opinion, that the writ directed the attachment of "the goods and chattels and real estate" of the defendant, and not his real estate only, so long as his real estate was attached. Indeed, if the officer had literally obeyed the precept and attached the goods and chattels, as well as the real estate, the action would still have been rightly brought in the court of common pleas. To the suggestion that the officer might have attached the goods and chattels only, it is enough to say that he did not do it. The jurisdiction is determined by what was done, not by what might have been but was not done.

The second error alleged is that the court below sustained the plaintiff's demurrer to the defendant's plea, setting up that the court of probate, which appointed the plaintiff administrator, did on September 1, 1879, cancel his bond and relieve him and his sureties from all responsibility thereon, without taking any new bond in its stead. We do not think the ruling was erroneous. The statute which empowers courts of probate to cancel such bonds, authorizes but does not require them to take new bonds in their stead. The mere cancellation of the bond does not, in our opinion, revoke the appointment of the administrator or disqualify him from suing as such.

The third exception is for the refusal of the court below to receive evidence offered by the defendant in support of a motion made by him for the dismissal of the action, on the ground that it was being prosecuted by counsel without the consent and against the will of the plaintiff. The reason given for not receiving the evidence was that it was for the plaintiff, the pendency of the action being known to him, to object to the prosecution himself, if it was against his will. We think, however, that the court should have heard the evidence, for it does not follow that the action was not being prosecuted against the plaintiff's will because the plaintiff did not appear to object; and it may be that the court, if it had heard the evidence, would have been convinced that it was being so prosecuted; and *prima facie* at least counsel ought not to be permitted so to prosecute. *Horton v. Champlin*, 12 R. I., 550.

We think, however, that it will not be necessary to remit the case for rehearing on this point. The motion to dismiss makes a question for the court, and we can hear it. The counsel who brought the action says the plaintiff assents to it now, and if so, the effect is the same as if he had authorized it originally. *Craig v. Twomey*, 14 Gray, 486.

The last exception is because the court below

admitted in evidence a copy of the judgment in suit as extended, certified by the clerk of the Justice Court of the City of Providence, under the seal of said court, together with the original writ and pleadings, the judgment being a judgment of the court of magistrates of said city. The court of magistrates ceased to exist in 1872. The justice court, under the statute by which it was established, is the successor of the court of magistrates, and as such, received from it all its books, records and papers, and carried its business, remaining unfinished when it ceased to exist, to completion. We think, therefore, that copies of the records and papers of the court of magistrates, certified by the clerk of the justice court, are entitled to be received in evidence the same as if they were copies of the records of the justice court. *Capen v. Emery*, 5 Met., 436.

We think, too, that the objection to the judgment that it does not show jurisdiction is not fatal, the jurisdiction appearing by the original writ which was produced.

The first, second and fourth exceptions are overruled. The third exception is sustained; the case to stand for hearing on the motion to dismiss in this court at the next August Term in Washington County.

Order accordingly.

STATE

v.

Frank McANDREWS.

1. At the trial of A, indicted for stealing from the person of B, it appeared that A, somewhat intoxicated, had been seen fumbling in the pockets of B, who was very drunk, taking money from them and putting it in his own. A did not account for the possession of money found on him. B, after becoming sober, denied any acquaintance with A and claimed to have had money which was gone. Held, that the question of A's intent was rightly left to the jury.
2. The presiding justice at the trial when asked to instruct the jury, that they must be satisfied the name of the person on whom the larceny was committed was B, as charged in the indictment, did so, adding, "But there is evidence tending to show the man's name was B." Evidence had been introduced that B. gave his name as B, that some one called at the police station, asked for "B," recognized him and paid a fine imposed on him. Held, no error.

(Providence — Decided May 28, 1885.)

EXCEPTIONS to the Court of Common Pleas.

The facts are stated in the opinion.

Mr. Samuel P. Colt, Atty-Gen., for plaintiff.

Mr. George J. West, for defendant.

Durfee, Ch. J., delivered the opinion of the court.

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1—Pub. Stat. R. I., cap. 198, § 3, as follows:

Sec. 3. The said court shall have original jurisdiction of all civil actions at law, which shall be commenced by attachment of real estate or which relate to real estate or to some right, easement or interest therein, the title to which is in dispute or which shall be of one hundred dollars value or upwards, of what kind or nature soever, except where the proceedings must be commenced by writs exclusively issuable by the supreme court, with full power to give judgment in such actions, when legally brought before said court, and to award execution thereon.

The defendant, who was indicted in the court of common pleas for stealing from the person of William H. Jennings, and there tried and convicted, brings the case to this court for revision by bill of exceptions.

The first exception is because the court below, after the testimony for the State was in, refused to rule that the State had not made out a *prima facie* case and allowed the case to go to the jury. The testimony for the State was to the effect that the defendant and Jennings were first seen on a street in Providence together, Jennings very drunk and the defendant somewhat in liquor; that the defendant was searching Jennings' vest pockets; that the two then walked off, the defendant having Jennings by the arm; that while they were walking, the defendant was seen to put his hand into Jennings' pantaloons pocket and take out a roll of bills and put it into his own; that Jennings was soon after arrested for intoxication; that the defendant was also arrested for stealing; that the defendant being asked what he had been going to do with Jennings, said he had been going to take him to his home, but on being further questioned, didn't seem to know who Jennings was; that the two were taken to the police station; that the defendant being there searched, seventeen dollars in a roll were found in his pocket; that Jennings stated in the defendant's presence that he had between seventeen and twenty dollars, but when searched was found to have but ninety-six cents, no bills; that the defendant on being asked where he got the money, said he didn't steal it, and repeated the statement several times, but could not seem to give any account of how he came by it, and that the next day Jennings, when perfectly sober, said in the defendant's presence that he did not know the defendant and had never seen him before. The testimony seems to have been entirely decisive except as to the felonious intent, and we think the court very clearly did not err in leaving the case to the jury on that point. Indeed, we do not see how the court could have found any pretext for taking it from the jury, or even how the jury, without some further explanation than appears to have been given by the defendant of his conduct, could fail to find the verdict which they returned.

The second exception is because the court below, in granting the defendant's request to charge the jury that they must be satisfied beyond a reasonable doubt that the name of the person on whom the larceny was committed, was the name set forth in the indictment, added the remark, "But there is evidence tending to show the man's name was Jennings." The testimony for the State on this point was as follows, to wit: the policeman who arrested the so-called William H. Jennings testified that he gave his name as Jennings; and the sergeant of police testified: "He told me his name was William H. Jennings, and a lady came the next morning and asked for William H. Jennings and I took her into the cell and she recognized him as such and paid his fine. He was fined for drunkenness." This testimony was given without objection and we think it warranted the remark to which exception was taken. We think, too, that the testimony was legitimate. Witnesses, to prove a name, seldom know more than that the person whose name is in question

answers to the name or that others call him by it or speak of him as having it. In *Rex v. Timmins*, 7 Car. & P., 499, on the trial of an indictment for manslaughter, a witness for the prosecution stated that the deceased stayed three days and nights at his inn, and that he asked the deceased his name, and that letters came directed in that name, which letters were delivered to the deceased and received by him. The court held that the witness might be asked what name was given by the deceased. The case was no stronger than the case at bar.

Exceptions overruled.

Pardon P. CASE *et al.*

v.

Edward F. MASON *et al.*

1. Under the first clause of the Pub. Stat. of this State, cap. 237, § 3, the assignee cannot be removed for any other cause than a neglect to render an inventory and schedule; the words "for cause shown," meaning a cause connected with such neglect.
2. The court will not peremptorily remove an assignee for neglecting to file an inventory and schedule as required by Pub. Stat., R. I., 237, § 11, when the neglect is unintentional or seems to have good excuse.

(Providence——Decided June 13, 1885.)

PETITION for the removal of the respondents as assignees under a deed of assignment for the benefit of creditors.

The Public Statutes of Rhode Island, cap. 237, §§ 3, 11, provide:

§ 3. The Supreme Court shall, upon the petition of any creditor interested in any deed of assignment made by a debtor for the benefit of creditors, upon due notice and for cause shown, remove any assignee named in such deed of assignment, who shall neglect to render an inventory and schedule as required by this chapter or shall neglect to give a bond as required by said court, and may, upon the petition of a majority in interest of the creditors interested in any such deed of assignment, upon due notice and for cause shown remove the assignee named therein, from his office and trust.

§ 11. The assignee named in any deed of assignment made by a debtor for the benefit of creditors, shall, within two months after the time of accepting the trusts created by said deed, render on oath to said court an inventory of all the effects, estates and credits conveyed by said deed and a schedule of the liabilities and creditors of said debtor so far as the same can be ascertained, and file said inventory and schedule, together with a copy of such deed, in the office of the clerk of said court in the county where said debtor resides or has his principal place of business.

Messrs. Colwell & Barney, for petitioners.

Messrs. Jas. Tillinghast and Jas. M. Morton, for respondents.

Per Curiam. In the above entitled cause

it appears that the assignees sent to the creditors individually, a statement of the assets and liabilities which they might well suppose would be satisfactory to the creditors and which appears to have been satisfactory to a large majority of them. The assignees might, therefore, assume that the creditors would not insist upon the inventory and schedule required by Pub. Stat., R. I., cap. 237, § 11. The neglect to comply with that section is not necessarily and absolutely a ground of removal of an assignee, as we infer from the language of Pub. Stat., R. I., cap. 237, § 3, which provides that the court shall remove the assignee in such case "upon due notice and for cause shown," and which, we think, leaves it in the discretion of the court to allow the assignee to remain, if his default was unintentional or there was good excuse for it. We think that under the circumstances, there was an excuse for the assignees in the present case, and we will not remove them, on condition that they file an inventory and schedule on or before Tuesday, June 23, 1885.

We are of the opinion that under the first clause of Pub. Stat., R. I., cap. 237, § 3, the assignee cannot be removed for any other cause than a neglect to render an inventory and schedule, the words "for cause shown," meaning a cause connected with such neglect.

Order accordingly.

Mary WHITTIER,

v.

Isaac P. COLLINS.

1. In Rhode Island the indorser of a promissory note, by taking security from the maker, does not waive demand upon the maker and notice of non-payment.
2. If, after the time for demand and notice has passed, the indorser of a promissory note merely requests the holder not to press the note against the maker he does not thereby waive demand and notice.

(Washington——Decided June 12, 1885.)

DEFENDANT'S petition for a new trial.

The facts are stated in the opinion.

Mr. Warren R. Perce, for plaintiff.

Messrs. James C. Collins and Walter H. Barney, for defendant.

Stiness, J., delivered the opinion of the court:

Petition for new trial in a suit against an indorser of promissory notes upon the ground that erroneous instructions were given to the jury. It was admitted at the trial that there was no legal demand and notice, but it was claimed that this was waived by the fact that the defendant stated to the plaintiff, when the loans were negotiated, that he held a bill of sale of certain property belonging to the maker of the notes to protect him as indorser of said notes. The defendant denied that he had security and that he so stated, but requested the court to charge that the mere holding of security by him

to secure him as indorser would not be equivalent to a waiver of demand and notice. This the presiding Judge refused, but instructed the jury that if the defendant held security, ample to cover his liability as indorser of which his statement to that effect to the plaintiff would be evidence, then legal demand and notice of the dishonor of the notes were unnecessary. The defendant excepted.

It cannot be denied that there is authority, both in text books and in decided cases, for the instruction that was given. *Judge Story* in his work on Promissory Notes, § 281, 7th ed., gives among the excuses for non-presentment, "The receiving of security by the indorser before or at the time of the maturity of the note as an indemnity or payment thereof. In such a case, if the security or indemnity be a full security or indemnity for the amount of the note, it is plain that the indorser can receive no damage from the want of a due presentment." A similar statement is made in 3 Kent, Com. 12th ed., *118, and the same cases are cited as authority in both books. It will be seen, however, upon examination, that the cases can hardly be regarded as authority for the statements of the distinguished writers. The doctrine seems to have had its origin in *Corney v. Da Costa*, 1 Esp., 802, a decision at *nisi prius*. An insolvent had made a composition with his creditors, but, to avoid the expense of a conveyance to trustees, it was agreed that he should give his notes, indorsed by the defendant, the latter taking a transfer of the debtor's property to the amount of the composition. Presumably the transfer covered the entire property of the debtor, although this is not stated, but the decision seems to rest upon the fact of a primary undertaking and liability on the part of the defendant, by reason of his agreement with the creditors, rather than upon his liability as a secured indorser. Indeed, he is not referred to as an indorser by the court. He seems to have been treated as a joint maker in fact, though an indorser in form. The case, therefore, is far from supporting the proposition which is quoted above. *Martel v. Tureaud's Estate*, 6 Mart. (N. S.), 118, is a case of similar character. The earliest and most frequently quoted case in the country is that of *Bond v. Farnham*, 5 Mass., 170, which was a typical case of another class. The point decided was that when an indorser takes for his indemnity all of the maker's property, thereby putting it out of his power to pay the note, he stands in the shoes of the maker, upon whom a demand would be fruitless, and a waiver of notice is consequently implied. It is to be noted, in this case, that the waiver is emphatically stated to depend upon the transfer of the whole of the maker's estate and not simply upon the fact that he received security. To exactly the same point are: *Mechanics' Bank of N. Y. v. Griswold*, 7 Wend., 165; *Perry v. Green*, 19 N. J. L., 61; *Duval v. Farmers' Bank of Maryland*, 9 Gill & J., 81; *Watkins v. Crouch*, 5 Leigh, 522. In *Andrews v. Boyd*, 8 Met., 434, the indorser was held liable upon an express agreement; in *Prentiss v. Danielson*, 5 Conn., 175, it was held that indemnity given for other notes did not apply to the one in suit, and hence the indorser was not liable; in *Holman v. Whiting*, 19 Ala., 708, it was determined that the indorser was not

indemnified and not liable. *Lewis v. Kramer*, 8 Md., 265, held that "receiving a sum less than the amount of the note will not necessarily operate as a waiver," but that it might be recovered by the holder against the indorser as money had and received to the holder's use, *pro tanto*, in discharge of the note. While there are numerous *dicta*, in these cases, to the effect that any taking of security is a waiver of demand and notice, the cases themselves do not decide nor even support the proposition.

The cases of *Mead v. Small*, 2 Me., 207, and *Develing v. Perrie*, 18 Ohio, 170, do, however, directly support it; but the former cites only *Bond v. Farnham*, and the latter, the same case with *Mead v. Small*, and *Mechanics' Bank of N. Y. v. Griswold*, *supra*. The curia^{on}, then, of these cases, is *Bond v. Farnham*, which, as before stated, stands upon a different ground and supports a different principle.

On the other hand, the question before us has arisen in many cases which have expressly decided that the receipt of security is not a waiver of demand and notice. *Kramer v. Sandford*, 4 W. & Serg., 328; *Wilson v. Senter*, 14 Wis., 380; *Denny v. Palmer*, 5 Ired., 610; *Seacord v. Miller*, 13 N. Y., 55; *Holland v. Turner*, 10 Conn., 308; *Woodman v. Eastman*, 10 N. H., 359; *Moses v. Ela*, 43 N. H., 557; *Creamer v. Perry*, 17 Pick., 332; *Haskell v. Boardman*, 8 Allen, 38.

We think the weight of authority is with these cases. We also think that they are correct in principle. The general rule of an indorser's liability is so well understood in commercial circles that no exception should be engrafted upon it which is not required by reason or necessity. Indorsements of negotiable paper have become such a necessary part of business affairs that the rules relating to them should be as simple and stable as possible. If they should be hedged about with unreasonable or unnecessary exceptions the plain man would become bewildered, and the law, instead of showing a straight path of conduct, would entangle him in a thicket of unexpected liabilities. Why should the receipt of security make an exception to the rule that an indorser is entitled to notice of non-payment? In taking security he has practically said to the maker, "I will hold this to indemnify me *in case* I become liable to pay your note." Why should it be said that he *thereby* becomes liable to pay it? This would change his contract and character from that of an indorser to that of surety or joint maker. If he has received funds for the express purpose of paying the note, or if he has taken the whole of the maker's property for security, reasons for holding him liable have been stated; but those reasons do not apply in a case like the one before us. The indorser's liability at the outset was contingent; to guard against the contingent liability he took security; we do not see how the liability thereby became absolute. It is said that the reason for the rule requiring notice to indorsers is to enable them to proceed at once to collect from the maker and thus to secure themselves; that if the indorser is secured he can lose nothing, and the reason for the rule failing, the rule itself does not apply. But this does not follow. An indorser, receiving no notice of non-payment, may think the note is paid; or, may be wrongly informed that it

is paid, and surrender the security, only to learn later, if this were the doctrine, that he has waived notice and is still liable without his security. Again; the security he supposed to be good may prove to be worthless. Moreover, if the fact that the indorser would eventually lose nothing is to effect his liability, the solvency of the maker, from whom the indorser could eventually recover, might be shown, with equal reason, as a ground to hold the indorser liable. The liability of the indorser is not dependent upon his ultimate loss or re-imbursement, but upon the rules of mercantile law and hence it does not depend upon the fact of security or no security. This has been well stated by Professor Parsons: "The answer to the objection that the whole object in requiring notice is attained as soon as the indorsee is indemnified is, in our opinion, that, whatever may have been its effect in the gradual formation of the law, the requirement of notice has at last settled down into a strict technical right, and an appeal to original reasons has become less frequent and less influential."

We think that the instruction given in this case, upon this point, was erroneous.

It is also set forth, in this case, that the court erred in refusing to allow the defendant to prove that the rate of interest charged was exorbitant, in order to enable him to claim an unconscionable contract as in *Brown v. Hall*, 14 R. I., 249. But this case does not fall within the principle upon which *Brown v. Hall* was decided. The parties to this note were competent to contract, and it does not appear that there was any fraud or oppression or any advantage taken of a confidential relation. The testimony was therefore properly excluded.

The third ground of error alleged is the instruction to the jury that requests by the defendant to the plaintiff for forbearance in demanding payment of the note, whether before or after maturity, would amount to a waiver of notice. It is not clear from the record whether the request related to the legal demand at maturity or whether it was a mere request to forbear demanding payment for a while, after maturity. If the plaintiff was induced to omit the legal demand by the defendant's request, of course, he would thereby waive notice of demand and non-payment; but if it was a simple request, after the time for demand and notice had expired, not to press the maker of the note, the plaintiff still being at liberty to bring suit, if she choose, we do not think that such a request would amount to a waiver by the defendant.

Petition granted.

Alfred J. KENT

v.

John H. BONGARTZ *et al.*

Certain citizens presented to the town council of their town a request that K. might be removed from his office of constable, because: "Firstly, said K. is a man utterly devoid of principle and uses his office more for the purpose of wreaking his personal spite than for the peace and harmony of the community;

secondly, said K. is wholly ignorant of the duties of his office; *thirdly*, said K. has at various times heretofore maliciously and wickedly assaulted and arrested sundry persons who were entirely innocent of the charges made by him against them;" whereupon K. brought an action for libel against the citizens, and at the trial introduced evidence to show that the statements of the request were false. Held, that the action could not be maintained without affirmative proof, which was not produced, of express malice. Held, that proof of the mere falsity of the statements would not support the action. Held, that the statements were not such as, if proved untrue, to imply actual malice.

(Kent—Decided June 26, 1885.)

EXCEPTIONS to the Court of Common Pleas.

The facts are stated in the opinion.

Messrs. Page & Owen, for plaintiff.

Messrs. Edward C. Dubois, John H. Bongartz, William B. W. Hallett, Charles F. Baldwin and George N. Bliss, for different defendants.

Durfee, Ch. J., delivered the opinion of the court:

This is an action on the case for libel. The plaintiff is a citizen of the Town of East Providence, and was, when the alleged libel was published, a police officer or constable of the town. The alleged libel is a petition which purports to be signed by the defendants as citizens of East Providence and which is addressed to the town council, the body having power to appoint and remove the town constables. It asks the town council to remove the plaintiff from his office for the following reasons, which are set forth in the petition and which the plaintiff complains of as false and defamatory, to wit: "Reasons. *Firstly*. That said Kent is a man utterly devoid of principle and uses his office more for the purpose of wreaking his personal spite than for the peace and harmony of the community. *Secondly*. That Kent aforesaid is wholly ignorant of the duties of his office. *Thirdly*. That said Kent has at various times heretofore maliciously and wickedly assaulted and arrested sundry persons who were entirely innocent of the charges charged by him against them."

At the trial the plaintiff introduced testimony tending to prove that the petition was signed by some of the defendants; that it was published by presentation to the town council and that the "reasons" were false. It is not claimed that there was any testimony other than that afforded by the charges contained in the "reasons" and the proof of their falsity, to show any actual or express malice toward the plaintiff on the part of the defendants. At the conclusion of the plaintiff's testimony, the defendants moved for a nonsuit on the ground that the petition was a privileged communication and that the plaintiff could not maintain his action thereon without proof of express malice. The court granted the motion and the plaintiff excepted.

The plaintiff admits that the petition is of the class of communications which are conditionally, not absolutely, privileged and, consequently, that the burden was on him to show by affirmative evidence that it was malicious. He contends, however, that the question of malice is a question of fact for the jury, and that, if the case had been left to the jury, there was evidence from which they might have found express malice, namely: the grossness of the charges and the testimony to their falsity. The question then is whether the charges themselves are of such a character that actual malice can be inferred from them simply on proof of their falsity. It is well settled that falsity alone is not enough. The author or authors of the communication may make it and press it upon the attention of others, honestly believing it to be true and acting from the purest and highest motives, when in fact it is false, and therefore actual malice is not to be inferred from mere falsity. *Somerville v. Hawkins*, 10 C. B., 589; *Harris v. Thompson*, 13 C. B., 333; *Hart v. Von Gumpach*, L. R., 4 P. C., 439; *Laughton v. Bishop of Sodor and Man*, L. R., 4 P. C., 495; *Lewis & Herrick v. Chapman*, 16 N. Y., 369; *Fowles v. Bowen*, 30 N. Y., 20; *Ormsby v. Douglass*, 37 N. Y., 477; *Shurtleff v. Stevens*, 51 Vt., 501; *Brow v. Hathaway*, 13 Allen, 239. The question then is: do the charges in the petition bear upon their face the indicia of actual malice? In *Laughton v. Bishop of Sodor and Man*, *supra*, the court say that "Undoubtedly a privileged communication may be couched in language so much too violent for the occasion as to afford in itself evidence of malice, whereby the privilege is forfeited." The court added, however, that it will not do to hold that "all excess beyond the exigency of the occasion is evidence of malice," and held that though there were some expressions used beyond what was necessary, they did not warrant any inference of express malice. In *Hart v. Von Gumpach*, *supra*, the same court used the following language: "It is no doubt true that malice may, in some cases, be inferred from the defamatory statements themselves; but where representations, if *bona fide*, are privileged by the occasion, the mere circumstance that they are defamatory does not furnish that proof; it must be shown either from the nature of the language employed or by extrinsic evidence, that they were prompted by bad feeling or wrong motives, and it is not sufficient in such cases that the representations are consistent with the existence of malice; they must be inconsistent with *bona fides* and honesty of purpose." The language accords with the decision in *Somerville v. Hawkins*, *supra*, that actual malice cannot be inferred from conduct which is as consistent with *bona fides* as with malice. The maintenance of the privilege is regarded as important not only to the parties immediately protected by it, but also the public at large. In *Brow v. Hathaway*, 13 Allen, 239, 242, the court say that the mere fact that the statements made are intemperate or excessive from over excitement will not defeat it. See, also, *Wright v. Woodgate*, 2 Crompt. M. & R., 573.

We do not think the charges here complained of are of such a character that a jury without other proof could be justified in finding them malicious. They are severe in substance but

concise in expression. They employ no language which has the appearance of being used only by way of spiteful invective or malignant vituperation. Their chief fault is that they are vague and inexplicit, but this is a fault which is as likely to have arisen from unskillfulness as from malice. Indeed the petition is just such a petition as we might expect from persons, honest and earnest in purpose, but ignorant of the proper mode of making charges which are to be judicially investigated. It is as consistent, on the face of it, with good faith as with malice and, therefore, under the rule laid down in the cases above referred to, it was for the plaintiff to show by extrinsic evidence not only that the charges were false, but also that the defendants had no probable cause for believing them to be true, or that they acted without sincerity, using the occasion as a mask for personal spite and ill will.

Exceptions overruled.

Charles E. BARNEY

v.

John H. ARNOLD *et al.*

1. On a devise to a daughter, M. A. W., during her natural life and at her decease, to her children, one half of a lot and half of all the buildings and improvements thereon; one quarter of said house and lot to S. L., her heirs and assigns, and the remaining quarter to J. B., her heirs and assigns, for and during the natural life of each of them, but if any of them or all may die, leaving no child or children, then each respective right shall be divided equally amongst my daughters, A. A., S. L. and J. B., their heirs and assigns forever. Held, that on her decease, M. A. W., dying childless, her one half, not the whole estate, became divisible among her sisters. Held, further, that S. L. took under the will an estate in fee simple, subject to a gift over by executory devise.
2. Distinction traced, between the words "child or children" and the word "issue" in case of a testamentary gift, with limitations over.

(Kent—Decided June 27, 1885.)

BILL IN EQUITY for partition.

The facts are stated in the opinion.

Mr. James C. Collins, for complainant.

Messrs. W. W. & S. T. Douglas and James Harris, for respondents.

Durfee, Ch. J., delivered the opinion of the court:

NOTE.—Distribution among heirs; children of brothers and sisters take *per capita*. McKelvey v. McKelvey, (Ohio), 1 West. Rep., 68.

Testamentary gift for life with added power to sell. Rhode Island Hosp. Tr. Co. v. Commercial Nat. Bk., *ante*, 20.

Devise in trust, with power in trustee to convey. Ames v. Ames, *ante*, 38.

Two questions have been submitted to us under the following clause of the will of Thomas Whipple, deceased, to wit: "I give, devise and bequeath to my daughter Martha Ann Whipple, during her natural life and at her decease to her children, one half of a lot and half of all the buildings and improvements thereon, situated in the City of Providence, at a place called Constitution Hill, and is the same house formerly owned by George Carpenter and myself. One quarter of said house and lot I devise to Sarah Loring, her heirs and assigns, and the remaining quarter of said house and lot I give and devise to Julia Barney, her heirs and assigns, for and during the natural life of each of them, but if any of them or all may die, leaving no child or children, then my will is that each respective right shall be divided equally amongst my daughters, Amey Arnold, Sarah Loring and Julia Barney, their heirs and assigns forever." Martha Ann Whipple died before her three sisters, leaving no child.

The first question is whether, on her decease, the whole estate or only her half became divisible among the three sisters. We think her half only became divisible; for otherwise, instead of using the distributive phrase, "each respective right," the testator would have said "the whole estate" shall be divided equally, etc.

The second question is, whether Sarah Loring took under the will an estate tail or an estate in fee simple, subject to a gift over by way of executory devise to Amey Arnold and Julia Barney on the event of her dying without leaving any child. We think she took a fee simple estate subject to such gift over.

In *Morgan v. Morgan*, 5 Day, 517, the devise was to the testator's four sons in fee simple, with the clause following added, to wit: "And also my will is that if my sons should either of them die without children, that his brothers shall have his part in equal proportion." The court held that the words, "die without leaving children" meant *dying without children living at the death of the first devisee*, and consequently that the limitation over was good as an executory devise. The case is exactly like the case at bar. In *Smith v. Hunter*, 23 Ind., 580, the estate given to the first devisee in fee, was given over "if he die childless," and the gift over was sustained. In *Doe v. Webber*, 1 B. & Ald., 713, the devise was to A. in fee, "and in case A. shall happen to die and leave no child or children" then to B. in fee, and the gift over was held to be good by way of executory devise. The court, however, was of opinion that the words "child or children" were equivalent to "issue" and sustained the gift over on other indications in the will going to show that the testator intended to have the gift over take effect, not on an indefinite failure of issue, but upon a failure happening at the death of the first devisee.

We think there is good reason for giving the words "child or children" an extended meaning, for the first devisee might die without leaving any child and yet have a grandchild or some other remoter descendant, in which case the gift over cannot have been intended to take effect. But we do not think it is necessary to give the words the same effect as to the gift over as if the word "issue" had been used by the testator in the place of them. For, as has

been well remarked, the words "child or children" have not the technical force of the word "issue" in a limitation over; and generally refer to the time of the death of the devisee. *Sherman v. Sherman*, 3 Barb., 385, 387. It is in the natural order for the parent to die before the children and for the children to succeed to the estate, and it is to be presumed that the testator made his will in view of the natural order and therefore, though the meaning of the word "children" be extended by construction, it is entirely unnecessary to extend it beyond the grandchildren or other descendants who take the place of the children in the succession. The construction, that the words, "dying without issue" or "dying without having issue," import an indefinite failure of issue, is highly artificial, and probably defeats oftener than it furthers the testamentary intent, and it is, therefore, not to be carried unnecessarily beyond the line of existing precedents. If, however, any other indication of the intent be required, such indication is afforded by the phrase, "for and during the natural life of each of them," which follows the devise to Sarah Loring and Julia Barney. That phrase is inconsistent with said devise, and as to them must be rejected for repugnancy, but, nevertheless, it indicates pretty clearly that the times which the testator intended as the times for the gift over to take effect, in case they should take effect, were at the deaths of the first devisees.

Sarah Loring died leaving a son living at her death. After the death of Martha Ann Whipple, Sarah Loring made a deed purporting to convey all her interest in the estate to Hannah Loring in trust. We think that under that deed, Hannah Loring took all her interest subject to said trust, and that therefore, no part of the estate descended to the son.

Samuel W. CHURCH

e.

Hezekiah W. CHURCH *et al.*

1. **Residuary testamentary disposition** as follows: "I give, devise, and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, wherever and however situate, of which I am now possessed, or may die seised or possessed, unto my sons S. T. B. H. J. and C., to have and to hold the same with all the privileges and appurtenances to the same belonging, to them the said S. T. B. H. J. and C., their heirs and assigns forever." Held, that the devisees took under Pub. Stat., R. I., cap. 172, sec. 1, as tenants in common, not as joint tenants. The devisees being individually named and nothing in the will or in

the testator's circumstances indicating a different intent, the devisees took as individuals, not as a class.

2. One of these sons died without issue before the testator. Held, that the deceased son's share lapsed and at the testator's death descended to his heirs as intestate estate.
3. A general residuary devise or bequest carries lapsed or void devises or bequests, but does not include any gift which falls of the residue itself.

(Bristol — Decided July 25, 1885.)

BILL IN EQUITY for opinion.

The facts are stated in the opinion.

Mr. O. D. Bosworth, for complainant:

In the absence of statutory provisions, the weight of authority, it seems, passes lapsed legacies to the residuary legatees, and lapsed devises to the heirs of the testator. *James v. James*, 4 Paige, 115; *Van Kleeck v. Dutch Church*, 20 Wend., 457; 1 Jarm. Wills, 685 and notes; *Salt v. Chattaway*, 3 Beav., 576; *Ferguson v. Hedges*, 1 Harr. (Del.), 524; 8 Washb. Real Prop., 444, 445; *Gore v. Stevens*, 1 Dana, 206; *Word v. Mitchell*, 82 Ga., 628; *Dawson v. Clark*, 15 Ves. Jr., 414; *Jones v. Letcher*, 18 B. Mon., 368; *Hughes v. Allen*, 31 Ga., 488; *Roberson v. Roberson*, 21 Ala., 278; *Cunningham v. Cunningham*, 18 B. Mon., 19.

The common law considered the term "real estate" as limited to lands of which testator was seised when he made his will. *Haydon v. Stoughton*, 5 Pick., 538; *Prescott v. Prescott*, 7 Met., 141.

In Massachusetts, since the passage of the Revised Statutes giving a person the right to devise after acquired property, the cases uniformly hold that a lapsed devise of real estate passes, the same as a lapsed bequest, into the residue and not to the heirs of the testator. *Thayer v. Wellington*, 9 Allen, 288; *Blaney v. Blaney*, 1 Cush., 107; *Haydon v. Stoughton*, 5 Pick., 528; *Allen v. White*, 97 Mass., 504; *Prescott v. Prescott*, 7 Met., 141.

As to the application of this rule in other States, see: *Shreve v. Shreve*, 2 Stock., 389; *Smith v. Curtis*, 5 Dutch., 345; *Van Kleeck v. Dutch Church*, 20 Wend., 457; *Patterson v. Swallow*, 44 Pa. St., 487.

The general statute of Rhode Island at the time of the making of the will aforesaid, had, and the public statute now has, a provision enabling persons to devise after acquired real estate. See, Gen. Stat., ch. 171, sec. 1; Pub. Stat., ch. 182, sec. 1.

The rule, it would seem, is well established, that where property is given to a class of persons, as legatees or devisees, and one dies before the testator, the survivors take the whole. See cases cited below: also, *Shore v. Billingsly*, 1 Vern., 482; *Willing v. Baine*, 8 P. Wms., 113; *Barnes v. Allen*, 1 Bro. Ch., 181; *Crecelius v. Horst*, 78 Mo., 566; *Gross' Estate*, 10 Pa. St., 860; *Robinson v. Martin*, 2 Pa., 525; *Smith v. Curtis*, 5 Dutch., 345.

Although an estate is devised to the children of a person by name, yet if it appear from the whole will that the testator intended they should take as a class, the share of one dying before the testator, without issue, will go to the sur-

NOTE.—Residuary clause in will; distribution among heirs; children of brothers and sisters take per capita not per stirpes. See, *McKelvey v. McKelvey* (Ohio), 1 West. Rep., 68.

vivor. *Schaffer v. Kettell*, 14 Allen, 528; *Stedman v. Priest*, 103 Mass., 293; *Springer v. Congleton*, 30 Ga., 976; *Warner's Appeal*, 39 Conn., 253; *Talcott v. Talcott*, 39 Conn., 186; *Gray v. Bailey*, 42 Ind., 349, and cases there cited; see, also, *Jackson v. Phillipps*, 4 Gray, 546.

If the gift was to be divided among them *nominatim* in equal shares and one dies before the testator, his share will lapse; yet the mere fact of mentioning them by name, is not conclusive. *Stedman v. Priest*, 103 Mass., 293.

Where a residue is given by will, every presumption is to be made that the testator did not intend to die intestate as to any of his estate. *Phillips v. Chamberlaine*, 4 Ves. Jr., 51; *Cushing v. Aylwin*, 12 Met., 169, 175.

Messrs. Irving Champlin and Chas. F. Baldwin, for respondents.

Durfee, Ch. J., delivered the opinion of the court:

The question now before us for decision, arises under the will of Samuel W. Church, late of Bristol, deceased. The will, after several specific devises and bequests for the benefit of the wife and daughters of the testator, concludes with the following residuary clause, to wit: "I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, wherever and however situate, of which I am now possessed, or may die seised or possessed, unto my sons Samuel W. Church, Jun., Thomas Church, Benjamin Church, Hezekiah W. Church, James C. Church, and Charles Henry Church, to have and to hold the same with all the privileges and appurtenances to the same belonging, to them the said Samuel W., Jun., Thomas, Benjamin, Hezekiah, James and Charles, their heirs and assigns forever." One of the sons died without issue before the testator. The question is whether the share of real estate which he would have taken under the residuary clause, if he had survived the testator, descended as intestate estate to the heirs at law of the testator or passed, under the will, to the residuary devisees.

We think there can be no doubt that under our statute, Pub. Stat., R. I., cap. 172, §1, the devise to the sons, so far as it applies to real estate, was a devise to them as tenants in common, there being no words manifestly showing an intent to have them take as joint tenants. The devise, therefore, if it is to be construed as a devise to the sons individually, was, in effect, a devise of one undivided sixth part of the residuary real estate to each son and, consequently, when one son died without issue before the testator, the part devised to him was as if it had never been devised to him, it lapsed and, there being no words to carry it elsewhere under the will, it necessarily descended as intestate estate to the heirs at law. 1 Jarman, Wills, 5th Am. ed., 622; 3 *Id.*, 17; *Page v. Page*, 2 P. Wms., 489; *Sykes v. Sykes*, L. R., 4 Eq., 200; *In Re Wood's Will* 29 Beav., 236; *Owen v. Owen*, 1 Atk., 494; *Norman v. Frazer*, 3 Hare, 84; *Lombard v. Boyden*, 5 Allen, 249.

The cases cited to show that, since the statute authorizing the devise of after acquired real estate, the distinction between lapsed devises and lapsed legacies no longer holds, and that now a lapsed devise like a lapsed legacy will fall into the residue, are not in point, for the devise here

was residuary in its inception and, therefore, could not fall into the residue. This would be so if the estate were personal; for though the general rule is that a general residuary bequest carries lapsed or void legacies, it does not include any part of the residue itself which fails. *Bagwell v. Dry*, 1 P. Wms., 700; *Page v. Page*, 2 P. Wms., 489; *Garthwaite's Est. v. Lewis*, 25 N. J. Eq., 351; *Hand v. Marcy*, 28 N. J. Eq., 59; *Floyd v. Barker*, 1 Paige, 480; *Hamlet v. Johnson*, 26 Ala., 557; *Solier, Admr., v. Inches*, 12 Gray, 385; *Waring v. Waring*, 17 Barb., 552; *Reed's Estate*, 82 Pa. St., 428; *Franier v. Frazier's Exrs.*, 2 Leigh, 642.

The surviving sons, however, contend that the devise to the sons, was a devise to the sons, not individually, but as a class, and that they are, therefore, entitled as a class to the entire residuary estate. But the devise was a devise to the sons, severally named, which indicates that they were, not simply as a class, but each individually, the objects of the testator's bounty. Cases are cited for the sons which show that a gift to persons by name, may nevertheless be a gift to them as a class. *Schaffer v. Kettell*, 14 Allen, 528; *Stedman v. Priest*, 103 Mass., 293; *Springer v. Congleton*, 30 Ga., 976; *Warner's Appeal*, 39 Conn., 253; *Talcott v. Talcott*, 39 Conn., 186.

In these cases, however, the general rule that a gift to persons named is a gift to them individually is recognized, and reasons are found in the language or structure of the will, or in the circumstances, for deciding that the intent of the testator, which is of course paramount to the rule, would be best subserved by disregarding it. It was, in fact, apparent in every one of the cases cited that the gift, though to persons named, was a gift to them as constituting a particular branch, or as representing a particular member of the family, and that if the gift were suffered to lapse and go to the heirs and next of kin generally, it would disappoint the purposes of the testator. There are no such reasons in the case at bar for finding that the sons were intended to take as a class. The beneficiaries under the will are a wife, four daughters, one of whom is married, and six sons. The design of the will seems to have been, after making special provisions for the wife and the married daughter, to divide the rest of the property among the sons and unmarried daughters equally or nearly so, during the lives of the daughters at least, and if the daughters have issue, their shares to go to such issue. Without question there is some favor to the sons, a remnant of the old traditional partiality lingering still, but we see no reason to doubt that, if the will had been made after instead of before the death of the son who died, the shares of the daughters as well as of the sons would have been proportionately increased. We can, therefore, see no reason why we should not construe the residuary devise according to its more obvious interpretation as a devise to the sons individually. *Bain v. Lecher*, 11 Sim., 897; *Knight v. Gould*, 2 Myl. & K., 295; *Williams v. Neff*, 52 Pa. St., 326; *Todd v. Trott*, 64 N. C., 280; *Startling's Est. v. Price*, 16 Ohio St., 29.

Our decision is that the share of the real estate given to the deceased son, descended, at the death of the testator, to his heirs at law as intestate estate.

John M. MACKAY

v.
Saint Mary's CHURCH.

1. A died in Connecticut and letters of administration on his estate were taken out in Connecticut. There were no claims in Rhode Island against his estate. **Held**, that the Connecticut administrator could transfer and indorse a promissory note due the estate of A so as to enable the indorsee to bring suit on the note in Rhode Island.
2. Promissory notes given to two joint administrators for a debt due to the estate of the intestate may be transferred and indorsed by one of the administrators. A died in Connecticut and B and C were appointed administrators of his estate both in Connecticut and New York. **Held**, that the administrators could, in New York, make a good transfer of a note due the estate of the intestate, although by reason of the intestate's domicile they were liable to account in Connecticut for the proceeds of the transfer.
3. B and C were appointed in Connecticut and New York administrators of A who died domiciled in Connecticut. Two notes were given to the administrators by a debtor of A's estate in Rhode Island for the amount due the estate. After the notes became due, the debtor made part payment to C, arranging to settle the whole debt thereafter. Then B, in New York, transferred the notes to D, in payment of a debt due from the estate of A, and D notified the Rhode Island debtor of the transfer. Subsequently the Rhode Island debtor made an additional payment to C, taking from him a general release under seal. **Held**, that D could recover in Rhode Island from the Rhode Island debtor the amount due on the notes when D received them.
4. A promissory note in the ordinary form given by a corporation had on it when produced in court a paper seal. No vote of the corporation authorized the seal; the note did not purport to be under seal; the seal was not the corporate seal; and the treasurer of the corporation who was a witness in the case did not admit putting it on the note. **Held**, that the seal must be disregarded as mere excess.

(Providence—Decided July 18, 1885.)

DEBT. Heard by the court, jury trial being waived.

The case is stated in the opinion of the court. Messrs. Michael J. Kelly and W. W. & S. T. Douglass, for plaintiff:

The disability of a foreign executor or administrator is personal, and does not attach to the subject-matter of the cause of action. *Petersen v. Chemical Bank*, 32 N. Y., 21; affg. 2 Rob., 605; S. C., less fully, 29 How. Fr., 240; affg. 27 Id., 491; *McBride v. Farmers' Bank*, 26 N. Y., 450; affg. 25 Barb., 657; *Midbrook v. Merchants' Bk.*, 3 Keyes, 135; affg.

41 Barb., 481; *Riddick v. Moore*, 65 N. C., 382; *Leake v. Gilchrist*, 2 Dev. (N. C.), 73; *Grace v. Hannah*, 6 Jones' L. (N. C.), 94; *Barrett v. Barrett*, 8 Me., 353; *Harper v. Butler*, 2 Pet., 239 (Law. ed., VII., 410); *Hutchins v. State Bank*, 12 Met., 421.

The cases of *Thompson v. Wilson*, 2 N. H., 291, and *Stearns v. Burnham*, 5 Me., 261, are criticised and held not to be good law, in *Petersen v. Chemical Bank*, in two opinions, and is disapproved in Story, Conf. L., secs. 258, 259.

The cases of *Dial v. Gary*, 14 S. C., 573, and *Carmichael v. Ray*, 1 Rich. (S. C.), 116, are not recognized as good law.

The case of *Cutler v. Davenport*, 1 Pick., 81, is not analogous; and that of *Daves v. Boylston*, 9 Mass., 337, merely holds that the assignee of a bankrupt in England cannot recover in our courts. *Bibb v. Skinner*, 2 Bibb (Ky.), 57, holds that part of a contract cannot be assigned, so as to permit assignee to bring a suit. *Sanford v. Mickles*, 4 Johns., 224, holds that after dissolution, one partner cannot indorse the name of the firm; doubted, Pars. Bills & N., 6.

In case of joint administrators, acts done by one are deemed the acts of all. *Wheeler v. Wheeler*, 9 Cow., 34; *Douglass v. Satterlee*, 11 Johns., 21; *Murray v. Blachford*, 1 Wend., 581; 616; *Sutherland v. Brush*, 7 Johns. Ch., 17; *Feld v. Schieffelin*, Id., 150; *Bogert v. Hertell*, 4 Hill, 503, 510, overruling *Smith v. Whiting*, 9 Mass., 334; *Stone, Exr. v. Union Savings Bk.*, 13 R. I., 25; 1 Dan. Neg. Inst., secs. 266, 268; *Edw. Bills*, pp. 80, 248; 1 Redf. Surr., 3d ed. 448.

The cases of *Brown v. Dickenson*, 27 Gratt., 698; *Carrick v. Vickery*, 2 Doug., 658; *Ryhiner v. Peickert*, 92 Ill., 305, are cases of individual joint payees; while *Sneed v. Mitchell*, 1 Hayw., 289; *Watson v. Evans*, 1 Hurl. & C., 662, are not in point. In *Sanders v. Blain*, 6 J. J. Marsh., 446, the administrator acted as an individual.

Before the sale, assignment or transfer of an administrator can be questioned, even by the parties interested in the estate, there must be evidence of fraud or collusion between the transferrer and transferee. *Sutherland v. Brush*, 7 Johns. Ch., 17.

Defendant being guilty of gross laches, the payment must be considered as made in its own wrong. *Davis v. Miller*, 14 Gratt., 13; *Coffman v. Bk. of Ky.*, 41 Miss., 212, 214; *Best v. Crall*, 23 Kan., 482; Dan. Neg. Inst., sec. 1227.

Possession of the original note by the defendant, is evidence of its payment or satisfaction, and no person can question it. Dan. Neg. Inst., sec. 1227.

The payment to Duffy in 1881, at most, is only a payment on account and, if allowed, must be appropriated to interest then due on the note. Dan. Neg. Inst., sec. 1289; Id., secs. 1250-51-52.

An impression without wax or wafer, is considered a seal, but wax or wafer without an impression is not a seal. Pub. Stat., R. I., R. S., N. Y. (re-enacted in sec. 960, Code Civil Proc.); Bouvier, Law Dic., titles "seal" and "scroll"; *Richard v. Boller*, 6 Daly (N. Y.), 460.

A seal is not necessary upon the note of a private corporation to give it effect. *Clark v. Farmer's Mfg. Co.*, 15 Wend., 256.

Where an instrument under seal is executed

under a power to execute one not under seal, the seal will be considered immaterial, and mere surplusage. *Jones v. Horner*, 60 Pa., 214 (cited in *Bouvier's Law Dic.*, title, "seal").

Messrs. Gorman & Feely, for defendant.

Stiness, J., delivered the opinion of the court:

The plaintiff sues, as indorsee, upon two notes given by the defendant Corporation to William H. Kelly and James Duffy, administrators upon the estate of William E. Duffy. It is admitted that William E. Duffy died in Connecticut; that these persons were appointed administrators in Connecticut and also in the State of New York, where both of them reside; and that the defendant Corporation, by its treasurer duly authorized, gave the notes in the settlement of a debt admitted to be due from the Corporation to the estate of William E. Duffy. April 8, 1881, after the notes were due, the defendant paid \$600 on account to James Duffy, one of the administrators, under an arrangement made with him to settle the whole indebtedness at a future time, for the face of the notes without interest. After this and before April 23, 1881, William H. Kelly, the other administrator, "for himself and James Duffy, administrators of estate William E. Duffy, deceased," indorsed one of the notes and delivered the other, which was made payable to the plaintiff as attorney and by him indorsed in blank, to plaintiff for his fees for legal service rendered in settlement of the estate, his bill having been subsequently allowed by the surrogate in New York, in Kelly's account, to the amount of \$3,000. Thereupon the plaintiff notified the defendant of his ownership of the notes and demanded payment. April 30, 1881, after such notice, the defendant paid to James Duffy, administrator, \$900 more, and took from him a general release, under seal, of all claims of the estate of William E. Duffy against the defendant, and particularly of the notes in question; the balance, as agreed, to be paid when Duffy should obtain and surrender the notes.

Upon this state of facts several questions arise: *First*. Can an executor or administrator under the laws of one State indorse a note so as to enable the indorsee to sue in another State?

This question was fully examined and discussed in *Petersen v. Chemical Bank*, 32 N. Y., 21, the court sustaining such an indorsement. So, also, in *Riddick v. Moore*, 65 N. C., 382; *Barrett v. Barrett*, 8 Me., 353; and in *Hutchins, Admr., v. State Bank*, 12 Met., 421, the same doctrine was sustained.

While there are cases which hold to the contrary, *e. g.*, *Thompson v. Wilson*, 2 N. H., 291; *Dial v. Gary*, 14 S. C., 573; *Stearns v. Burnham*, 5 Me., 261, the underlying considerations on which such decisions rest, seem to be that an administrator's authority does not extend beyond the jurisdiction of the State in which he is appointed, and that to give effect to such an indorsement would really amount to administration in another State to the possible detriment of resident creditors. This last consideration does not apply in the case before us, for it does not appear that there are any creditors of William E. Duffy in this State.

Upon the other grounds, the cases which up-

hold the transfer seem to us to stand upon the better reason. The title to a negotiable instrument passes by indorsement, and if indorsed by an administrator, who is the representative of the deceased owner, in the proper settlement of an estate and without affecting the rights of other parties, why should its effect be limited to the boundaries of the State where the deceased lived? Not only would this limit the negotiability of the instrument, but it would cast upon an administrator the unnecessary burden of procuring letters of administration in another State, simply to collect an admitted debt. Moreover, suppose the administrator, indorsee and maker lived in the same State at the time of the indorsement, but that the maker subsequently removed to another State, could it be claimed that the indorsee would be barred from suing in the second State because his title came through an administrator who would himself be incapable of bringing suit in that State? Yet the elements of title, in the case supposed, would be the same as in the case in question. We see no reason why the residence of the maker should affect or control the plaintiff's title or his right to sue. The right of action is transitory; the holder of a note must collect of the maker where he can find him. If, therefore, as against the maker, the holder's title to a note is good, his right of action should be good also. We therefore hold that, in a case like this, in which no interests but those of the parties to the note are involved, and we say this without passing upon the effect of the transfer when there are creditors in this State, an administrator in another State may transfer a note upon which the indorsee may sue in this State.

Second. Can a note given to two joint administrators be transferred by one of them? There is no question that one of two executors or administrators may transfer notes held by the deceased, for the reason that the several persons are considered as holding one office, and, in the settlement of the estate, the act of one is equivalent to the act of all; the power of the office may be fully exercised by one, for each takes the whole in his representative capacity, and not a moiety. *Stone v. Union Savings Bank*, 13 R. I., 25. When, therefore, administrators, in collecting assets, take a note payable to themselves as administrators, though the form of the obligation be changed, its character is the same; it is still a debt due to the estate, not to them personally, and its proceeds are assets of the estate. We see no reason, therefore, why the same rule should not apply as though the obligation remained in its original form. The case is quite different from the ordinary case of joint payees, who may have adverse interests, and where each is entitled to hold his moiety of the obligation until he sees fit to part with it. In the ordinary cases of joint payees, excepting of course co-partnerships, neither one represents the other; one alone, therefore, cannot transfer a note without the other. But where one represents the whole, as a partner or an administrator, the rule should follow the reason. And thus it has been held in *Bogert v. Hertell*, 4 Hill (N. Y.), 492, where the cases upon this point were carefully examined. See, also, 1 Dan. Neg. Inst., sec. 268, and 1 Pars. Bills & N., 159. Most of the cases to which we have been referred by

the defendant, are cases of individual joint payees and cases of partners after dissolution. In *Sanders v. Blain's Adm.*, 6 J. J. Marsh, 446, the court said that the administrator and administratrix might have sued jointly or individually, but as the administrator had undertaken to act individually, not as administrator, he could not transfer the note without the other payee. *Smith v. Whiting*, 9 Mass., 334, is commented on in *Bogert v. Hertell*. In the present case, the notes were given for different amounts, and in different tenor, for a debt due to the estate represented by the administrators. They were, therefore, assets of the estate, and as such we hold that they could be dealt with as other assets of the estate, by either administrator.

Third. Could the administrators in New York transfer in that State a note on which, by reason of the domicile of the intestate, they were accountable in Connecticut? If the administrators in New York were not the same as the administrators in Connecticut, clearly they could not, for in that case the property in the notes would not have passed to them. But they were the same persons. Under their dual authority they had the whole of the estate. The transfer does not show in which capacity Kelly claimed to act. We do not think that the mere fact that he acted in New York, though he might ultimately be accountable in Connecticut, rendered his act invalid. The validity of an administrator's act depends upon its character, rather than upon the locality where it is done. *Judge Story*, in *Trecothick v. Austin*, 4 Mason, 18, 35, says: "A will, bequeathing personal estate, conveys that property, wherever it may be situated, if the will is made according to the law of the place of the testator's domicile. And it has never been supposed that it was indispensable to the assertion of a title, derived under such will, that there should be a probate in every place where such property was situated." In this case, as also in *Hutchins, Admr., v. State Bank*, 12 Met., 421, transfers of property by foreign executors were recognized. In *Wilkins v. Elliott*, 9 Wall., 740 [XIX., Law. ed., 586], a payment to a foreign administrator was held to be good against an administrator afterwards appointed in the State where the debtor resided. Many cases might be cited where payments of debts outside of the jurisdiction of the court appointing the representative, have been upheld.

In *Shakespeare v. Fidelity, etc., Co.*, 97 Pa., 173, it was held that United States coupon bonds, deposited with the defendant for safe-keeping, were properly delivered, in Philadelphia, to a foreign executor. Very often the powers given to executors by wills are broader than those which the law gives to an administrator, and most of the cases on this point relate to executors. But, with reference to the settlement of the estate, their powers and duties are the same. In either case, however, the letters testamentary of an executor have no greater extraterritorial force than letters of administration. What an executor can do, as the representative of the deceased, regardless of special powers, an administrator may do. In the recent case of *McCord v. Thompson*, 92 Ind., 565, it was held that a note given to administrators in Illinois, for goods sold,

made payable in Indiana, could be collected by the administrators in the latter State, even against the claim of an administrator appointed in Indiana. If an executor or administrator can dispose of property outside of the jurisdiction where he is appointed, there is no good reason why he should be required to be within the limits of the jurisdiction when he makes the transfer. In many cases it may be quite necessary for him to be present at the place where the property is, in order to carry out the transfer.

From this review of the law, it appears that the notes could be legally transferred from Kelly, as administrator, to the plaintiff. From the testimony it appears that they were transferred for adequate consideration, in part payment of a claim, which was subsequently passed upon and allowed, for a larger sum than the amount of the notes, by the surrogate in New York. While the evidence shows that the transfer was made by Kelly as soon as he learned that his co-administrator, Duffy, had taken steps to collect the notes and that it may have been to prevent Duffy from getting the proceeds of the notes into his hands, still we cannot, simply from this, infer that it was fraudulent, when it appears to have been made upon good consideration and with immediate notice to the defendant. The testimony shows that the transfer of the notes to the plaintiff was talked over at the time of the settlement, April 30, 1881. A payment made after such notice could not avail as against the plaintiff, who then held the notes and who had demanded payment.

One more question remains. A paper seal was pasted upon one of the notes and the defendant claims that this made it non-negotiable. The vote of the Corporation did not authorize the treasurer to make a note under seal; the note itself does not purport to be under seal; it is not the seal of the Corporation, and the treasurer, who has been a witness, did not state that it was his seal or that he put it on. In other respects it is in the form of an ordinary negotiable promissory note. We think, therefore, that we must consider the paper, as suggested by plaintiff's counsel, "a piece of unnecessary ornament," or, in the words of *Jones v. Horner*, 60 Pa., 214, disregard "the seal as a mere excess."

We conclude, therefore, that the plaintiff is entitled to recover the amount due upon the notes when they came into his hands.

Judgment for plaintiff.

John J. BURNS

Samuel W. K. ALLEN.

When an attorney at law, making collections for his client so retains the whole of the sum collected, or so retains a large part thereof, as to raise a presumption of bad faith on his part, the court will by order require him to make payment to his client. An attorney collected by suit seventy-five dollars for his client and held the whole as payment for services in the suit.

and in other litigation as to officers' fees, which grew out of the suit, the client not being interested in this other litigation, held, that the court in the circumstances, would allow the attorney to retain thirty per cent of the sum collected, and would order him to pay over the balance to his client.

(Providence — Decided May 28, 1885.)

PETITION for an order of court requiring the respondent to pay over certain moneys collected by him as the petitioner's attorney.

The facts are stated in the opinion.

Mr. John M. Brennan, for petitioner.

Mr. Nicholas Van Slyck, for respondent.

Stiness, J., delivered the opinion of the court:

In *Orr v. Tanner*, 12 R. I., 94, the court recognized the liability of an attorney at law to summary process for the payment of money in his hands belonging to his client. See, also; *Bowling Green Savings Bank v. Todd*, 52 N. Y., 489; *In Re Fyncke*, 6 Daly, 111; *In re Bleakley*, 5 Paige, 311; *In Re Attkin*, 4 B. & Ald., 47.

Proceedings of this kind, however, cannot be entertained when the case simply presents a difference of opinion as to the fair amount to be retained for services. The court cannot thus undertake to adjust accounts between counsel and client. But when an attorney withholds the whole, or a sum so much exceeding a proper or justifiable charge as to amount to a breach of his duty and to raise a presumption of bad faith, the court which admits him to the privilege of practicing at its bar should require of him the fulfillment of the obligations that attend the privilege. Such a process is not, as contended by the respondent, in contravention of his right of trial by jury. He is an officer of the court; he has taken an oath that he will demean himself as an attorney and counselor of the court, "uprightly and according to law." When the court undertakes to enforce this plain duty of its officer, it is doing that which a jury trial cannot do. It does not undertake, primarily, to settle the rights and credits of the parties, but only to require that its officers do not make illegal exactions nor deny to clients their indisputable rights. A jury is the tribunal to settle what is fairly due to the parties under their contract. Except incidentally, the court does not touch that matter in a proceeding like this, but simply acts with reference to an excess, so apparent as to amount to misconduct.

As stated by the court in *Bowling Green Savings Bank v. Todd*, *supra*, "The law is not guilty of the absurdity of holding that after a client has spent years in collecting through his attorney a lawful demand, he shall be put to spending as many more to collect it from his attorney, and, if that attorney should not pay, then try the same track again."

In this case, the respondent attached property and obtained a judgment of \$75 and costs for the petitioner against the American Mills Co., in the Justice Court of Warwick, in April, 1881. In November, 1881, a subsequent at-

taching creditor brought a bill in equity against the sheriff and deputy-sheriff to review the taxation of costs and to restrain the sheriff from paying over the costs as taxed. As these costs were incident to judgments, the judgment plaintiffs were afterwards made parties to the bill. But the only question at issue was the amount due to the officers and keepers, no question being made as to the judgment debt itself. The petitioner was in no way interested in the result; for, not having paid these costs, he would be under no obligation to pay them at all if they were decided to be illegal, and otherwise, the sheriff would pay them, as he had received the money for that purpose. It was a matter in which only the officers were interested, although others were nominal parties to the bill. Numerous hearings were had and after decision another suit was brought against the sheriff in the Circuit Court of the United States, about the same matter, which is still pending; but to this suit the petitioner and other judgment creditors are not parties. The respondent claims to hold the whole amount of the judgment for services rendered in these cases and hearings, and also in a suit which he brought against the sheriff in a special court of common pleas, without the knowledge or authority of the petitioner and which was, under the circumstances, both unnecessary and fruitless. We do not think he is entitled to maintain such a claim. The only service rendered to the petitioner was the issuing of a writ, attaching property and obtaining a *nil dicit* judgment, followed by execution, on which, after considerable trouble it is true, the money was paid in full. The petitioner cannot be held to pay for defending the large allowance made to the officers for costs. The respondent charges, among other things, for going to Philadelphia, pending the bill in equity, to induce the petitioner not to sell his claim to other parties. But he cannot charge for doing that. If the petitioner was willing to sell his claim, subject to the lien for costs and service, it was no part of his counsel's duty to prevent it. On the contrary, if he was to be charged with all the litigation then in prospect, it would have been greatly to his advantage to sell and get what he could out of it, before the whole was consumed in expenses; and his counsel, if asked, should have so advised him.

The whole controversy was about the officers' fees and the defense to the litigation was solely to enable them to hold that which had been allowed to them. No doubt the respondent thought that as plaintiffs' attorney in the justice court suits he was bound to defend the officers in the litigation that ensued and that he had the right to make charges to his clients therefor, but he had not the right to think so. The fact that the cause of complaint against the officers happened to grow out of those suits, did not cast upon the plaintiffs the burden of defending them. Moreover, it appears by the record in the Furbush case that in a week after the filing of the bill, the *ex parte* injunction, which had been granted to restrain the sheriff from paying out the funds in his hands, was dissolved as to the judgment debts and all costs, except those taxed for taking inventories and for keepers' fees. From that time, it cannot be

claimed that the petitioner and other judgment creditors had any interest in the suit even though they were made parties to it for the purpose of reaching the officers, if possible. Upon motion, the sheriff could have been ordered to pay over to them all but the costs in dispute, which in no event were to go to them; and, consequently, it is not to be presumed that they would have been held liable for costs, if the complainants had prevailed. The respondent must have understood the matter in this way for he did not, in that suit, enter an appearance for the petitioner or for any of the plaintiffs in the justice court suits, but only for the officers. Clearly he cannot charge the petitioner for services in matters where he did not appear for him. To withhold his money on that account is to withhold it without a legal right to do so.

Under the circumstances we think that thirty per cent of the judgment debt is, certainly, as much as could be claimed for all services that the respondent had the right to charge for, and that he should pay over all that he holds above that limit.

Order accordingly.

Alpha R. HILL

v.

Hugh B. BAIN, Town Treasurer, etc.

A, claiming to be injured by collision with certain teams left in a highway by B, brought an action against B to recover damages for his injuries. In this action B obtained judgment. A then brought an action against the town in which the highway was situated to recover damages for his injuries, charging the town with negligence in permitting the highway to be unsafe. The town pleaded in bar the judgment recovered by B against A alleging that B caused the defect complained of. To this plea A demurred. Held, that the plea was good, and that the demurrer should be overruled. Held, further, that A, by the judgment which B recovered against him, was estopped from suing the town.

(Kent — Decided June 26, 1885.)

TRESPASS on the case. On demurrer to plea.

The facts are stated in the opinion.

Messrs. Page & Owen, for plaintiff.

Messrs. Nicholas Van Slyck and Ziba O. Slocum, for defendant.

NOTE.—As to the obligation of municipal corporations to keep streets in such repair as to be safe for travelers, see, *City of Madison v. Baker*, (Ind.) 1 West. R., 116, and note.

The passage of an ordinance requiring vigilance on the part of policemen to report defects in streets will not relieve the corporation from liability for the bad condition of its streets through negligence of the officers to make report. *Goodfellow v. The Mayor, etc.*, of New York, 1 Cent. R., 21.

R. I. N. E., V. I.

Durfee, Ch. J., delivered the opinion of the court:

The case made by the pleadings is this: September 28, 1882, the plaintiff, while driving on the Pontiac road, so called, in the Town of Cranston, in the night time, in the exercise of reasonable care, came into collision with certain teams or carts placed in the road and left there by James A. Budlong and Frank L. Budlong, copartners, and was badly injured in his person. He sued the Budlongs at the March Term of this court, 1883, in a plea of trespass on the case, laying his damages at \$20,000 for injuries received from said obstruction, but after trial the jury found a verdict for the Budlongs as not guilty of causing the injuries, on which verdict the court gave a final judgment for the Budlongs, which judgment still remains in force. At the December Term of the Court of Common Pleas, 1883, the plaintiff brought this action against the Town of Cranston, which is an action on the case to recover damages for the injuries aforesaid, on the ground that the town neglected to keep said road, the same being a public highway, safe and convenient for travel. The defendant pleads the judgment for the Budlongs in bar by way of estoppel, alleging that the Budlongs were the authors of the obstruction or defect complained of. The plaintiff demurs to the plea. The case is here on appeal. The question is whether the plea is a good plea by way of estoppel. The defendant contends that it is, because: in the first place, the plaintiff in order to recover in this action would have to prove all which it was necessary for him to prove in order to recover in the former action, except the fact that the said teams and carts were placed in said road and left there by the Budlongs, which fact is admitted by the demurrer; and something else besides, namely: that the town after notice of the alleged nuisance, actual or constructive, neglected to remove or guard against it; and because, in the second place, the town has only to notify the Budlongs of this action, thus giving them an opportunity to defend it, in order in case of a judgment against the town to make the Budlongs liable over for the damages recovered; so that, if the plea is not sustained, the Budlongs, after judgment in their favor proving that the plaintiff has no case, may be compelled in this roundabout way, to compensate the plaintiff for his injuries. The plaintiff, on the other hand, contends that the plea is bad because the defendants in the two actions are different and there is no privity between them.

Undoubtedly the rule as generally laid down is that judgments as well as estoppels only for or against parties and privies, but nevertheless the courts allow themselves a good deal of latitude in applying the rule, observing the spirit of it rather than the letter. Thus it has been held that a judgment in favor of a deputy-sheriff, in an action against him for official misfeasance or default, is available by way of estoppel in an action against the sheriff for the same misfeasance or default. *King v. Chase*, 15 N. H., 9.

So, it has been held that a judgment in favor of a master in an action against him for the act of his servant, rendered in a trial of the case on its merits, is a bar to a suit against the servant for the same act. *Emery v. Fowler*, 39 Me., 326.

So it has been held that a judgment on the ground of payment against one of two joint and several makers of a promissory note is a bar to recovery against the other, whether as between the makers the other signed as principal or surety. *Spencer v. Dearth*, 43 Vt., 98. In *Bates v. Stanton*, 1 Duer, 79, 88, the plaintiff, claiming to be the owner of certain goods, delivered them to the defendant by way of bailment; the defendant afterwards surrendered them to the true owner, taking from him an indemnity bond. Thereupon the plaintiff sued him in trover for their conversion, and it was held that a judgment recovered by the true owner in an action against the plaintiff involving the right to the goods, was conclusive against the plaintiff in his action against the defendant, inasmuch as the parties, though nominally different, were virtually the same on account of the interest which the true owner had in the defense of the later action by reason of the indemnity bond which he had given to the defendant of record. In *Atkinson v. White*, 60 Me., 396, the owner of a lot of logs mortgaged them to A, and then sold them to B. A afterwards sold a portion of them to C, warranting their title. B sued C in trover for a conversion of the logs bought by him, and recovered judgment; C setting up his title under A. In a later suit by C against A involving the same title, it was held that the judgment recovered by B was a bar to recovery. See, also, *Durham v. Giles*, 52 Me., 206, and *Freer v. Stotenbur*, 2 Abb. Ct. App. Dec., 189.

In these cases the defendants were permitted to avail themselves, by way of estoppel, of judgments to which they were neither parties nor privies. The ground on which this was permitted seems to have been that the defendants, though not parties to the judgments, were so connected in interest or liability with the parties, that the judgments when recovered could be regarded as virtually recovered for them, for the purposes of estoppel, as well as by and for the parties of record. The Supreme Court of Maine in *Atkinson v. White*, *supra*, express an inclination to go even further and to hold broadly that "When a party has once tried a question in one suit, he shall not, without regard to mutual estoppel, again try the same question involving the same testimony in another suit." We think, on the authority of these cases, it is competent for the defendant town to set up by way of estoppel in the case at bar the judgment recovered by the Budlongs. Certainly if the town had notified the Budlongs of the pendency of this action and the Budlongs had, in consequence of the notice, assumed the defense, it would be competent for them, on the authority of these cases, to plead the former judgment in bar, for they would then be the real defendants, though defending in the name of the town, and ought not to be required to try over a question which they have already tried with the result of a final judgment against the plaintiff in their favor. But the Budlongs, if they assumed the defense, would have to make it in the name of the town, and we see no good reason why the town should not be permitted to make, without calling upon them, any defense which they could make, if called upon, in the name of the town.

Demurrer overruled.

William N. OTIS

v.

Cassius M. VON STORCH.

1. When one of two debtors is surety for the other and the common creditor has taken security from the principal debtor, he must give the surety the benefit of the security either by way of payment or subrogation. If the creditor surrenders the security without the surety's consent the surety is *pro tanto* discharged, and may show the surrender in defense either at law or in equity.
2. If this relation of principal debtor and surety does not appear on the face of the obligation, it may be shown by extrinsic evidence, as may also notice to the creditor of such relation.
3. But the surrender of the security to discharge the surety must be a surrender of property actually acquired by the creditor for security. Mere non-action on the creditor's part or neglect to obtain possession of property for security which, with more effort he might have obtained, does not discharge the surety.

(Providence—Decided June 13, 1895.)

DEFENDANT'S petition for a new trial. This action was *assumpsit* on a promissory note brought against the defendant as a joint and several maker thereof with one Charles H. Scott.

At the trial the defendant offered evidence to show that, as between himself and the plaintiff, he was surety for the payment of the note. The defendant also called the plaintiff as a witness to show that the plaintiff had taken a mortgage from Scott to secure the note. The plaintiff testified to having received but a portion of the property covered by the mortgage.

On the objection of the plaintiff's counsel all this evidence was excluded by the court, the presiding justice ruling that the defendant was a joint and several maker, as such was liable on the note, and could not change this liability by parol evidence.

To this ruling the defendant excepted.

Mr. Robert W. Burbank, for plaintiff.

Mr. Simon S. Lapham, for defendant.

Durfee, Ch. J., delivered the opinion of the court:

We think it is well settled that where the relation of principal and surety exists between two debtors, it is the duty of the creditor, if he knows of the relation and has taken collateral security from the principal debtor, even though both are principals to him, either to enforce the security himself and apply the avails of it to the debt, or to preserve it for the surety, so that the surety paying the debt can have the benefit of it by way of subrogation, and that if the creditor, in violation of his duty, surrenders the security without the consent of the surety, the latter will be discharged either wholly or *pro*

tanto according to the value of the security so surrendered; and that, according to modern decisions, the surety is entitled to show the surrender by way of defense at law as well as in equity. *Baker v. Briggs*, 8 Pick., 122; *Guild v. Butler*, 127 Mass., 386; *New Hampshire Savings Bank v. Colcord*, 15 N. H., 119; *Springer v. Toothaker*, 43 Me., 381; *Ferguson v. Turner*, 7 Mo., 497; *Kirkpatrick v. Houk*, 80 Ill., 122; *Rogers v. School Trustees*, 46 Ill., 428; *Neff's Appeal*, 9 Watts & S., 36; *Everly v. Rice*, 20 Pa. St., 297; *Mayhew v. Crickett*, 2 Swant., 185.

It is also well settled that the fact that one debtor is surety for the other is no part of the contract, but merely a collateral fact, which, if it does not appear on the face of the obligation, may be proved, together with the fact of notice thereof to the creditor, by extrinsic evidence. *Guild v. Butler*, 127 Mass., 386; *Hubbard v. Gurney*, 64 N. Y., 457.

It follows that the ruling of the court at *sis prius* was erroneous in point of law, and that the defendant is entitled to a new trial if he has been injured by it. The petition shows that the testimony of the plaintiff introduced by the defendant, was that he took from the principal debtor, by way of collateral security, a mortgage of the debtor's household furniture, buggy and harness, and an assignment of bills or book accounts; that all that had been delivered to him under the mortgage was the buggy and harness which he had sold, netting by the sale the sum of \$21.80; that he had asked for a list of the bills or accounts but had never been able to get it and did not know who owed them, and that he had asked for the furniture, but the debtor had never delivered it and it was still where it was left by the debtor. It was at this point, while the defendant was pursuing the inquiry as to the furniture, that the counsel for the plaintiff interposed the objection which was sustained. The petition does not show and it is not claimed that the mortgage has ever been released or given up. Nor does it appear from the petition, as allowed with amendment by the court, that the defendant had any testimony other than that of the plaintiff, to show what had become of the mortgage or assigned property, or any testimony to show that the plaintiff had been guilty of any other default or fault with regard to it than this, namely: that he had omitted to reduce it to possession when, with a little more effort, he might have done it. But if this was all he could show, the ruling did not harm him and a new trial could do him no good; for the surety is not exonerated, either wholly or in part, by mere non-action or passivity on the part of the creditor, so long as the security or any property or advantage actually taken or acquired under it is preserved unimpaired. *Colebrook, Collateral Securities*, § 241.

We decide, therefore, that the petition must be dismissed unless the petitioner will satisfy us by affidavit,* to be filed on or before the 20th inst., that he had good reason, stating the reason, to believe that but for the ruling he could have been able to show that the plaintiff came into the actual possession of property under the mortgage or assignment, and subsequently surrendered it.

Order accordingly.

*Subsequently the affidavit above spoken of was filed and the petition for a new trial was granted.

Walter H. JOHNSON, *Appt.*,

v.

Charles E. JOHNSON.

1. In granting letters of administration the interest of the estate is the main object to be kept in view. Hence, other things being equal, that person should be appointed administrator who is entitled to the residue of the estate after creditors have been paid.
2. A died intestate leaving B the widower of her bastard daughter, and two grandchildren, C a son, and D a daughter of B by his deceased wife, A's daughter. Held, that C, rather than B, was entitled to administer the estate of A.

(Providence—Decided July 18, 1885.)

A PPEAL from the Probate Court of the Town of Cranston.

The facts are stated in the opinion.

Mr. James Tillingham, for appellant:

Appellant is, under the statute, next of kin of the deceased; Stat., p. 490, § 7; *Briggs v. Greene*, 10 R. I., 495, and, therefore, by its express terms, is absolutely entitled to this administration. Stat., p. 476, § 4; *Atwood v. Ames*, Sup. Ct., Kent, Sept. Term, 1868.

Were it otherwise, he would be entitled to it on general principles. "The right to the administration of the effects of an intestate follows the right to the property in them." 1 Wms. Exrs., 8th Am. ed., top, 485, foot 419, top 529, bottom 462, note h; compare *Groane v. Groane*, 1 Har. & McH. (Md.), 846.

The sister of appellant, being a non-resident, is not entitled, and being a married woman would not, even if a resident, be appointed. Stat., p. 476, § 6.

But even if she were entitled, it would be but a personal right to herself, and as she makes no claim, she could not dictate who should be appointed; particularly to the exclusion of one entitled. *Cobb v. Newcomb*, 19 Pick., 386; *McBeth v. Hunt*, 2 Strob., 335; *Estate of Heron*, 6 Phila., 88, 89; *Matter of Cresse*, 28 N. J. Eq., 236.

The adverse interest of appellee is sufficient to disqualify him. *Estate of Heron*, *supra*.

Messrs. Jas. M. Ripley and Nathan W. Littlefield, for appellee.

Matteson, J., delivered the opinion of the court:

This is an appeal from a decree of the Court of Probate of Cranston appointing an administrator on the estate of Anna Johnson, deceased.

The intestate died in Cranston on the 17th day of January, 1885. At and for several years prior to her death, she had resided in Cranston, and in the family of Charles E. Johnson, the appellee, whose wife, also deceased, was her illegitimate daughter. The appellant, Walter H. Johnson, and his sister, Mary E. Seward, wife of Charles R. Seward, of Chicago, Illinois, are children of the said Charles E. Johnson by his said wife, and grandchildren of the intestate.

Both Charles E. Johnson and his son, the said Walter H. Johnson, made application to the court of probate to be appointed adminis-

trator. Mrs. Seward objected to the appointment of her brother and requested the appointment of her father. The court appointed the father, and the son appealed.

The son claimed the appointment as next to kin of the intestate, under Pub. Stat., R. I., cap. 184, § 4, which is as follows: "Administration of the estate, both real and personal, of a person dying intestate, shall be granted to the widow or next of kin of the intestate, being suitable persons and of the age of twenty-one years, or to both, as the court of probate shall think fit."

On the part of the father, it was argued that Pub. Stat., R. I., cap. 184, § 4, had no application, the son not being, in contemplation of law, next of kin of the intestate, because his mother, being the illegitimate daughter of the intestate, was not, at common law, of the kindred of the mother, though the same blood ran in their veins, and that while Pub. Stat., R. I., cap. 187, § 6, in these words, "Bastards shall be capable of inheriting and transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother," has so far changed the common law as to enable illegitimate children to take and transmit inheritances, collaterally, on the part of their mother, the statutes have nowhere made such illegitimate children kindred of their mother and, consequently, as the mother of the appellant was not kindred of the intestate, her son is not.

If we concede the force of this argument and grant that the appellant is not in legal contemplation next of kin to the intestate, we, nevertheless, think that he is entitled to the appointment. If he is not to be regarded as such next of kin, then no application for letters of administration has been made within thirty days from the death of the intestate, and under Pub. Stat., R. I., cap. 184, § 5, it is competent for the court to commit administration to some suitable person of full age, not a member of the court. For aught that appeared at the hearing, the appellant answers these requirements of the statute. In granting administration, the primary object is the interest of the estate; hence, courts have deemed it their duty to place the administration in the hands of the person most likely to convert the property to the best advantage of those beneficially interested. Other things being equal, that person will be he who is entitled as distributee, in whole or in part, to the residue of the estate after the claims of creditors have been satisfied, because of his interest. It is, therefore, an established principle governing courts exercising probate jurisdiction, that the right to the administration of the effects of an intestate follows the property in them. *In the goods of Gill*, 1 Hagg. Eccl., 341, 342; *Weldrill v. Wright*, 2 Phillim., 243, 248; *Ellmaker's Estate*, 4 Watts, 34, 38; *Swozey v. Willis*, 1 Bradf. Surr., 495-497; *Hall v. Thayer*, 105 Mass., 219, 224; *Thornton v. Winston*, 4 Leigh, 152; *Clay v. Jackson*, T. U. P. Charlt., 71, 73; *Leeverett v. Dismukes*, 10 Ga., 98, 99. In 1 Williams on Executors, 486, the author remarks that both in the common law and spiritual courts it has always been considered that the object of the statutes of administration, 81 Edw. 3, cap. 11, and 21 Henry 8, cap. 5, is to give the management of the property to the person who has the beneficial inter-

est in it; and the inclination to effectuate this object has been so strong that in some instances not only the practice of the ecclesiastical court, but the decisions of the judges delegate have not scrupled to disregard the express words of the statute; and he cites the cases of *Bridges v. The Duke of Newcastle*, cited by the court in *West & Smith v. Wilby*, 3 Phillim., 381, and *Young v. Peirce*, Freem., 496. In the former, Lord Hollis had died intestate and Bridges claimed administration as next of kin. The effects were vested by Act of Parliament in the Duke of Newcastle to pay the debts of the deceased. The judge of the prerogative court, and afterwards the delegates, held that the next of kin was excluded on the ground that he had no interest, and granted administration to the Duke of Newcastle. In the latter, administration was refused by the prerogative and the delegates to a next of kin on the ground that she had released her interest, and the letters were granted to the party beneficially entitled to the personal estate. And see, also, *Thornton v. Winston*, 4 Leigh, 152; *Leeverett v. Dismukes*, 10 Ga., 98, 99.

Under our statutes of descent and distribution, Pub. Stat., R. I., cap. 187, §§ 1, 5, 7, 9, the appellant and his sister are the persons entitled to the surplus of the personal estate of the intestate after payment of her just debts, funeral charges and the expenses of settling her estate. It follows, therefore, that they are the persons who would, if competent, be entitled to the administration. Mrs. Seward, however, is not an applicant, and if she were, her coverture and non-residence would probably be regarded as sufficient disqualifications to prevent her appointment. If there was any good reason against appointing her brother, her wishes in regard to the appointment would be entitled to consideration, but in the absence of such reason we cannot permit them to operate to his exclusion, he being equally entitled with herself and both competent and desirous to act. *McBeth v. Hunt*, 2 Strob., 335; *Estate of Heron*, 6 Phila., 87, 88; *In the Matter, etc., of Nathan Cresse*, 28 N. J. Eq., 236, 237; *Cobb v. Newcomb*, 19 Pick., 336. The decree of the court below must be reversed, and letters of administration granted to the appellant.

Order accordingly.

Andrew L. ESTES, Admr.,

John C. HOWLAND et al.

1. An administrator cannot, in Rhode Island, maintain proceedings to recover property conveyed away by the deceased, though the conveyances may have been in fraud of creditors and the property may be needed to pay the debts of the estate of the deceased. In such case the defrauded creditors are the proper parties to act.
2. An administrator is, however, the proper party to act, in order to recover sufficient property to defray the expenses of administration, if the assets in his hands are not sufficient for the purpose.
3. Where a bill in equity was brought by an

administrator, to set aside as fraudulent against creditors, a conveyance made by the deceased, and it did not appear whether the administrator held sufficient assets to pay the expenses of administration; held, that the bill, instead of being dismissed might, if the administrator lacked funds to defray the expense of administration, be amended by setting forth this fact, and by adding the creditors, or some of them suing for themselves and the others.

(Newport—Decided July 13, 1885.)

BILL IN EQUITY, brought by the administrator *de bonis non*, with will annexed of George Howland, late of Tiverton, to set aside certain conveyances of realty made by the testator while in life, as being in fraud of his creditors.

The facts are stated in the opinion.

Messrs. Wm. P. Sheffield and Wm. P. Sheffield, Jr., for complainant.

Mr. Darius Baker, for respondent:

At common law, in no case can an administrator impeach a fraudulent conveyance of his intestate, and recover the property conveyed. *Haves v. Leader*, Cro. Jac., 270; *Haves v. Leader*, Yelverton, 196; *Osborne v. Moss*, 7 Johns., 161; *Lassiter v. Cole*, 8 Humph., 621; 1 Am. L. Cas., 3d ed., 74.

And this, *a fortiori*, is so as to real estate, as to which he has no title, but a naked authority to sell on license. See, 1 Wms. Exrs., 6th Am. ed., 651, n. d.

But the creditors had their remedy against the fraudulent grantee as executor *de son tort*, if the subject of the conveyance was personal estate. 1 Am. L. Cas., 74; see, also, *U.S. Bank v. Burke*, 4 Blackf., 141; *Jones v. Jones*, 1 Bland, 448, as to real estate.

It was held under an action of ejectment, that an administrator cannot avoid his intestate's deed by showing fraud as to creditors; the creditors must seek relief in equity. *Martin v. Martin*, 1 Vt., 91.

Under a later statute, the court held that administrators may bring actions or suits for recovery of real estate conveyed in fraud of creditors. *McLane v. Johnson*, 48 Vt., 48.

In *Osborne v. Moss*, 7 Johns., 161, it was held that an administrator could not impeach a judgment obtained against his intestate, through the latter's fraudulent purpose, but under the statute other cases permitted such actions and suits. *Babeock v. Booth*, 3 Hill, 182; *Brownell v. Curtis*, 10 Paige, 212; *McKnight v. Morgan*, 2 Barb., 171.

If the conveyance be set aside after intestate's death, and the land be sold to pay creditors, neither the administrator nor the probate court can control the proceeds. *U.S. Bank v. Burke*, 4 Blackf., 141.

An administrator cannot impeach a voluntary conveyance, although the estate be insolvent. *Brown v. Finley*, 18 Mo., 875.

The right to do so is a statutory right. *Morris v. Morris*, 5 Mich., 171; *Martin v. Root*, 17 Mass., 228; *Gibbons v. Peeter*, 8 Pick., 254; *Holland v. Crust*, 20 Pick., 328.

In Connecticut an administrator is bound to inventory real estate fraudulently conveyed. See, *Minor v. Mead*, 3 Conn., 289; *Booth v. Put-*

rick, 8 Conn., 106; *Andruss v. Doolittle*, 11 Conn., 288.

So, the statutes of Maine, authorize administrators to sell lands which deceased has conveyed in fraud of creditors. See, *McLean v. Weeks*, 61 Me., 277.

In South Carolina, both personal and real estate are assets in hands of administrator. See, 2 Rich. Eq., 185.

The Rhode Island Legislature, in making real estate chargeable with debts and providing for its sale and payment of such debts, had in view only the real estate of which deceased died seised. Pub. Stat., ch. 189, sec. 2; ch. 179, sec. 18; see, 3 Wms. Exrs., 1879 n. x; *Sexton v. Wheaton*, 8 Wheat., 229 (V., Law. ed.); 1 Am. L. Cas., 1.

Durfee, Ch. J., delivered the opinion of the court:

The complainant is administrator *de bonis non*, with will annexed of George Howland, deceased. The testator died, owing or liable for considerable sums, leaving personal assets which, as inventoried and appraised, amounted to only \$62.97, and after having conveyed away all his real estate. The complainant brings this suit in his representative capacity to set aside certain conveyances of real estate made by the intestate shortly before his death, on the ground that the conveyances were fraudulent and void as against his creditors, and that the estates conveyed are needed for the payment of his debts. The first question is whether such a suit can be maintained by an administrator. It is perfectly well settled that an administrator cannot impeach his intestate's conveyances of either real or personal property for fraud, if the property conveyed away is not required for the payment of the debts. The complainant concedes this, but he contends that the administrator can impeach the conveyances for fraud, if the property conveyed away is needed for the payment of debts, because the statute makes it the primary duty of an administrator to pay the debts; and, therefore, to the extent of the debts, he represents the creditors. This is a view which has prevailed in some of the States, but more generally it is held that the administrator cannot act in such way for the creditors, unless he is specially empowered to do so by statute. 1 Am. L. Cas., *48; Bump, Fraud. Conv., 3d ed., 445, and cases cited in notes 1, 2; *Crawford's Admr. v. Lehr*, 20 Kan., 509; *White v. Russell*, 79 Ill., 155; *Burton v. Farinholt*, 86 N. C., 260; *Merry v. Fremont*, 44 Mo., 518; *Zoll v. Soper*, 75 Mo., 460; *Cobb v. Norwood*, 11 Tex., 556; *Boggs v. McCoy*, 15 W. Va., 344.

We have come to the conclusion that it is not the duty of an administrator, under our statute, to do more, in respect to the personal estate, than to administer the assets which he is required to inventory, namely: the goods, chattels, rights and credits of the deceased; which, in our opinion, do not include goods, chattels, rights and credits, which the deceased has conveyed away in fraud of his creditors; and that, in respect of the real estate, it is his duty, if the personal assets are deficient, to obtain leave to sell as much of the real estate left by the deceased, not including the real estate conveyed away by him in fraud of his creditors, as is necessary to make up the deficiency; and that in

these respects the power of the administrator is only commensurate with his duty. If the deceased has conveyed his estates away in fraud of his creditors, the creditors who have been defrauded are the proper parties to prosecute the remedy.

The complainant contends that, even if he cannot maintain the suit in his representative capacity for the benefit of the creditors, he is, nevertheless, a proper party to enforce a charge for funeral expenses and expenses of administration. The defendants urge in reply that the real estate is not liable for these expenses, because they were incurred after the real estate had been conveyed away. We think, however, considering how shortly before the death of the intestate the real estate was conveyed, that, if the conveyances are set aside, the real estate may be charged for these expenses, as well as for the other debts, these expenses, though incurred after the other debts, being preferred to them in the settlement of the estate. See, *Allen v. Allen's Admr.*, 18 Ohio, 234.

It does not appear, however, that the complainant has either paid the funeral expenses or that he contracted for them, and so made himself personally liable for their payment. We do not see why, if he did not contract and has not paid them, it is for him, instead of the claimants, to enforce the charge for them more than for the other debts. As to the expenses of administration, we think he is a proper party, if the assets in his hands are not sufficient to pay them, and that if the assets are not sufficient, the bill, instead of being dismissed, may properly be amended by showing the fact and by adding the creditors, or a portion of them, suing for themselves and in behalf of the others, as parties upon terms as to costs.

Order accordingly.

Horace B. KNOWLES, Surviving Partner,

v.

Josiah A. WHALEY, Admr.

The Statute of Limitations limiting actions in *assumpsit* to **six years**, Pub. Stat., R. I., cap. 205, § 3, begins to run **in favor of executors and administrators** as soon as they are qualified. Executors and administrators may **reduce this time** to three years, Pub. Stat. R. I., cap. 189, § 8; cap. 205, § 9, **by giving the notices** provided in the last named section. These **notices are**, however, **not a condition precedent** to the qualification of the executor or administrator.

(Providence—Decided July 9, 1885.)

EXCEPTIONS to the Court of Common Pleas.

The facts are stated in the opinion.

Messrs. W. W. & S. T. Douglas, for plaintiff.

Messrs. Charles Bradley and Walter F. Angell, for defendant.

Matteson, J., delivered the opinion of the court:

This is an action of *assumpsit* for moneys alleged to be due to the late firm of Knowles & Boyce, of which the plaintiff is surviving partner, for the funeral and burial expenses of the defendant's testator. The items in the account, filed with the declaration, bear date respectively, Feb. 13 and May 2, 1872. The writ is dated July 7, 1884. The defendant pleads *first*, the general issue; and *second*, the Statute of Limitations, namely: that said supposed causes of action did not, nor did any of them, accrue within six years next before the commencement of the suit. The plaintiff joined issue upon the first plea, and replied to the second, that he ought not to be barred from maintaining his action, because the causes of action in his declaration set forth are for the recovery of the funeral expenses of the defendant's testator and accrued to the said firm since the death of the testator, and the defendant first gave notice of his appointment as administrator within less than three years before the bringing of the suit, to wit, etc. To this replication the defendant rejoined that the plaintiff ought not, by reason of anything therein contained, to have or maintain his action against him, because more than six years prior to the bringing of the suit, to wit: on the 23d of April, 1872, Mary Tanner was appointed by the Probate Court of North Providence administratrix, with the will annexed, on the estate of the testator, and qualified herself and acted as such administratrix to the time of her death, to wit: in January, 1882. To this rejoinder the plaintiff demurred.

The cause was heard in the Court of Common Pleas, at the December Term, 1884, and the demurrer sustained. Thereupon judgment was rendered for the plaintiff. To the ruling sustaining the demurrer, the defendant excepted.

Pub. Stat., R. I., cap. 205, § 3, provides that an action of *assumpsit* "Shall be commenced and sued within six years next after the cause of such action shall accrue and not after." Pub. Stat., R. I., cap. 189, § 8; and cap. 205, § 9, limits the period within which actions may be brought against executors or administrators to three years next after the will shall be proved or administration granted, *provided* the executor or administrator shall give notice of his appointment, by publishing the same in some public newspaper in this State nearest the place in which the deceased person last dwelt, or in such other manner as the court of probate shall direct. Pub. Stat., R. I., cap. 184, § 37, directs executors and administrators, as soon as may be after their appointment, to give notice thereof in the manner prescribed in the above recited provision.

It is conceded that the plaintiff's claim is barred by the general Statute of Limitations, Pub. Stat., R. I., cap. 205, § 3, if that statute is applicable to this case. The plaintiff, however, contends that it is not so applicable, but that the case is governed by the special statutes, relating to executors and administrators, mentioned above. He insists that, inasmuch as Pub. Stat., R. I., cap. 184, § 37, requires executors and administrators to give notice of their appointment as set forth therein, and in the proviso above quoted, the three years limited, in which actions may be brought, do not begin to run till such notice has been given; hence the

defendant's rejoinder, as it does not aver that the original administratrix, Mary Tanner, gave notice of her appointment as required by the statute, is insufficient.

We do not think these views correct. The general Statute of Limitations in its terms applies to all actions, and therefore to actions against executors and administrators as well as others. The notice prescribed by Pub. Stat., cap. 184, §37, is nowhere made a condition precedent to the qualification of an executor or administrator. On the contrary, Pub. Stat., cap. 184, § 1, provides for the issuing of letters testamentary to the executor on the probate of the will, and § 12 provides that every executor or administrator, who has given bond as such, shall be qualified as executor or administrator according to his appointment. The general statute, therefore, begins to run as soon as the executor or administrator is qualified.

The special Statutes of Limitations in favor of executors and administrators were intended to promote the speedy settlement of estates. To obtain the benefit of them, the executor or administrator must first bring himself within their provisions by giving the prescribed notice. *Bowcorth v. Smith*, 9 R. I., 67. They do not exclude the operation of the general statute except in cases in which the prescribed notice has been given.

It follows that the general Statute of Limitations began to run against the claim of the plaintiff as soon as the original administratrix was qualified as such by the filing of her bond, and that at the expiration of six years the claim became barred. The rejoinder was, therefore, sufficient, and the demurrer thereto should have been overruled. The exceptions are sustained and the case is remitted to the Court of Common Pleas for trial.

Exceptions sustained.

Benjamin B. HOPKINS, Collector of Taxes,

v.

Cyrus YOUNG.

An assessment list for town taxes was made up, and with the list was a certificate setting forth the total valuation in dollars and cents, and the amounts in dollars and cents of the total realty tax and of the total personalty tax. **Held**, that the assessment list sufficiently described the estates taxed, and was not void for uncertainty, owing to a lack of dollar marks.

(Washington — Decided June 13, 1885.)

NOTE.—The rule as to the effect of the omission of the dollar mark, differs in different States and under certain attending circumstances. Where, in its absence, there is nothing to determine what the figures indicate, its omission renders the assessment nugatory. *Braley v. Seaman*, 30 Cal., 610; *People v. Empire, etc. Co.*, 33 Cal., 171; but the contrary has been held in New Hampshire; *Cahoon v. Coe*, 53 N. H., 518, 524; and in Illinois, *Chickering v. Fale*, 36 Ill., 342; *Elston v. Kennicott*, 46 Ill., 202. R. I.

ASSUMPSIT. Heard by the court, jury trial being waived.

The facts are stated in the opinion.

Messrs. Brown & Van Slyck, for plaintiff.

Messrs. Colwell & Barney, for defendant.

Stiness, J., delivered the opinion of the court:

Suit to collect a town tax, which the defendant resists upon two grounds.

First. That the assessment list does not properly describe the estates taxed. The list is made up as follows:

NAMES.	DESCRIPTION.	Real.	Personal.	Tax.
Young, Cyrus,	24 a. home	800	—	} 12.60
	estate,	—	—	
	20 a. T. Young, lot,	800	—	
	9. woodland	200	—	
	Whipple lot,			

Unquestionably a valid assessment must describe the property assessed with sufficient clearness and certainty to inform the owner of the assessment and to show upon what property the tax is levied. The description must be sufficient to identify the property in case of a sale, upon which the tax has not been paid and the property which is to be sold to pay the tax. It does not follow, however, that in the assessment list a description of the property by metes and bounds is necessary. This would be both cumbersome and impracticable. But, short of this it would be difficult to describe a man's estate with clearer definiteness than as his "home estate," of twenty-four acres, or his "9 a. woodland, Whipple lot."

The owner certainly could not be misled by such a description and others would be quite as likely to know the land levied upon by these designations as by metes and bounds. In a deed a more extended and exact description would be given, but such a reference as this points out the tract that is assessed as clearly as could be expected in an assessment list. If "Buck Leap," "Far End Close," a house with a certain number on a certain street, and the like, are sufficient for a declaration in trespass, the description which is given in this case ought to answer for the assessment list in a town tax.

It is suggested by counsel that without a more particular description, the assessors may have erroneously supposed that the twenty-four acres lay mostly on one side of the defendant's house, when, in fact, they lay mostly on the other, and have valued it accordingly. We are bound to assume, if nothing appears to the contrary, that the officers assessed what they say they assessed, the "home estate," etc. The statute requires the taxpayer, after notice given as in this case, to bring in an exact account of his ratable estate, "describing and specifying the value of every parcel of his real and personal estate," and if he fails to do so, he, "if overtaxed, shall have no remedy therefor." If the individual is denied a remedy for an error in judgment on the part of the assessors, by reason of his default, clearly the tax should not be declared void because of the same default in failing so to describe his property that the assessors might know with certainty what and where it was.

Second. That the manner in which the valuations and amount of tax are carried out, without dollar marks or other indications to show whether the figures stand for dollars, cents or mills, is so uncertain as to render the assessment void. In California, Illinois and Tennessee, it has been held that defects of this character invalidate and avoid the tax. *People v. San Francisco Savings Union*, 81 Cal., 132; *People v. Hastings*, 84 Cal., 571; *Laurence v. Fast*, 20 Ill., 338, 340; *Lane v. Bommetmann*, 21 Ill., 148; *Dukes v. Rowley*, 24 Ill., 210; *Randolph v. Metcalf*, 6 Cold., 400.

It should be noticed, however, that in Illinois and Tennessee the question arose upon judgments against delinquent taxpayers, where greater strictness would be required, and that the decision in each case proceeds upon the ground that nothing appeared by which it could be determined what value had been put upon the property. In other cases it has been held that a similar method of setting out values was not invalid, because what was meant sufficiently appeared and no one could be misled thereby. *Cahoon v. Coe*, 52 N. H., 518, 524; *Bird v. Perkins*, 33 Mich., 28, 31; *State v. Eureka Consolidated Mining Co.*, 8 Nev., 15.

The case before us is somewhat different. Appended to the assessment list is a certificate by the assessors, in which they set forth that the total valuation of the real and personal estate, each, is a certain amount in dollars and that the total tax is a certain amount in dollars and cents. This, in connection with the other parts of the list, indicates the meaning of the figures and renders them certain. *Id certum est, quod certum reddi potest.*

We think, therefore, that the assessment is not void, upon the grounds claimed, and that the plaintiff is entitled to judgment.

Judgment for plaintiff.

Jane CARROLL

v.

Francis P. RIGNEY.

1. A landlord cannot maintain trespass for injury to the premises let, done by the tenant during the tenancy. His remedy is trespass on the case.
2. Pub. Stat., R. I., cap. 196, § 80, provides: "Whenever an action of trespass shall be brought before any justice's court, and the defendant shall plead the general issue, he shall not be allowed to offer any evidence that may bring the title to real estate in question." Held, that the word "title," meant the right of possession, not the fact of possession. Held, further, that in trespass before a justice's court, evidence may be given to disprove the fact of the plaintiff's possession, if it can be given without bringing the right of possession into dispute.
3. When, without objection, a defendant introduced evidence affecting both the

fact and right of the plaintiff's possession; held, that in the circumstances, the evidence was good to the extent and for the purposes allowed by the statute.

(Kent——Decided July 6, 1885.)

EXCEPTIONS to the Court of Common Pleas.

The facts are stated in the opinion.

Messrs. Edward D. Bassett and Frederick Hayes, for plaintiff.

Mr. George J. West, for defendant.

Durfee, Ch. J., delivered the opinion of the court:

This is a trespass for injuries to the plaintiff's barn. The case was begun in the Justice Court of the City of Providence. The only plea pleaded was the general issue. The case was carried by appeal to the Court of Common Pleas, where on trial by the jury, a verdict was rendered for the plaintiff for \$55. It comes before us on exceptions. The bill of exceptions makes the following statement, to wit: "The action was trespass *ri et armis* and was brought to recover damages done by a tenant by the month, in possession, to a barn and the earth thereunder. The plaintiff offered testimony tending to prove that manure was thrown upon the barn floor to the depth of two or three feet and left there a long time; that the defendant's horse was cast one night and kicked down a stall, and that the mangers, feed boxes, etc., were destroyed and the barn otherwise seriously damaged and torn during the tenancy. The barn belonged to the plaintiff and she leased the land on which it stood. The defendant was a tenant by the month. The defendant offered testimony to show that he was a tenant by the month, that he did not injure the premises, but that one night his horse, being seized by the colic, rolled about while in great pain and kicked down the stall." The bill of exceptions further states, in effect, that at the conclusion of the testimony, the court instructed the jury that the plaintiff was entitled to recover if the barn was injured by the defendant or by his horses, or servants acting under his direction, in the manner testified to by the plaintiff and her witnesses. The court also refused to charge as requested by the defendant in several requests.

The defendant contends that the court erred because, as a rule, a landlord cannot maintain trespass for injuries to the premises let, done by the tenant during the tenancy and because the possession was in the defendant. Without doubt these positions are generally correct; 2 Greenl. Ev., § 616.

The plaintiff contends that where the general issue alone is pleaded, the plaintiff's possession need not be shown, citing Add. Torts, §§ 424, 425. The statement in Addison, however, rests not upon the common-law rule of pleading, but upon the new rules adopted, Hilary Term, 4 Willes, 4. The new rules do not govern here. But we have a statute which provides as follows, to wit: "Whenever an action of trespass shall be brought before any justice court and the defendant shall plead the general issue, he shall not be allowed to offer any evidence that may bring the title to real estate in

NOTE.—A lessor, not injured in the reversionary rights, cannot maintain trespass against a mortgagee peaceably entering into possession. *Baker v. Kimball*, (Ohio) *ante*, 91, and *note*.

question." Pub. Stat., R. I., cap. 196, § 30.

It has been held in Massachusetts, under a similar provision, that when the defendant pleads only the general issue, he cannot give evidence that the plaintiff was not in possession. *Lynch v. Rosseter*, 6 Pick., 419; *Stone v. Hubbard*, 17 Pick., 217.

But in New York, under similar provisions, it has been decided that the question of actual possession is not one of title under the statute, and accordingly that when the plaintiff adduced evidence to show his possession, the defendant was entitled to give counter evidence to prove possession in himself. *Ehle v. Quackenboss*, 6 Hill, N. Y., 587; *Fredonia, etc., Plank Road Co. v. Wait*, 27 Barb., 214. We think the New York decisions rest on the better reason and are more accordant with the view which has been generally taken of our statute. The word "title," as used in our statute, signifies not the fact of possession, but the right of possession which may exist without the fact, and accordingly evidence may be given to controvert the fact, whenever it can be given without bringing the right in question. The purpose of the statute was not to exonerate the plaintiff from the burden of making out a *prima facie* case by proving his possession as well as the acts complained of as trespasses, or to preclude the defendant from controverting such case by disproving the fact of possession; but only to require that questions of disputed right, if any there are, shall be raised on the record and carried to a higher court for adjudication. In the case at bar, it is true, the defendant did more than controvert the fact of possession; he proved that he was himself in possession as tenant of the plaintiff; but the evidence on this point went in without objection and indeed, so far as appears, the tenancy was not disputed. We do not see, under these circumstances, that the fact that the evidence went further than the statute allows, would render it any the less effectual to the extent and for the purposes which the statute allows.

Exceptions sustained.

Caleb H. PAINE *et al.*

v.

Elijah C. BAKER.

1. Under a statute which provided, that in every case of a deed executed by husband and wife to convey the wife's realty, "The wife acknowledging such deed or instrument, shall be examined privily and apart from her husband, and shall declare to the officer taking such acknowledgment, that the deed or instrument shown and explained to her by such magistrate, is her voluntary act, and that she doth not wish to retract the same," an acknowledgment was certified to as follows, by the magistrate who took it: "Personally appeared S. A. J. and A. J., wife of said S. A. J., to the within and foregoing written instrument, and severally acknowledged the same to be their free and voluntary act and deed, hand and seal, the said A. J. having acknowledged separate and apart from the said husband as the law directs,

and that they did not wish to retract the same." Held, that the acknowledgment was fatally defective. The statutory provision requiring the deed to be shown and explained to the married woman was mandatory, and that the omission from the magistrate's certificate of a statement that the deed had been shown and explained to the married woman, was fatal.

2. A, by fraud and deception, obtained a deed of realty from B. B, after learning the deceit practiced, ignored the deed to A, and conveyed the same realty to C. Held, that C could maintain a bill in equity against A to annul B's deed to A, without making B a party to the bill.

(Providence—Decided July 18, 1885.)

BILL IN EQUITY to set aside certain conveyances of realty as fraudulent and for an injunction. On demurrer to the bill.

The case is stated in the opinion.

Messrs. Miner & Roelker and Henry B. Whitman, for complainants.

Mr. James Tillinghast, for respondent:

Whether the original deed was good or bad, the case is within *Taylor v. Staples*, 8 R. I., 170, 181.

If the complainants have acquired title as against these heirs by adverse possession, they must rest upon that. *Taylor v. Staples*, *supra*. And see, *Clark v. Clapp*, 14 R. I., 248.

If complainants have not acquired such title, then they show no title as against these heirs, and their bill is fatally defective. *Melvin v. Proprietors of Locks, etc.*, 16 Pick., 187, 140; *Raymond v. Holden*, 2 Cush., 264, 269; *Mellus v. Snowman*, 21 Me., 201; *Fagan v. Walker*, 5 Ired., 684; *Jackson v. Cairnes*, 20 Johns., 301; *McCorry v. King*, 3 Humph., 267; *Maraman v. Caldwell*, 8 B. Mon., 82; *Gill v. Fauntleroy*, 8 B. Mon., 177, 186, 188; see, also, *Milner v. Brightwen*, 10 East, 588; *Colclough v. Hulse*, 3 Barn. & C., 757, 10 Eng. C. L.; *Heath v. White*, 5 Conn., 228; *Foster v. Marshall*, 22 N. H., 491; *Wells v. Prince*, 9 Mass., 508; *Wallingford v. Heart*, 15 Mass., 471; *Wilson v. Thompson*, 10 Pick., 359; *Miller v. Ewing*, 6 Cush., 85; *Parlee v. Thomas*, 11 Fed. Rep., 769.

Whether this acknowledgment was good or not, is a pure question of law, and courts of equity do not sit, to try such a question as a foundation of a complainant's right to sustain his bill. 2 Story, Eq. Jur., sec. 869; *Patterson v. McCamant*, 28 Mo., 210; *Farnham v. Campbell*, 84 N. Y., 480; *Phelps v. Harris*, 51 Miss., 789.

Assuming that fraudulent misrepresentations are sufficiently charged for any purpose, they were, so far as the complainants are concerned, entirely *inter alios acta*, by which the complainants cannot be affected, and of which they are not entitled to take advantage. *Peak v. Laughlin*, 49 Mo., 162; see, *Friedburg v. Knight*, 14 R. I., 585; 1 Dan. Ch. Pr., 4th Am. ed., 324.

If the statements to the heirs could be regarded as promises or undertakings on the part of the defendant, they were, as regards the complainants, mere nude facts, and, as mere statements

ments of his purposes in the use of the deeds, no trust in favor of the complainants can arise or be implied from them. *Bispham, Eq.*, § 211.

The subsequent deeds obtained by the complainants were mere nullities and cannot affect the defendant, nor, as against him, enlarge the complainants' rights. *Bennett v. Dollar Savings Bank*, 87 Pa. St., 382; *Hendrix v. Nunn*, 46 Tex., 141; *Perkins v. Lougee*, 6 Neb., 220.

This bill is defective in not offering in any way to repay the defendant what he paid for these deeds. The defendant is at least entitled to hold the deeds as security. *Jenckes v. Cook*, 9 R. I., 520; *Anthony v. Hutchins*, 10 R. I., 165; *McDonald v. Neilson*, 6 Johns. Ch., 201; *McDonald v. Neilson*, 2 Cow., 189; *Jeffers v. Forbes*, 28 Kan., 174.

Durfee, Ch. J., delivered the opinion of the court:

The case, as made by the bill which is demurred to, is as follows, to wit: on November 3, 1825, Samuel A. Jacoy and Amey A. Jacoy, his wife, in her right, she being one of four children and heirs of Zuriel Waterman deceased, gave to her brother Zuriel, jointly with the other heirs except said Zuriel, a quitclaim deed of all her right, title and interest as heir in about one hundred and forty acres of land belonging to her father at his decease. The deed, however, was acknowledged as follows, to wit: "Warwick, November 12th, 1825. Personally appeared Samuel A. Jacoy and Amey Jacoy, wife of said Samuel A. Jacoy, to the within and foregoing written instrument, and severally acknowledged the same to be their free and voluntary act and deed, hand and seal, the said Amey Jacoy having acknowledged separate and apart from the said husband as the law directs, and that they did not wish to retract the same. Before me," etc. Afterwards Zuriel Waterman, the grantee in said deed, sold and conveyed said land to Philip Paine, grandfather of the complainants, who, after disposing of a portion of the land, died intestate in 1856, leaving Philip S. Paine, the father of the complainants, his only child and heir. Philip S. Paine, after selling portions of the land, died intestate August 10, 1870, leaving the complainants as his only heirs at law. Among the portions sold by Philip S. Paine, was a lot of nearly three acres sold to Julius Baker, the father of the defendant. In 1874 the defendant, having succeeded to said lot, obtained from the heirs of Amey Jacoy, then deceased, quitclaim deeds of all their right, title and interest in said lot. Later, in 1875, the defendant obtained from the Jacoy heirs, for a nominal consideration, quitclaim deeds of all their right, title and interest in the entire tract of land described in the deed to Zuriel Waterman. The bill charges that the defendant obtained the last mentioned quitclaim deed from the Jacoy heirs by representing to them that, as he had bought lands included in the deed to Zuriel Waterman and claimed title thereunder, he desired to quiet the title to those then in actual possession and to perfect his own title, so that he might be enabled to borrow money on the security of his own title, and by expressly representing to them that it was not his purpose to disturb the heirs of Philip S. Paine in their occupancy, and that but for these representations he would not have

obtained the deeds, the only purpose of the Jacoy heirs being to confirm the title intended to be conveyed to Zuriel Waterman in 1825 by their ancestor, Amey A. Jacoy. The bill charges that the procuring of the deeds was fraudulently contrived by the defendant for the purpose of ousting the complainants from their possession, and that in pursuance of this purpose the defendant, on March 5, 1883, commenced an action of trespass and ejectment against the complainants in the Supreme Court, in Providence County, in the names of the Jacoy heirs, which action is still pending. The bill also alleges that the Jacoy heirs, when it came to their knowledge that the defendant had commenced said action in their names, repudiated the same, and thereupon conveyed by quitclaim deeds all their right, title and interest in the premises, described in the deed of 1825, to the complainant, Caleb H. Paine, who accepted said conveyance for the purpose of quieting and confirming the title of the complainants under said deed. The prayer of the bill is that the defendant may be enjoined from prosecuting his action at law; that the deeds last procured by him from the Jacoy heirs may be decreed to be fraudulent and void; that he may be compelled to release his interest under them to the complainants, and for general relief.

The right of the complainants to relief rests solely on the assumption that the deed from Samuel A. Jacoy and Amey A. Jacoy to Zuriel Waterman was ineffectual to pass the title of Amey A. Jacoy; for if her title passed, the deeds from the Jacoy heirs to the defendant were mere nullities, and this suit is wholly unnecessary. The first question, therefore, is whether the title of Amey A. Jacoy passed by the deed to Zuriel Waterman. The decision of this question depends on the sufficiency of the acknowledgment. Under the statute as it existed in 1825, it was competent for a man and his wife to convey her real estate by their joint deed, subject to the following provision, however, namely: "In every such case the wife acknowledging such deed or instrument shall be examined privily and apart from her husband, and shall declare to the officer taking such acknowledgment that the deed or instrument *shown and explained to her* by such magistrate is her voluntary act, and that she doth not wish to retract the same." The certificate of the acknowledgment of Amey A. Jacoy does not show that the deed was *shown and explained to her* by the magistrate. The question is whether the omission is a fatal defect.

The question is one which has been much mooted at the bar. It has been once or twice presented to the court, but not decided. *Lippitt v. Huston*, 8 R. I., 415; *Kavanaugh v. Day*, 10 R. I., 393, 397.

It is said the omission is of frequent occurrence, especially in the earlier deeds, and that if necessary we ought for the security of titles to apply the maxim, *Communis error facit jus*. We are not convinced of that, though we have no doubt that the omission is common enough to make it our duty to be circumspect. There are a few cases under similar statutes which hold that it is not necessary for the certificate to show that the deed was shown and explained. *Gregory's Heirs v. Ford*, 5 B. Mon., 471, 481; *Nanta v. Bailey*, 3 Dana, 111; *Tod v. Baylor*, 4 Leigh,

498; *Chesnut v. Margaret Shane's Lessee*, 16 Ohio, 599; *Stevens v. Doe, dem. Henry*, 6 Blackf., 475. But in these cases the chief ground of decision was that the statutes, while they were express that the other matters should be certified, made no mention of this. Our statute does not expressly prescribe any certificate. It is well settled, however, that an acknowledgment to be good must be certified and that in all other respects the certificate must show a complete compliance with the statute. Why must it not show it in this respect? Clearly it must show it unless there is some good reason why it may omit to show it. The complainants find such a reason in the manner in which the direction to show and explain is given, the direction being expressed, as it were, incidentally, rather than in the shape of a direct command. They argue from this that it was not intended to be mandatory, but only directory and, therefore, that a compliance with it is not indispensable. The argument is ingenious, but it is too obviously ingenious to be entirely satisfactory. The direction is clearly given and, considering the purpose for which it is given, it seems to us that it is not safe to infer from the mere phrasing of it that it was not intended to be mandatory. Of what avail is it for the magistrate to go with the wife apart from her husband to take her acknowledgment, if she does not know what she is acknowledging? The first thing for him to do, therefore, is to make sure that she understands her act, for until she understands it she cannot truly say that it is her free and voluntary act, and, in these days, she is quite as likely to need protection from her own ignorance or from her blind trust in her husband and sometimes, from downright imposition, as from fear or coercion.

In Pennsylvania, under a statute which directed the magistrate to read the deed or otherwise make its contents known, it was decided that a certificate which did not show compliance with this direction was invalid. *Steele v. Thompson*, 14 Serg. & R., 84, 92; *Barnet v. Barnet*, 15 Serg. & R., 72. To the same effect see, also, *Pease v. Barbers*, 10 Cal., 436; *Garrett v. Moss*, 22 Ill., 368; *O'Ferrall v. Simplot*, 4 Greene, Iowa, 162; also, 4 Iowa, 381. And as to the strictness of the law, see, *Lessee of Watson v. Bailey*, 1 Binn., 470; *Watson v. Mercer*, 6 Serg. & R., 49.

In Missouri, a certificate which did not show that the wife had been made acquainted with the contents of the deed, as directed, was held to be insufficient. *Chauvin v. Wagner*, 18 Mo., 531; *Burnett v. McCluey*, 78 Mo., 676.

In *Langton v. Marshall*, 59 Texas, 296, a certificate stating that the *feme* declared that she "fully understood the contents" of the deed was held to be an insufficient compliance with a statute requiring from the *feme* a declaration that "The said writing to be shown and explained to her" was her free act, and giving the form of a certificate in which compliance is stated in the words "Having the same fully explained to her." See, also, *Ruleman v. Pritchett*, 56 Texas, 482.

In Virginia, the statute required the magistrate to certify in effect that the wife "Being examined by me privily and apart from her husband and having said writing fully explained to her," declared, etc.; and, under this statute, it was held in

Hairston v. Randolph, 13 Leigh, 445, that a certificate which did not show such explanation was invalid. And see, *Bolling v. Teel*, 76 Va., 487. And in West Virginia, which has the same statute, it has been decided that a certificate which stated that the deed was "read" to the wife instead of stating that it was "fully explained" to her, is insufficient. *Watson v. Michael*, 21 W. Va., 568.

These cases show the strictness of the law. It is true that some of them are cases under statutes which give a form of certificate, but it is not the form of words, but the fact that explanation was given as directed, which the courts consider important. In *Hairston v. Randolph*, the court, in giving decision, uses the following significant and instructive language: "There is good reason for requiring a substantial compliance with all the requisitions of the statute. The Statute of Fines, 18 Edw. I, provided that 'If a woman covert be one of the parties, then she must be examined by four of said justices, and if she doth not assent thereunto, the fine shall not be levied.' Coke in his commentary on the statute, 2 Inst., 514, says: 'The examination must be solely and secretly, and the effect thereof is whether she be content of her own free will, without any menace or threat, to levy a fine of these parcels, and name them unto her, everything distinctly contained in the writ so as she perfectly understand what she doth.' This statute had received, therefore, a construction in practice which required an explanation to the wife, and her knowledge of the nature of the act done." The significance of the practice under the ancient method of conveyance by fine is that, in the case of married women, our modern acknowledgment is a substitute for it or a revival of its protective procedure in another form.

Our conclusion is that, under our statute, the direction to show and explain the deed is clearly given; that the direction, notwithstanding the oblique manner in which it is expressed, is mandatory and, consequently, that it is as necessary for the certificate to show compliance with it as with any other direction or requirement of the statute.

This being so, the next question is: does the bill make a case for relief for the complainants? We think it does very clearly, for it shows a case of fraudulent representation and fraudulent practice by the defendant to and upon the Jacoy heirs. The defendant maintains that the Jacoy heirs are necessary parties. We do not think so. We are by no means clear that the complainants could not, without joining the Jacoy heirs, have the defendant decreed to hold as trustee for them, even if the Jacoy heirs had not conveyed their interest to Caleb H. Paine; but, in view of that conveyance, we do not think there can be a doubt that the complainants are entitled to full relief without joinder with them. The case of *Whitney v. Roberts*, 22 Ill., 381, cited by complainants, is fully in point. In that case the court held that when a person by fraud and deception obtained a conveyance, the grantors may disregard it and convey to a third party, who may establish the fraud in equity and have the same relief which the grantors but for their conveyance would have had.

Demurrer overruled.

RE CENSUS SUPERINTENDENT.

A statute provided that "**A census * * shall be taken * * *** on the first day of June," and that at least **six months previous**, the Governor shall appoint a Superintendent of the Census. Held, that the power to appoint a superintendent was incident to the imperative duty of taking the census. Held, further, that the Governor, not having made an appointment within the prescribed time, could make it afterwards.

(Providence — Opinion rendered April 24, 1885.)

The Public Statutes of Rhode Island, Chapter 63, §§ 1 and 3 provide:

Sec. 1. A census of the population, manufactures, agriculture, fisheries and business of the several towns shall be taken as they exist on the first day of June, one thousand eight hundred eighty-five, and every tenth year thereafter.

Sec. 3. At least six months previous to the date for taking the census in each census year, the Governor shall appoint a superintendent of the census, who, together with the Governor and the Secretary of State, shall constitute the Census Board, which shall have the charge of taking the census.

These statutory provisions being in force the Governor, acting under article 10, § 3, of the Constitution, which provides that "The judges of the Supreme Court shall give their written opinion upon any question of law whenever requested by the Governor," addressed the following communication to the justices of the court:

State of Rhode Island, Executive Department,
Providence, April 22, 1885.

To the Honorable the Judges of the Supreme Court:

I have the honor under the provisions of article 10, section 3, of the Constitution, to request your opinion on the following question of law:

January 5, 1885, I appointed Amos Perry, of Providence, to be Superintendent of the Census, no appointment having been previously made. Was such appointment lawful?

Very respectfully,
Augustus O. Bourn, Governor.

Opinion of the court:
To His Excellency, Augustus O. Bourn, Governor of the State of Rhode Island and Providence Plantations:

We have received from Your Excellency a communication requesting our opinion upon a question stated as follows, to wit:

"January 5, 1885, I appointed Amos Perry,

of Providence, to be Superintendent of the Census, no appointment having been previously made. Was such appointment lawful?"

The statute, Pub. Stat., R. I., cap. 63, § 1, provides that "A census of the population, manufactures, agriculture, fisheries and business of the several towns shall be taken as they exist on the first day of June, one thousand eight hundred and eighty-five, and every tenth year thereafter." It will be noted that the language is imperative, "the census shall be taken." The 3d section provides that "At least six months previous to the date for taking the census in each census year, the Governor shall appoint a Superintendent of the Census, who, together with the Governor and the Secretary of State, shall constitute the Census Board, which shall have the charge of taking the census." The language here is likewise imperative. Other sections, particularly section 4, prescribe duties to be performed by the Superintendent, which are indispensable to the proper taking of the census. The power to make the appointment is unquestionably given as incident to the duty which is imperative. The only question, therefore, is whether the Governor, having failed to make the appointment within the prescribed time, could lawfully make it afterwards. We think he could, for without the appointment the taking of the census, which is absolutely prescribed, would fail. We think the provision in regard to time must be construed as merely directory, the duty to appoint being paramount and essential.

The case of *People v. Allen*, 6 Wend., 486, seems to be exactly in point. There a statute of the State of New York provided that "The commanding officer of each brigade of infantry shall, on or before the first day of June in every year, appoint a brigade court-martial." The officer did not appoint until July. The question for the court was: could the power of appointment be exercised after the first day of June? The court decided that it could. Judge Marcy, delivering the opinion of the court, said: "The general rule is, that where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory merely, unless the nature of the act to be performed, or the language used by the Legislature, show that the designation of the time was intended as a limitation of the power of the officer." We think that here, without doubt, the purpose was not to limit the power, but to insure its timely exercise.

Thomas Durfee,
Charles Matteson,
John H. Stiness,
P. E. Tillinghast,
George A. Wilbur.

NEW HAMPSHIRE SUPREME COURT.

PARKER *et al.*

v.

ROBERTS *et al.*

A judgment rendered upon a default for the price of goods sold, the amount thereof being fixed by agreement, is not a bar to an action by the purchaser for a breach of warranty of the quality of the goods.

(Grafton—Decided July 31, 1885.)

ASSUMPSIT on a warranty of a steam engine. The defendants in a brief statement, pleaded a judgment recovered by them in Massachusetts, in 1884, against the plaintiffs, upon default, and an agreement as to the amount of damages in a suit to recover the price of the engine, in which suit these plaintiffs, before submitting to a default, appeared and filed an answer in which they alleged the same breach of warranty of the engine relied on here, and claimed to recoup the damages suffered by them on that account. The court ruled that the Massachusetts judgment is not a bar to this suit, and the defendant excepted.

The evidence tended to show that Young, the member of the plaintiff's firm who bargained for the engine with the defendants in Boston, was not a practical machinist and never run an engine; and it did not appear that he had any acquaintance with the mechanism or operating of steam engines. The defendants requested the following instructions: "If the jury find that the engine was defective and that the defects were not apparent to a person without some skill in the matter of engines and machinery of that nature; and further, that Mr. Young had sufficient skill to see such defects and opportunity to examine the engine and did examine it, and that the defendants did not practice any concealment or deceit in reference to such defects, the plaintiffs cannot recover." These instructions were refused and the defendants excepted.

The court instructed the jury that if Young had an opportunity to examine the engine and did examine it, and the defects complained of in this suit were apparent on simple inspection and required no skill to discover them, the plaintiffs cannot recover, because they were not misled by the defendants' representations. If the finding of the jury is against the defendants on this point, then the question is whether there has been a breach of the defendants' warranty. If the engine was not what the defendants warranted it to be, the plaintiffs can recover, with instructions as to damages to which no exception was taken. The jury returned a verdict for the plaintiffs for \$397.91, being the difference in the value of the engine as warranted and the value of the engine delivered, without interest.

Mr. Ossian Ray, for plaintiffs:

The merits of plaintiffs' claim sued on in New Hampshire have never been considered or tried in Massachusetts, and plaintiffs are not estopped from recovering their damages here. *Greenl. Ev.*, secs. 523, 529; *Gilbert v. Thompson*, 9 Cush., 348; *Eastman v. Cooper*, 15 Pick., 276; *Bodurtha*

v. Phelon, 13 Gray, 413; *King v. Chase*, 15 N. H., 9; *Moulton v. Libbey*, Id., 480; *Metcalf v. Gilmore*, 61 N. H., 174, 189; *Cromwell v. County of Sac*, 94 U. S., 851 (XXIV., Law. ed., 195).

Interest should be allowed from the date of delivery of the engine, as damages for detention of the money due. *Johnson v. R. R. Co.*, 43 N. H., 410; *R. R. Co. v. Elliot*, 57 N. H., 437.

Messrs. Burleigh & Adams, for defendants:

A brief statement needs only to embrace the substance of a special plea. *Leslie v. Harlow*, 18 N. H., 518.

Precision and exactness are not necessary. *Folsom v. Braten*, 25 N. H., 114; *Pallet v. Sargent*, 36 N. H., 496.

The issue in a case is that matter upon which the plaintiff proceeds by his action and the defendant, by his pleadings, controverts. *Potter v. Baker*, 19 N. H., 197; *King v. Chase*, 15 N. H., 9; *Demerit v. Lyford*, 27 N. H., 547; *Taylor v. Dustin*, 43 N. H., 495; *Smith v. Smith*, 50 N. H., 218.

A judgment for the plaintiff in a suit in *quare clausum* might not show whether the taking of the chattels was put in issue and settled or not. It would show a trespass upon the land named in the declaration and be *prima facie* evidence of the conversion of chattels described therein. *Smith v. Smith*, 50 N. H., 218.

Such judgment could be pleaded in bar of another suit for conversion of the same chattels, and the burden of proof would be on the plaintiff, to show that the conversion of the personal property claimed in the second suit was not put in issue and settled in the first suit. *Demerit v. Lyford*, 27 N. H., 548; *King v. Chase*, 15 N. H., 9; *Taylor v. Dustin*, 43 N. H., 495; *Smith v. Smith*, 50 N. H., 218; *Sanderson v. Peabody*, 58 N. H., 116.

A judgment by default, with pleadings filed, is as good as any other to bar a subsequent action for the same cause. *Bigelow, Est.*, 3d ed., 25-28; *Loring v. Mansfield*, 17 Mass., 394; *Jordan v. Phelps*, 3 Cush., 547-8; *Fuller v. Shattuck*, 13 Gray, 70; *Binck v. Wood*, 43 Barb., 315.

The practice in England accords with this view. *Bigelow, Est.*, *supra*, 25; *Knox v. Walldorrough*, 5 Me., 185; *Davis v. Talbot*, 12 N. Y., 184.

Bascom v. Manning, 52 N. H., 182, was decided like all others, on the particular facts presented; by suffering a default, defendant evinced his determination not to proceed further with the litigation of his counterclaim in that suit.

Concerning the conclusiveness of agreed judgments, are cited, *Bigelow, Est.*, *supra*, 22, 23; *Bank of Commonwealth v. Hopkins*, 2 Dana, 395; *Hanover v. Wear*, 2 N. H., 134; see, also, *Olcott v. Banfill*, 7 N. H., 469.

The issue may or may not be specifically disclosed by the declaration and pleadings. If it is not, extrinsic evidence may be adduced, to show what was the matter really in issue, and upon what ground the verdict and judgment proceed. *King v. Chase*, 15 N. H., 9; *Smith v. Smith*, 50 N. H., 218; *Bigelow v. Winsor*, 1 Gray, 299; *Sanderson v. Peabody*, 58 N. H., 118.

Carpenter, J., delivered the opinion of the court:

The former judgment is not a bar. *Bascom v. Manning*, 52 N. H., 182. That case does not differ from this, except in the immaterial circumstance that here the damages were fixed by agreement. A default admits all the material allegations of the writ except the amount of damages, which are assessed by the court, unless, for special reasons, an inquiry by the jury is ordered. *Huntress v. Effingham*, 17 N. H., 584; *Toppan's Petition*, 24 N. H., 43; *Manchester's Petition*, 28 N. H., 296; *Willson v. Willson*, 25 N. H., 229; *Bowman v. Noyes*, 12 N. H., 307; *West v. Whitney*, 26 N. H., 314; *Chase v. Lovering*, 27 N. H., 295.

The law and practice are substantially the same in Massachusetts. *Jarvis v. Blanchard*, 6 Mass., 4; *Storer v. White*, 7 Mass., 448; *Folger v. Fields*, 12 Cush., 98; *Colby's Prac.*, 225.

Judgment for the plaintiff, for nominal damages at least, follows a default, as of course.

After the plaintiffs in the action against them in Massachusetts were defaulted, no question except the amount of damages, remained open. To fix that amount, was the only purpose of the agreement and its only effect. The operation of the judgment is the same as if the damages had been assessed by the court or by the jury. If the matter alleged in the answer was competent to be considered in the assessment of damages, the plaintiffs were not obliged to present it, and if not presented not considered it would not be barred by the judgment. *Seddon v. Tutop*, 6 T. R., 607.

There was no evidence that it was taken into consideration by the parties in settling the amount of damages by their agreement. It rests upon the party setting up a judgment as an estoppel, to show that the matter in question was adjudicated by it.

It is unnecessary to determine whether the instructions requested by the defendants were abstractly correct or not. They were properly refused because the case did not call for them. There was no evidence that Young had any acquaintance with or skill in relation to engines and machinery of the kind in question.

Interest from the date of the writ may be added to the amount of the verdict.

Exceptions overruled.

Smith, J., did not sit; the others concurred.

John C. PEARSON, Petitioner,
v.

William K. NORTON.

The Act of June 14, 1881, relating to the production of packages of votes by the Secretary of State, before the court or other proper authority, was not intended to give everybody, or every citizen, or every voter of the county, an absolute right to a re-count without due cause shown.

(Merrimack — Decided July 31, 1885.)

PETITION, presented to the court at the October trial Term, 1884, as follows:

"Respectfully represents John C. Pearson, of Boscawen, in said County of Merrimack, that

on the first Tuesday of November, 1884, he was and for a long time prior thereto had been a resident of said Boscawen; that at the biennial election held on said Tuesday of November he was a candidate for the office of sheriff of said County of Merrimack, and as such received a large number of legal votes for said office; that he apprehends that errors have been made in counting the ballots cast for said office in the various towns throughout said county, and that he made due request, in writing, to wit: on the eighth day of December, 1884, upon each and every town clerk in said county to send to the Secretary of State the packages or envelopes of votes cast for your petitioner, as well as all other ballots given in for any person for said office of sheriff, at said election, pursuant to the provisions of chapter 57, section 40, of the laws passed at the June session, eighteen hundred and seventy-nine; wherefore your petitioner prays this court to make an order, in writing, upon the Secretary of State, to produce before said court such package or packages of votes as may be in his custody given in for your petitioner, or for any other person for said office of sheriff of said County of Merrimack on the first Tuesday of November, 1884, and in the presence of this court open the same and permit said votes to be examined and correctly counted, pursuant to the provisions of chapter 1, section 1, of the laws passed at the June session, eighteen hundred and eighty-one."

An order of notice was issued to the defendant, who appeared and objected: 1, that the court cannot order a re-count before the state of the votes is declared by the court at the law term acting as a canvassing board; 2, that the court cannot go behind the returns and declare any person elected; 3, that the petition does not allege any fraud or error in the count or returns; 4, that the grounds of the petitioner's apprehension, that errors in the count have been made, are not set forth; and 5, that the petition is not sworn to.

Mr. J. H. Albin, for the petitioner.

Messrs. Henry Robinson and George & Shirley, for defendant:

The petition for re-count of votes was premature. No official declaration of the election of sheriff in said county had been made, and it did not appear that Pearson had received any votes for the office, or that he was not duly elected to the same, in which latter event there was no cause for his complaint. The court would surely decline to act in any way as judges of the election, before ascertaining and declaring the result of the returns. *Osgood v. Jones*, 60 N. H., 273.

It is not the duty of the court, sitting as a canvassing board, to go behind the returns of votes, re-count the ballots cast and engage in a general discussion of the legality of the election, upon the motion of a claimant. *Osgood v. Jones*, (*supra*.)

Carpenter, J., delivered the opinion of the court:

If some proceeding were pending in this court for settling the claims of these parties to the office of sheriff, there would be a question whether, as a matter of law, either of them would be entitled to such an order as the plaintiff asks. It might be claimed that an examination, including a re-count of the votes, was their

legal right. But no such proceeding has been instituted; and the Act of June 14, 1881, was not intended to give everybody, or every citizen, or every voter of the county, an absolute right to a re-count without due cause shown. There may be a question whether the Act authorizes the court to order a re-count at the request of any voter or other person interested in the public welfare, or either of the candidates having a private interest in the election, for the purpose of discovering evidence on which a suit could be begun for contesting the election, for the purpose of satisfying persons specially concerned, or the public in general. However it might be if the Legislature should appoint a committee of investigation for the discovery of facts of which, for some legislative purpose, information might be desired, there is no presumption that they intended to impose upon the court an imperative duty of ordering a re-count for the mere purpose of quieting the public mind, or enabling a candidate to discover whether it would be expedient for him to contest an election. A recount for such a purpose would not be within the usual range of judicial action; and so wide a departure from the ordinary course of judicial duty cannot be fairly inferred as the legislative intent from anything less than a plain expression of that intent. A design to require the court, without any exercise of judgment upon any question of law or fact, to order a re-count merely because it is desired by any of the candidates, is not plainly expressed in the statute, and cannot be reasonably held to be its meaning.

It is not necessary to inquire whether the court have power to make the order in this case. If the power exists, we think the statute does not require its exercise for the cause alleged by the plaintiff. Without examining the question of power, the petition is dismissed, on the ground that the statute does not make it our duty to grant it without other cause than that alleged by the petitioner, and that if we are authorized to grant it in the exercise of a discretionary power, sufficient cause is not alleged for the exercise of the power in this case.

Petition dismissed.

Smith, J., did not sit; the others concurred.

Ashland SAVINGS BANK

Cornelia W. MEAD et al.

1. A general attachment of all a debtor's interest in real estate in a town, **does not hold and fraudulently conveyed by the debtor by a deed recorded before the attachment and conveyed by his fraudulent grantee to an innocent purchaser for value after the attachment.**

NOTE.—Attachment Ven. An action on a demand secured by attachment is not barred by a subsequent discharge in insolvency. A special judgment and execution thereon may be had, but the court cannot at a subsequent term, render judgment for any residue. *Gay v. Raymond*, Sup. Ct. (Mass.), *ante*, 80.

H. H.

2. **Against the latter and subsequent purchasers from him, such attachment is not constructive notice of a lien, nor of *lis pendens*.**

(Grafton—Decided July 31, 1885.)

WRIT OF ENTRY to foreclose a mortgage.

Facts agreed for the opinion of the court. Aug. 22, 1876, David Blaisdell conveyed the premises to William G. Brown, and on the same day Brown conveyed them to Mary A. Blaisdell, the wife of David Blaisdell. The consideration named in each of these deeds was \$1,500, and they were duly recorded the day of their date. Apr. 26, 1880, Mary A. Blaisdell, for the consideration of \$2,500, by deed of warranty conveyed the premises to Sarah M. Perkins. This deed was recorded June 23, 1880. Mrs. Perkins purchased the premises in good faith, without knowing of any adverse claims. July 23, 1881, the plaintiff loaned Mrs. Perkins \$600, and took from her the mortgage in suit to secure payment thereof, relying upon the records which showed no defect in her title. Afterwards Mrs. Perkins conveyed her equity in the premises to the defendant Bond. At the time of the conveyance by David Blaisdell to Brown, Blaisdell was largely indebted to the defendant Mead, and January 13, 1879, Mead caused an attachment of all his interest in real estate in Campton to be made, without describing any particular close or parcel, by leaving a copy of the writ and return in the town clerk's office in the usual way. Judgment was obtained in this suit at the October Term, 1880, and September 30, 1881, the demanded premises were set off on the execution taken out on that judgment. Mead claims title by virtue of that levy on the ground that the conveyance of Blaisdell to his wife through Brown was fraudulent as to existing creditors.

At a former Term, the court was inclined to the opinion that the plaintiff was entitled to judgment; but the case was continued for further argument, and the opinion was not announced till the present term.

Messrs. Burleigh and Adams, for plaintiff:

The object of the enrollment of a deed is to give public notice to all, of the sale and transfer of the property conveyed, for the benefit of subsequent purchasers and creditors, and not for the benefit of wrong doers and strangers. *Brown v. Manter*, 22 N. H., 471.

If a grantor deeds land and his grantee fails to procure the enrollment of the deed, a second deed of the same land to a purchaser without notice will be good against the first conveyance. *Whittemore v. Bean*, 6 N. H., 47; see, also, *Somes v. Brewer*, 2 Pick., 184; *Trull v. Bigelow*, 16 Mass., 406; *Connecticut v. Braddish*, 14 Mass., 296; *M'Mechan v. Griffing*, 3 Pick., 149.

Notice, to break in upon the registry laws, must be such as to charge the second purchaser with fraud, or must be very clearly proved. *Emmons v. Murray*, 16 N. H., 386.

When a prior conveyance, not recorded until one of a subsequent date, is attempted to be supported on the ground of fraud in the second purchaser, the fraud must be clearly proved. *Norcross v. Widgery*, 2 Mass., 506.

A purchaser with notice from a purchaser without notice of fraud in the chain of title, will

take the land discharged of all incumbrances. *Harrison v. Forth*, 1 Eq. Cas. Abr., Notice A 6, p. 331; 1 Story, Eq. Jur., 9th ed., §§ 409, 410; 4 Kent, Com., 179; 2 Lead. Cas. Eq., 3d Am. ed., 68, 69; 1 Pars. Bills & N., 261, q; 2 Id., 26, 27; Red. & Big. Cas., Bills & N., 261, 262; *Trull v. Bigelow*, 16 Mass., 406, 418, 420; *Boynton v. Rees*, 8 Pick., 329, 332; *Bell v. Twilight*, 18 N. H., 159.

A husband conveyed to his wife, through a third person, without consideration, and subsequently the wife conveyed the same land to an innocent purchaser for value and without notice. A creditor of the husband obtained judgment and levied his execution upon the land. This levy was held void and the purchaser's title sustained. *Gordon v. Haywood*, 2 N. H., 402.

A deed from a judgment debtor to an innocent purchaser first registered, was good against an unregistered sheriff's deed of the same land sold at public auction on an execution. *Denniston v. Bacon*, 10 Johns., 197; *Jackson v. Terry*, 18 Johns., 471, 473.

A special statute making conveyances void except as to innocent purchasers for value, for the purpose of hindering and delaying creditors so far as it applies to purchasers, is only an affirmation of the common law, and a purchaser in a recent case was protected in his title. *Starin v. Kelley*, 14 Rep., 119.

When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld however fraudulent his purpose. *Prewitt v. Wilson*, 11 Rep., 417, 418.

If a third party acquires the property from a fraudulent grantee for value without notice, he will hold the property even against the defrauded creditor. *House Machine Co. v. Claybourne*, 11 Rep., 729, 730; *Greenwell v. Nash*, 7 Rep., 595; *Jackson v. Andrews*, 7 Wend., 156; Bump, Fraud. Conv., 3d ed., 492, 497.

The object of this statute being to give notice of sale, if a party have actual notice of an unrecorded deed, or such facts as would lead directly to such notice upon reasonable inquiry, he will be bound the same as though the deed were recorded. *Stowe v. Meserve*, 18 N. H., 46; *Moore v. Kidder*, 55 N. H., 492.

The statute requires that the reliance of innocent persons, without fault or laches, upon public records, shall not be frustrated. *Moore v. Kidder*, *supra*.

An attachment made in general terms of all the debtor's interest in real estate, is good as against an unrecorded deed previously executed of the same property. *Moore v. Kidder*, *supra*.

Pratt v. Wheeler, 6 Gray, 520, 522, is not a precedent of much value in deciding this case where the facts are, in one important particular at least, not analogous.

If a junior judgment creditor files a bill to set aside the conveyance, he obtains a right of priority over the lien of a senior judgment as a reward for his diligence. Bump, Fraud. Conv., 3d ed., 571.

In case of a fraudulent conveyance of land, a subsequent judgment against the grantor is not constructive notice to a purchaser from the grantee. Bump, Fraud. Conv., 496, cit-

ing *Ledyard v. Butler*, 9 Paige, 132; *Jackson v. Terry*, 18 Johns., 471; *Scott v. Purcell*, 7 Blackf., 66. Therefore, if he buys the land from the grantee in good faith and for a valuable consideration, prior to a sale under an execution on the judgment, he will acquire a good title notwithstanding the judgment or even the issue of an execution thereon. *Anderson v. Roberts*, 18 Johns., 515; *S. C.*, 2 Johns. Ch., 202; *Scott v. Purcell*, *supra*; *Wood v. Wright*, 4 Fed. Rep., 511; *Murray v. Jones*, 50 Ga., 109; *Beall v. Hurrell*, 7 Bk. Reg., 400; *S. C.*, 1 Wood, 476.

If a purchaser at a sale under an execution records his deed prior to a purchase from the grantee, he has the prior right. But his deed may be postponed to a subsequent deed from the grantee if that is recorded first. Bump, Fraud. Conv., 497.

The lien of a judgment is a mere *quasi* lien, which is liable to be displaced by subsequent equities. *Henderson v. Hutton*, 26 Gratt., 926.

The common law as well as the Statutes 18 Eliz., ch. 5, and 27 Eliz., ch. 4, uphold conveyances of the kind under discussion. *Cadogan v. Kennett*, Cowp., 484; *Anderson v. Roberts*, 18 Johns., 515.

The Statute of Frauds was intended to avoid deeds contrived and devised fraudulently for the delaying and defrauding of creditors, in those cases only where both parties participated in the fraud. *Sands v. Hildreth*, 14 Johns., 497.

The title of the *bona fide* purchaser from the fraudulent grantee was to be preferred to that of the purchaser under the execution of the creditor of the fraudulent grantor. *Young v. Lathrop*, 67 N. C., 63; *S. C.*, 12 Am. Rep., 603.

If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside between the parties; but the rights of third parties who are purchasers without notice for a valuable consideration cannot be disregarded. *Fletcher v. Peck*, 6 Cranch, 138 (III., Law. ed., 177).

The doctrine of *lis pendens* is ably expounded in *Murray v. Lyburn*, 2 Johns. Ch., 445; *Hopkins v. M'Laren*, 4 Cow., 678, 679; and in the opinion by Senator Seward, in *Parks v. Jackson*, 11 Wend., 456, and proves conclusively that the defendants cannot find refuge in that direction.

Messrs. Barnard & Barnard, for defendant:

Real estate may be attached on any writ of *meane* process by leaving an attested copy thereof with the return, etc., at the dwelling-house of the town clerk, etc. Gen. Laws, ch. 224, §§ 8, 5.

The notice of the fraud need only be sufficient to put a man of ordinary prudence and experience in business transactions upon inquiry. It is not necessary that the notice should be in the shape of a formal communication. Whatever is sufficient to direct his attention to the prior rights and equities of creditors, and to enable him to ascertain their nature by inquiry, will operate as notice. Bump, Fraud. Conv., p. 484.

The case of *Gordon v. Haywood*, 2 N. H., 402, is not in point, as the conveyance was made before the creditor had acquired a lien by attachment.

Stanley, J., delivered the opinion of the court:

Conceding that Mrs. Blaisdell's title was fraudulent as against her husband's creditors, the plaintiffs, nevertheless, have a good title, unless the attachment under which Mead claims can be set up to defeat them. Mrs. Perkins, under whom they claim, was an innocent purchaser for value and took a good title, notwithstanding the fraudulent character of Mrs. Blaisdell's title, and the plaintiffs are innocent mortgagees and they would have a good title even if the title of Mrs. Perkins was fraudulent. *Gordon v. Haywood*, 2 N. H., 402; *Fling v. Goodall*, 40 N. H., 208; *True v. Congdon*, 44 N. H., 48; *Piper v. Hilliard*, 52 N. H., 211; *Holt v. Russell*, 56 N. H., 559, 564; *Fletcher v. Peck*, 6 Cranch, 87, 133 (III. Law. ed., 162, 177); *Jackson v. Van Dalfsen*, 5 Johns., 48; *Jackson v. Henry*, 10 Johns., 185; *Jackson v. Terry*, 18 Johns., 471; *Jackson v. Walsh*, 14 Johns., 407; *Anderson v. Roberts*, 18 Johns., 515; *Ledyard v. Butler*, 9 Paige, 132; *Bump, Fraud. Conv.*, 496, 499; 1 Story, Eq., §§ 409, 410; 4 Kent, Com., 179.

But Mead claims that her title is superior to the plaintiffs' because it dates from an attachment made in 1879, before the wife's conveyance to Mrs. Perkins. The attachment was against David Blaisdell, the fraudulent grantor of his wife. David parted with his title August 26, 1876, on that day conveying it, so far as he could, to his wife, through one Brown. Those deeds were recorded on the day of their date. The attachment was general "of all David's interest in real estate in Campton," with no description of any particular parcel, and nothing to indicate what real estate it was claimed David owned. The return suggested no attachment of this land or of the property of Mrs. Blaisdell, in whom the record then showed the title of the land to be vested.

The object of the statute requiring that, where real estate is attached, a copy of the writ and return shall be left with the town clerk, is the same as the statute requiring the registration of deeds, to give notice to all of the true state of the title. If the record fails in this, it fails to accomplish the object for which it is required to be made. To hold Mead's title superior to the plaintiffs', we must hold that when the attachment was attempted to be made, the title was in David, and that the leaving the copy of the writ with the town clerk, was notice of an incumbrance upon the demanded premises.

If David was to be regarded as the owner, as between his attaching creditor and the fraudulent grantee, we come to the question whether the copy of the writ with the return thereon, created a valid lien upon the premises as against subsequent innocent purchasers. If the premises had been particularly described or described to such an extent and in such a way that an inspection of the return would have shown an intention to attach them, the question would be whether the plaintiff could safely take the mortgage from an innocent purchaser for value, without searching for attachments in suits against each one of the series of former owners in whom the record showed no real estate when the attachments were made. If Mead prevails, it must be on the ground that

the plaintiff and Mrs. Perkins had constructive notice of Mead's attachment. When the attachment was made, David had no title of record to this land. He had parted with it long before, by a conveyance which, as to everybody but his creditors, was valid; and his grantee could convey it absolutely and effectually to an innocent purchaser. There was nothing in the record of attachments to indicate that the estate of which Mrs. Blaisdell held the title was attached, and nothing calling on the plaintiff to make inquiry.

The fact that David's interest in real estate was attached, would not suggest the inquiry whether his wife's prior title was good or her right to convey perfect; whether David was owing the debt which Mead's action was brought to recover, at the time when he conveyed to his wife; or whether the purpose of that conveyance was fraudulent. If the plaintiffs were put upon this inquiry there would be no limit to which it might not be extended, certainly not within the period within which the Statute of Limitations would not be a bar. How can a record which raises no doubt and suggests no inquiry, be considered evidence to put a party upon inquiry and charge him with constructive notice? Having no knowledge of the fraudulent character of David's conveyance, the grantee of his wife was only bound, as against the attachment, to find out whether upon the records the wife's title appeared to be valid. Mrs. Perkins and her grantees were not bound to look for a general attachment of all David's real estate in the town, made after the registry showed this land had ceased to be his.

These views do not conflict with the rule that a general attachment of all the debtor's real estate in a town, without other description, is sufficient against some persons and that such an attachment is good against a fraudulent grantee of the debtor, because the conveyance is not valid against the attaching creditor. Cases like *Howard v. Daniels*, 2 N. H., 187; *Moore v. Kidder*, 55 N. H., 488; *Taylor v. Minter*, 11 Pick., 341; *Crosby v. Allyn*, 5 Greenl., 453, and *Pratt v. Wheeler*, 6 Gray, 520, in which the land was attached by the creditor before it was conveyed by the debtor or before the conveyance was recorded, or in which the contention was between two attaching creditors of the same debtor, or in which an attachment and levy were set up against the fraudulent grantee or one having no more than his defeasible estate, are not in point.

As against the fraudulent and voidable title of Mrs. Blaisdell and of anyone standing in her position, Mead could take the land on execution without an attachment. But the attachment of David's estate, either alone or in connection with the registry of deeds, did not give Mrs. Perkins or the plaintiff notice of a lien on land which was shown not to be David's by the record on which Mrs. Perkins and the plaintiff had a right to rely. A fraudulent grantee, holding only a voidable title, may convey an indefeasible estate to an innocent purchaser. While the record of the attachment was security for the creditor against a subsequent conveyance by the debtor, the record of the prior conveyance to the fraudulent purchaser whose title appeared to be good, was security for Mrs. Perkins, the innocent purchaser, acquiring title

through that deed. *Gillig v. Maass*, 28 N. Y., 191, 209; *Westbrook v. Gleason*, 79 N. Y., 23, 81; *Turbell v. West*, 86 N. Y., 280, 288; *Tied man*, Real Prop., § 817.

Mrs. Perkins and the plaintiff having no notice, actual or constructive, of an attachment or of any defect in Mrs. Blaisdell's title, cannot be defrauded by the creditor's omission to re-inforce the attachment by an injunction against Mrs. Blaisdell's exercising the power vested in her by the record evidence of the prior deed, of conveying a good title to an innocent purchaser. The land was not the subject-matter of Mead's suit; and the records were not constructive notice to Mrs. Perkins or the plaintiff, of *his pendens*.

Judgment for the plaintiff.

Blodgett, J., did not sit; the others concurred.

NICHOLS *et al.*, Appts.,

v.

SHEPARD, Admr.

1. Under the **Statute of Distributions**, there being none nearer of kin living, the **children of deceased brothers and sisters take equal shares per capita**.
2. **Claimants take per stirpes** only when they stand in **unequal degrees**, or claim by representation; but when all stand in **equal degree**, they take *per capita*.

(Hillsborough — Decided July 31, 1886.)

PETITION for leave to appeal from a decree of distribution by the Judge of Probate. Facts found by the court.

Blanchard Nichols died intestate, leaving as next of kin and heirs at law thirty-one nephews and nieces, children of seven deceased brothers and sisters, there being eight children of one brother; five of another; four each of three sisters and another brother; and two of another brother. The eight children are the plaintiffs and reside in Massachusetts. The defendant is the administrator of the intestate's estate and resides in Amherst.

By the decree from which this appeal is sought, the probate court, ordered the personal estate in the hands of the administrator to be distributed and paid, one seventh to the children of each deceased brother and sister of the intestate, *per stirpes*. The petitioners were prevented from taking an appeal through accident, mistake and misfortune, and not by their own neglect.

Messrs. M. T. Allen, Wiggin & Fuller, for the appellants.

Mr. C. H. Burns, for the defendant.

Smith, J., delivered the opinion of the court:

The personal estate of a person dying intestate is distributed: 1. To the widow the share by law prescribed; the residue to the children

of the deceased and the legal representatives of such of them as are dead. 2. If there be no issue, to the father, if he is living. 3. If there be no issue or father, in equal share to the mother and to her brothers and sisters and their representatives. 4. To the next of kin in equal shares. Gen. Laws, ch. 203, §§ 1, 6.

In this case, the intestate left no widow, father, mother, brother, sister, uncle or aunt. His heirs at law and the next of kin are thirty-one nephews and nieces, children of different deceased brothers and sisters. The words "next of kin" in the statute are words of purchase, denoting the persons who are to take the estate, and not words of limitation. The heirs, therefore, do not take by representation. Being all next of kin, they take as such, and in equal shares, *per capita*. *Snow v. Snow*, 111 Mass., 389.

In *Hill v. Nye*, 17 Hun, 457, it was held that the maternal grandmother and paternal grandparents, being the next of kin, took the estate of the intestate *per capita*. *Knapp v. Windsor*, 6 Cush., 156, is a similar case. The next of kin were the paternal grandmother and the maternal grandparents of the intestate. It was held that each was entitled to a distributive share, one third, in the estate. *Shaw, C. J.*, said: "It is a plain rule of the law that those who take property as a class of persons described, where there is nothing to distinguish their respective rights, take equal shares. * * * The rule of representation applies only from necessity or where there are lineal heirs in different degrees, as children and the children of a deceased child, or brothers and sisters and the children of a deceased brother and sister."

In *Jackson v. Thurman*, 6 Johns., 322, the question was whether B. and C., children of the intestate's deceased sister, and D., son of the intestate's deceased brother, took *per stirpes* or *per capita*. It was decided that they took *per stirpes*, because the statute made them inherit such shares as their parents respectively would have inherited, if living; but the court said this was carrying the doctrine of inheritance *per stirpes* further than it was carried in the case of lineal descent and further than it was carried in the Novel of Justinian (118), from which the New York Statute was copied.

The rule is nowhere better stated than by *Chancellor Kent* (2 Kent, Com., 425): "It is the doctrine under the Statute of Distributions, that the claimants take *per stirpes* only when they stand in unequal degrees or claim by representation, and then the doctrine of representation is necessary. But when all stand in equal degree, as three brothers, three grandchildren, three nephews, etc., they take *per capita*, or each an equal share; because in this case, representation, or taking *per stirpes*, is not necessary to prevent the exclusion of those in a remote degree, and it would be contrary to the spirit and policy of the statute which aimed at a just and equal distribution." See, also, *Page v. Parker*, 61 N. H., 65, and authorities cited; 2 Wms. Exrs., 6th ed., 1513; 3 Redf. Wills, 425.

It having been found that the plaintiffs were prevented from appealing within sixty days through accident, mistake and misfortune, the petition for leave to appeal is allowed. The decree of the probate court is reversed and a decree of distribution ordered, that the sum to be

NOTE.—Rule of distribution in Ohio; see, *McKelvey v. McKelvey* (Ohio), 1 West, R., 68.

distributed be divided into thirty-one equal shares and one share be paid to each of the eight plaintiffs.

Decree accordingly.

Allen, J., did not sit; the others concurred.

Hattie E. CORLISS, Admr.,
v.

The WORCESTER, Nashua and Rochester
R. R. Co.

1. In an action for causing the death of a person by a wrongful act or omission, the damages which an administrator may recover, are not necessarily nominal and may be assessed by a jury.
2. In estimating the damages, the jury may consider the expense of board, nursing and medical aid, with compensation for loss of time, physical and mental pain, including such sum as they may assess on account of distress or anxiety of mind, experienced in view of death.

(Hillsborough—Decided July 31, 1885.)

CASE for causing the death of the plaintiff's intestate by carelessly running upon him with an engine and train of cars while crossing the defendant's track with a horse and wagon in the highway.

The court ruled that nominal damages only could be recovered and the plaintiff excepted.

Mr. Henry B. Atherton, for plaintiff:

The right of action for damages for a wrongful act causing the death of a person, is given by statute. Acts 1879, ch. 35.

The measure of damages is not limited to the injury to dependents, but embraces all pecuniary loss which they must directly sustain, and to this must be added the agony of death. *Clarke v. Manchester*, Hills. June, 1883.

The jury must consider the pecuniary value to his wife, of the life destroyed. *Parkinson v. Nashua & L. R. Co.*, N. H., Oct., 1881.

Where the interpretation of a statute is doubtful, no such construction must be given as will defeat a remedy. *Pond v. Trigg*, 5 Heisk, 587.

A statute which gives a remedy for the death of a person caused by the wrongful act or omission of another, gives the right of action in cases of instantaneous death. See, *N. C. R. R. Co. v. Prince*, 2 Heisk., 580; *Fouikea v. R. R. Co.*, 9 Heisk., 829; *Brown v. R. R. Co.*, 22 N. Y., 191; *Murphy v. R. R. Co.*, 30 Conn., 189.

Messrs. C. H. Burns and A. F. Stevens, for defendant,

Bingham, J., delivered the opinion of the court:

The court ruled that only nominal damages could be recovered.

At common law the cause of action died with

NOTE.—Action of statutory origin; by whom may be brought and for whose benefit; necessary averments in complaint. See, *Stewart v. Terre Haute, etc., R. Co.* (Ind.), 1 West. R., 152.

N. H.

the decedent, but by chapter 35 of the laws of 1879, it survives to his administratrix and she may have damages assessed, if the liability of the defendant is established. *Clark v. Manchester*, Hills, June Term, 1883; *Needham v. G. T. R. Co.*, 88 Vt., 294, 302.

The ordinary grounds of damage in such cases are the expense of board, nursing, medical aid, compensation for loss of time, physical and mental pain, including such sum as the jury think ought to be given on account of distress or anxiety of mind experienced in view of approaching death, while in imminent danger of the injury received and to the close of life.

Such damages are not necessarily nominal. What they should be depends upon the varying facts of each particular case and are for the jury to assess, guided by the instructions of the court as to the law.

Exceptions sustained.

All concurred.

JONES v. LANE.

Under the Statute of this State the plaintiff cannot be allowed more costs than damages, when the title to real estate is not in question, and the damages recovered do not exceed thirteen dollars and thirty-three cents.

(Strafford—Decided July 31, 1885.)

TRESPASS *quare clausum*.

The title to real estate was not in question. Damages were assessed by the court at twelve dollars. The defendant moved that the costs be limited to twelve dollars, claiming it as matter of right. The court denied the motion and the defendant excepted.

Messrs. Burleigh & Kivel, for the plaintiff.
Messrs. Copeland & Edgerly, for the defendant.

Bingham, J., delivered the opinion of the court:

The costs should have been limited to the amount of the verdict or a less sum. "In actions of trespass to real estate commenced in the Supreme Court, where the title to real estate is not in question, the court shall allow so much costs as they think just, not exceeding the damages recovered, in case they do not exceed thirteen dollars and thirty-three cents." G. L., ch. 283, § 5.

The construction given this Statute is that when the damages in an action of trespass to real estate commenced in the Supreme Court, are less than thirteen dollars and thirty-three cents, the court shall allow no more costs than damages. *Petare v. Towne*, 57 N. H., 220; *Bachelder v. Green*, 88 N. H., 265; *Ward v. Bartlett*, 1 N. H., 14; *Brown v. Mathes*, 5 N. H., 229.

The title to real estate not being involved in this action, it comes within the statute.

Exceptions sustained.

Allen, J., did not sit; the others concurred.

WHITNEY *et al.*

v.

PARKER.

In a petition for a partition, under the statute, the committee has no authority, without the consent of the parties, to set off to one, more than his just share of the estate, and then award, that he pay a sum of money to the others to make it equal.

(Cheshire—Decided July 31, 1885.)

PETITION for partition.

The petition was sent to a committee who found the value of the estate to be \$5,985, and, in accordance with the petition, set off the shares of the petitioners jointly. They also reported that the share set off to the petitionee "is \$150 greater in value than her just share, but in our opinion the said estate is so situated that it cannot be divided so as to give to each owner his equal share without prejudice or inconvenience, and we award that the petitionee, Mary E. Parker, pay to the petitioners * * * jointly the sum of \$150, they having that amount less than their just share, or give bond, with sufficient sureties, to pay the same with interest within such time as the court shall order." To this partition and award the petitioners refused to consent.

The petitioners moved that the estate be sold and the net proceeds divided among the owners according to their respective interests; and the petitionee moved for judgment on the report.

It appearing upon examination that it would not be for the interest of all parties to have the estate sold and the proceeds divided, the court ordered judgment on the report, to which the petitioners excepted.

Mr. Hiram Blake, for petitioners:

A partition under the statute is in the nature of a bill in equity. *Nesmith v. Dinmore*, 17 N. H., 515.

The committee may and generally should receive such offers as may be made by the several owners, for a choice of the parcels into which the premises are divided. *Timon v. Moran*, 54 N. H., 441.

Whenever the estate of tenants in common is practically incapable of division by assigning to each owner thereof his equal portion in severalty, he cannot be compelled, by force of the provisions of § 25, ch. 228, Gen. Stats., either to sell his own share or purchase that of his cotenant; but, in such a case, resort may be had to a court of equity, which has power to compel the sale of the entire estate, and order distribution of its proceeds upon equitable principles. *Barney v. Leeds*, 54 N. H., 128; *Timon v. Moran*, 52 N. H., 613, *supra*.

Messrs. Hersey & Abbott, for the defendant.

Bingham, J., delivered the opinion of the court:

The committee, in their report, assigned to the petitioners their shares jointly and to the petitionee without the consent of the petitioners her share, with \$150 more than the shares of the petitioners, awarding that she pay them

that sum to make the shares equal, for the reason that the estate could not be divided equally without prejudice or inconvenience.

In this the committee exceeded their authority: They were proceeding under Gen. Laws, ch. 247, §§ 13, 25, in which they were authorized to divide the estate by setting off to each petitioner his just share; but if the estate is so situated that it cannot be divided so as to give each owner his share therein without great prejudice or inconvenience they may, if the parties consent, assign the same or a part of it to one of the owners, he paying to the others such a sum of money as the committee may award to make the shares equal.

The authority of the committee to partition the estate, otherwise than by giving each owner his just share therein, being dependent on the consent of the parties, and the petitioners having refused theirs, this part of the report was a nullity. *Barney v. Leeds*, 54 N. H., 128, 145.

It appears, in the report, that the petitioners refused to consent to the partition and award and moved at the Term that the estate be sold and the proceeds divided among the owners, and that the petitionee moved for judgment on the report.

The court, on examination, found that it would not be for the interest of all parties to have the estate sold, and ordered judgment on the report, subject to the exception of the petitioners. If the court had found it for the interest of all parties to sell the estate, the statute authorized it to order a sale; but the court finding that it was not for their interest, properly declined to make the order.

The action of the committee being unauthorized, their report should be set aside.

Exception sustained.

Blodgett, J., did not sit; the others concurred.

AHEARN *et al.*, Petrs.,
v.

MANN, Admr.

Leave to **appeal from a decree** of the Probate Court, allowing the settlement of an administrator's account, cannot be granted when the terms of the settlement were agreed to by counsel for the petitioners, and there was no fraud, and the only errors in the account were such as would have been discovered, by reasonable diligence on the part of the petitioners and their counsel.

(Strafford—Decided July 31, 1885.)

PETITION, for leave to appeal from a decree of the Probate Court allowing the settlement of the defendant's account as administrator of the estate of John Briony, on the ground that the petitioners were prevented from appealing therefrom within sixty days through mistake, accident or misfortune.

Messrs. Cooke & Kivel, for the plaintiffs (petitioners).

Messrs. T. J. Smith and J. G. Hall, for the defendant.

Allen, J., delivered the opinion of the court:

The reasons assigned for leave to appeal from the defendant's settlement of his administration account are, that one inventory having been made and filed, other assets, of which no inventory was made, were discovered, and that neither at the settlement of the account nor subsequently within the time for taking an appeal did the administrator produce his books and vouchers for examination, and the petitioners were deprived of the opportunity of objecting to various errors and frauds, which it is claimed were made in the settlement.

The only errors in the account which the referee has found are a charge by the administrator, of money paid for services by his attorney, \$13 of which were for services rendered while the attorney was register of probate; and an excess, how much is not found, taken by the administrator as commissions upon money collected and disbursed.

These charges were examined and agreed to by the plaintiffs' attorneys at the time the account was settled. The assets, of which no appraisal was made, were accounted for at their value. At the time the vouchers were called for by the plaintiffs, the administrator could not find them; but they were subsequently discovered and produced before the referee, and corresponded with the items of the account. After the settlement, the plaintiffs gave a receipt for the balance found and a release under seal of all further claim against the administrator. There was no fraud or concealment on the part of the administrator and there were no errors in the account, which, by reasonable diligence, might not have been discovered in season for correction or appeal.

There being no fraud or concealment, and all matters having been open to examination, or so situated that by reasonable diligence they might have been examined, there is no such mistake, accident or misfortune as warrants the granting of leave to appeal to prevent injustice.

Petition dismissed.

All concurred.

Calvin W. STEVENS

v.

City of MANCHESTER *et al.*

1. A public cemetery cannot be laid out within twenty rods of a dwelling-house, without consent of the owner, although the land to be so used had been procured by voluntary purchase.
2. The mischief sought to be restrained by the limitation, in the statute, to a distance of twenty rods from a dwelling-house, affects all public cemeteries alike, whether established by voluntary or compulsory purchase.

(Hillsborough—Decided July 31, 1885.)

BILL IN EQUITY for an injunction to restrain the City of Manchester and the other defendants who are trustees of the Amoskeag Cemetery under a city ordinance, from using

land for the burial of the dead, within twenty rods of the plaintiff's dwelling-house.

The bill showed that the land in question was bought of one Hanscom, by the City, in 1883, and laid out into burial lots and that it comes within four rods of the plaintiff's dwelling-house.

The defendants demurred to the bill.

Messrs. C. R. Morrison and Wm. Little, for the plaintiff.

Messrs. George W. Prescott, City Solicitor, and A. C. Osgood, for the defendants:

Section 2, ch. 49, of the Gen. Laws, relates only to land taken by exercise of the right of eminent domain, and the fact of defendant being a corporation, does not bring this case within the provisions of this section. *Carter v. Moulton*, 58 N. H., 64.

Allen, J., delivered the opinion of the court:

The statute authorizing cities and towns to take land, when it cannot be obtained by purchase at a reasonable price, for the establishment and enlargement of public cemeteries, provides that no cemetery shall be laid out within twenty rods of any dwelling-house, without consent of the owner. Gen. Laws, ch. 49, § 2. The cemetery may be established by the purchase of land for that purpose as well as by taking it by the exercise of the right of eminent domain.

The mischief sought to be restrained by the limitation, in the statute, to a distance of twenty rods from a dwelling-house, affects all public cemeteries alike, whether established by voluntary or compulsory purchase of the land. It is the public right of purchasing or taking land for a public purpose that is restrained by the limitation in the statute, and not the exercise of the private right of purchasing land for a private cemetery or any other private purpose. *Carter v. Moulton*, 58 N. H., 64.

Demurrer overruled.

Bingham, J., did not sit; the others concurred.

The STATE (Maggie Castles, *Complt.*)

v.

Daniel WELCH.

The course of proceeding in bastardy cases is so far criminal, that the warrant may be served by an officer authorized to serve warrants in criminal cases; and the defendant's recognizance for his appearance at court, should be taken by the State.

(Merrimack—Decided July 31, 1885.)

COMPLAINT for bastardy, returnable before the police court of Pembroke.

The defendant moved there and seasonably renewed the motion here, to dismiss the complaint because it was served by a police officer, such an officer having no authority to serve the process. He also moved to dismiss the complaint because the police court exceeded its authority in taking the recognizance, it having

been taken, as in criminal cases, to the State. Both motions were overruled and the defendant excepted.

Mr. C. A. Gallagher, for the complainant.
Messrs. N. E. Martin, A. F. Burbank
and **Albin & Burbank**, for defendant:

The statute expressly limits the powers of police officers to criminal cases; they have no authority to serve civil process. *Gen. L., chaps. 25-30; Comp. Stat., ch. 120, § 1.*

Bastardy is a civil proceeding, and the rules of civil proceedings are applicable. *Marston v. Jenness, 11 N. H., 156.*

A person confined in jail for non-compliance with an order of the court that he should give security, etc., on a complaint under the law relating to bastardy, is not a prisoner confined on criminal process. *Harris v. County of Sullivan, 15 N. H., 81.*

A prosecution under the bastardy Act is a civil suit within the meaning of § 15, ch. 17, *Comp. Stat. Little v. Dickinson, 29 N. H., 56; Stokes v. Sanborn, 45 N. H., 274; Richmond v. Bowen, 54 N. H., 99.*

The statute governing the services of a bastardy warrant strongly implies that a police officer cannot serve it. "Whenever a warrant shall be issued by any justice, and the person charged therein shall either before or after the issuing thereof, escape or go out of the county, the sheriff thereof or his deputy, or any constable of the town to whom such warrant shall be directed," etc., *Gen. L., ch. 84, § 11.*

In *Little v. Dickinson*, before cited, the court dismissed the action because the defendant was bound over to appear in the wrong district. And in *Gilman v. Bartlett, 20 N. H., 168*, the court dismissed an appeal because the defendant recognized with but one surety when the law required two. And so if a justice of the peace grant an appeal in a criminal cause without sureties, the court above, on motion seasonably made, will dismiss the appeal. *State v. White, 41 N. H., 194.*

When an action comes to this court from an inferior tribunal, the fact that the recognizance or bond required by law is wrong, furnishes a sufficient cause for its dismissal on motion. *State v. Thornton, Aug. 18, 1884.*

Smith, J., delivered the opinion of the court: A proceeding under the bastardy Act is a civil suit. *Marston v. Jenness, 11 N. H., 156; Harris v. County of Sullivan, 15 N. H., 81; Little v. Dickinson, 29 N. H., 56; Stokes v. Sanborn, 45 N. H., 274; Richmond v. Bowen, 54 N. H., 99.*

But the forms of the proceedings are in most particulars of a criminal character. "It is founded upon a complaint made under oath. It is commenced by a criminal *capias* or warrant."

* * * It is returnable to a court of inquiry. The officer making the arrest cannot take bail. The defendant is bound to answer *instantly* upon being brought before the magistrate; and if there is probable cause for prosecution he is bound over for trial, and upon his failure to give bonds (recognize) he is committed." *Hill v. Wells, 6 Pick., 104, 107; Marston v. Jenness, 11 N. H., 156, 160.* The warrant is made returnable in the county in which the offense is alleged to have been committed or in which the respondent resides and, unless discharged, he is bound over for trial in the county

in which the offense is charged to have been committed. *Gen. L., ch. 84, §§ 1, 2.* The object of the statute is to cause the respondent to furnish indemnity to the town and to contribute to the mother of the child for its support.

The course of the procedure in the police or justice's court is so far criminal, that the warrant may be served by a police officer authorized to serve warrants in criminal cases. *Gen. L., ch. 254.*

The recognizance was properly taken to the State. The security is taken for the appearance of the respondent at the proper court. *Stokes v. Sanborn, 45 N. H., 274, 277.*

Exceptions overruled.

Bingham, J., did not sit; the others concurred.

Charles S. EASTMAN

v.

John J. DEARBORN *et al.*

1. A judgment by default against a non-resident of the State, without service of the writ or other notice of the suit than that given by publication, and without his appearance to the action, is void as a personal judgment against the defendant, beyond its effect upon attached property, and cannot be made the foundation of another suit, to collect the unsatisfied part.

2. Such a judgment may be valid, for the purpose of appropriating the attached property, to the payment of the debt, and for no other purpose.

Kendrick v. Kimball, 33 N. H., 482, qualified.

(Merrimack—Decided July 31, 1885.)

DEBT on a judgment.

Facts found by the court. July 3, 1877, the plaintiff commenced a suit against the defendant, and a horse of the defendant, attached upon the writ, was sold July 9, for \$43.15. The officer's return stated that he made no service of the writ upon the defendant, for the reason that he was not an inhabitant of the State. The defendant left the State in June, 1877 and did not return until some time in 1878 and during that time was not an inhabitant of the State. The suit was entered at the October Term, 1877, and continued to the next Term, with an order of notice to the defendant by publication, which was complied with. At the April Term, 1878, judgment was recovered against the defendant upon default for \$88.08, damages, and \$14.75, costs, and execution issued, upon which the money remaining in the hands of the officer was applied in part satisfaction. This suit is brought to recover the balance of the judgment. The defendant offered to show that the horse attached was his only horse and ex-

NOTE.—A discharge in insolvency is not a bar to an action on a demand secured by attachment before the insolvency proceedings. See *Gay v. Raymond, (Mass.) ante, 89.*

empt from attachment; and also that he did not know of the bringing of the suit or of the pendency thereof until long after the judgment was recovered. The plaintiff offered to show that the defendant did know of the bringing of the suit and of the attachment soon after the attachment was made. The court ruled that the evidence offered was immaterial and rejected it, and the parties respectively excepted. The court also ruled that the judgment obtained by the plaintiff was valid only as against the property of the defendant attached, and ordered judgment for the defendant, and the plaintiff excepted.

Mr. George R. Stone, for the plaintiff, cited: *Currier v. Sutherland*, 54 N. H., 475; *Hall v. Williams*, 6 Pick., 240; *Currier v. Gilman*, 55 N. H., 355; *Packard v. Matthews*, 9 Gray, 311; *Johnson v. Thaxter*, 12 Gray, 198; *Kendrick v. Kimball*, 83 N. H., 482; *Ward v. Cole*, 32 N. H., 452; *Ward v. Howe*, 38 N. H., 40, 41; *Ellsworth v. Learned*, 21 Vt., 535; *Lapham v. Briggs*, 27 Vt., 26; *Stevens v. Fisher*, 30 Vt., 200; *Morrison v. Underwood*, 5 Cush., 54; *Thatcher v. Gammon*, 12 Mass., 268, 269; *Morris v. Boomer*, 16 Wis., 547; *Story, Conf. L.*, §§ 21, 43, 46, 49, 50, 56, 539; *Picquet v. Swan*, 5 Mason, 43; *Pennoyer v. Neff*, 95 U. S., 740 (XXIV., Law. ed., 575).

Messrs. Shirley & Stone, for defendant:

Plaintiff cannot contradict the sheriff's return under which he claims jurisdiction. He cannot use the return to set up jurisdiction and deny it for the purpose of claiming another. *Brown v. Davis*, 9 N. H., 76; *Clough v. Monroe*, 34 N. H., 331.

An action against a non-inhabitant is a proceeding *in rem* as respects the property attached, but beyond that it is as if it had never existed. *Cooper v. Reynolds*, 77 U. S., 10 Wall., 313 (XIX., Law. ed., 931); *Thompson v. Whitman*, 85 U. S., 18 Wall., 457 (XXI., Law. ed., 897); *Pennoyer v. Neff*, 95 U. S., 714, 735 (XXIV., Law. ed., 565, 578); *Brooklyn v. Ins. Co.*, 99 U. S., 362, 370 (XXV., Law. ed., 416, 418); *Empire v. Darlington*, 101 U. S., 92 (XXV., Law. ed., 879); *St. Clair v. Cox*, 106 U. S., 350 (XXVII., Law. ed., 222); *Pana v. Bowler*, 107 U. S., 529 (XXVII., Law. ed., 424); *Nat. Bk. v. Peabody*, 55 Vt., 492; *S. C.*, 45 Am. Rep., 632; *McKinney v. Collins*, 88 N. Y., 216—224.

Allen, J., delivered the opinion of the court:

In the former suit, the defendant's property was attached and sold and the proceeds applied in part satisfaction of the judgment then obtained. The validity of that attachment or its sufficiency to enable the plaintiff to enter the action and give the defendant notice of the suit by publication according to the statutes (G. L., ch. 223, § 9; ch. 226, §§ 3, 4), cannot be questioned in this suit. If the proceedings by which the property was appropriated were irregular because the property was exempt from attachment, advantage of the irregularity cannot be taken in a suit to enforce the collection of the unsatisfied balance of the judgment.

The judgment which is attempted to be made the foundation of this action of debt, was rendered upon default, without other notice of the suit to the defendant, who was a non-resident, than that given by publication. At common

law a judgment is void unless rendered upon personal notice to the defendant or his appearance to the action; and this rule, as a part of the body of the common law, prevails in this State. *Wilbur v. Abbot*, 60 N. H., 40, and cases cited.

No court has jurisdiction beyond the State which created it and cannot effectively send its process for execution beyond the limits of the State; and an order of notice by publication made within the State cannot be more effective than a summons or other process sent out of the State. The natural and just right universally recognized, which every person has of appearing and answering to an action, before he shall, by a judgment, be deprived of liberty or property, is not met or sustained by process sent abroad for service, nor by a newspaper notice which may or may not reach the party; and no jurisdiction of the person is acquired by notice of that kind. Judgments may be valid for some purposes and void for other purposes. That a judgment may be valid against all parties and for all purposes, the court in which it is rendered must have jurisdiction of the subject-matter of the suit and of the person or persons against whom it is rendered. *State v. Richmond*, 26 N. H., 232.

By the attachment of the defendant's property within the State in the former suit, jurisdiction of the property was acquired and the judgment rendered, without other notice to the defendant than the statutory one by publication and without his appearance to the action was valid for the purpose of appropriating the attached property to the payment of the debt and for no other purpose. No jurisdiction of the defendant's person having been acquired by the proceedings, the judgment is void as a personal one against the defendant beyond its effect upon the property taken, and cannot be made the foundation of another suit to collect the unsatisfied part. *Bonwell's Lessee v. Otis*, 9 How., 336 [XIII., Law. ed., 164]; *Cooper v. Reynolds* [77 U. S.], 10 Wall., 308 [XIX., Law. ed., 931]; *Pennoyer v. Neff*, 95 U. S., 714 [XXIV., Law. ed., 565]; *Brooklyn v. Insurance Co.*, 99 U. S., 362 [XXV., Law. ed., 416]; *St. Clair v. Cox*, 106 U. S., 350 [XXVII., Law. ed., 222]; *Pana v. Bowler*, 107 U. S., 529 [XXVII., Law. ed., 424]; *Nat. Bk. v. Peabody*, 55 Vt., 492.

The principle is recognized and adopted in the Fourteenth Amendment to the Constitution of the United States, which declares that "No State shall deprive any person of life, liberty or property, without due process of law." Notice of a suit to a non-resident debtor by publication as a substitute for personal service within the State cannot be due process of law, and a judgment rendered upon such notice, without appearance of the defendant, in a suit brought to determine the private rights and obligations of the parties can have no validity.

The case of *Kendrick v. Kimball*, 83 N. H., 485, to the extent that it decides that a judgment rendered without personal service of process upon the defendant or without his appearance in the suit, is valid as a personal judgment upon which an action of debt can be maintained, cannot be sustained.

Exceptions overruled.

Smith, J., did not sit; the others concurred.

William KENNARD *et al.*, *Appts. (Defts.)*,

v.

Virginia KENNARD.

1. A copy of a will executed and proved according to the laws of another State, may be filed here with a copy of its probate, and will then have the same effect, in the disposition of property both real and personal, situated in this State, as though it had been executed and proved according to the law of this State.
2. The testimony of a lawyer of another State is admissible to prove the laws of that sister State.
3. It is the present right of future enjoyment whenever the possession becomes vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, which distinguishes a vested from a contingent remainder.
4. The interpretation of a will is the ascertainment of the testator's intention. *Hall v. Nute*, 88 N. H. 422, and *Hayes v. Tabor*, 41 N. H., 521, criticised and qualified.

(Rockingham ——— Decided July 31, 1885.)

APPEAL from a decree of the Judge of Probate, for the filing and recording of a copy of the will of Manning Kennard, deceased, and of the probate of the same in Pennsylvania, upon the application of Virginia Kennard, widow and legatee under said will.

Facts found by the court. Manning Kennard resided at Florence, Italy, at the time of his death in December, 1873. He left a will whereby he gave all his property, real and personal, to his wife, appellee, to hold for her own use forever. The will was executed in Florence, and was attested by but two subscribing witnesses.

To show the interest of the appellee under the will of Manning Kennard, a copy of the will of James Kennard was admitted in evidence, subject to exception. The will of James Kennard is as follows: "I, James Kennard, of Portsmouth, in the County of Rockingham, * * * do make, publish and declare this my last will and testament in manner and form following: first, I give and bequeath to my executors hereinafter named, to be held by them in trust for the following purpose, all my Rockingham Bank stock, consisting of 226 shares, 225 shares of which stand in the name of Manning Kennard, of Philadelphia, the remaining one share in my own name. I also give and bequeath to my executors to be held by them in trust for the following purpose, all my land in Austin Street, together with my dwelling-house No. 9 thereon, with all the furniture therein, which is not to be separated from the house except by consent of all parties interested: all

the dividend or interest that may accrue on the 226 shares of Rockingham Bank stock, after paying the taxes thereon, to be paid over to my beloved wife, Frances B. Kennard, during her natural life or widowhood, the house, furniture and land above named, to be also for her only use and benefit, she paying the taxes thereon during her life, or while she remains my widow. At her decease or marriage the whole of the Rockingham Bank stock, house, furniture and land before named, is to revert to my heirs as follows: to my son, Manning Kennard, fifty shares Rockingham Bank stock. * * * The house, furniture and land before named, together with all the rest and residue of my estate, personal, real or mixed, to be equally divided between my four children or their heirs."

The appellants contend that Manning Kennard took nothing under the will of James Kennard, because Frances B. Kennard survived him. Other exceptions are shown by the opinion of the court.

Messrs. James W. Emery and Wm. H. Rollins, for appellants:

The will of Manning Kennard is not executed as required by the laws of this State, being attested and subscribed by only two witnesses. Gen. L., 455, ch. 193, § 6.

The judge of probate has jurisdiction of the probate of wills, etc. Gen. L., 448, ch. 189, § 2.

If he allowed a will attested and subscribed by only two witnesses, his act would be void. *Morgan v. Dodge*, 44 N. H., 258; *State v. Richmond*, 26 N. H., 239; *Kimball v. Fisk*, 39 N. H., 116.

Prior to 1848 no particular formality was required as to the execution of wills of personal property. *Marston v. Marston*, 17 N. H., 506.

Three years after, the Legislature passed an Act requiring wills of personal property to be attested by three witnesses, in the presence of the testator, in the same manner as wills of real estate. L. 1848, 325, ch. 726. And such has been the law to the present time. Gen. L., 455, ch. 193, § 6.

There should be three credible witnesses to testify as to the identity of the will, capacity, sanity or insanity of the testator, and all questions which may arise as to the execution of the will. *Lord v. Lord*, 58 N. H., 10; *Carlton v. Carlton*, 40 N. H., 17.

It is a general rule that the parts of a statute, as well as different statutes relative to the same subject, are to be construed together. *Sloan v. Bryant*, 28 N. H., 71.

The general legislation on the subject-matter may be considered by the court. *Hayes v. Hanson*, 12 N. H., 284, 290; *Robinson v. Tuttle*, 37 N. H., 248.

There are many cases where what was clearly within the letter has been held not to be within the equity of a statute. Thus the letter of a statute has been enlarged or restrained according to the true intent and meaning of the makers. *Whidden v. Drake*, 5 N. H., 15.

The defect in the old law and the remedy provided in the new are to be considered, and one part of a statute to be construed by another, that the whole may, if possible, stand. *Barker v. Warren*, 46 N. H., 124; *Tappan v. Bellows*, 1 N. H., 100, 107.

Applying these rules to the case under consideration, we are sustained in contending that

NORM.—Execution and attestation of a will in this State, and proof thereof. See, *Welch v. Adams*, *ante*, 59, and *note*.

A vested interest is assignable. See, *Gibbens v. Gibbens (Mass.)*, *ante*, 98.

ch. 194, § 18, applies to wills executed according to the provisions of ch. 193, § 6.

If the evidence is incompetent, the finding of the judge must fail.

In Pennsylvania, registers of wills have jurisdiction of probate of wills, granting letters of administration, etc., etc. 2 *Purd. Dig. Pa.*, 1253, § 5; they are required to keep a record thereof in proper books. *Id.*, 1248, § 1; and wills, etc., must be recorded. *Id.*, 1254, § 9.

Strict compliance with the provisions of the statute must be shown. *Barstow v. Sprague*, 40 N. H., 32.

Here it has been held that the certificate of a register of probate is not evidence of a grant of administration. If a record of the grant is kept, a copy of that record is the proper evidence. If no record is kept, the register is not a certifying officer. *Morse v. Bellows*, 7 N. H., 568.

The records and judicial proceedings of the courts of a State are to be proved in a neighboring State by the attestation of the clerk and seal of the court, etc. Act of Congress, May 26, 1790; R. S., U. S., § 905.

Copies of the docket entries duly authenticated by the clerk according to the statute are admissible as evidence, but they must contain a full description of the court, the names of the parties and all the entries made in the case. *Philadelphia, etc., R. R. Co. v. Howard*, 18 How., 813, 381 (XIV., Law. ed., 160, 168).

In regard to wills, the law of the place where real estate is situated, is to govern as to the capacity of the testator, the extent of his power and the form and solemnities necessary to give the will its due attestation and effect. *Heydock's Appeal*, 7 N. H., 502; *Eyre v. Storer*, 87 N. H., 122.

To give the judge jurisdiction to allow the copies to be filed and recorded, there must be an application for that purpose. Gen. L., ch. 194, § 14.

Kennard can be interested in the estate of J. Kennard only through the will of M. Kennard, as she cannot take as heir to her husband. *Richardson v. Martin*, 55 N. H., 45.

When a legacy is to take effect at a future time it is contingent and lapses by the death of the legatee before the time. *Snow v. Snow*, 49 Me., 159.

When the words of the bequest which look to the future, apply to the substance of the gift, the vesting is suspended; but if they apply to the time of payment, the legacy vests at once upon the death of the testator. If the bequest be of a sum of money to the legatee at the age of twenty-one years, etc., then the interest is contingent. *Brown v. Brown*, 44 N. H., 283; *Jarm. Wills.*, 760.

At the wife's decease or marriage, the property is to revert to testator's heirs. Thus the time when the legacy was to take effect and the property be distributed was fixed by the marriage or death of Mrs. J. Kennard, and nothing could vest in M. Kennard until that event happened. *Hill v. Bank*, 45 N. H., 270.

When an estate is limited to A for life, remainder to B, after the death of A, the remainder is contingent. *Robertson v. Wilson*, 38 N. H., 51; *Hall v. Nute*, 38 N. H., 424; 41 N. H., 527, 528, 529.

Messa, Lincoln L. Eyre and Frink & Batchelder, for appellee:

N. H.

Words of attestation in a will are not necessary; they are material only as showing the intent of the attesting signers. The court must be satisfied that the names were written "*animo attestandi*." *Ela v. Edwards*, 16 Gray, 92; *Chaffee v. Baptist, etc.*, 10 Paige, Ch., 85, 89; *Fry's Will*, 2 R. L., 88; *Forsaith v. Clark*, 21 N. H., 421; *Hogan v. Grosvenor*, 10 Met., 54.

That the witnesses signed in the testator's presence, can be shown by parol. 1 *Jarm. Wills*, 219 (Linn's ed., 1880).

The acknowledgement may be made before each witness separately. 1 *Jarm. Wills*, 210; *Deucey v. Deucey*, 1 Met., 849.

The papers in this case constitute a record duly attested with the seal of the court and a certificate of a judge of the State in which the will was proved, and this is sufficient under the Rev. Stat. U. S. See, *Shannon v. Shannon*, 111 Mass., 381.

The authentication of this record follows the requirements of the above Act of Congress in every particular, and therefore must be taken as a due authentication in the courts of New Hampshire, and a "full faith and credit" given to it. See, *Bigelow Est.*, 3d ed., 171, 172.

There is no principle of interstate law better settled than that the transfer and disposition of personal property is governed by the law of the domicile; and it was found in the court below that the domicile of Manning Kennard was in Pennsylvania. *Story, Conf. L.*, 8th ed., §§ 464-472.

Even admitting that real estate is held, enjoyed or acquired according to the *lex rei sita*, it is by no means clear that the mode of transferring it shall be in accordance with that law; it is not clear that the will of Manning Kennard should be executed according to the laws of New Hampshire, if his devisee is entitled to it by the New Hampshire law. *Story, Conf. L.*, 8th ed., §§ 437, 438.

By chapter 147, R. S., it was provided that a copy of a foreign will, executed with the formalities required by the laws of our State, might be filed and have the same effect as the probate of the will here would have. This Act was unchanged in the Comp. Stat. and the Gen. Stat., but in 1868 the present amended Act was passed. It is very evident that the Legislature intended to extend the scope of the Act, so that the same estate in this jurisdiction would be transmitted by will, duly executed according to the laws of the testator's domicile, as would pass under the Acts of 1842, 1858 and 1867.

Similar statutes to ours exist in several of the States, and they have undergone judicial interpretation in their respective States. *Crippen v. Dexter*, 18 Gray, 330; *Bayley v. Bailey*, 5 Cush., 245; *Parker v. Parker*, 11 Cush., 520; see, *Ives v. Allen*, 12 Vt., 589.

The only countenance that the appellant has for the position that Manning Kennard's estate is a contingent remainder is derived from the two cases in our State to which he refers: *Hall v. Nute*, and *Hayes v. Tabor*. These decisions have excited the unfavorable comment of no less able an author than Washburn. 2 *Washb. Real Prop.*, ch. 4, § 1, n.

Chancellor Kent gives the very case of a demise to A for life, and after his death to B, as an example of a vested remainder. 4 Kent,

Com., 202. And Jarman says, where one devises unto A for life, and after his decease in fee to B, the respective estates of A and B are made vested, the one being an estate in possession, and the other in remainder. 2 Jarm. Wills, 407. The English and American authorities to the same point are very numerous, and many of them are collected in the note to the text in Jarman on Wills. See, also, *Loring v. Coolidge*, 99 Mass., 191; *Hill v. Bacon*, 106 Mass., 578.

But we are relieved from discussing such a question, by the statutory law passed in New Hampshire to meet any defects in that regard. Gen. L., N. H., 1878, ch. 194, § 313.

A will executed out of the State but with the formalities now required by the laws of this State, will be sufficient to pass realty, and the authentication has the same effect. See, *Stark v. Parker*, 56 N. H., 481; *Bayley v. Bailey*, (*supra*).

A duly authenticated copy of a foreign will shall, when admitted in Massachusetts, be effectual as to real, as well as personal property. *Dublin v. Chadbourn*, 16 Mass., 433; *Parker v. Parker* (*supra*); and see, *Shannon v. Shannon* (*supra*); *Slocumb v. Slocumb*, 13 Allen, 38; *Ives v. Allyn* (*supra*).

Wherever the preceding estate is limited, so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse* and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. *Fearne*, Rem., 4th Am. ed., 215, 216.

Where a testator creates a particular estate, and then goes on to dispose of the ulterior interest expressly in an event which will determine the prior estate, the words descriptive of such event, occurring in the latter devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting. 2 Jarm. Wills, 5th ed., 407; *Doe v. Selby*, 2 B. & C., 930.

A vested remainder is where a present interest passes to a certain and definite person to be enjoyed *in futuro*. *Doe v. Considine*, 73 U. S., (6 Wall.), 474-476 (XVIII., Law. ed., 874, 875).

It is the present capacity of taking effect in possession if the possession were fallen. 1 Prest. Est., 70.

A remainder is never deemed to be a contingent one, when it can be construed to be vested, within the intention of the one who creates it. 2 Washb. Real Prop., §§ 9, 12, 15, 16.

An estate is accordingly said to be vested in one in possession when there exists in his favor a right of present enjoyment. 2 Flint, Real Prop., 259; *Pearce v. Savage*, 45 Me., 101.

The test of the character of a remainder is to be found in its present capacity for being taken should the particular estate now expire, not in the probability or improbability, possibility or impossibility, of it outlasting the life of the particular estate. 2 Shars. Lead Cas. Real Prop., 281, and cases there cited.

Thus where an estate is given to A for life, and after his death to B, B has a vested remainder, although he may not outlive A. *Allen v. Mayfield*, 20 Ind., 293; *Smith v. West*, 103 Ill., 332.

The principle suggested in *Hall v. Nute*, 38 N. H., 424, and *Hayes v. Tabor*, 41 N. H., 521, has been commented on by so great an authority as Washburn in his law of Real Property, in a note to § 17, p. 548, Vol. 2, 4th ed., as follows: The courts of New Hampshire have recently adopted a principle of contingency in respect to remainders which does not appear to have been heretofore recognized in other quarters, or even to a casual observer to find support in the authority on which the doctrine is said to rest.

A grant of an estate to A for life, with remainder to B in fee, or to A for life and after his death to B in fee, is a grant of a fixed right of future enjoyment in B. 4 Kent. Com., 202; *Fearne*, Rem., 2, note; *Carter v. Hunt*, 40 Barb., 89; *Price v. Sisson*, 13 N. J. Ch., 168, 176; *Williamson v. Fields*, Exrs. 2 Sandf. Ch., 583; *Moore v. Lyons*, 25 Wend., 144; *Gourley v. Woodbury*, 42, Vt., 395.

A remainder is not to be considered as contingent where it may be construed, consistently with the testator's intention, to be vested. 2 Redf. Wills, *215; see, *Felton v. Sawyer*, 41 N. H., 202; *Dennett v. Dennett*, 43 N. H., 499; *Emery v. Judge of Probate*, 7 N. H., 152.

In favor of the rule of construing a remainder vested if possible, words of futurity apparently importing a contingency are, in the absence of a clearly contrary intent, regarded not as conditions precedent or as postponing the time at which the remainder is to vest, but as specifying the time when the remainder-man is to take possession of his estate. *Linton v. Laycock*, 33 Ohio, St. 129; *Taylor v. Mosher*, 29 Md., 443; *Fairfax v. Brown*, 60 Md., 50; *Danforth v. Talbot's Admr.*, 7 B. Mon., 623; *Hancock v. Titus*, 39 Miss., 221; *Roome v. Phillips*, 24 N. Y., 463; *Harris v. Alderson*, 4 Sneed, 250; *Rogers v. Rogers*, 11 R. I., 38; 2 Shars. Lead. Cas. Real Prop., 293.

A remainder after A's death to B and C or their heirs, vests in B and C; "or their heirs," are words of limitation, and not of substitution. *McGill's App.*, 61 Pa. St., 46; *Mull Exrs. v. Mull, Admr.*, 81 Pa. St., 393; *King v. King*, 1 W. & S., 205, cited in 2 Jarm. Wills, 410, note (a).

The principle as laid down by Hawkins, Wills, 180, is as follows: *Rule*. A devise of real estate to A or his heirs, gives to A an estate in fee, the word "or" being read "and." See cases there cited; also see, *Patterson v. Hawthorne*, 12 Serg. and R., 112; *King v. King*, *supra*; *Buckley Admr. v. Reed*, 3 Harris, 83 (15 Pa. St.); *McGill's App.*, 11 P. F. S. (61 Pa. St.), 46; *Provencher's App.*, 17 P. F. S. (67 Pa. St.), 463. In *Roe v. Griffiths*, 1 W. Bl., 606, Lord Mansfield expressed himself of the opinion that wherever, in the case of a contingent, springing or executory use, the person who was to take was so certain that it might be descendible, it was also devisable. *Moor v. Hawkins*, cited in *Roe v. Jones*, 1 H. Bl., 80, affirmed in the King's Bench unanimously in *Jones v. Roe*, 3 Duff. & E., 88; *Fearne*, Rem., 371.

One well recognized distinction between a vested and contingent remainder is, that in the former case there is a person in being capable of taking the remainder upon the determination of the precedent estate. 2 Redf. Wills, 506.

A remainder is not to be considered as contingent, where it may be construed, consistently

with the testator's intention, to be vested. *Dingley v. Dingley*, 5 Mass., 535; 2 Redf. Wills, 627.

Even if the interest of Manning Kennard was a contingent one, it is transmissible like a vested interest, and the devisee or legatee took the title when the contingency happened. *Winslow v. Goodwin*, 7 Met., 377; *Moor v. Hawkins*, (*supra*).

Allen, J., delivered the opinion of the court:

Several reasons of appeal from the decree of the probate court, allowing a copy of Manning Kennard's will with a copy of the probate by the Orphans' Court of Philadelphia to be filed, are assigned.

The first reason, that of want of domicile of the testator in Philadelphia, being found against the appellants, cannot prevail.

The second reason is that the will was not executed according to the laws of New Hampshire, in that the execution of the will was in the presence of only two witnesses, who subscribed their names to the attestation. The provisions of the Statute, permitting the copy of a will with its probate made in another State, to be filed, do not require the execution of the will to be according to the laws of this State, but only according to the laws of the State where probate of the original will has been made. G. L., ch. 194, § 12.

The will was executed and proved according to the laws of Pennsylvania, where the domicile of the testator was. The testimony of two witnesses, experienced lawyers of Philadelphia, was competent to prove what the law of that place was upon the subject of executing and proving wills, *Rickard v. Basley*, 26 N. H., 152, 169, 170, 171, and cases cited, and their testimony accords with the published statutes and judicial decisions of that State. Laws Pa., 1833, 249, § 6; *Purd. Dig.*, 1872, 1474, § 6.

The existence or non-existence of a foreign law is a question of fact, and the law of Pennsylvania having been found, upon competent evidence, to be as claimed by the plaintiff, that finding is conclusive.

Another reason of appeal is, that no duly authenticated copy of the will and probate was presented at the probate court here. The evidence was that the record, of which a copy is produced, is the only record kept of the probate of wills in Pennsylvania. The papers produced were a copy of the will, the affidavits of witnesses to the genuineness of the signatures of the testator and witnesses to the will, and the certificate of the register of wills to its due allowance in the orphan's court. These were duly attested by the register, and the seal of the court was attached, with the certificate of the presiding Judge to the official character of the attesting officer and that his attestation was in due form. The copies were copies of the only record kept and were authenticated according to law. R. S., U. S., § 905.

The remaining reason of appeal is that the copies are filed with a view of transmitting title to real estate in New Hampshire and the will, not being executed according to the laws of this State, cannot have that effect. The law in general is that real estate is transmitted according to the law of the State or country where it is situated. Until 1868, to enable one interested in a will to produce and file a copy with a copy

of its allowance in court, and make it effective to operate upon property situated here, the will must have been executed according to the laws of New Hampshire. R. S., ch. 157, § 13; C. S., ch. 166, § 13; G. S., ch. 175, § 13.

In that year (Laws of 1868, ch. 1, § 50), it was enacted that a copy of any will executed out of the State and allowed in a court with probate powers in any other State or county according to the laws thereof, on the application of any person interested, may, with a copy of the probate, be decreed to be filed in the probate office of any county where there is property upon which the will may operate, and the decree shall have the same effect as if the will were executed according to the formalities required by the laws of this State. G. L., ch. 194, § 13. Under that statute, if the applicant, Virginia Kennard, had any interest in the will of Manning Kennard, a copy of it duly proved in Pennsylvania, the State of his domicile, was properly decreed to be filed, and that being done, it operates to transmit real estate situated in Rockingham County as effectively as if it had been executed in the presence of three witnesses according to the requirements of the New Hampshire Statute of Wills.

The defendants, who take this appeal, claim that Virginia Kennard, the plaintiff, has no interest in the will of her husband, Manning Kennard. By the terms of that will, the testator gave all his property, real and personal, to the plaintiff. If there was any property upon which the will would operate in New Hampshire, it came to Manning Kennard through the will of his father, James Kennard, and is situated in Rockingham County.

James Kennard, by his will, gave his property, consisting of bank stock, furniture and a house and land in Portsmouth, to his executors to be held by them in trust for the use and benefit of his wife, Frances B. Kennard, during her natural life or widowhood, and at her decease or remarriage to revert to his heirs; fifty shares of bank stock and an equal fourth part of the furniture, house and land and other property, being designated as the share of his son, Manning Kennard. James Kennard died in 1856, and his widow never remarried. She enjoyed the use and income of all the property named in her husband's will until her death in 1882. She survived Manning Kennard who died in 1878. It is claimed by the defendants, that the interest in the share of his father's estate designated for him never vested, and he having died before the life estate of Frances B. Kennard terminated, nothing of that share was transmitted by his will.

The bequest of the personal estate by limitation over, after the use for life by Frances B. Kennard, is supported in the nature of an executory devise (*Ladd v. Harvey*, 21 N. H., 514), and, as a bequest to Manning Kennard to come into enjoyment at a future day, vested immediately upon the death of the testator. *Brown v. Brown*, 44 N. H., 281. The fifty shares of bank stock and a fourth part of the furniture and other personal property, if any, passes by the will of Manning Kennard to the plaintiff as his sole legatee.

In the devise of the real estate, the limitation over, by way of remainder to Manning Kennard and others, created a vested remainder, if

Manning Kennard, then living, had an immediate right to the possession of the estate designated to him upon the ceasing of the prior estate. The prior estate would terminate at all events upon the death of the life tenant, an event certain to happen; and the time for coming to the enjoyment of the estate being fixed by an event certain, the right of enjoyment by a person then in being, immediately upon the occurrence of the event and the termination of the prior estate, was established.

It was not necessary to vesting the remainder that Manning Kennard should survive the first taker. It is the present right of future enjoyment whenever the possession becomes vacant and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder. When the event on which the preceding estate is limited must happen, and when also it may happen, before the expiration of the estate limited in remainder, the remainder is vested. 4 Kent, Com., 202, 203; 2 Washb. Real Prop., 228; Jarm. Wills, ch. 25, § 1, and cases cited.

The provision that the life estate should terminate on the marriage of the life tenant, did not prevent the remainder from vesting. For as that estate would terminate at all events with the death of Frances B. Kennard, the uncertain contingency of her marriage prior to that time, if at all, could not change the character of the remainder from a vested to a contingent one; for in any event the ulterior estate would come in on the death of the life tenant, and by the terms of the devise, the same person would take the estate on the marriage of the life tenant. 2 Jarm. Wills, 414, 415; 2 Redf. Wills, pp. 596, 597; *Farmers' Bank v. Hooff*, 4 Cranch (C. C.), 323; *Chappel v. Avery*, 6 Conn., 81; *Ferson v. Dodge*, 23 Pick., 287; *Biddle's Appeal*, 69 Pa. St., 190.

In the construction of the devise, the rule of interpretation is the ascertainment of the testator's intention. *Rice v. Society*, 56 N. H., 191, 197, 198, 203; *Brown v. Bartlett*, 58 N. H., 511; *Wilkins v. Ordway*, 59 N. H., 378; *Kimball v. Lancaster*, 60 N. H., 264; *Sanborn v. Sanborn*, 61 N. H. That intention is gathered not only from the words of the devise, but as well from the language of the whole will, from the relations of the testator to the persons who are the objects of his bounty and from surrounding circumstances. The old and arbitrary method of always giving to certain words and phrases a technical and fixed meaning despite the intention of the testator (*Holmes v. Cradock*, 3 Ves., 317), and of always making the application of artificial rules the test of construction (*Scott v. Chamberlayne*, 3 Ves., 302; *Martin v. Holgate*, L. R., 1 H. L. Cas., 175), has often led to gross injustice and the breaking of wills, and does not now prevail. The more liberal and natural rule and one which makes the ascertainment of the testator's intention the paramount test of accuracy in interpretation, is now more generally applied. *Pearsall v. Simpson*, 15 Ves., 29; *Leake v. Robinson*, 2 Mer., 363, 386; *Leeming v. Sher-*

ratt, 2 Hare, 14; *Thompson v. Thompson*, 28 Barb., 432; *Wright v. Miller*, 8 N. Y., 9; *Roome v. Phillips*, 24 N. Y., 463; *Letchworth's Appeal*, 30 Pa. St., 175; *Chess' Appeal*, 87 Pa. St., 362; *Dingley v. Douglass*, 5 Mass., 537; *Furness v. Fox*, 1 Cush., 184; *Eldridge v. Eldridge*, 9 Cush., 516; *Fay v. Sylcester*, 2 Gray, 171; *Barton v. Bigelow*, 4 Gray, 853; *Childs v. Russell*, 11 Met., 16; *Throop v. Williams*, 5 Conn., 98; *Cooper v. Hepburn*, 15 Gratt., 551; *Thompson's Lessee v. Hoop*, 6 Ohio St., 480; *Sinton v. Boyd*, 19 Ohio St., 30; *Branson v. Hill*, 31 Md., 181; *Saylor v. Plaine*, 31 Md., 158; *Clark v. Fennison*, 33 Md., 85; 1 Redf. Wills, 423; 2 Id., 619; 1 Jarm. Wills, 753 and note; 2 Id., 436; 2 Washb. Real Prop., 227; 2 Cru. Dig., 203.

In doubtful cases a construction is favored that gives a vested rather than a contingent interest, and except the contrary appears in clear and unmistakable terms, it will be presumed that the testator intended to dispose of his whole estate by the will. It is plain from the terms of his will, that James Kennard never intended or contemplated leaving a part of his estate to lapse by reason of a doubtful contingency, or for want of more express words indicating that the remainder created by the devise should vest at once on the death of the testator. The intention is as manifest that Manning Kennard should enjoy the estate designated for him after the termination of the widow's prior estate, as that the widow should enjoy the use and income of the estate given to trustees for her benefit during life or widowhood. It is as if James Kennard had given the whole estate to Manning and his other children subject to the widow's enjoyment of the use for life or so long as she might remain unmarried. Looking at the terms of the devise and the intention of the testator as gathered therefrom, the only conclusion that can be reached is that the devise to Manning Kennard in remainder, after the satisfaction of the prior interest of Frances B. Kennard, is a vested remainder, and the estate so devised is transmitted by Manning Kennard's will.

The case of *Hall v. Nute*, 38 N. H., 422, followed by *Hayes v. Tabor*, 41 N. H., 521, is cited, as authority against the view here expressed. To the extent that these cases substitute an arbitrary and fixed rule of interpretation for one which makes the ascertainment of the testator's intention the guide in construction, they are overruled. Upon the rule of testamentary interpretation, established in this State, it is immaterial whether the doctrine of remainders is correctly or incorrectly applied in *Hall v. Nute* and *Hayes v. Tabor*. Whatever that doctrine may be and however it may be applied, it does not set aside the supreme rule that the interpretation of a will is the ascertainment of the testator's intention. If it upholds the intention disclosed by the terms of the will in this case, it is useless; if it does not uphold it, it is equally useless as it cannot break the will.

Decree affirmed.

Clark, J., did not sit; the others concurred.

SUPREME COURT OF RHODE ISLAND.

PETITION OF William M. BAILEY, Jr., et al., for an opinion of the court.

1. When a power, coupled with a trust, is given to two or more persons to be executed by them jointly, and one renounces, the other or others may execute the power as if originally given only to them, that the trust may not fail nor suffer delay.
2. A, by will, devised and bequeathed his estate to B and C in trust, to sell, to invest the proceeds, and to use the income for his daughters during their lives with remainder over. In case of the death, refusal or inability of one of the trustees, the testator desired the other to fill the vacancy. One of the trustees refused the trust; the other did not make an appointment in his stead, but alone made sales and gave deeds of the realty devised. Held, that the sales and deeds so made and given by the one trustee, were valid. Held, further, that such sales and deeds were valid, whether the estate devised to the trustees was a joint tenancy or under Pub. Laws, R. I., Dig. of 1844, p. 197, § 16; Pub. Stat., R. I., cap. 172, § 1,* a tenancy in common.

(Kent— Opinion rendered June 26, 1886.)

CASE STATED for an opinion of the court under Pub. Stat., R. I., cap. 192, § 23, as follows:

"William E. Greene, being an inhabitant of North Providence, died September 19, 1851, leaving a last will and testament containing the following provisions:

Second. I give, devise and bequeath all the rest and residue and remainder of my estate, both real and personal, to Richard J. Arnold and Zachariah Allen, Esquires, of the City of Providence, their heirs, executors, administrators and assigns forever, in trust for the uses and purposes following, to wit:

My will is that the said trustees shall, whenever and as soon as a sale can be judiciously made in their discretion, sell and dispose of the

* The Public Laws of Rhode Island, Digest of 1844, p. 197, § 16; see, also, Pub. Stat., R. I., cap. 72, § 1, provide:

"All gifts, grants, feoffments, devises and other conveyances of any lands, tenements and hereditaments which shall be made to two or more persons, whether they be husband and wife or otherwise, and whether for years, for life, in tail or in fee, shall be taken, deemed and adjudged to be estates in common and not in joint tenancy, unless it is or shall be therein expressly said that the grantees, feoffees or devisees shall have or hold the same lands, tenements or hereditaments as joint tenants or in joint tenancy, or to them and the survivors or survivor of them, or unless other words be therein used clearly and manifestly showing it to be the intention of the parties to such gifts, grants, feoffments, devises or other conveyances, that such lands, tenements and hereditaments shall vest and be held as joint estates and not as estates in common."

NOTE.—On a devise in trust, for the use of another with directions to trustee to assign, transfer and convey, for the purposes designated in the will, trustee takes a fee simple, with power to sell and convey the fee. Ames v. Ames (R. I.), ante, 33, and note.

R. I.

real estate belonging to me in the Town of North Providence aforesaid, and being the farm whereon I now reside, and being the same estate purchased by me from Richard J. Arnold and Tristram Burgess, Esquires (excepting therefrom the burying place where my late wife lies buried, and containing about one quarter of an acre bounding on the Chalkstone road), and that they invest the proceeds thereof in the stock of banks in the State of Rhode Island or in notes secured by mortgages on real estate. I further direct my said trustees to sell and dispose of all other property belonging to me and not disposed of by this will, as soon as practicable after my decease, and invest the proceeds thereof in the manner prescribed with reference to the proceeds of my real estate, and the income arising from all my property, I desire the said trustees to collect and receive and appropriate the same as follows: * * *

I further desire my said trustees to change the investment of my said property from time to time as they may judge expedient, but not to sell any of the bank stock now possessed by me unless they judge it expedient so to do. In case of the death, resignation, refusal or inability to act, of either of said trustees, I desire the vacancy to be filled by the other trustee; and in case of the death, resignation, refusal or inability to act on the part of both of said trustees, I desire the Court of Probate of the Town of North Providence for the time being to fill said vacancy. * * *

The said will was duly admitted to probate in said North Providence on the eleventh day of October, A. D. 1851. The said William E. Greene, at his decease, was seised and possessed in fee simple of a tract of land on which said testator resided, situate on the northerly side of Chalkstone Avenue in said Providence, then in said Town of North Providence, containing about thirteen acres, which by *mesne* conveyances under the deed from Richard J. Arnold, executor, hereinafter mentioned, is now owned by said William M. Bailey, Jr., trustee of Harriet B. Bailey, wife of William M. Bailey, and by Thomas Brown as claimed by them. Although Richard J. Arnold and Zachariah Allen were by said will named as executors and trustees thereunder, the said Richard J. Arnold alone accepted the trust as executor of said will, and qualified as such and alone accepted the trusts as trustee thereunder. He did not obtain any license from the Court of Probate, North Providence, to sell the parcel of real estate in question, but did convey said tract of about thirteen acres to said William M. Bailey by a deed signed by him as executor.

The said Zachariah Allen did not accept the trust as trustee under said will nor did he exercise any power nor do any act thereunder; on the twenty-seventh day of June, A. D. 1868, he also made affidavit that he always refused to act as trustee under said will, which affidavit is recorded in the Probate Records of said North Providence, in Vol. 12 at page 31, and that said Arnold did not appoint any trustee in the stead of said Allen prior to making said deed.

It is further agreed that the proceeds of said sale were duly applied under the provisions of said will and that the parties interested thereunder have duly received the income

thereof, and that no objection has been raised by any party interested under said will as to said sale and deed, until these questions raised by Goff as intending purchaser of said parcel of land from Bailey, Jr., trustee, and Brown.

And these petitioners differing as to the true construction of said will and of the power of said Richard J. Arnold to convey the said estate either as executor or as sole trustee, the said Goff claiming that said executor had no power to sell and convey the same as executor of said will; and that if said Richard J. Arnold did by virtue of said will convey said estate, he had no power so to do, inasmuch as the discretionary power to sell said estate given to said Arnold and Allen by said will did not pass to said Arnold upon said Allen refusing to act as trustee under said will and could not be exercised by said Arnold alone.

And said William M. Bailey, Jr., trustee as aforesaid, William M. and Harriet B. Bailey and said Thomas Brown claim that taking all the parts of said deed together considered with reference to said will and in view of the declaration of Zachariah Allen, and especially after this lapse of time, that their title to said parcel so sold as aforesaid is salable and such a title as a court of equity on a bill for specific performance would compel a purchaser to take.

The said parties therefore request the opinion of the Honorable Court as to:

First. Whether the aforesaid said deed from Richard J. Arnold, executor to William M. Bailey, did convey a good title to the land described therein.

Secondly. Whether said title of said Bailey, Jr., trustee, and Brown, is a salable title in view of all the circumstances hereinbefore set forth."

Mr. Joseph C. Ely, for petitioners:

A disclaimer by one of two trustees, appointed by will devising an estate to be sold and the proceeds invested, by non-acceptance of the trust, is sufficient. *Perry, Trusts*, § 270.

Such disclaimer vests the whole estate in the trustee accepting as sole trustee. *Perry, Trusts*, § 373; *Smith v. Wheeler*, 1 Vent., 130; *Freem. Coten.*, § 45, note; see, also, *Gray v. Lynch*, 8 Gill, 403; *Goss v. Singleton*, 2 Head (Tenn.), 67; *Ellis v. Boston, H. & E. R. R. Co.*, 107 Mass., 18; *Clemens v. Clemens*, 60 Barb., 366; *Taylor v. Benham*, 5 How., 233 (XII., Law. ed., 130).

In New Jersey, the rule on disclaimer is held to be good. *Scully v. Reeves*, 2 Green, Ch., 84; *King v. Donnelly*, 5 Paige, 46; *In Re Stevenson*, 8 Paige, 420; *Adams v. Taunton*, 5 Madd., 438; *Nicolson v. Wordsworth*, 2 Swanst., 365.

When all persons appointed trustees renounce the trust except one, the trust may be executed by that one, even if the power is in their discretion as to time of its exercise, if the sale is imperatively required by the will. *Cooke v. Crawford*, 18 Simons, 91; *Adams v. Taunton*, 5 Madd., 435; *Bradford v. Monks*, 132 Mass., 405; *Saunders v. Schmalzle*, 49 Cal., 59; *Druid Park Heights v. Oettinger*, 53 Md., 46; *DeSausure v. Lyons*, 9 S. C., 492; *Story, Eq. Jur.*, § 1061; *Perry, Trusts*, §§ 414, 499, 502.

A deed by such sole trustee is good, even though the will authorized filling a vacancy in the number of trustees. *Golder v. Bressler*, 105, Ill., 419; *Perry, Trusts*, § 414; *Re Norton and Hallet*, 10 Reporter, 414.

His description of himself in the deed, as executor instead of trustee, he being so actually, is a mere formal defect from which a court of equity will relieve the purchaser and after a lapse of time, in this case thirty-three years, equity will consider that done which ought to have been done, and he would be estopped by his covenants. *Perry, Trusts*, § 511, c; *Campbell v. Johnson*, 5 Reporter, 71; *Warner v. Ins. Co.*, 17 Reporter, 97.

Our statute as to joint tenancy expressly includes estates by entirety, which, under similar statutes elsewhere, are held to be exceptions thereto. *Thomas v. De Baum*, 1 McCart. (N.J.), 37; *Brownson v. Hull*, 16 Vt., 309.

A statute abolishing all survivorships does not apply to trusts. *Hannah v. Carrington*, 18 Ark., 104; nor to trustees, *Parsons v. Boyd*, 20 Ala., 118; *Sander's Heirs v. Morrison*, 7 T. B. Mon., 54; *Gray v. Lynch*, 8 Gill (Md.), 403; *Earle v. Wood*, 8 Cush., 443; *Robison v. Codman*, 1 Sum., 121; but see, *Webster v. Vandewater*, 6 Gray, 429; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq., 394; *Saunders v. Schmalzle*, 49 Cal., 59; *McAllister v. Plant*, 54 Miss., 106.

Whether the legal estate survives or not, the power to sell being coupled with an interest and being imperative and necessary, survives. *Tillinghast v. Champlin*, 4 R. I., 173; *Taylor v. Benham*, 5 How., 233, (XII., Law. ed. 130); *Peter v. Beverly*, 10 Pet., 582 (IX., Law. ed., 522); *Franklin v. Osgood*, 2 Johns. Ch., 1; *Colsten's Heirs v. Chaudet*, 4 Bush (Ky.), 666; *Williams v. Otey*, 8 Humph. (Tenn.), 563.

Mr. Joseph E. Spink, for petitioner, David F. Goff:

The discretionary power of sale and investment given to the two trustees could not be exercised by the surviving or remaining trustee. *Bailey v. Burges*, 10 R. I., 422, and cases there cited.

The present statute was in force at the date of the will. *Pub. Laws*, R. I., 1844, p. 197.

Our Statute was evidently copied from that of Massachusetts; and in that State a devise to two trustees, without words creating a joint tenancy, or of survivorship, was held to constitute a tenancy in common. *Earle v. Wood*, 8 Cush., 446; and so, under a similar statute in New Jersey; *Boston Franklinite Co. v. Condit* (*supra*).

Durfee, Ch. J., delivered the opinion of the court:

We do not find it necessary to decide whether our statute extends to devises and conveyances in trust or not, for assuming that it does, and that the devise to Arnold and Allen must be construed as a devise to them as tenants in common, and that, consequently, Arnold acquired title to only an undivided half of the real estate devised, we are, nevertheless, of the opinion that Arnold, on disclaimer by Allen, had power to sell the entire estate, and that his deed to Bailey therefore vested in Bailey the entire estate in land described in it. The reason which has led us to this conclusion is that the power to sell which is given by the will to Arnold and Allen, was not a mere power to be exercised or not at their pleasure or discretion, but a positive direction, a duty imposed on them to convert the land into money for use and investment, in a manner which is plainly declared, for the benefit of the *cestuis que trustent*, a duty so dis-

unct, so obligatory, so imperative, that if it had been neglected the *cestuis que trustent* could have resorted to this court in equity to enforce its execution. In other words, the power is of that class of powers which are denominated powers coupled with a trust; and we think that where such a power is given to two or more to be executed by them jointly, if one renounces, the other or others will take the power as if it were originally given only to them, to the end that the trust may not fail of execution, or suffer detriment or delay. *Howell v. Barnes*. Cro. Car., 382; *Lessee of Zebach v. Smith*, 3 Binn., 69; *Osgood v. Franklin*, 2 Johns. Ch., 1; *Franklin v. Osgood*, 14 Johns., 527; *Jackson, dem. Hunt v. Ferris*, 15 Johns., 346; *Peter v. Beverly*, 10 Pet., 532 [IX., Law. ed., 522]; *Putnam Free School v. Fisher*, 30 Me., 523. A review of some of these cases will set the doctrine in a clearer light.

Howell v. Barnes was a question out of chancery propounded to the common law judges. "The case was," says the report, "one Francis Barnes, seised of land in fee, deviseth it to his wife for her life, and afterwards orders the same to be sold by his executors hereunder named, and the money thereof coming to be divided amongst his nephews; and of the said will made William Clerk and Robert Cheffy his executors. William Clerk dies; the wife is yet alive. Two questions were made. *First*. Whether the said William Clerk and Robert Cheffy had an interest by this devise, or but an authority. *Secondly*. Whether the surviving executor hath any authority to sell." The Judges all resolved "That they have not any interest, but only an authority, and that the surviving executor, notwithstanding the death of his companion, may sell." And so the Judges certified their opinions. The questions were answered without reasons, but if the Judges had given their reasons, they probably would have said that the power survived, not because it was coupled with a trust, but because it was official, not merely personal, and therefore followed the office to the surviving executor, being essential to the performance of a duty imposed upon the executors as such, for the purpose of carrying the will into effect. The meaning, however, would have been essentially the same as if they had used the language of the chancery courts, and said that the power survived because it was a power coupled with a trust. The law is quoted in *Osgood v. Franklin*, 2 Johns. Ch., 1; in support of the doctrine that a power given to two or more goes to the survivor when coupled with a trust. See, also, *Lessee of Zebach v. Smith*, which is very similar to *Howell v. Barnes*.

In *Osgood v. Franklin*, 2 Johns. Ch., 1, the power was given by a will which appointed the wife of the testator and his three brothers executors. The power was given in these words, to wit: "I give to my executors that may act, and to the major part of them, their heirs or executors, full power to sell any or all my real estate not already devised." The will gave the residuary estate to eight persons, four of whom were the four persons appointed executors, one eighth to each. This devise was coupled with the following direction, to wit: "I order that the money or effects be distributed and divided from time to time, as it can be raised from my debts and estate by my exec-

utors, hereafter named." One of the brothers declined to act; the other two accepted the appointment and acted until they died. After their death the widow qualified. The principal question in the case was whether she had power under the will to sell the real estate. Chancellor Kent decided that the executors were charged with a trust, relative to the estate, depending on the power to sell, and that the power, therefore, survived. "The intention of the testator," he remarked, "is much regarded in the construction of these powers, and they are construed with greater or less latitude in reference to that intent." The case was carried to the Court of Errors and there affirmed, the court holding that where the provisions of a will evince a design in the testator that, at all events, the lands are to be sold, in order to satisfy the whole intent of the will, then the power survives.

In *Peter v. Beverly*, 10 Pet., 532 [IX., Law. ed., 522], David Peter left a will in which he appointed his wife, his brother, George Peter, and his wife's brother, Leonard H. Johns, executors, and provided that portions of his real estate should be sold for the payment of his debts. All the executors qualified. The widow and the brother entered upon the execution of the will and subsequently died, leaving debts still unpaid. The question was whether under the will George Peter, as surviving executor, could sell the real estate for the payment of the debts. The court decided that he could, the power being coupled with a trust. The court say, "When power is given to executor to be executed in their official capacity and there are no words in the will warranting the conclusion that the testator intended, for safety or for some other object, a joint execution of the power, as the office survives, the power ought also to be construed as surviving; and courts of equity will lend their aid to uphold the power for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power; and where there is a trust charged upon the executors in the direction given them in the disposition of the proceeds, it is the settled doctrine of courts of chancery that the trust does not become extinct by the death of one of the trustees."

In the cases above cited the power was given to the donees as executors. In the case at bar the power was given to Arnold and Allen as trustees. The difference is not material; for in equity executors are regarded as trustees in so far as they are invested with dominion over the testate estate for the benefit of others, and, independently of any statute, the reasons for the continuance or survival of the power are as strong in favor of trustees as of executors. It will be observed that the courts in the cases cited build largely upon the presumed intent of the testator, and argue that the testator must have intended to have the power continue to exist without interruption, so long as any or either of the donees of the power continued to exist to exercise it, because it was through the exercise of it that he contemplated having his will carried into effect. The argument from presumed intent is very cogent in the case at bar. Evidently the testator here meant to have the real estate sold at all events, and to have the

proceeds of the sale invested so as to yield an income to be applied by the trustees as directed, for the benefit of his daughters. The power is given to the trustees jointly, even if the estate, under our statute, goes to them as tenants in common. And see, *Randall v. Phillips*, 3 Mason, 378. It is true the testator expresses his desire, in case of the death, resignation, refusal or inability to act of either of the trustees, that the vacancy shall be filled by the other trustee; but the expression is not, in our opinion, equivalent to an absolute command, and we think, therefore, that it does not warrant any inference that the testator did not intend to have the power go to the sole accepting or surviving trustee, to be executed by him alone, if he should not think it expedient to appoint an associate. It will be noticed, moreover, that the will makes no provision for vesting in the new trustee, if appointed, his proper portion of the estate and, therefore, if it be supposed that the power did not go to the sole accepting trustee because the entire legal estate did not go to him, that is a defect which his appointment of a new trustee could not remedy. Clearly such a construction would defeat the intention of the testator. Under the will the *cestuis que trustent* were entitled to the benefit of the provision made for them immediately and without intermission. If, therefore, the acting trustee did not appoint a new trustee and could not execute the power without one, they would have had to come to this court to supply the execution. It seems to us that the better view is that the power survived because it was coupled with a trust.

We declare it to be our opinion that the deed of Richard J. Arnold to William M. Bailey did convey to said Bailey a good title to the land described therein.

Nathan P. MAKER

v.

The SLATER MILL AND POWER CO.

The provisions relative to fire escapes and stairways, in the Building Act for the City of Providence, Pub. Laws, R. I., cap. 688, of April 12, 1878, are too indefinite and uncertain to impose a criminal liability upon the owner of a building, for not furnishing either fire escapes or stairways, as provided in the Act, before the inspector of buildings has required them.

Hence, an action cannot be maintained under Pub. Stat., R. I., cap. 204, § 21, arising from the crime or offense of not furnishing such fire escapes or stairways.

(Providence—Decided July 18, 1886.)

TRESPASS on the case. On demurrer to the declaration.

This is one of several cases brought against the defendant for neglecting to provide fire escapes in alleged violation of Pub. Laws, R. I., cap. 688, of April 12, 1878, in consequence of which the plaintiff was injured by a conflagra-

tion in the building in which he was employed. See, *Grant v. Slater Mill and Power Co.*, 14 R. I., 380; *Baker v. The Same*, 14 R. I., 531. The facts are further stated in the opinion.

Messrs. Spooner, Miller & Brown, for plaintiff.

Messrs. Charles Hart, Benjamin T. Eames and Stephen A. Cooke, Jr., for defendant.

Stiness, J., delivered the opinion of the court:

Plaintiff sues under Pub. Stat., R. I., cap. 204, § 21, claiming that he had suffered an injury to his person by the commission of a "crime or offense" on the part of the defendant. The crime or offense consists in an alleged violation of the Building Act, so called, Pub. Laws, R. I., cap. 688, of April 12, 1878. Since the decision of the court sustaining a demurrer to the declaration in *Baker v. Slater Mill and Power Co.*, 14 R. I., 531, complaint has been made against the defendant, pursuant to Pub. Stat., R. I., cap. 204, § 22,* and process has issued thereon, which is duly averred in this declaration, but there is no averment of service of such process or of any proceedings thereon. A demurrer is filed to this declaration. Several grounds have been urged in support of the demurrer which need not now be considered; *e. g.*, that the statute giving a right of action for injury sustained "by the commission of any crime or offense" does not include a mere neglect of duty or omission to comply with the requirements of law; that such a statute does not apply to a plaintiff to whom the defendant owed no duty outside of statutory requirements; that the terms "crime and offense" do not apply to a violation of the Act in question, upon the ground that it is not a public statute, but a local police regulation; that the injury, for which an action can be sustained, must be the immediate and not the consequential result of the omission charged. Assuming all these points in favor of the plaintiff, the fundamental question remains, whether the defendant's omission to provide its building with fire escapes or stairways, as required by cap. 688, is a "crime or offense." If, under the Act, an owner of a building is not criminally liable for neglect to comply with its requirements, the foundation of the plaintiff's action fails. The penal provision in the Act is in the general terms of § 37, "Any person violating any provision of this Act," shall be fined, etc. Our inquiry, then, is whether an owner, complained of for neglecting to provide fire escapes or stairways, could be found guilty under the provisions of the Act.

*Cap. 204, §§ 21, 22, are as follows:

Sec. 21. Whenever any person shall suffer any injury to his person, reputation or estate by the commission of any crime or offense, he may recover his damages for such injury, either in an action of trespass or in an action of the case against the offender.

Sec. 22. No such action, except as provided in the five sections preceding the last, shall be commenced for such injury until after complaint has been made to some proper magistrate for such crime or offense, and process issue thereon against the offender, excepting only those cases in which such actions may now be maintained at common law; and whenever any person shall be convicted of larceny, he shall be liable to the owner of the money or articles taken for twice the value thereof, unless the same be restored, and for the value thereof in case of restoration.

The requirements of the Act are minute and manifold. Some clearly pertain to the owner, some to the contractor or builder, some to tenants, and some to other persons; while in many cases it is by no means clear to whom the duty imposed by the Act belongs. The duty to provide fire escapes or stairways is explicit. The section reads as follows: "Sec. 28. Every building already built or hereafter to be erected, in which twenty-five or more operatives are employed in any of the stories above the second story, shall be provided with proper and sufficient strong and durable metallic fire escapes or stairways constructed as required in this Act, unless exempted therefrom by the inspector of buildings, which shall be kept in good repair by the owner of such building, and no person shall at any time place any incumbrance upon any of such fire escapes."

But upon whom does the duty rest; when is it to be performed, and what facts are necessary to constitute a violation of the duty?

The plaintiff claims that the reasonable construction of the Act puts the duty upon the owner. He argues that, as there is an alternative between fire escapes or stairways, the duty must be upon one and the same person, and that person the owner, because only he could provide stairways. We do not see that this is necessarily so. Of course, permanent or structural improvements are ordinarily made by an owner, but if a lessee takes a building as it stands and then lets into it twenty-five or more operatives, it is difficult to see why by his act a burden should be cast upon the owner, which may not have been expected or provided for when the contract was made. It is said that no one but the owner would have the right to put fire escapes on a building; but, on the other hand, if a building was under lease, what right would the owner have to enter and interfere with the lessee's occupation by erecting stairways, such as are required by the Act. Moreover, if the duty is solely upon the owner, why should the Act particularly specify that he should keep the stairways or escapes in repair? The plaintiff further urges that the defendant in this case is liable, because it is both the owner and the party in control of the building. Without control over the number of persons which tenants may employ, the same unexpected burden might suddenly be cast upon the person in control of a building by the act of a tenant. Under the construction claimed, such person would be made criminally liable by the act of another person, which he had no power to prevent. But if an owner is to be held responsible by reason of his control, then it follows that a lessee must be held responsible when he is in control; and so the question recurs, whose is the duty? In most cases it would not be an unreasonable construction to say that the duty of complying with a statute is upon the one who creates, and has the power to prevent, the necessity of complying with it. Under the present Act this might be the owner or tenant, and the very alternative which is given is possibly significant. It may have been thought that owners could make the permanent, structural provision of stairways, and that lessees or tenants, if they create the necessity, could provide the light, temporary and less expensive fire escapes. A more troublesome ques-

tion arises in the case of a building let out to tenants, when no one of them employs twenty-five persons, but when, all together, they exceed that number, thus bringing the building within the law in this respect. Undoubtedly it would be most natural to look to the owner for the provision, but the statute does not say whose the duty is, nor whose the responsibility for neglect. It is one of the omissions that frequently occur in legislation, but an omission that we do not think we can cure by construction. Suppose, however, we assume that the duty is upon the owner, having control of a building, the problem is by no means solved. The Act does not say when or under what circumstances the duty is to be performed. The Act went into effect in ten days after its passage, and it does not seem probable that it was intended to make all owners of buildings, already built, immediately responsible for its multitudinous provisions and liable to its penalties. Immediate compliance with the law in all respects would probably have necessitated changes in many, perhaps nearly all, of the buildings then built. But if the liability of an owner did not attach at once, when did it attach? If there were nothing in the Act to indicate the contrary, all its provisions would take effect at the same time. But we think there are indications that the Act did not contemplate an immediate compliance with reference to existing buildings. The inspector of buildings is charged with the enforcement of the Act, but in the very section in question, is given authority to exempt buildings from its requirements. Section 88 provides that, upon complaint, he shall examine buildings already erected, including any workshop having *employés* on any story above second story, and require such building to be provided with proper and sufficient fire escapes, stairways and exits, constructed as described in the Act. This section must relate to buildings where there are more than twenty-five *employés*, for no others are required to have fire escapes, and, taken in connection with the authority to exempt, indicates that the requirement is to be discretionary with the inspector, dependent, perhaps, upon his judgment of danger in a particular case or of other equivalent provisions for safety. It also indicates that the time for requiring the fire escapes is when the inspector requires them. In regard to "buildings for public assembly, already built, and also boiler houses and rooms and their heating apparatus, now built," an express discretion is given to the inspector, namely: "If in his judgment the safety of the public requires it, he shall require that the same be made to conform to the provisions of this Act." It is hardly probable that in respect to fire escapes the Act was intended to be more restrictive. If this is so, an owner would not be in default until after examination and notice by the inspector. To construe the provision otherwise, the inspector would be obliged to require only what the law itself had already required, and that, too, without pointing out how or from whom he should require it. In *Willy v. Mulledy*, 78 N. Y., 310, the court said the defendant "was not permitted to wait until he should be directed to provide" a fire escape by the commissioners. "He was bound to do it in such way as they should direct and approve, and it

was for him to procure their direction and approval." But under the law in that case there was no discretion in the commissioners whether to require a fire escape or not. There was no power of exemption. The owner was bound to provide one in any event; the commissioners were simply to direct and approve the kind to be used. But under that Act no penalty was to be imposed until after notice by the commissioners. The case was not based upon the "commission of a crime or offense," but upon a negligence of duty to the plaintiff as tenant of the defendant. With reference to our statute, it has already been decided, in *Grant v. Slater Mill and Power Co.*, 14 R. I., 880, that the Act does not create a duty between an owner and the employees of his tenant, such as to give them a right of action for neglect. In *Parker v. Barnard*, 135 Mass., 116, it was held that the plaintiff, having a license to enter a building, could maintain an action for neglect to protect the elevator well, as required by statute. The court conclude their opinion, however, by

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saying: "We have not considered the respective duties of the owners and of the occupants of the building as to the protection of the elevator well. Upon this inquiry the case is not before us, and the facts are not reported."

There are many peculiarities and difficulties in the Act as it stands, some of which have already been noticed by the court in previous cases; but upon this fundamental point we think it sufficiently appears that the provisions in regard to fire escapes and stairways are too indefinite and uncertain to impose a criminal liability upon an owner of a building for not providing one or the other before the inspector required it. Penal statutes must be strictly construed and a duty must be clearly imposed upon a particular person before we can say that he has violated the law by neglecting it.

We do not think the plaintiff states a case against the defendant under the law, and therefore the demurrer to the declaration must be sustained.

Demurrer sustained.

CASES

DETERMINED IN THE

Supreme Court of Errors of Connecticut,

FROM SEPTEMBER 1, 1885.

CHIEF JUSTICE,

HON. JOHN DUANE PARK.

JUDGES,

HON. ELISHA CARPENTER.

HON. DWIGHT LOOMIS,

HON. DWIGHT WHITEFIELD PARDEE,

HON. MILES TOBEY GRANGER,

JOHN HOOKER, Esq., Reporter.

Samuel B. JOHNSON

v.

William E. HIGGINS, Appt.

1. The mere act of signing the findings and statement on appeal, may be performed by the judge who tried the cause, even after he ceased to hold office; and an Act empowering him to do so is constitutional.
2. The practice obtains generally in this State, to direct the jury to return a verdict upon each of several distinct counts, embracing independent matters; rather than to obtain the required information by inquiry of the jury, or by framing special verdicts, although either mode may be resorted to.
3. A general verdict will frequently and perhaps ordinarily ascertain and fix the rights and obligations of parties, and when this is manifest, general verdicts are proper.

(New Haven—Decided September, 1885.)

APPEAL from the Court of Common Pleas, New Haven County.

Action by attachment, for damages for breaking into and entering plaintiff's store, etc.

The facts are stated in the opinion.

Messrs. Henry G. Newton, William K. Townsend and John H. Whiting, for appellant:

In proving the contents of a lost paper, plaintiff should have given the best evidence obtainable. And there should have been some effort made to obtain a copy containing the notice, especially as the date of the paper was the material point. *Kelsey v. Hammer*, 18 Conn., 317.

But aside from discrediting this particular witness, the fact that Cytron was disposing of his property generally, was admissible without directly connecting it with plaintiff. *Mead v. Noyes*, 44 Conn., 487.

To remove the goods would cause great and unnecessary damage. Plaintiff's assent might well be presumed in the absence of a demand for possession. *Mills v. Camp*, 14 Conn., 219; *Newell v. Woodruff*, 80 Conn., 492.

Proof that defendant was acting in accordance with the ordinary custom of officers, was admissible on the question of malice. *Pratt v. Pond*, 42 Conn., 320.

Receiving proof of the fact as to the time when an attachment was served, is not the same as receiving proof to contradict an official return. *Palmer v. Thayer*, 28 Conn., 287.

Whether, on the facts, the attachment was made on the 8th or 10th, is a matter of opinion and very doubtful, and is a question of law, and on such a matter the return is not conclusive. *Williams v. Cheesbrough*, 4 Conn., 360.

The crucial test of a sufficiently apparent change of possession is: how would this appear to a stranger? Much of the testimony offered by the plaintiff was of this nature. *Mead v. Noyes*, 44 Conn., 487.

The decided cases in this State make the clear distinction between a parol license in such a case and a change on the record. *Hull v. Signorini*, 48 Conn., 267.

A change of possession of real estate by record, is held to constitute sufficient change of possession of the personal property kept on it, but a verbal hiring of the real estate is held insufficient. *Mead v. Noyes (supra)*.

There is no claim made that plaintiff agreed with Gans or Ullmann to pay either of them any part of the rent. It was an agreement with Cytron only. *Potter v. Payne*, 21 Conn., 361.

The defendant having received the key to the store from Cytron, was not a trespasser as against the plaintiff until a demand and refusal, and this demand must be from what the plaintiff was legally entitled to and no more. *Cross v. Robinson*, 21 Conn., 379; *Newell v. Woodruff*, 80 Conn., 492.

Retention of possession is a mixed question of law and fact, to be submitted to the jury with proper instructions. *Mead v. Noyes (supra)*.

The jury should therefore be told in each case, what facts, if proved, will show a retention of possession. *Osborne v. Tuller*, 14 Conn., 529-541; *Carter v. Watkins*, 14 Conn., 240.

In this case, the jury may have found every fact in regard to possession to be exactly as claimed by the defendant, and still concluded

that the plaintiff had paid for the goods and ought to have them; and this the more readily, as the court failed to indicate what facts, if any, in this case, would amount to a retention of possession. *Potter v. Payne*, 21 Conn., 361.

This done, the court, being unable to tell what facts were found, might, if it could see any evidence of any facts indicating a change of possession, refuse to certify that the verdict was against evidence. In such case the defendant would be remediless, unless he is entitled to a specific charge, adapted to the facts in the case and distinctly raising the question of law upon those facts. *Peck v. Whiting*, 21 Conn., 206-212; *Crouch v. Carrier*, 16 Conn., 505.

The admitted facts in regard to the sign, and license, Cytron's continued presence on the premises, and having a key to the door, amounted in themselves to a retention of possession, and the court should have so charged. *Buddington v. Stewart*, 14 Conn., 404; *Peck v. Whiting*, 21 Conn., 212.

A verbal arrangement between Cytron and the plaintiff, whether assented to by Gans and Mrs. Ullmann or not, and whether, as between the parties, it amounted to a lease of part of the store or not, cannot carry with it the possession of these goods as against attaching creditors, whatever might be the effect of a recorded lease. *Mead v. Noyes* (*supra*); *Hull v. Sigsworth*, 48 Conn., 258; *Gilligan v. Lord*, 51 Conn., 567.

"The deed of the premises in *Elmer v. Welch* had been duly recorded." *Hull v. Sigsworth* (*supra*).

"Here was a recorded transfer." *Elmer v. Welch*, 47 Conn., 58.

"The plaintiffs had a good title to the real estate and took possession as owners." *Smith v. Skeury*, 47 Conn., 55.

He was the owner of the establishment. *Partridge v. Wooding*, 44 Conn., 284.

In *Mead v. Noyes* (*supra*), it is found that the property, when attached, was actually in a barn hired by the plaintiff by parol. An actual hiring, and a transfer in good faith for value are expressly found. The law says that if the possession be apparently as before, if the property is so placed that it holds the same apparent relation to the vendor, it is still liable to an attachment, no matter whether there be an actual delivery and change of possession or not. *Norton v. Doolittle*, 32 Conn., 410; *Seymour v. O'Keefe*, 44 Conn., 131.

Allowing the vendor to regain possession of these goods or intermittently to appear as their owner, renders them as liable to attachment as if the plaintiff had never taken possession. *Mead v. Noyes* (*supra*); *Hatstat v. Blakeslee*, 41 Conn., 301.

The fact that the plaintiff made arrangements to have the sign changed after the first of May, or that the delay was for the convenience either of the painter or Cytron, furnishes no justification for the failure to make the change in a reasonable time, which was "the time fairly required to perform the act." *Seymour v. O'Keefe* (*supra*); *Webster v. Peck*, 31 Conn., 495.

So, in regard to the retail license, if the plaintiff did take possession of this stock on April 5th, and thereafter carry on the business

as his own up to April 10th, he was liable to fine and imprisonment for so doing. U. S. R. S., 625, § 3242.

A stranger, seeing no license in plaintiff's name about the place, would not readily believe him to be the owner; the absence of a license in his name was a constant denial of the truth of the declaration of ownership by plaintiff. *Hull v. Sigsworth* (*supra*).

In *Capron v. Porter*, 48 Conn., 383, the plaintiff had no opportunity to select the goods, and it did not appear that there was any difficulty in distinguishing them by defendant. Both these facts appear in this case, and it is thus brought directly within the case relied on in *Capron v. Porter*, *Smith v. Sanborn*, 6 Gray, 134.

The attachment, and taking and holding possession of the store under the circumstances hereinbefore stated, showed no malice on the part of the defendant. And the charge given by the court on this point was not applicable to the facts, and was calculated to mislead the jury. *Oviatt v. Pond*, 29 Conn., 485; *Pratt v. Pond*, 42 Conn., 320.

Mr. C. S. Hamilton, for plaintiff:

By no voluntary act could the Judge recall his resignation and become again a judge for any purpose, except by a regular appointment pursuant to the Constitution. *Gates v. Delaware Co.*, 12 Iowa, 405.

The Constitution provides that appointments to the Court of Common Pleas shall be for four years only and that "All vacancies * * * shall be filled by the General Assembly for the remainder of the unexpired terms only." Now both these provisions of the Constitution are violated in this attempt to appoint a judge for an indefinite time, to hold office for an indefinite period. *Goodin v. Thoman*, 10 Kan., 191, 197; *Ex Parte Meredith*, 33 Gratt., 119, 121; *Whipper v. Reed*, 9 S. C., 5, 6, *et seq.*; *People v. Bull*, 46 N. Y., 57, 60, *et seq.*; *Howard v. State*, 10 Ind., 99, 100.

This would be an attempt to legalize and make valid an act which was utterly and absolutely void; for by the ruling of this court in *Griffin v. Danbury*, 41 Conn., 96, a finding made and an appeal allowed after the expiration of the term of office of the judge, is utterly void, and it is attempted by this act to make it valid when thus utterly void. This cannot be done by the Legislature. *Maxwell v. Goetschius*, 40 N. J. L., 383, 392; *Pryor v. Downey*, 50 Cal., 388, 403.

The payment of rent by one in occupancy of premises, is evidence of a tenancy. *Wood, Land. & Ten.*, 2, 10.

If the conduct of the defendant in putting and shutting the plaintiff out of his store was wanton, malicious and without color of right, as the plaintiff claimed both in his complaint and in the evidence offered at the time, he was entitled to recover damages for being broken up in business. *Dibble v. Morris*, 26 Conn., 416, 426; *St. Peter's Ch. v. Beach*, 26 Conn., 355, 365; *Williams v. Ives*, 25 Conn., 568, 575.

The principle laid down by this court in *Ellwell v. Merrick*, 50 Conn., 272, following the rule of *Kelsey v. Hawmer*, 18 Conn., 311, fully covers this point.

Schwab's cross-examination cannot be rested on what had occurred on the cross-examination

of other witnesses, and much less lay any foundation for going into an inquiry as to what occurred between Cytron and the witness. *Edward v. Warner*, 85 Conn., 517, 519.

The question was vicious in form, irrelevant and immaterial. An officer acts at his peril when attaching a third party's property. *Drake, Attach.*, § 197; *Stickney v. Davis*, 16 Pick., 19, 21, 22.

An officer in making an attachment has no right to take entire possession of even the attached debtor's store; if he does, he becomes a trespasser *ab initio*. *Fullerton v. Mack*, 2 Aiken, 415, 416; *Drake, Attach.*, § 194.

Nor would the officer have any right to use Johnson's store to keep the attached goods of Cytron in. *Williams v. Powell*, 101 Mass., 467, 469; *Davis v. Stone*, 120 Mass., 228, 231; *Perry v. Carr*, 42 Vt., 50, 54, 55.

Time in an issue of this kind, is in the highest degree material. On this question of possession as between *bona fide* purchasers and attaching creditors even moments are to be counted. *Taintor v. Williams*, 7 Conn., 271, 273; *Hollister v. Goodale*, 8 Conn., 382, 384, 5.

The legal doctrine is firmly established, that to constitute an attachment of goods, the officer must have the actual possession and custody. *Hollister v. Goodale (supra)*.

An officer cannot make use of the premises of a third party to keep attached goods in, and when he attempts to do it without permission of such third party he is a trespasser. *Drake, Attach.*, § 200; *Williams v. Powell (supra)*; *Davis v. Stone (supra)*; *Perry v. Carr*, 42 Vt., 50, 54, 55.

When a landlord grants a new lease to a stranger with the assent of the tenant under an existing lease, and the latter gives up his own possession, that is a surrender by operation of law. *Wood, Land & Ten.*, 846-7, § 498, and cases there cited; *Thomas v. Cook*, 2 Barn. & Ald., 119; *Johnstone v. Huddleston*, 4 B. & C., 922; *Smith v. Niver*, 2 Barb., 180.

The only fact in the case on which the defendant relies in support of this claim to possession, is the circumstance that the goods remained in the warehouse where they were kept by the company. If such a claim could be successfully made, sales of business establishments and changes in business would be rendered difficult and dangerous. *Smith v. Skeary*, 47 Conn., 47, 55; *Elmer v. Welch*, 47 Conn., 56, 58; *Gilligan v. Lord*, 51 Conn., 562, 567.

The right that Cytron had was at most but a mere easement, which is in no sense a possession on the part of the person who has the enjoyment of the easement, nor does it in any way interfere with the absolute possession of the owner of the servient tenement. *Goddard, Eas.*, p. 280; *Rez v. Joliffe*, 2 T. R., 95; *Dyce v. Lady Jane Hay*, 1 Macq., 805.

At most, the fact of Cytron passing and re-passing through the front store, even though such passing and re-passing amounted to a joint occupancy of the front store, would simply be evidence to be left to the jury, with the other facts in the case, as to who was actually in possession, as was properly done by the court below. *Potter v. Mather*, 24 Conn., 551, 553-4; *Partridge v. Wooding*, 44 Conn., 277, 285; *Bird v. Andrews*, 40 Conn., 542, 543.

Nothing short of a fraudulent intermin-

gling of the goods of the plaintiff with those of Cytron, "and with the intention of frustrating the attachment," could justify an attachment of the plaintiff's goods, because intermingled with those of Cytron. *Treat v. Barber*, 7 Conn., 274; favorably commented upon by this court in *Capron v. Porter*, 43 Conn., 883, 890.

If any one count in the complaint is good, a general verdict on the complaint must stand. *Smith v. Hawkins*, 6 Conn., 444, 446.

The plaintiff was entitled to a general verdict even if the evidence supported but one count of the complaint. *Stamford Bk. v. Ferris*, 17 Conn., 259.

The court below was not obliged to require the jury to declare upon what count or counts they formed their verdict, or in any way pry into the secrets of the jury room. *Bulkeley v. Andrews*, 39 Conn., 523, 534-6.

Stoddard, J., delivered the opinion of the court:

A plea in abatement is filed in this court. The finding and statement of rulings in the court below was not signed by the Judge until the 10th day of April, 1885, and the Judge had previously and on the 7th day of March, 1885, resigned his office. It is now contended that the act of signing said finding and statement upon appeal was a judicial act, and must have been done by the Judge while in office.

Upon the 31st day of March, 1885, a statute law took effect, which fully empowered the Judge to make and sign the finding and statement after ceasing to hold office. This is admitted, but it is said that the Act in question is beyond the power of the Legislature and is unconstitutional. Even if it be admitted that the act of the Judge in signing the finding on appeal is a judicial act in the sense claimed by the plaintiff, and that the act was done after he had ceased to be such Judge, no authority has been brought to our attention denying the Legislature the power implied in the law in question. Similar legislation, and of more embracing scope, has for many years been operative unchallenged, in reference to the judicial power of justices of the peace. No substantial reason is given why the legislative power is incompetent to authorize judicial officers, after their term of office, to complete the history of trials had, and to give permanent and official power to facts found during their term of office. Such acts are rather clerical than judicial.

But the constitutional term of office of the Judge who tried this case below extended to June 30, 1885, so that the questioned act of the Judge was done during his lawful term of office, and the Legislature certainly may empower the Judge to perform the acts complained of until the expiration of his term of office, notwithstanding the fact that the Judge has sent his resignation to the Governor of the State.

The signing of the finding and statement in this case, is so far from being an illegal act, that it may admit of serious question whether, even without the enabling legislation passed in 1885, the judge not only would have the power, but the duty may be imposed upon the judge by the law as it now stands, to complete the finding and statement upon appeal without reference to his term of office.

By the Statute regulating appeals, Session

Laws of 1882, ch. L., when a notice of appeal is properly made, the law imperatively commands the judge, under certain circumstances (and the case in question presents such circumstances), to make such finding as may be necessary to properly present the case for revision upon appeal, and the appeal need not be filed until after such finding or statement is made by the judge and filed with the clerk; and execution is to be stayed "until the expiration of the time hereinbefore fixed for filing the appeal."

Under this law, a party has an absolute, unqualified right to take an appeal upon complying with the terms of the statute, irrespective of any act on the part of the judge, and the appeal is perfected without his sanction. Formerly, and under the practice as it existed before the passage of this Act, it was otherwise, and no case could, by motion for a new trial, be taken to the Supreme Court without the presiding judge's allowance of the motion. Under this former practice, it was ruled that with no statute permitting such act, the judge had no power to allow a motion for a new trial after his resignation had taken effect. In other words, the court ruled that the law had provided no way by which a party could go to the Supreme Court with a motion for a new trial, except such motion was allowed by a judge while in office. The law does not require such sanction by the judge to give the Supreme Court jurisdiction.

This requisite statement of facts proved and of rulings made upon the trial in the court below, is merely clerical, is absolutely imposed by the law as a duty upon the judge trying the case; is demanded by the rights of litigants, and is essential to the due administration of justice. Unless required by principle or precedent, courts would hesitate to rule that a person holding the office of judge can, by resigning his office, defeat the plain mandate of the law, the due administration of justice, and deny litigants appealing to the law their undoubted and material rights. At all events, and not to pursue this subject further, we are all of opinion that the Statute of 1885, before referred to, fully warranted the act of the Judge in sending the case to this court.

As to the merits of the cause: it appears that the defendant is a deputy sheriff, who, acting by authority of a lawful writ of attachment and under directions of a resident attorney, who, as such attorney, was acting for non-resident parties, attached certain goods in a store as the property of one Otto Cytron. The plaintiff claimed title to the goods and right to possession of the store through a claimed sale by said Cytron to the plaintiff. The defendant denied the sale, attacked the good faith of the plaintiff and Cytron, and insisted that there had not been that open, visible, manifest, continued and exclusive change of possession necessary to protect the property from attachment by the creditors of Cytron.

In the original, amended and supplemental complaints on three counts, each complaining of separate and distinct wrongs, the first and second counts are for acts alleged to have been done willfully, maliciously and without color of right. The third count alleges simply wrongful acts. The first count is for taking possession of the goods, and thus breaking up the plaintiff's business; the second count is for tak-

ing possession of the store, and thereby destroying the business of the plaintiff; and the third count is for keeping possession of the store for an unlawful period. The plaintiff sought punitive damages for the acts claimed to have been done maliciously and unlawfully; damages for the illegal acts of the defendant as deputy-sheriff in making the attachment; and, finally, damages for taking goods of the plaintiff in a lawful manner for the debt of another.

It is manifest, under these circumstances and claims, that it was important for the defendant to know whether any possible verdict to be rendered against him, was because he had acted in an illegal manner in making a lawful attachment, or, whether the verdict was based upon acts done with personal malice and unlawfully; or whether the verdict was given against him simply because he was attaching, under orders of the attorney for the plaintiffs in the suit against Cytron, the property of the plaintiff for the debt of Cytron. The defendant's right of indemnity might depend upon the ascertainment of the basis of the verdict, and so counsel for the defendant requested the court "To inquire of the jury upon what grounds their verdict was based, and which issues were found for the plaintiff, and the amount of damages upon each;" also, to direct the jury to render their verdict upon the issues framed upon each count of the complaint. Upon the plaintiff's objection, the court refused so to inquire or direct.

It is the practice, if the right of the parties so demand, to direct the jury to find upon each separate issue, when separate and independent claims are to be determined by distinct issues and when separate and distinct matters of substantially different character and nature are litigated, and to be determined by separate issues, it is the right of the parties to have the verdict follow and answer the issues; especially so when other rights and obligations may depend upon the verdict.

In *Newell v. Roberts*, 18 Conn., 73, the court say: "We are not prepared to say that the verdict in this case founded upon this charge would not do entire justice to the parties in the cause. But in its consequences it may injuriously affect their rights, as the facts found may be made use of beyond the present suit. The parties had chosen to go to issue upon distinct pleas, alleging distinct facts, although mostly tending to one point. Under these circumstances they had a right to an expression of opinion from the triers upon each of these distinct points." Judge Loomis, in giving the opinion in the recent case of *Morris v. Hydraulic Co.*, 47 Conn., 279, states the rule as follows: "When there are several counts for distinct and independent causes of action, or when there is no evidence at all applicable to some of the counts, it would doubtless be the duty of the court to comply with such a request." And the practice obtains generally in this State, rather to direct the jury to return verdicts upon each of several distinct counts embracing independent matters, than to obtain the required information by inquiry of the jury, or by framing special verdicts, although both of the two latter modes have been resorted to.

It is not intended to hold that in all cases when claims are stated separately, the verdict

must specify the particular count or counts upon which it is found. A general verdict will frequently and, perhaps, ordinarily ascertain and fix the rights and obligations of litigants, and when this is manifest, general verdicts are proper. The rule above stated has always obtained in this State, and since the enactment of our recent practice Act, and the adoption of the method of pleading thereby provided, it is more important and in consonance with the spirit of that Act, that this rule should be complied with in all cases when the rights of the parties demand it. There is error in this particular.

A new trial must be advised, also, for error in the charge to the jury in at least two particulars. In the first place, the evidence in the case and the claims of the parties called for a full and explicit statement to the jury of the law in relation to the necessity of an open, visible and apparent change of possession. This was not sufficiently given; nor do we think the charge in relation to the damages can be justified. There are some rulings upon evidence which are questionable, but mostly of an extremely technical character. It is hardly possible that the questions made in the trial below will be again made upon the new trial. The trial seems to have proceeded in quite an extraordinary manner, for in the defendant's original appeal he alleges thirty-eight reasons of appeal, and then supplements his original list with a line of sixteen more reasons, most of them technical, some frivolous and some well taken. The case, in itself, is simple, mainly of fact; involving a small amount, and yet, owing to the method of trial, the finding on appeal fills ten and one half pages of printed matter, exclusive of a copy of the charge to the jury.

The case is loaded with statements that might well have been omitted, and evidently both the trial court and this court have been compelled to deal with a mass of practically irrelevant matter before being permitted to determine the rights of the parties. There is no new or novel principle of law involved in the questions raised, except in reference to the form of the verdict, which has been disposed of, and as they all consist in contests whether a perfectly well settled rule of law was or was not properly applied to the facts, evidence and claims of the parties, they do not require comment.

A new trial is advised.

In this opinion the other Judges concurred.

The TOWN OF ESSEX

2.

Robert E. DAY, *Appt.*

1. Where the agent of a Town gave a memorandum of town bonds to be printed "which called for ten-twenty bonds only," omitting by mistake a recital of

option to redeem in ten years; and the party receiving it delivered it to the printing company to be printed, and the bonds were printed with such omission and none of the agents of the Town observed the mistake, and were ignorant of it until several years after the bonds were negotiated, the negligence of the Town being the result of a careless inadvertency of its agents, based upon an honest assumption that all was right, was, therefore, not such negligence as would prevent the Town from obtaining equitable relief in a suit against a bona fide holder having notice of the mistake in the bonds.

2. Even assuming that such an error could not be cured in cases where holders for value had no notice of the mistake, yet after the Town had voted to call in all the bonds at the end of ten years, and had given notice by publication, that they would then be paid, and that interest on them would cease from that time, the delay, in the circumstances, was not fatal to plaintiff's right to equitable relief.
3. Where the defendant, at the time of his purchase of the bonds, had full knowledge of the vote of the Town in relation to the issue and that the Town had called them in, for payment, it is sufficient information for the law to impute to him knowledge that the bonds were issued by mistake, as twenty year bonds, instead of ten-twenty bonds.
4. There is nothing in the nature of the mistake, or in the relation of the parties to it, which should lead a court of equity to refuse the relief sought.
5. Where the Town, at a legal meeting, voted to call in the bonds, if deemed advisable, authorized the selectmen of the Town to do so, leaving it to their discretion, this did not in itself constitute a calling in of the bonds; but the subsequent action of the Town, in giving notice by publication that said bonds would be paid at the office of the treasurer, on a certain date, and that interest upon them would cease from that date, it may be assumed that this notice was signed by the selectmen and was, therefore, their action under the vote authorizing them to call in the bonds.
6. The correction of the mistake in the decree, was merely to make the bonds ten-twenty bonds, as the Town had intended they should be, and the mere omission in the decree to fix the time when the correction should operate, whether from date of the bonds, commencement of suit, or date of the decree, could not prejudice the rights of the bondholder and is immaterial.
7. After the ten years had expired from issue of the bonds, and notice given calling them in, the Town ceased to be liable on coupons thereafter maturing.

NOTE.—The illegal issue of municipal bonds will be enjoined, although other bonds, open to the same objection, have been already issued. The bona fide purchasers of prior issues are not thereby prejudiced. See, *Whelen's Appeal* (Pa.), 1 Cent. R., 35. CONN.

Park, Ch. J., and Carpenter, J., delivered dissenting opinions.

(Hartford — Decided September, 1885.)

EQUITY to correct town bonds, by inserting an option to redeem, omitted therefrom by mistake.

The facts are stated in the opinions.

Mr. George G. Sill, for appellant:

The Town never voted to issue ten-twenty bonds. On Jan. 12, 1870, a committee was appointed to propose a proper plan for issuing bonds to pay for its stock. The committee made a report and presented a resolution which says nothing about the form of the bonds or time of payment. This report was received and, after being amended, the resolution was passed. The Town did not so understand the report, for it passed a resolution after making a proper amendment. *Dill. Mun. Corp.*, § 242; *Dudley v. Inhab. of Weston*, 1 Met., 477.

Though a court of equity will relieve against a mistake, it will not assist a man whose condition is attributable only to that want of due diligence which may fairly be expected from a reasonable person. *Iverson v. Welburn*, 65 Ga., 108; *Kerr, Fraud*, 407, 405, and cases in note 2, and **Brown v. Fagan*, 71 Mo., 563; *Witthaus v. Schack*, 57 How. Pr., 810.

The legal effect of recitals in town bonds is stated in 2 Edw. Bills, § 876; *Menasha v. Hazard*, 102 U. S., 81 (XXVI., Law. ed., 83); *Anthony v. County of Jasper*, 101 U. S., 693 (XXV., Law. ed., 1005). Under these decisions the bondholders were under no obligation to inquire outside of the bond itself.

Mutuality of mistake is the sole ground of equitable jurisdiction. 2 Swift, 96; *Brainerd v. Arnold*, 27 Conn., 617; *Thompsonville S. Co. v. Osgood*, 26 Conn., 16.

A written instrument will be reformed for a mistake, only so as to give effect to a previous binding contract of the parties. *Petesich v. Hamback*, 48 Wis., 448.

Mistake must be material and the determining ground of the transaction, that is, the point misconceived, must be the cause of the agreement. *Segur v. Tingley*, 11 Conn., 143; *Kerr, Fraud*, 408-410 and note.

And the party asking relief must make his complaint with reasonable diligence. *Sable v. Maloney*, 48 Wis., 331; *Willard, Eq.*, 69.

To entitle a party to relief the fact must not only be material, but must be such that plaintiff could not, with reasonable diligence, have obtained knowledge of the fact. *Willard, Eq.*, 70; *Kerr, Fraud*, 435, and note on 436.

Suppose Tiffany knew just what the vote of the Town disclosed. The means of information were equally open to both parties. *Willard, Eq.*, 71; *Laidlaw v. Organ*, 2 Wheat. (15 U. S.), 178-195.

Bonds payable to bearer and put into the market for sale, are not choses in action, but rather mere chattels, and there came into existence a vendor and vendee of these chattels between the Town and Tiffany, with all the rights and duties springing from that relation. *Griffith v. Burden*, 35 Iowa, 188; *Lexington v. Butler*, 14 Wall., 282 (81 U. S., XX. Law. ed., 809).

The Town is estopped by the recitals in the bonds. This is no longer an open question. *Bigelow, Estop.*, 3d ed., 469; *Coloma v. Eaves*, 92 U. S., 484 (XXIII. Law., ed., 579); *Orleans*

v. Platt, 99 U. S., 676 (XXV. Law. ed., 404), *Supervisors v. Galbraith*, 99 U. S., 214 (XXV., Law. ed., 410); *Supervisors v. Inhab. of Imboden*, 12 Reporter, 467.

The usual test of good faith is that the party pays value for the negotiable instruments or that he took them without notice of the facts and circumstances going to impeach their validity, or diminish the amount recoverable thereon. 1 Edw. Bills, §§ 517, 518.

Swan put his confidence in the right place and bought the bonds for what they appeared to be. *Menasha v. Hazard* (supra); *Anthony v. County of Jasper* (supra); 2 Edw. Bills, § 898.

Conceding, for the argument, that the Town had an equitable right to correct the mistake while the bonds are held by Tiffany, has it also the right after they have gone into ownership of Mr. Swan or this defendant? See, Edw. Bills, § 21.

The law requires that notice of town meeting shall be given at least five days, inclusive, before the meeting is held. Stat., p. 88.

This notice was February 8, and meeting held February 7. A vote passed at such a meeting was of no effect, the meeting being illegal and its acts void. *Hayden v. Noyes*, 5 Conn., 391; *Brooklyn Tr. Co. v. Hebron*, not yet reported.

This court in its discretion, can take notice of this error, although not assigned, through the mistake of defendant's counsel in failing to observe the exact date of the notice, and reverse the judgment below for such error. *Sturdevant v. Stanton*, 47 Conn., 579.

Mr. M. E. Culver, for appellee.

Loomis, J., delivered the opinion of the court:

It is not necessary for us to consider in this case whether the bonds issued by the Town are to be regarded as negotiable and, therefore, protected in the hands of a bona fide holder against the correction which the plaintiffs seek to procure. We may assume, for the purposes of this case, that, in the absence of notice on the part of the defendant of the error claimed by the plaintiffs to have intervened in the printing of the bonds, the corrections could not be made.

Starting with this assumption, the questions which present themselves for consideration are the following:

1. Have the plaintiffs, through their agents, been guilty of such negligence, either in the original execution and issuing of the bonds or in the seeking of a correction of the error when discovered, as precludes them from the equitable relief which they seek?

2. Did the first purchaser of the bonds, and, afterwards, the purchaser from him, and, finally the defendant at the time of his purchase, have such knowledge of the error in the bonds, either actual or to be imputed, as gives the plaintiffs a right, as against them, to the equitable relief which they seek?

3. Was the error one of such a character that it can be corrected by a court of equity?

4. Supposing the plaintiffs not to be precluded by their own negligence from the relief sought, and the defendant not to be protected by want of notice, has the Town so far

exercised its claimed right of option to call in the bonds at the end of ten years, as to stand in a position to assert the equitable rights which it claims?

These are the principal questions in the case, each covering some minor questions that do not need to be stated separately; besides which, there are some questions made with regard to the decree which lie wholly outside of these, principal ones, and which, though not of great importance, will need some notice:

First. Have the plaintiffs been guilty of a fatal negligence? They had made a reasonable provision for the printing of the bonds and for the printing of them as ten-twenty bonds. It is found that the town agent gave to Mr. Walkley, who procured the printing of the bonds for all the towns, a written memorandum of the bonds to be printed for the plaintiffs "which called for ten-twenty bonds only," and that Mr. Walkley delivered this memorandum to the printing company. The plaintiffs so far, therefore, had used reasonable care. It is only in the execution and issuing of the bonds that the negligence exists. It is found that none of the agents of the town who subscribed the bonds, namely: the first selectman, the treasurer, and the special agent, observed the mistake, and that they were, in fact, all ignorant of it until several years later, when the Chelsea Savings Bank called their attention to it. It is specially found that the treasurer, who was charged more especially with the duty of vigilance in everything affecting the finances of the Town, signed the bonds without reading them, supposing that they were payable at the option of the town in ten years, and it may be assumed that none of the signers read them or read them with proper attention.

There is here, unquestionably, a reprehensible carelessness; a lack of intelligent attention to the matter, that must be regarded as not only unreasonable but culpable. We have no disposition to defend, or even to excuse, such conduct. The question, however, as we conceive, is not so much whether a culpable negligence existed, as it is whether such negligence should operate to bar the plaintiffs from relief against this defendant. This negligence is not of that extremest kind which the courts sometimes characterize as the equivalent of fraud. It was not recklessness; it was mere want of care. There was no indifference to the effect; it was simply an honest assumption that all was right. It is to be classed only with those incautious and unbusiness like acts, which are constantly presenting themselves and would not have been noticed but for some mischief that they have wrought. Thus a man carelessly signs a note for \$1,000 which he supposed to be for \$100. Through a mistake of the scrivener it is thus written, when he had directed that it be written a hundred and he signs it without reading it. This is certainly gross carelessness; but should it debar him from all remedy against a party who receives the note knowing of the mistake? Would not a court of equity enjoin the holder, who took it with full knowledge against its collection? Would it be good in his hands in any court admitting of equitable defenses, for more than \$100? We think, therefore, that the negligence of the plaintiffs in the execution and issuing of the bonds, was not of

such a character as to preclude all equitable relief against the present defendant.

But it is claimed by the defendant that, if this be so, yet the plaintiffs have been guilty of such negligence in the assertion of their equitable rights as to preclude them from relief. It is a well settled rule that a party who discovers some fact against which he needs equitable protection, like an error in a deed, or a judgment rendered against him without notice, must use diligence in seeking equitable aid. But this is required for the purpose, mainly, of protecting other persons against loss by reason of the unasserted right. If the records show a title in a third person, that third person, even after notice, may convey to an innocent purchaser. In all these cases delay is likely to add to the complication and make the equitable adjustment of rights more difficult.

In the present case the plaintiffs, with every day's delay, ran the risk of a transfer of the bonds by the parties who held them as *bona fide* purchasers. This was, however, their risk and not that of the public; certainly not upon our assumption that the error could not be corrected against a holder who had no notice of the mistake. In this case, the defendant purchased the bonds in question, not only of a holder who had notice of the mistake, but with personal knowledge of it, and after the Town had voted to call in all the bonds at the end of the ten years, and had given notice by publication in various newspapers, that the bonds would be then paid, and that interest upon them would cease from that time. Whatever delay the plaintiffs made after that time, could not, therefore, injuriously affect the defendant. They, of course, ran the risk of a sale by him of the bonds to an innocent purchaser, but that was wholly their risk; it involved no risk to him. The public notice given by the plaintiffs of the payment of the bonds at the end of ten years, was given on the 25th of February, 1880. The ten years expired April 1, 1890. The defendant purchased the bonds in question on the 20th of April, 1880. The present suit was brought in May, 1882, two years later. We cannot say that the delay was, in the circumstances, fatal to the plaintiffs' right to equitable relief. It was not, we think, unreasonable for the plaintiffs to expect that, after the notice given, the holders of the bonds would accept payment without contesting the matter, and that they should have been confirmed in that expectation and so the more inclined to save the expense of a lawsuit, by the fact that forty-two out of the forty-eight bonds were thus brought in and canceled.

Second. Did the first purchaser of the bonds in question, and, afterwards, the purchaser from him, and, finally, the defendant at the time of his purchase, have such knowledge of the mistake, either actual or to be imputed, as gives the plaintiffs a right, as against them, to the equitable relief which they seek?

The finding upon this point is as follows: "Before Tiffany (the first purchaser) purchased the bonds, the then town treasurer, E. W. Redfield, told him that the bonds were ten-twenty bonds, and at the option of the Town could be called in and paid at the expiration of ten years from their date, and that such was the vote of the Town authorizing the issue of the bonds,

Before Swan (the second purchaser) bought the bonds of Tiffany, he called upon the then town treasurer in relation to them and to know what the action of the Town would be, and the treasurer told him what the vote of the Town was in authorizing the issue of the bonds and that the Town would call them in at the expiration of ten years from their date and pay them up, and that the Town had already called them in, but by mistake they had been called in a year too soon. Swan sold the bonds to the defendant, April 20, 1880. The defendant, at the time of the purchase, had full knowledge of the vote of the Town in relation to the issue of the bonds, and that the Town had called them in for payment."

It is difficult to see how this information can be regarded as anything less than information of the fact of the mistake. A knowledge of the vote of the Town necessarily involved a knowledge that the bonds were not drawn in accordance with the vote. It is, of course, barely possible that the defendant may have supposed that the Town relied upon its vote as giving it the power to call in the bonds in ten years, without any provision to that effect in the bonds, thus making their mistake one, not of fact, but as to the legal effect of their action. This, however, seems to us a forced and unnatural construction. We think the only reasonable view of the matter is, that the defendant knew or had such information that the law would impute to him knowledge that the bonds were by mistake issued as twenty year bonds instead of ten-twenty bonds.

Third. Was the mistake one of such a character that it can be corrected by a court of equity? It is claimed by the counsel for the defendant that the mistake, in such a case, must be mutual and the cause of the agreement; and numerous authorities are cited in support of the proposition.

This rule, within the limits of its proper application, is founded in reason. If a contract is corrected by a court of chancery to make it conform to the intention of one of the parties, it is, of course, forcing a contract upon the other party which he never intended to make, unless his own intent concurred with that of the other party. But this case is not of that character nor governed by that rule.

A grantor, by mistake, embraces in his deed a parcel of land that neither party intended to have conveyed. The grantee sees his mistake but does not call the attention of the grantor to it, and, afterwards, claims the parcel thus accidentally conveyed; or a person offers a reward of \$100 for the detection and arrest of a burglar, but by mistake and without his notice, it is printed \$1,000. A man who knows of the mistake, arrests the burglar and claims the \$1,000. In each of these cases the error is not mutual, but wholly on the one side. What is there on the other? Not mistake but fraud. That fraud can never stand for a moment in a court of equity. But suppose the case to be one where, instead of actual fraud, there is merely such knowledge, actual or imputed by the law, as makes it inequitable for the purchaser to retain his advantage. The court will deal as summarily with that inequitable position of the party, as in the other case with his fraud.

Kerr, in his work on Fraud and Mistakes, p. 409, after speaking of the general rule that mistakes must be mutual, says: "The mistake of one party only is attended by different consequences, according as the other party is or is not cognizant of the mistake. * * * An agreement cannot be affected by the mistake of either party in expressing his intention, of which the other party has no knowledge." Again, he says, on the same page: "A man cannot have relief on the ground of mistake, unless the party benefited by the mistake is disentitled in equity and conscience from retaining the advantage which he has acquired." Numerous authorities are cited in support of this proposition which we will not take time to consider.

It is, however, claimed, on the part of the defendant, that the mistake must have been one that induced the contract on the part of the purchaser; that is to say, that the purchaser must have taken the bonds for the very reason that they were twenty year bonds and not ten-twenty ones. But it is obvious that the hardship attending the correction of a contract, is all the greater when the other party accepted the contract for the reason that he supposed himself to be acquiring what the correction of it deprives him of. But, supposing the purchasers of the bonds in question had taken them in entire indifference as to whether they were twenty year or ten-twenty bonds, and that the defendant was now endeavoring to assert rights under them to which he had before been indifferent, would there be no remedy in equity? Can it be claimed for a moment that equity, which deals with substance, and not mere form, which applies reason and not mere arbitrary rules, would see no substantial difference between the case of a party who, when he accepted the contract, was indifferent with regard to a known mistake, and one who, at first indifferent, was now trying to take an unjust advantage of the mistake?

We conclude, therefore, that there was nothing in the nature of the mistake or in the relation of the parties to it, that should lead a court of equity to refuse the relief sought.

Fourth. Has the Town so far exercised its claimed right of option to call in the bonds at the end of ten years, as to stand in a position to assert the equitable rights which it claims?

It appears by the finding, that the Town, at a legal meeting held on the 7th day of October, 1878, voted "To authorize the selectmen of the Town (if deemed advisable) to call in the bonds," etc. This vote left it to the discretion of the selectmen and did not, in itself, constitute a calling in of the bonds. Nothing was done during the ensuing year under the vote, as it was discovered that the bonds could not be called in until a year later.

Another town meeting was called on the 8d and held on the 7th of February, 1880, at which the selectmen were instructed to call in the bonds. This action of the Town covered the whole ground and, if legal, would have constituted, in the fullest manner, a calling in of the bonds. It was not, however, a legal meeting, having been called on the 8d of February and held on the 7th, not leaving the time required by law between the warning and the holding of the meeting. *Brooklyn Trust Co. v. Hebron,*

51 Conn., 22. This point does not seem to have been made in the court below and we do not feel bound to consider it for the sake of reversing a judgment.

We will, however, in view of this illegality, lay this meeting out of the case. If this is done, we are compelled to fall back on that of the year before. That, it will be seen, referred the matter of the calling in of the bonds to the selectmen. The vote did not limit itself in the matter of time, or require the exercise of their discretion by the selectmen within any limited period. The action of the selectmen one year later was, of course, authorized by it. Now, we do not find the action of the selectmen stated in express terms in the finding, but it is found that "The Town, on the 25th of February, 1880, gave notice by publication in various newspapers, that said bonds would be paid at the office of the treasurer on the 1st of April, 1880, and that interest upon them would cease after that time." The Town, except in its assembled action in town meeting, acts through its selectmen, and it may be taken for granted that this notice was signed by the selectmen and was, therefore, their action under the vote authorizing them to call in the bonds. Thus the bonds were called in by the selectmen, under authority of the vote of the year before, their action losing none of its validity or effect by reason of its being taken under the vote of the later meeting, then supposed to be legal, but since discovered not to have been so.

It may, perhaps, be said that if the selectmen acted in the belief that the vote of February, 1880, was a legal one and, therefore, acted under it, they were merely obeying a positive order of the Town and not exercising their judgment on the question whether the calling in of the bonds was advisable. But the selectmen having, in fact, called in the bonds, and having clearly the power to do so, the question how far they acted according to their best judgment is one that cannot be made by an outsider like the defendant. If we look at the facts that appear, it is hardly possible to escape the conclusion that the selectmen concurred in the prevailing opinion of the people of the Town that it was best to call in the bonds. But, without assuming this, it is sufficient that the selectmen acted with full power, and that no fact is found which tends in any manner, to show that they did not act according to their best judgment and precisely as they would have acted if the vote of October, 1878, was the only one under which they attempted to act.

This, we believe, disposes of the principal questions in the case. Certain other questions, are made as to the correctness of the decrees even if the plaintiffs were entitled to relief.

It is said that the decree does not fix the time when the correction of the mistake is to operate, whether from the date of the bonds, the commencement of the suit, or the date of the decree. But it is clear that the correction of the mistake is merely to make the bonds ten-twenty bonds, just as if they had been so printed at the outset. No particular time needed to be named. The bonds simply became changed from what, by the mistake, they are, into what the Town intended that they should be; and the rights of the defendant are just what they would have been if the bonds had been made right at first.

CONN.

It is further claimed that the decree is erroneous in not making any disposition of the defendant's counterclaim. This counterclaim was for the recovery of the amount of the several coupons that had matured since April 1, 1880. But if the bonds are corrected so as to be ten-twenty bonds, then clearly the defendant had no right to collect the coupons maturing after the ten years had expired and the bonds had been called in.

The further claim, that the decree is erroneous in not fixing the date when the Town was or should be excused from paying its coupons, is answered by what we have last said. The bonds becoming ten-twenty bonds, the time when the Town ceases to be liable on its remaining coupons, is when the ten years have expired and the Town has called in the bonds.

We ought, perhaps, to notice a consideration bearing upon the general question of the plaintiffs' equity, which is urged by the defendant's counsel. They say that the plaintiffs, in delaying to bring their suit for so long a time after they learned of the mistake in the bonds, were "watching the uncertain tides of finance," and regulating their action accordingly. But, if the bonds had originally been ten-twenty bonds, the plaintiffs were not bound to call them in at the end of ten years, and had the right to watch the money market and determine their action by its condition and prospects. They were not bound to publish their intentions until such a time before the expiration of the ten years, as reasonable notice to the holders of the bonds would require. In applying to a court of equity for the correction of the bonds, they were not committing themselves at all to the policy of calling in the bonds; they were simply securing a right of option, which, when secured, they could exercise or not wholly at their own pleasure.

There is no error in the judgment.

In this opinion **Granger and Beardsley, JJ.**, concurred.

Park, Ch. J., dissenting:

I cannot concur in the result, to which the majority of the court have come, upon the question whether the plaintiff Town exercised its optional right to make the bonds payable at the end of ten years. It is true the committee has found that "On the 25th day of February, 1880, the Town gave notice, by publication in various newspapers, that the bonds would be paid at the office of the treasurer on the first day of April, 1880, and that interest upon them would cease at that time." But the committee has also found upon what action or attempted action of the Town this finding is based, and if the premises do not warrant the conclusion, then the finding ceases to be a finding of fact. Let us examine the premises:

On the 7th day of October, 1878, the Town passed the following vote: "That the selectmen be and they hereby are authorized (if in their judgment it seems advisable) to call in the bonds issued by the Town amounting to \$48,000, and to issue new bonds at a lower rate of interest." At this time it could not be known whether or not it would be for the interest of the Town to call in the bonds at the expiration of ten years. That would depend upon the

question whether or not new bonds could be issued at a lower rate of interest and, therefore, the Town merely authorized the selectmen, when the proper time came, to exercise their best judgment in the matter. The selectmen did nothing whatsoever in regard to the bonds till the 8d day of February, 1880. The time was now at hand when action must be taken to make the bonds ten year bonds, or they would become twenty year bonds, to all intents and purposes. For a period of sixteen months the selectmen had been unwilling to exercise the discretionary power conferred upon them by the vote of the Town on the 7th day of October, 1878, and were still unwilling, as clearly appears by their action, for they issued a call for a town meeting to convene on the 7th day of the same month, to instruct them what to do in the matter.

This as clearly makes a refusal on their part to act under the vote of 1878, as would a finding in express terms that they refused to exercise the discretion at that time conferred upon them. What can be clearer? After having ample power, and ample opportunity to use it for so long a period, and when at last there could be no further delay, we see the selectmen calling upon the Town to decide the matter and give them particular instructions what to do. The Town formally gave them particular instructions at the meeting which convened on the 7th day of February, 1880, as requested, and formally directed them to issue new bonds for the redemption of the old ones, at a rate of interest not exceeding four and one half per cent. The Town further formally instructed them in relation to all the steps to be taken in issuing the bonds and in relation to the redemption and destruction of the old bonds. New bonds were issued and the old bonds, except those in controversy, were redeemed and destroyed in accordance with these formal instructions of the Town.

Now, can there be any doubt under which vote of the Town the selectmen acted in calling in the bonds? I think not. It was not enough that the selectmen had discretionary authority to call in the bonds by the vote of October, 1878. They must intentionally exercise the power, in order to make the act the act of the Town. The authority conferred involved judgment and responsibility. Would they exercise it after sixteen months' delay, and after, as they supposed, the Town had instructed them to call in the bonds? I think not.

But it appears that the warning for the meeting of the Town on the 7th of February, 1880, was fatally defective in that but four days' notice was given for the meeting and, consequently, all the proceedings of that meeting were null and void. It was so held by this court in the recent case of *Brooklyn Trust Co. v. Hebron*, 51 Conn., 22. But it clearly appears that the selectmen and the voters of the Town supposed that the warning was sufficient and the meeting legal; consequently, it had the same effect upon the selectmen as it would have had if it had been legal. The case cited had not then been decided. Indeed, it must be conceded that the selectmen acted under it in the issuing of the new bonds and in the redemption and destruction of the old ones. They followed implicitly the supposed instructions of the Town

in all these transactions, and is it reasonable to conclude, that in calling in the bonds they exercised the discretion conferred sixteen months before, when the meeting of February 7, 1880, virtually instructed them so to do? Is it likely that they made an exception in this particular and followed all the other supposed instructions? I think not.

Furthermore, if the warning of the meeting of February 7, 1880, had been legal, the votes of the Town at that meeting would have revoked the discretionary authority conferred by the vote of October 7, 1878. The selectmen supposed that it was legal. Would they have intentionally exercised authority that they believed had been revoked, and that, too, when the revocation would relieve them from all responsibility in the matter? I think not.

I think, therefore, that the Town never exercised its optional right of making the bonds payable at the expiration of ten years from their issue; that this was not done by the vote of the Town on the 7th day of October, 1878, for the reason that the selectmen never exercised the discretion therein conferred; and that it was not done by the votes formally passed at the meeting on the 7th day of February, 1880, for the reason that all the proceedings of that meeting were null and void.

I think there is error in the judgment appealed from.

Carpenter, J., dissenting:

In reforming written instruments, the defective instrument and the real contract between the parties must be alleged in the complaint. *Thompsonville S. Mfg. Co. v. Osgood*, 26 Conn., 16.

It is not claimed that any contract was ever made with the defendant except that contained in the bond. If that was all, that is, if it was conceded that no other contract existed between these parties, it would be a pretty bold claim that a court of equity had power to change that contract. Let us then examine the transaction critically and see what evidence there is of any other contract with the defendant or with those in privity with him.

In January, 1870, preliminary steps were taken by the plaintiff to issue bonds. Bonds of a certain description were authorized in April. Prior to January, 1871, bonds were prepared and placed upon the market, by the agents of the Town. The Town voted that the bonds should be payable at the option of the Town in ten years, and that they should be due in twenty years. By mistake the option clause was omitted.

About the first of January, 1871, one Tiffany commenced negotiations for the purchase of the bonds in question. At that time the bonds were printed and signed, bearing date April 1, 1870. Both parties knew, or had ample means of knowing, just what they contained. Whatever mistake was made, was made before that time and, obviously, was the mistake of the Town alone, for Tiffany was in no sense a party to the transaction. There was then existing no parol contract with him.

The Town had prepared certain bonds and proposed to sell them, and he was willing to buy. The agent of the Town informed him that the Town had the right to redeem the

bonds before the expiration of the twenty years; that the bonds were ten-twenty bonds, and at the option of the Town could be called in and paid at the expiration of ten years from their date, and that such was the vote of the Town issuing the bonds. Tiffany took no pains to inform himself what the vote of the Town was, because he did not care whether the bonds were redeemable in five, ten or twenty years. He bought the bonds. That is all the finding on that subject.

Now, it will be observed that the negotiations related to existing bonds and not to bonds to be subsequently prepared pursuant to any agreement they might make. There was no contract that the bonds should be of a certain description. Tiffany made no agreement whatever in relation to that matter. As to that he was totally indifferent. The Town simply represented that an article which it had to sell was of a certain description. Tiffany neither assented to it nor denied it, as it was of no consequence to him. It was simply a sale of the bonds as they were, without warranty or other agreement. The contract was fully executed when he received the bonds and paid for them. The legal result was that the Town then became obligated to pay the amount of the bonds according to the terms and conditions named in them. No other executory contract existed between the parties.

To torture that transaction into an agreement by Tiffany that the bonds should be as represented by the Town is an unprecedented stretch of judicial power. But the plaintiff must not only show that there was such a contract, but also that Swan, a subsequent owner of the bonds, and the defendant, had notice of it when they purchased.

In respect to Swan. The first finding is, "That at the time Swan bought them he knew that the Town claimed the right to call them in at the expiration of ten years from date, and that they intended to do so," and the supplemental finding is as follows: "Before Swan bought the bonds of Tiffany, he called upon the then town treasurer in relation to them, and to know what the action of the Town would be, and the said treasurer told him what the vote of the Town was in authorizing the issue of the bonds, and that the Town would call them in at the expiration of ten years from their date, and pay them up; that the Town had already called them in, but by mistake they had been called a year too soon." Here is no verbal agreement between Swan and the Town, and there is not the slightest intimation that Swan had any knowledge whatever of any agreement with Tiffany.

How is it with the defendant? In respect to him, the finding is as follows: "Swan sold these bonds to the defendant, April 20, 1880, at a premium of not over two per cent. The defendant, at the time of his purchase, had full knowledge of the vote of the Town in relation to the issue of the bonds, and that the Town had called them for payment."

What is the effect of such knowledge? It gave the defendant no notice of any contract with Tiffany, and there is no other evidence that he had such notice. Whatever, therefore, may be said of the transaction between the Town and Tiffany, nothing occurred that will

bind the defendant. If he is liable at all it is because of some implied agreement with him, or of circumstances equivalent to such an agreement. The only evidence of such circumstances, or implied agreement, is the extract from the finding just quoted. If found there, it is because the defendant then knew of certain facts. Now, it is true that mere knowledge will often subject a man to pre-existing equities; but how it can be regarded as sufficient evidence of a contract, or, in law, as the equivalent of a contract, is beyond my comprehension. Will it be seriously contended by any fair-minded man that the defendant's knowledge of the vote of the Town, of its action in calling the bonds and of its claim in respect thereto, is equivalent to a contract that the bonds were and should be as the Town claimed they ought to be? These bonds had been in existence ten years; he found them in the market; he knew the claims of the Town in respect to them, but he knew at the same time that they were not in fact as the Town claimed them to be. Under these circumstances, he had a perfectly legal, equitable and moral right to purchase them, relying upon the liability of the Town as therein expressed. A judicial decree changing them to his prejudice is arbitrary and unwarranted; and a decree for which, I am sure, no precedent can be found.

But supposing I am wrong as to the facts, and in my conclusions therefrom; even then I say the law will not justify such a decree.

"There are two requisites essential to the exercise of the equitable jurisdiction in giving any relief, defensive or affirmative. The fact concerning which the mistake is made, must be material to the transaction, affecting its substance and not merely its incidents, and the mistake itself must be so important that it determines the conduct of the mistaken party or parties," Pomeroy, Eq. Jur., § 856.

"Mistake in matter of law or matter of fact, to be a ground for equitable relief, must be of a material nature, and must be the determining ground of the transaction. A man who seeks relief against mistake must be able to satisfy the court that his conduct has been determined by the mistake. Mistake in matters which are only incidental to and are not of the essence of a transaction, and without or in the absence of which, it is reasonable to infer that the transaction would nevertheless have taken place, goes for nothing. If the mistake has not been the only cause by which the conduct of a man has been induced, but another motion has intervened, the mistake cannot be set up as a ground of relief." Kerr, Fraud and Mistake, 408.

"The rule as to ignorance or mistake of facts entitling the party to relief, has this important qualification, that the fact must be material to the act or contract, that is, it must be essential to its character and an efficient cause of its concoction. For, though there may be an accidental ignorance or mistake of a fact, yet, if the act or contract is not materially affected by it, the party claiming relief will be denied it." 1 Story, Eq. Jur., § 141.

It cannot be said that the mistake concerned the substance of the transaction; it concerned a mere incident and that an unimportant one. The object was to effect a loan. The time of

its continuance, whether ten or twenty years, was then of trifling importance to the Town; and the option clause was, perhaps, of still less importance. Time was not of the essence of the contract. In either event, the Town was reasonably accommodated. If the bonds were to run twenty years absolutely, the rate of taxation could be adapted to it; if redeemable in ten years, they could still run twenty years, or bonds at a lower rate of interest could be substituted for them, at the pleasure of the Town. But at that time it could not be known whether the option clause would be of any advantage. So, in any event, it was of little consequence and by no means an essential feature of the transaction. In the absence of any finding that it was material, this court cannot presume that it was.

And how and where does it appear that the mistake induced the loan; that it determined the action of the Town; that the Town, had it known that the option clause was omitted, would not have accepted the loan? On this point the record is silent. How, then, can the Town have the relief asked for, without disregarding or overriding an essential principle of equity of universal application in this class of cases? This is a point the Town must show affirmatively, and it has wholly failed to do so.

But I go further and insist that the probability is that the agents of the Town did know of the omission, before the bonds were sold, and that they sold them knowingly; in short, that there was no mistake.

There is no direct, explicit finding that there was a mistake. It is found that a mistake occurred in printing the bond, but the essential thing is, and that is not found, that the mistake was unknown when the bonds were sold and the money received.

At this point let us glance at what the law requires: "Whether the contract contains more or less, than the agreement of the parties, or something different, if the mistake is made out by proofs entirely satisfactory, equity will reform the contract so as to make it conform to the precise intent of the parties. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief." 1 Story, Eq. Jur., § 152. This principle was recognized and enforced by this court in *Bishop v. Clay Fire Ins. Co.*, 49 Conn., 167.

Now look at the finding: "It did not appear in evidence that any agent of the Town noticed the form of the bond, or noticed that it did not contain the option to redeem in ten years, but it was assumed to be correct." "None of the agents of the Town appear to have had any knowledge that there had been a mistake in the issue of the bonds, until the Town was informed, after February 25, 1880, by the Chelsea Savings Bank, a holder of some of them, that the bonds, on their face, were twenty year bonds and not redeemable before."

That is all there is upon this vital point in the case, the mistake itself. That is found only in this vague and ambiguous language. "It did not appear in evidence that any agent of the Town noticed the form of the bond," etc. But did it appear in evidence that they did not? That is the important inquiry; and the report gives us no answer, except by its

silence. And such an answer must be regarded as a negative one.

But we are told that this must be regarded as equivalent to a finding that they did not know that there was a mistake. I think otherwise. The learned committee understood the use of language and, had he intended to find that fact, he would have done so in terms not to be misunderstood, and would not have left it to inference and a doubtful inference at that.

And so of the other expression. "None of the agents of the Town appear to have had any knowledge," etc. If by this he intended that they did not have knowledge, why did he not say so?

Suppose that the then agents of the Town had testified that they did not remember as to a transaction that took place ten years before; that they had forgotten about it; that they had no recollection of noticing the mistake, etc.; in that state of the testimony a cautious trier might express himself in the language quoted: "None of the agents appear," etc. Can we not see in that careful and somewhat peculiar expression, not only an unwillingness, but a refusal to find the fact? To me it is perfectly clear that it is not such a finding as the law requires.

Again; there is negative evidence of great significance, that the view I take of this finding is the correct one.

The quotations above are from the first report of the committee. The case was recommended with directions to the committee "To hear further evidence and make additional report of the facts found on such evidence." In the second report we find this clause: "At the time the town treasurer signed the bonds, he signed them supposing they were payable at the option of the Town in ten years from their date. He signed them all without reading any of them; the bonds were left with the town treasurer for delivery to purchasers."

That is an explicit and unequivocal statement as to the knowledge of one of the three men who signed the bonds. We should expect to see, yea, more, it is morally certain that we should have seen an equally clear and explicit statement as to the knowledge of the other two men, if the evidence would justify it. The three signers were Giles Potter, first selectman; Edward W. Redfield, treasurer, and Carnot O. Spencer, agent. The treasurer does not appear to have had anything to do in preparing the bonds or causing them to be prepared. It was made the duty of the selectmen, by vote of the Town, to see that the bonds were "properly numbered, dated and signed by competent authority." The knowledge or want of knowledge of these men was the all important inquiry. They knew about it if anyone did, and they were doubtless called as witnesses. However that may be, the committee heard the evidence, had this matter in mind, knew its importance and could only make this tame and inconclusive statement, immediately following that quoted above: "The agents of the Town did not intend to have the bonds printed as they were printed, but did intend that they should be printed so as to be payable at the option of the Town in ten years from their date." This part of the finding is silent as to their knowledge, and that silence is significant.

To me, the inference is necessary and conclusive that the evidence did not warrant the committee in finding that these men had no knowledge of the mistake at the time the bonds were issued. Unless that fact is clearly established by proof and found by the court, the plaintiffs have no case; and I submit that the fact does not appear in this case.

But suppose that I am wrong in this, and that the fact was clearly proved and expressly found; then another question arises. In 1 Story, Eq. Jur., § 146, this rule is laid down: "It is not, however, sufficient in all cases to give the party relief, that the fact is material; but it must be such as he could not by reasonable diligence get knowledge of when he was put upon inquiry. For, if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence."

These agents were put upon inquiry, for it was clearly their duty to know the character of the bonds they were signing and to detect the mistake, if there was one. A party will not be permitted to allege ignorance of the contents of his own deed. *Hamilton v. Nutt*, 84 Conn., 501.

Is the Town an exception to this rule? The slightest diligence would have disclosed the fact. It was only necessary to read the bond to discover the omission. A want of slight diligence in such matters is culpable negligence. The plaintiff, then, is in this dilemma: if its agents read the bond, they had knowledge of the mistake and issued the bonds understandingly, and that is fatal to the case; if they did not, they were guilty of culpable negligence, and that is equally fatal.

John W. WEBSTER, Trustee,

v.

Oliver WELTON *et al.*

1. Where, by his will, testator, after making certain bequests, creates a trust, embracing the residuary estate, providing that on a certain date named the trustees shall divide and pay over the principal sum of the trust fund, one fifth part to his grandchildren, the children of his son, in equal shares, held, that a post-natal grandchild, born of a second wife of his said son, shares equally with its brothers and sisters, in the one fifth of the residuary estate.

NOTE.—Children of brothers and sisters heirs of testator take *per capita* with such heirs an equal share in the residue, where by the terms of the will each relative to whom he had given a legacy was named in the will. See, *McKelvey v. McKelvey* (Ohio), 1 West. Rep., 68.

Devises individually named, and nothing in the will indicating a different intent, devisees, take of the residue as individuals, not as a class. *Church v. Church* (R. I.), *ante*, 139. A general residuary devise or bequest carries lapsed or void devises, but does not include any gift of the residue itself which falls. *Id.*

2. Such a bequest is a class gift, and the rule applies, that children born after the death of the testator take equally with children living at his death.
3. Where, in one clause of a will, personal and separate bequests are made to grandchildren by name, they constitute specific legacies and not a class gift, and the grandchildren take *per capita*; but where, in a subsequent clause, a trust is created, embracing the residuary estate, to be divided on a certain date in the future, they take as a class.

(New Haven — Decided September, 1885.)

RESERVATION of a question concerning the construction of a will.

The facts sufficiently appear in the opinion.

Mr. J. W. Webster, in person:

The gift is to take effect, not at the death of the testator, but after a particular estate or interest is carved out, with a gift over to this class. This, as we believe, will embrace, not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. In other words, when the legacy takes effect in point of enjoyment. 2 Jarm. Wills, 155, 157; 2 Redf. Wills, 10, 29; *Dingley v. Dingley*, 5 Mass., 585, 587; *Fosdick v. Fosdick*, 6 Allen, 41; *Hall v. Hall*, 123 Mass., 120; *Jones' App.*, 48 Conn., 60.

Mr. L. B. Morris, for the four grandchildren.

Stoddard, J., delivered the opinion of the court:

Maud A. Welton, a child of Noah B. Welton, and grandchild of the testator, Avad W. Welton, claims as legatee under the ninth clause of her grandfather's will. This claim is contested by all the other children of Noah B. Welton.

By his will, the testator, after making certain bequests, creates a trust, embracing the residuary estate, and in the ninth clause of the will he provides that "On the first day of July, 1885, or as soon after that time as is practicable, I order and direct my said trustees to divide and pay over the principal sum of said trust fund in manner and portions as follows, * * * and to my grandchildren, children of my said son, Noah B. Welton, or to such of them as shall at that time be living, and to be equally divided between them, one fifth part."

The will was made March 15, 1870, and the testator died March 15, 1871.

At the time the will was made, Noah B. Welton was married and had the four children and no other, who are named in the fifth clause of the will, and who are contesting the claim of Maud.

About the 8th day of January, 1878, the wife of Noah B. Welton was divorced from him, and said Noah married again about January 22, 1879, and of this second wife Maud A. was born December 19, 1879.

The testator gives the legacy in question to a class, that is, to his grandchildren, children of his son, Noah B. Welton. Under a similar provision, this court has very recently held that children born after the death of the testator take equally with children living at his death.

Jones' Appeal, 48 Conn., 67. This rule has "nearly universal application, with hardly a dissenting authority," and controls the case at bar, unless a different disposing intent can be discovered in other parts of the will. And in this behalf, it is urged on the part of the children living at the testator's death, that the testator has, by the terms of his will, expressed an intent that this nearly universal rule shall not govern the disposition of this legacy: for the 5th section of the will gives a legacy to each of the four children living at the testator's death in terms as follows: "I give and bequeath to my grandchildren, Oliver, Andrew, Walter and Esther, children of my son, Noah B. Welton," etc.; and the argument is, that as the testator in the 5th clause of the will gives specific legacies to these particular persons by their individual names, and in connection with such gift describes them as "my grandchildren, children of my son, Noah B. Welton," therefore the 9th clause of the will, which contains the same words of general or class description, "grandchildren, children of my son, Noah B. Welton," must bear the same restricted construction as to the persons taking thereunder, notwithstanding the omission to individualize therein.

This course of reasoning is not persuasive, and there are, at least, two substantial considerations antagonistic to this view; one is that it is not lightly to be assumed that the testator intended to disinherit one grandchild while making all others, members of the same class, recipients of his bounty; another reason is to be drawn from the form of the will itself. The will is drawn with technical nicety, dis-

poses of a considerable estate by a variety of trust and other provisions, and provides for possible contingencies, indicating both care and capacity to express the precise intent of the testator in apt and full terms. Language thus used should have its natural and legal meaning, and the very fact that the testator uses, in different clauses of this will, different phraseology to express his intent, prompts the belief that such use was intentional, and made in order to produce different results in view of future possibilities.

Besides, the 5th clause does not contain a class gift; the legacies therein are personal, separate legacies to particular persons. While the legacy in the 9th clause is, by its terms, a class gift, the testator was obviously certain as to what particular persons would take under the 5th clause, and uncertain under the 9th clause, and expressed himself accordingly. This view is not weakened by suggesting that the testator contemplated the possible death of some of the living grandchildren, for he might, with equal reason, have contemplated the birth of others, and there is nothing in the general scope of the will, nor in any particular clause or combination of clauses, to indicate an intent to exclude any of his grandchildren, children of his son Noah, from the benefits of this legacy.

We see nothing to take this case from the operation of the general rule, and advise the Superior Court that Maud A. Welton takes under the ninth clause of the will equally with each of the other children of Noah B. Welton.

In this opinion the other Judges concurred.

SUPREME JUD. CT. OF MASSACHUSETTS.

Maurice GODDARD, *Trustee, etc.*,

v.

Josiah D. WHITNEY *et al.*

After certain specific devises and bequests, a testator directed that the residue of his estate should remain as invested, at his death, for five years thereafter, the income to be divided into five shares, one share for his wife, and one share to each of his four children; and at the end of the five years the principal to be divided into five portions, one for his wife for life, and one to each of his four children, with provisions, in case of the death of the wife, that her share be divided among her immediate surviving children; and with provisions in case of the death within the five years, without issue, of any of his children, that the share of such child, dying, should go to the surviving children in equal proportions. One of his heirs died intestate, before the testator and without issue. The wife died more than five years after the testator; so also, did one of the heirs, who left a husband and a daughter. Held, re-affirming *Goddard v. May*, 109 Mass., 468, that the share of the heir, dying before the testator, did not lapse, but that the income went to the three other immediate heirs, his children, and the principal would go to those of the three who were alive at the end of the five years from the testator's death. Held, also, that upon the decease of his other heir, after the five years, her portion was to be held in trust, for the use of her son and daughter, testator's grandchildren, during their lifetime respectively, and on the decease of her daughter, testator's granddaughter, leaving issue, the trust terminated as to the share of such granddaughter, which then became the property of the estate of such granddaughter, and passed to her husband and her issue.

(Suffolk—Decided September 3, 1885.)

PETITION by Maurice Goddard, Trustee under the will of Samuel Goddard, praying for instructions as to the construction of the will. The petitioner having died, Julia Goddard, administratrix *de bonis non*, with said will annexed, was made a party. The case, as it appeared from the petition and answers, on which it was reserved by Holmes, J., for the determination of the full court, was as follows:

Samuel Goddard, on September 25, 1865, made a will. By the first clause he gave to his wife his estate in Brookline, furniture and other appurtenances, for her life, "at her death to be divided equally among her immediate surviving children," according to provisions therein-

after named. By the third clause, he gave to his granddaughter, Eleanor G. May, certain personal property, and if she "shall die before the age of twenty-one, without legal issue," her portion to revert in equal shares to testator's immediate children living at the time of her death.

In the fourth clause he directed that the portion of his estate remaining after the bequests in the three preceding clauses, remain invested as he might leave it at his death, for the space of five years, and that the income accruing therefrom during said time be divided into five equal shares, and paid as it should become due, one share to his wife in lieu of dower, and in case of her death to be equally divided among her immediate surviving children; one share to his daughter, Louisa Whitney, and in case of her death it, together with all other income accrued to her, is to be equally divided between her two children, Ann Louisa Field and Eleanor G. Whitney, but should either or both of her said children decease without legal issue, then to be equally divided among testator's immediate surviving children; one share to his son, William D. Goddard, and in case of his death without legal issue, it, together with all other income accrued to him, to be equally divided among his immediate surviving brother and sisters; one share to his daughter Julia, and one to his son Maurice, each in the same terms as those of the gift to William D.

The fifth clause is as follows: "And it is my will that at the expiration of five years after my death, the principal of all that part of my estate specified in article fourth of this instrument, shall be divided as it then stands into five equal portions, each portion to contain a fifth part of each of the investments in which my estate may then be comprised; said portions to be then given according to my following directions to the persons hereinafter specified, viz.: one of said portions to my wife, Mehitable May, to have and to hold the same during her life, and at her death her said portion shall be equally divided among her immediate surviving children. Also, I give and bequeath one of said portions to Josiah Bardwell, of Boston, in the County of Suffolk and Commonwealth of Massachusetts, to have and to hold the same to him, his heirs, executors, administrators, and assigns, but to hold the same in trust, nevertheless, for the following purposes and uses, viz.: to receive and collect all the income that shall accrue from the said portion of my estate, and pay the same to my daughter, Louisa Whitney, during her life, in semi-annual payments." * * * "And it is my will that at the death of my daughter Louisa, this her said portion of my estate shall be equally divided between her two children, Annie Louisa Field and Eleanor G. Whitney, the same to be held in trust for them by the said Josiah Bardwell, and the income thereof to be paid them semi-annually during their life; and should either or both of the said children decease without legal issue, then it is my will that the said portion of my estate above bequeathed to such child or children shall be divided in equal shares among my immediate surviving children. Also, one of the said portions shall be given to my son, William D. Goddard, to have and to hold, and to dispose of the same, together with

NOTE.—See, *McKelvey v. McKelvey*, (Ohio,) 1 West. R., 66; *Ames v. Ames*, (R. I.), ante, 33.

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all other property that may accrue to him under the provisions of this will; but if he should die intestate and without legal issue, it is my will that his said portion of my estate shall be equally divided among his immediate surviving brother and sisters." The remaining portions were given to Julia and Maurice, on the same terms as those of the gift to William D.

The sixth clause is as follows: It is my will that if either or any of my children above specified, viz.: Louisa Whitney, William D. Goddard, Julia Goddard and Maurice Goddard, should decease without legal issue during the space of five years after my death, then all that portion of the principal of my estate bequeathed to such child or children shall be added in equal shares to the portions of such of my immediate children who may be living at the expiration of the five years aforesaid.

William D. Goddard died intestate and without issue in 1867. The testator died in 1871, leaving his wife him surviving, and as his heirs, his children Louisa, Julia and Maurice, and his granddaughter Eleanor G. May, only child of Eleanor L. May, a deceased daughter. Louisa Whitney died May 18, 1882, leaving a husband, Josiah D. Whitney, and two daughters, Annie L., wife of Henry L. Field, and Eleanor G., who died May 14, 1882, leaving a husband, Thomas Allen, and their daughter, born April 18, 1882. Mehitable, the testator's wife, and Maurice, the petitioner, died pending the petition.

Under a former petition (as reported 109 Mass., 468), this court decreed that the share of William did not lapse, but the income went to the three surviving children of the testator, and the principal would go to those of the three who were alive at the end of the five years from the testator's death.

The present petitioner prayed to be instructed: 1. whether the one third of the portion bequeathed to William and paid to the petitioner under said decree is to be held in trust and subject to the provisions which applied to the other portion of the estate given to Bardwell in trust under the fifth clause, or whether at the expiration of the five years it became the absolute property of Louisa Whitney, discharged of all trust; 2. whether the trust was terminated in whole or in part by the decease of Eleanor G. Allen, leaving lawful issue; and if so, who is entitled to the property, and how is the same to be now held and administered.

Messrs. A. A. Ranney and W. E. L. Dillaway, for petitioners.

Messrs. Nathan G. Morse and Horace G. Allen, for defendant Whitney:

Where a testator first makes a gift in terms which clearly confer a vested interest, the additions of equivocal expressions of a contrary tendency will not suspend the bequest, or prevent it from taking effect absolutely. *Williams v. Bradley*, 8 Allen, 282.

The words of the will are clear and unambiguous and are to be taken as they stand. *Rogers v. Daniel*, 8 Allen, 348; *Yates v. Mad-dan*, 3 Macn. & G., 542-543; *Kirkpatrick v. Bedford*, 4 App. Cas., 104-108; *Smith v. Butcher*, L. R., 10 Ch. D., 116; *Ralph v. Carrick*, L. R., 11 Ch. D., 878; *Caledonian R. Co. v. N. B. R. Co.*, L. R., 6 App. Cas., 181; *Grey v. Pearson*, 38

L. R., 6 H. L. Cas., 106; *Roddy v. Fitzgerald*, L. R., 6 H. L. C., 876; *In Re Orey*, L. R., 20 Ch. Div., 681.

The words "shall be added" etc., must be allowed their universally recognized import. *Barrett v. Marsh*, 126 Mass., 213; see, *Goddard v. May*, 109 Mass., 468.

After a gift in terms clearly conferring a vested interest, the addition of equivocal expressions to the contrary, will not suspend it. *Williams v. Bradley*, 8 Allen, 282.

Mr. C. W. Turner, Guardian Ad Litem, for defendant, Eleanor G. Allen:

A construction for the purpose of carrying into effect the intention of the testator, is in accordance with the rules of law in the construction of wills. *Howland v. Howland*, 11 Gray, 475; *Ellis v. Proprietors, etc.*, 2 Pick., 247; *Metcalf v. First Parish*, 128 Mass., 371; *Cook v. Holmes*, 11 Mass., 581; *Bradlee v. Andrews*, 138 Mass.

The gift does not come within the rule of law against perpetuities. *Loring v. Blake*, 98 Mass., 253; *Otis v. McLellan*, 13 Allen, 339.

A bequest for personal property may be made to one for life, with remainder over absolutely. *Dorr v. Wainwright*, 13 Pick., 328.

An absolute ownership of personal property may be given to one, subject to a contingent limitation over at his decease. *Homer v. Shelton*, 2 Met., 194.

The final vesting of personal property may be postponed to the same extent as in executory devises of real estate. *Fosdick v. Fosdick*, 6 Allen, 41; *Sears v. Russell*, 8 Gray, 86.

There seems to be no occasion for the application of the rules of law distinguishing between a gift dependent upon a definite or indefinite failure of issue, under the doctrines discussed and laid down in *Hayward v. Howe*, 12 Gray, 49; *Terry v. Briggs*, 12 Met., 17; *Hall v. Priest*, 6 Gray, 18; *Parker v. Parker*, 5 Met., 184; *Brightman v. Brightman*, 100 Mass., 238.

The gift over in the bequest and devise to William D. Goddard is maintained in *Goddard v. May*, 109 Mass., 468.

In the gifts to the children, other than Mrs. Whitney, it is to be observed that the property was given "To have and to hold and to dispose of the same, together with all other property that may accrue to him under the provisions of this will; but, if he should die intestate and without legal issue," then to the immediate surviving brothers and sisters. In their case it is difficult to see why this power of alienation during life, and of testamentary disposition, did not give an absolute estate to the children alive after the expiration of five years from the testator's decease, during which time it was to be held in trust. *Id. v. Id.*, 5 Mass., 500; *Sears v. Russell*, 8 Gray, 86, 100; *Gifford v. Choate*, 100 Mass., 343; *Homer v. Shelton*, 2 Met., 194; *Hale v. Marsh*, 100 Mass., 468; *Burbank v. Whitney*, 24 Pick., 146.

If the property had been left simply in trust for Mrs. Allen with a limitation over in case she died without issue, it might be claimed that she took an equitable estate tail in the real estate and the complete equitable title to the personal property. *Loring v. Elliot*, 16 Gray, 573; *Perry, Trusts*, 2d ed., 437.

But as the will distinctly provides that she

was only to have the income of the property during her life, she must be held to have taken only an equitable estate for life; and, as the rule in *Shelley's Case* is not in force in this State, her issue must take as purchaser. Pub. Stat., ch. 126, § 4; *White v. Woodberry*, 9 Pick., 136.

If the daughters of Louisa Whitney should take the entire interest in the personal property after the death of their mother, their husbands would, under the law as it existed at the time the will was made, at their decease become entitled to the whole of such personal property. Gen. Stat., ch. 95, § 16, clause 4. And Thomas Allen would now, under Stats., 1882, ch. 141, be entitled to one half of the property, the income of which was payable to his wife. Such results would certainly be contrary to the testator's intention, as shown by the whole will. It is true that the will provides that, at the death of Louisa Whitney, her portion "shall be divided between" her two children; and in the last part of the clause the testator refers to the trust property, as property "above bequeathed to such child or children." The portions of the clause quoted, construed in connection with the words directing the trust and the income only be paid over during the lives of the beneficiaries, with remainders over in case of failure of issue, indicate the intention of the testator with sufficient clearness. *Barrus v. Kirkland*, 8 Gray, 512; *Simonds v. Simonds*, 112 Mass., 163.

The testator intended to make by his will, a full, complete and final disposition of all his property, and that the trust in question should not be allowed to fail of its purpose. See, *Metcalf v. First Parish*, 128 Mass., 371.

His intention, as drawn from the whole will that the issue should take, may be carried into effect by supplying the proper words for that purpose under the authority of *Weston v. Weston*, 125 Mass., 270; *Ex Parte Rogers*, 2 Mad., 449.

Mr. J. F. Colby, for Thomas Allen:

One half of the portion given in trust for the benefit of Mrs. Louisa Whitney goes and belongs to Allen's infant daughter, Eleanor G. Allen, under the terms of the will. But if not so held, the portion of said Mrs. Whitney given in trust went to and became the absolute property of her two children upon her decease, subject to be held in trust during their lifetime and upon the decease of his wife, Allen, under the Statutes of 1882, ch. 141, became entitled to one half of his wife's portion. *Fay v. Phipps*, 10 Met., 341; *Bowditch v. Andrew*, 8 Allen, 339.

Mr. H. S. Dewey, for Annie L. Field:

The fifth and sixth clauses must be interpreted together. *Parker v. Parker*, 5 Met., 186.

The decision in *Goddard v. May*, 109 Mass., foot p. 472, imports that the testator did not intend that Louisa should have two separate shares in different estates, but that the portion for her and her children should be held in trust during their lives. As to the termination of the trust, the words in the fifth clause, "Should either or both of said children decease without legal issue," import a gift to such legal issue. *Roe v. Summeret*, 2 W. Bl., 692; *Humphreys v. Humphreys*, L. R., 4 Eq., 479; *Hayward v. Howe*, 12 Gray, 51; *Parker v. Parker*, 5 Met., 189.

Mr. C. F. Sanger, Guardian *Ad Litem*, for John H. and W. H. Field.

Devens, J., delivered the opinion of the court:

The will concerning which instructions are asked, has been once before this court for interpretation. *Goddard v. May*, 109 Mass., 468. William D. Goddard having died during the lifetime of his father, it was necessary then to determine whether the legacies of principal and income of the shares directed to be set apart for W. D. Goddard had lapsed by his death without issue and intestate in the lifetime of the testator, there being in that event an unconditional gift over.

It was decided that the words "his share" and "his portion," found in the will, referred to the shares of the estate set apart for him, but did not show any intent to make the vesting of an interest in W. D. Goddard a condition of the gift over; that the sixth clause was not inserted with a view to the limitation over, and that the share of Wm. D. Goddard should be retained undivided, except for the purpose of distributing the income to the surviving brothers and sisters until the expiration of five years from the testator's death, during which time the principal of the estate was to remain undivided.

It was further said that when the distribution shall take place, one third of this share will be added to each of the shares of the brothers and sisters.

When this division was made the five years had not expired and it was not necessary to decide, nor was it by this language decided, whether the portion of the estate coming to Mrs. Whitney, by reason of the death of her brother, should be taken by her absolutely, or whether it should be added to the trust estate created on her behalf and that of her children, and thus held and administered.

The fourth clause, which relates to the disposition of the income, provides that Mrs. Whitney's share, in case of her death, together with all that may have accrued, is to be paid to her daughters whom it names; the fifth clause places her share of the principal in trust, and provides for the division of it between her daughters at her decease, the income being paid to them during life; the sixth directs that if either child shall decease during the five years, that portion of his estate bequeathed to each child "shall be added" in equal shares to the portions of such of any intermediate children who may be living at the expiration of "five years aforesaid." The fourth and fifth clauses show fully an intention that the husband shall not participate in the income or principal of the estate which Mrs. Whitney received. By the sixth clause, if the death of W. D. Goddard had occurred after that of his father, as such share of his interest as Mrs. Whitney might have received was to be added by terms of the clause to her portion, this addition would have been to the portion described in the fifth clause, which was in trust. By the first clause, also, had Mrs. Whitney died subsequent to the decease of her mother, such share as she might have received from her mother's estate would not have been received absolutely, but added to that portion which was held in trust. The language that at the mother's death "Her said estate shall be divided equally among her immediate surviving children according to the provisions hereinafter named, with regard to their portions of the rest

of my estate," allows no other interpretation.

Where, therefore, the testator in the fifth clause, referring to the portion of W. D. Goddard, and to the contingency of his dying intestate and without issue, provides "That his said portion of my estate shall be equally divided among his immediate surviving brothers and sisters," the intention of the testator revealed throughout the will compels us to hold that this division is to be made by addition to the portions elsewhere given to such surviving children and upon the same terms as those upon which such portions are given. When the testator, in the entire structure of his will, has revealed an intention, the language of individual clauses is always to be construed with reference to that intention, even if in another instance or in another connection, it might properly receive a different construction. *Sparhawk v. Cloon*, 125 Mass., 265; *Metcalf v. Framingham Parish*, 128 Mass., 370, 374; *Bradlee v. Andrews*, 187 Mass., 50.

Assuming that the property derived from the share of W. D. Goddard is to be added to and form a part of the share of Mrs. Whitney, we are to consider what disposition is now to be made of it and who is entitled thereto. Mrs. Whitney having deceased after the expiration of the five years and her daughter, Mrs. Allen, spoken of in the will as Eleanor G. Whitney, having deceased subsequently to the decease of her mother, Mrs. Whitney, herself having a daughter, Eleanor G. Allen. Mrs. Allen's husband, Thomas Allen, was alive at her decease and is still living.

The part of the fifth clause relating to the final disposition of the trust property held for the benefit of Mrs. Whitney during her life, and of which she was to have the income, provides that at her death "Her said portion of my estate shall be equally divided between her two children, Annie Louise Field and Eleanor G. Whitney" who afterwards became Mrs. Allen, "The same to be held in trust for them by the said Josiah Bardwell, and the income thereof to be paid them semi-annually during their life, and should either or both of the said children decease without legal issue, then it is my will that the said portion of my estate above bequeathed to such child or children shall be divided in equal shares among my immediate surviving children."

The clause certainly attempts to provide for all contingencies and to make a complete disposition of the testator's estate appropriated to Mrs. Whitney. The final vesting of personal property (and Mrs. Whitney's portion consisted both of personal and real estate) may by means of an express trust be postponed as in executory devises of real estate and there can be no objection, if the ultimate disposition of the property is not postponed in any contingency for a period beyond lives in being and twenty-one years thereafter. *Sears v. Russell*, 8 Gray, 86; *Fosdick v. Fosdick*, 6 Allen, 41; *Loring v. Blake*, 98 Mass., 283; *Otis v. McLellan*, 18 Allen, 339; *Hooper v. Bradbury*, 183 Mass., 308.

Mrs. Whitney had only an equitable estate for life. She had no power to say who should take after her, and those who were then to take were distinctly named. Had there been, at the time the will became operative, other children or had there been such subsequently born, they

would have had no benefit under this clause. The rights of Mrs. Field and Mrs. Allen are directly derived from the will and they take thereunder as purchasers.

The remaining questions raised by the will for instructions will be determined by considering what was the character of the estate taken by the two daughters of Mrs. Whitney respectively. Did they have equitable estates for life only in the trust property or such estates of inheritance therein that when Eleanor G. Whitney (Mrs. Allen), deceased, leaving lawful issue the trust was terminated as to one half the property, and is such portion now to be treated as her intestate property to be disposed of according to the rules of descent and distribution? The language of the will immediately relating to this point, we have already quoted. Although a contingency existed, in the occurrence of which there was a devise over of the property, the expressions which show that the two granddaughters are to take more than equitable estates for life in the trust property are very strong. Thus it is provided that Mrs. Whitney's share "shall be equally divided" between them, and the trust property is spoken of as "above bequeathed to such child or children." The rule of the common law, that in a deed or conveyance *inter vivos*, the omission of the words "heirs or assigns" indicated an intention to convey only a life estate, does not ordinarily apply to devises. Our statute also has provided that "Every devise shall be construed to convey all the estate which the testator can lawfully devise in the lands mentioned unless it clearly appears by the will that he intended to convey a less estate." R. S., ch. 127, § 24; *Gleason v. Fayerweather*, 4 Gray, 343.

While in terms the testator provides for the death of his granddaughters without issue by the bequest of the portion in such case to his immediate surviving children, he does not expressly provide for the contingency which has occurred; the death of one of them leaving issue. But that which the testator gave is not to be construed as less than an estate of inheritance, because in a certain contingency it might be determined. The devise over in case either of the granddaughters die without legal issue, necessarily implies that if they die leaving issue an estate of inheritance is devised to her. If the clause by which it was ordered that the estate should be equally divided between the two granddaughters, the income being paid to each for life, could otherwise be construed as giving only an estate for life, the effect of the limitation over to her legal issue, would be to enlarge it. *Hayward v. Howe*, 12 Gray, 49; *Parker v. Parker*, 5 Met., 184.

It is contended that the manifest purpose of the testator was not merely to prevent the husband of Mrs. Whitney, but also the husbands of either of her daughters, from any participation in his estate and to keep it in his immediate family. If so, he has certainly failed to express such purpose, as it is only in case of "decease without issue" that he has shown an intention that the share bequeathed to either of his granddaughters named shall be disposed of by a devise over to his then surviving children.

Mrs. Allen's share was, indeed, to be kept in trust during her lifetime, but this is not inconsistent with holding that she was equitably the owner of the property. Trusts are subject to the same

rules of descent and are deemed capable of the same limitations as legal estates. Whatever would be deemed the rule of law, if it was a legal estate, is applied in equity to a trust estate. *Burgess v. Wheate*, 1 W. Bl., 160; *Loring v. Eliot*, 16 Gray, 568. Although the rule in *Shelley's Case* is not in force in this State, the words used in the devise do not operate to make the issue of Mrs. Allen purchasers under the will, but only to enlarge the estate conferred on her. *Hayward v. Howe*, *ubi supra*.

We do not perceive that the case as now presented requires us to determine whether the words "decease without issue" refer to an indefinite or a definite failure of issue, a question often difficult to decide in the construction of wills. In either case the result is the same so far as the present disposition of the property, which consists of both personality and realty, is concerned. If they are construed as meaning a definite failure of issue on which the ultimate limitation was a valid devise at the decease of Mrs. Allen, the contingency upon which it depends has not occurred and cannot occur. *Hooper v. Bradbury*, 138 Mass., 303. The property is to be treated as her intestate property. The personality will pass to her administrator and, by the law which prevailed at the time of the decease of Mrs. Allen, the husband will be entitled to the whole thereof after the payment of debts and expenses. G. S., ch. 95, §§ 14, 16. In the real estate he will be entitled to his tenancy by the curtesy.

If the words "decease without issue" are construed as meaning an indefinite failure of issue, the ultimate limitation over would be void as to the personality; Mrs. Allen would take a complete equitable title thereto and it would now pass to her administrator. In the realty she would take an equitable estate tail of which her daughter would now be the tenant and the devise over would be of a remainder after an estate tail. *Allen v. Trustees Ashley School Fund*, 102 Mass., 262; *Hall v. Priest*, 6 Gray, 18; *Albee v. Carpenter*, 12 Cush., 382. But an estate tail being one of inheritance and the wife having been seised, the husband is entitled to his curtesy therein. R. S., ch. 124, § 1; Co. Litt., 30 a; 2 Bl. Com., 126; *Loring v. Eliot*, 16 Gray, 578.

Decree for instructions accordingly.

Giles G. PRATT

v.

Inhabitants of the Town of AMHERST.

An instruction which assumes a fact, and which is not applicable to the facts found is properly refused.

(Hampshire—Decided October 23, 1885.)

NOTE.—It is the duty of municipal corporations to keep its streets in such repair as to be safe for travelers. See, *Madison v. Baker*, (Ind.), 1 West. R., 116, and note.

The question of sufficiency of a street is one of fact for the jury. See, *Goodfellow v. Mayor, etc.*, of (N.Y.), 1 Cent. R., 21.

MASS.

ON exceptions to instructions.

Action for damages for injury resulting from defect in highway.

Mr. Wm. G. Bassett, for plaintiff :

The verdict necessarily included in the finding that the post, standing where it did, made the way defective. It was designed to cause people to drive away from a building, standing 120 feet away, at a corner, instead of turning the corner near to the building. Whether it accomplished, or was adapted to that end, does not appear. *Murphy v. Gloucester*, 105 Mass., 470; *Com. v. Wilmington*, 105 Mass., 599, 601.

It was no part of defendant's duty to erect it. The building did not make the way, near where it stood, defective. *Smith v. Wakefield*, 105 Mass., 478. If there was no error in locating the railing or any part of it, the question whether there had been negligence in constructing or maintaining it was for the jury. *Howard v. Mendon*, 117 Mass., 585; *White v. Boston*, 122 Mass., 491, 494; *Myers v. Springfield*, 112 Mass., 489. Defendant was to keep the way reasonably safe and convenient. Pub. Stat., ch. 52, § 1. There seems to be no difference in principle whether they in good faith think an existing condition judicious or necessary for convenience and so decide, or themselves actively bring it about with a like view. Pub., Stat. ch. 52, § 15; *Denniston v. Clark*, 125 Mass., 216.

Defendant had the advantage of having the jury consider all that was in fact done, as bearing on the question of fact, whether the defective condition as it existed at the time of the injury might have been remedied by reasonable care and diligence on the part of the Town. This was all it was entitled to. Pub. Stat., ch. 52, § 18; *Rooney v. Randolph*, 138 Mass., 580; *Hayes v. Cambridge*, 186 Mass., 402.

Whether the railing was permissible at all, and whether suitable, as well as whether suitably maintained, were facts to be passed upon by the jury on the question of whether the way was reasonably safe. Persons and property are not to be unreasonably exposed. *Currier v. Lowell*, 16 Pick., 170, 174; *Taylor v. Woburn*, 180 Mass., 494, 502.

Messrs. Hamlin & Paige, for defendants.

Towns are bound to keep their roads in a reasonably safe condition for travelers, and the statute points out the manner in which this duty shall be performed. P. S., ch. 52, §§ 1, 8. The selectmen may themselves act as highway surveyors under a proper vote of the Town. *Benjamin v. Wheeler*, 15 Gray, 486; *Bay St. B. Co. v. Foster*, 115 Mass., 431.

The erection of a railing wherever needed is a "repair" of the highway, and the want of a railing where one is necessary is a "deficiency" in the way. *Hayden v. Attleborough*, 7 Gray, 388; *Harwood v. City of Lowell*, 4 Cush., 310.

A railing lawfully existing is not a legal defect in the highway. *Macomber v. Taunton*, 100 Mass., 257.

In *Stickney v. City of Salem*, 3 Allen, 876, the court says that "The legal obligation of keeping a sufficient railing upon a highway is imposed only when it is necessary to mark the limits of that part of the road within which persons may safely travel. The question of the necessity of the repairs must be determined by the proper officers of the Town, and their judgment and action upon the subject cannot be

revised by the jury in an action at law." *Benjamin v. Wheeler*, 8 Gray, 418.

Morton, Ch. J., delivered the opinion of the court:

The instruction requested was properly refused, because it was not applicable to the facts found. It assumed that the selectmen had, for the purpose of marking the traveled part of the road, erected and maintained a railing, and that the post against which the plaintiff ran was a part of this railing. The facts were that they had not maintained such railing and that, at the time of the accident, the post was standing by itself, not a part of a continuous railing. But it is not their duty nor within the power of the selectmen to alter a highway for the purpose of changing the line of travel. It is a question of fact for the jury to determine whether the way is thereby made defective.

The case was properly submitted to the jury.

Rachael H. FLETCHER *et al.*

v.

Arthur M. EVANS *et al.*

Where the heirs at law gave authority to the widow of the deceased, to contract for the erection of a monument in their cemetery lot, the authority carries with it, by implication, the right to give to the contractor, a license to enter the lot, build the monument, and to remove it if it was not satisfactory to the widow or if she did not pay for it, according to the terms of the contract.

(Worcester—Decided October 26, 1885.)

TORT for trespass in forcibly entering a burial lot and taking and converting a tablet erected there by plaintiffs upon a contract, executed by Rachael Steele, widow of David Steele, who was the father of the plaintiffs and who owned said lot at his death. It was used as the family burial lot of himself and the said Rachael Steele, his wife, for their children. Rachael Steele contracted for a tablet to be placed at the grave of her husband, in said lot. It appeared that the plaintiffs, who were the only children living of said David Steele at his death, and the only persons interested in said lot, unless the said Rachael Steele, their mother and widow of said David Steele, had an interest, knew of the said contract with defendants for said tablet, and the defendants placed the tablet upon a gravel foundation not otherwise affixed to or upon the lot, with the knowledge and assent of the plaintiffs, but it did not appear that they knew or assented to the part of the contract which gave the defendants power to take it away and sell it. Rachael Steele accepted the tablet, but upon demand for payment wrote them to come and take it away; that it was not according to contract. Plaintiff, Rachael Fletcher, then forbade the defendants from entering the lot or taking the said tablet. Defendants entered and took the tablet under their contract, claiming that said Rachael Steele had such an interest in said lot and authority as widow of

David Steele that she could give the license contained in said contract.

The court ruled that Rachael Steele had no interest or authority to make the contract and give the license without the consent of plaintiffs, and that the title to said tablet passed to the plaintiffs, and found for the plaintiffs for the trespass and conversion, and defendants excepted and their exceptions were allowed.

Mr. H. L. Parker, for plaintiffs:

The plaintiffs were the sole owners in fee, and defendants were trespassers; hence, the findings of the court were correct. *Meagher v. Driscoll*, 99 Mass., 281.

The act of the defendants, claimed to have been done under an authority or license, given without the knowledge or assent of the plaintiffs and after they had expressly forbidden it, was an indictable offense under the provisions of the statutes and punishable as such. And the court correctly ruled that Rachael Steele could give no such license, and that no such license or authority would be a bar to this action. Pub. Stat., ch. 207, §§ 49, 50.

The tablet being erected upon the lot, without any contract with the owners, became a part of the realty and the defendants are liable for its conversion. *Washburn v. Sproat*, 16 Mass., 449; *Peirce v. Goddard*, 22 Pick., 559; first par. in *Sudbury v. Jones*, 8 Cush., 189, 190; *Howard v. Fessenden*, 14 Allen, 128; *Meriam v. Brown*, 128 Mass., 391; *Sabin v. Harkness*, 4 N. H., 415.

Mr. W. A. Gile, for defendants:

Plaintiffs' consenting that the defendants should put the property upon their land amounted to a license, which would prevent the property from becoming a fixture or a part of the realty; and the property being placed upon gravel with no other foundation, as the facts find, it could not thereby become a part of the plaintiffs' property as affixed to their realty. Washb. Real Prop., * 498; *Ashmun v. Williams*, 8 Pick., 402.

If the plaintiffs' consent, that the defendants should place the property upon the lot, was a license, it would carry with it the right of removal and the incidental right of taking it away, and to entering upon the lot. *Doty v. Gorham*, 5 Pick., 487; *Curtis v. Riddle*, 7 Allen, 185.

In *Lakin v. Ames*, 10 Cush., 198, it was held that a license would be presumed from the relation of the parties, and will be presumed from mother to son, to remove the son's children from the mother's tomb.

A husband is liable for his wife's funeral expenses, as well as for necessities during her life; and the wife, by chapter 262, Acts of 1883, has a right to be buried in the lot owned by her husband during coverture. *Cunningham v. Reardon*, 98 Mass., 588; see, *Weld v. Walker*, 130 Mass., 422; *Durell v. Hayward*, 9 Gray, 248.

Morton, Ch. J., delivered the opinion of the court:

By an express provision of the contract made between Rachael Steele and the defendants, they had the right to remove the monument erected by them at the grave of her husband, David Steele, if it was not paid for according to the terms of the agreement. The bill of ex-

ceptions states that the plaintiffs knew of said contract and that the defendants erected the said monument with the knowledge and assent of the plaintiffs, but it did not appear that they knew or assented to the part of the contract which gave the defendants power to take it away. After the monument was completed, Rachael Steele notified the defendants that it was not according to the contract, requested them to remove it and refused to pay for it. Upon these facts, we are of opinion that the defendants had the right to enter the burial lot and remove the monument. It is not necessary to consider whether a widow can, without the consent of the heirs, erect a monument at the grave of her deceased husband and give to the contractor a license to enter the burial lot for the purpose of removing it, if it is not satisfactory or is not paid for according to the contract. In this case the heirs at law authorized her to erect the monument. Such authority, without any restriction, gave the widow the right to make any reasonable contract for a monument and by implication, the right to give to the contractor a license to enter the lot to build the monument and to remove it if it was not satisfactory or if she did not pay for it according to the contract.

The contract which the widow made with the defendants was a reasonable one; under it the monument would not become a part of the realty until it was accepted and paid for. They knew of the contract and knew that the defendants were putting up a monument under it. They did not object to it at the time and cannot now deprive the defendants of their right to remove the monument because they did not inquire into its terms.

Exceptions sustained.

Ansel WRIGHT

v.

Elias DRESSEL.

1. An allegation in a complaint and search warrant that stolen goods are concealed in the "house of E. D., of Granby," imports the house wherein E. D. dwells in Granby, and if he is the only E. D. in Granby, and does not own or occupy any other house, the house is sufficiently described, as being in Granby.
2. The portion of the General Statute omitted in the Public Statutes, is not thereby annulled; and a search warrant may be returned to any court having cognizance of the case, although not in the county of the court which issued it.
3. A search warrant need not set forth that there is "reasonable cause" for the complainant's belief that the goods are concealed in the building to be searched; nor, that there is "satisfactory evidence," etc., to justify a warrant for search in the night time.
4. A search warrant is not civil process, within the prohibition of the Sunday Law.

(Hampshire—Decided October 21, 1885.)

MASS.

TORT, for an assault and battery on a deputy sheriff while serving a search warrant on defendant at his residence. Defendant answered that "The plaintiff was trespassing upon the close of the defendant, and he, the defendant, only used necessary and justifiable force to protect the said close and remove said plaintiff therefrom."

It appeared that plaintiff, a deputy sheriff of Hampshire County, on Sunday, January 13, 1884, with his son, also a deputy sheriff, and others, assistants, arrived at the house of defendant at Granby, informed him of the warrant and explained its contents, entered the house peaceably and on searching found part of the property mentioned in the warrant, and thereupon attempted to arrest defendant, who forcibly resisted. Later in the day officers of Hampden County arrested defendant and the next day took him to Northampton, whence he was brought by plaintiff before the District Court of Hampshire, as returned on the warrant.

The defendant objected that the warrant furnished no justification because (1) it "is a civil process and cannot be executed on the Lord's day"; (2) it contained "no proper description of the place to be searched"; (3) it "should have been made returnable into some court of the County of Hampden having jurisdiction of a larceny in Holyoke"; (4) it "did not justify the search of the house in the night time and the attempted arrest."

The Judge, against the plaintiff's objection, ruled that the warrant was insufficient in law; that upon all the evidence the plaintiff could not justify the attempted arrest; and that the defendant was justified in employing proper and reasonable force in resisting; but this only applies if the plaintiff was acting under the authority of the search warrant alone.

To the ruling of the court, plaintiff alleged exceptions.

Mr. J. C. Hammond, for plaintiff:

The search warrant is not a civil process within the prohibition, Pub. St., ch. 98, § 6, and the service on Sunday was valid. *Johnson v. Day*, 17 Pick., 106.

The description of the place was sufficient. The words "and premises" may be rejected as surplusage. The evidence sufficiently identifies the house. The warrant was properly returnable in Hampshire. Pub. Stat., ch. 212, § 3.

The plaintiff as deputy sheriff can now justify under his common-law authority, if he had reasonable ground to suspect the defendant guilty of a felony, although he did not at the time have in mind the principle. It is absurd to hold that a sheriff must prove his state of mind to justify his official acts. *Commonwealth v. Carey*, 12 Cush., 246; see, also, *Comrs. v. McLaughlin*, 12 Cush., p. 615.

Larceny and the receiving or concealing of stolen goods are felonies. Pub. Stat., ch. 203, §§ 20, 48; ch. 210, § 1.

Mr. W. H. Brooks, for defendant:

The warrant is fatally defective as to distinct designation of the place to be searched. U. S. Const., art. 4. Declaration of Rights, art. 14. 1 Bishop, Cr. L., § 209; *State v. Robinson*, 33 Me., 564; *Commonwealth v. Intoxicating Liquors*, 116 Mass., 342.

The town or county of the place is not alleged.

Commonwealth v. Intoxicating Liquors, 110 Mass., 182. "House" and "premises" are words too vague. *Humes v. Taber*, 1 R. I., 464.

The word "premises" signifies lands and tenements generally. Bouvier, Law Dic., Vol. 2. If it be surplusage, then the officer abused his precept and became a trespasser *ab initio*. *Esty v. Wilmot*, 15 Gray, 168.

The warrant is void for want of jurisdiction. The portion of Gen. Stat., ch. 170, §§ 3, 4, omitted in Pub. Stat., ch., 212, §§ 3, 4, is annulled. *Ellis v. Paige*, 1 Pick., 43.

The warrant failed to recite that there was "reasonable cause" for the belief alleged in the complaint. Pub. Stat., ch. 212, § 1; *Attorney-General v. Justices*, 103 Mass., 456.

The warrant being defective, the defendant had a right to resist. *Commonwealth v. Crotty*, 10 Allen, 408.

The instructions were sufficiently favorable to the plaintiff. His return shows that he acted under the warrant alone, and parol evidence is inadmissible to contradict the return. *Wellington v. Gale*, 13 Mass., 483.

Holmes, J., delivered the opinion of the court:

This is an action of tort for assault and battery. The defendant pleaded *son assault demesne*. At the trial it appeared that the plaintiff was a deputy sheriff of the County of Hampshire; that he came to the defendant's house at about three o'clock Sunday morning, exhibited a search warrant, entered the house peaceably, searched it, and found there part of the property described in the warrant. He also searched a shed and corn-barn connected with the house, and the barn. While in the house he attempted to arrest the defendant, who resisted with force. The defendant contended, and the court ruled, that the warrant was insufficient in law, and that upon the warrant and the evidence the plaintiff could not justify his attempt to arrest the defendant, and that the defendant was justified in resisting with reasonable force. There was also a question, whether the plaintiff could rely on his common-law authority, which it will not be necessary to consider. For we are of opinion that the warrant was sufficient and that the plaintiff did not exceed the authority conferred by it.

The chief objection to the warrant is, that it contains no proper description of the place to be searched. The warrant was attached to the complaint, *Commonwealth v. Dana*, 2 Met., 329-336, and directed the officer to enter "the house and premises mentioned in the above complaint." The language of the complaint is, "The house and premises of Elias Dressel, of Granby, in said County of Hampshire;" the whole being closely similar to the warrant which was held good in *Stone v. Dana*, 5 Met., 98.

It was argued, that the words "of Granby, in said County of Hampshire," must be referred to Elias Dressel, and not to the house; and so far we agree with the defendant. Then it was said that although it appeared that Elias Dressel was the only man of his name in Granby, and both owned and occupied the house searched and owned no other house, that it seemed to be assumed, in this county, he might own houses in other counties to which the warrant would equally apply. But we think, that,

according to the common use of language, in this State at least, when a man is commanded to enter, or it is alleged that goods are concealed in, "the house of E. D., of Granby," *prima facie* the words mean the house occupied by E. D., not the house owned by him; and that no sound distinction exists between this language and "the dwelling-house of E. D.," etc., as to which the law is settled. *Dwinnele v. Boynton*, 3 Allen, 810; *Humes v. Taber*, 1 R. I., 464, 471. Furthermore, an interpretation of the warrant which would bring houses outside the county, if they exist, within its language—and thus read it as directing the officer to search outside his county, and attributing to the magistrate a manifest attempt to exceed his jurisdiction—is avoided; the word "of," is taken to refer to visible occupation, rather than to record title if upon the facts of the case and in this collocation.

As Elias Dressel is described as of Granby, that is, as residing there, if the warrant means the dwelling-house occupied by him, the house, of course, must be in Granby, and the place is properly described. *Dwinnele v. Boynton*, *Humes v. Taber*, *ubi supra*. The words, "and premises," plainly refer only to the premises used and occupied in connection with the house.

It was further objected, that the warrant was void because made returnable before the District Court which issued it, and as the complaint alleges that the goods were stolen in the County of Hampden, it was suggested that the District Court did not have "cognizance of the examination of the case," within Pub. Stat., ch. 212, §§ 3, 4.

We see no reason to suppose that the language was intended to do anything more than to abridge the words of Gen. Stat., ch. 170, § 3; Rev. Stat., ch. 142, § 3, which was "before the magistrate or court having cognizance of the case." The periodical codification of the statute law stands on a different footing from new legislation, and we cannot presume that changes are intended unless the intention clearly appears. Moreover, if the thief brought the goods into Hampshire, or if stolen property was received in the county, there was an offense in Hampshire. *Commonwealth v. White*, 123 Mass., 480.

We have no doubt that the warrant was properly made returnable before the court from which it issued. See the complaint in *Stone v. Dana*, *ubi supra*. It was unnecessary for the warrant to set forth that the court was satisfied that there was "reasonable cause" for the complainant's belief that the goods were concealed in Dressel's house, under Pub. Stat., ch. 212, § 1; or that there was "satisfactory evidence," etc., to justify a warrant to search in the night time, under § 4. See, *Holland v. Seagrave*, 11 Gray, 207.

It was not much pressed that the warrant, if valid, could not be executed on Sunday; the prohibition of Pub. Stat., c. 98, § 6, only extends to civil process. A search warrant is not civil process within the prohibition. Pub. Stat., c. 212, § 1. See, *Robinson v. Richardson*, 13 Gray, 454-456, and the execution of it on Sunday was valid at common law. *Pearce v. Atwood*, 13 Mass., 824, 847; *Johnson v. Day*, 17 Pick., 106-109.

Exceptions sustained.

In Re County COMMISSIONERS of HAMPSHIRE COUNTY, *Petre*.

1. The Statute vests in the **County Commissioners** the power, and makes it their duty, to **make public improvements** and pay for the same, out of the county treasury. On the completion of the work, **three special commissioners** were appointed by this court, to **determine** what towns, persons and corporations, including the county, are being benefited by the said improvements, and **decree** what proportion of the **expense** of the work should be **apportioned** to each, in view of the special benefits derived; with the authority conferred upon them to decide all questions of law and fact which may arise on the hearing, and report to this court. **Held**, that **special commissioners have no authority to reserve questions** for review in this court; that **the only mode** of revising their opinions is **by an appeal** taken by the party aggrieved.
2. Where their report is **imperfect**, and incomplete, it must be **recommitted** for amendment, and be **returned**, as amended, to this court for **final judgment**, and until then no questions of law can be raised under it.

(Hampshire — Decided October 26, 1885.)

PETITION for appointment of commissioners to apportion the expense of protecting the bank of the Connecticut River, under ch. 900 of Acts of 1875.

The case is stated in the opinion.

Mr. Enos Parsons, for Mass. Cent. R. R. Co., *et al.*:

The petitioners are estopped to claim under these proceedings, by reason of their own laches, in that the benefit was completed September, 1875, and no assessment was asked for on account thereof, until August, 1884, to wit: 8 years and 11 months. *Forward v. H. & H. Canal Co.*, 22 Pick., 462; *Codman v. Rogers*, 10 Pick., 112, 118, 119.

No assessments can be made for interest until the account is rendered, adjudicated and payable. *Hendrick v. W. Springfield*, 107 Mass., 541; *Brainard v. Champlain T. Co.*, 29 Vt., 154.

The petitioners have charged compound interest. *Dean v. Williams*, 17 Mass., 417; *Ferry v. Ferry*, 2 Cush., 92.

Mr. J. C. Hammond, for Town of Hadley.

Mr. T. G. Spaulding, for Town of Northampton.

Mr. Wm. G. Bassett for Hampshire County:

The County Commissioners in doing the work were not the agents of the county. In the exercise of the powers and performance of the duties imposed upon them by the statute they acted as public officers vested with quasi judicial functions, deriving their power from the sovereign authority. L. 1875, ch. 200; *Brewer v. Boston, C. & F. R. Co.*, 118 Mass., 52; *Brimmer v. Boston*, 102 Mass., 19; *Carpenter v. Co. Comrs.*, 21 Pick., 258. The "authority and power" thereby vested in the County Commissioners by reference to the general statutes, affords the county a remedy for interest on all

"expenses and charges" from the time of their payment from the county Treasurer. Gen. Stat., ch. 43, §§ 49, 50; Pub. Stat., ch. 49, §§ 60, 61; *Old Colony R. Co. v. Miller*, 125 Mass., 1, 8; *French v. French*, 126 Mass., 360.

The objectors have had the advantage of the partial payments. Interest was correctly computed. *Dean v. Williams*, 17 Mass., 417; *Ferry v. Ferry*, 2 Cush., 98.

A copy of the schedule of details was unnecessarily annexed to their petition for the appointment of the Special Commissioners; it was not required by the statute and no question was submitted to the court thereby. *Ellcott v. Coffin*, 106 Mass., 365.

The record made, as directed by the Act, was a record of a tribunal by its clerk, to remain with him, of a determination by the County Commissioners. Pub. Stat., ch. 159, §§ 6, 16; ch. 22, 27; Gen. Stat., ch. 121, §§ 6, 13; ch. 17, 27; *Rich v. Lancaster R. Co.*, 114 Mass., 514.

The Special Commissioners, in determining the matters submitted to them, had no authority to revise it, and that could only be done by a writ of *certiorari*, by means of which such decree as law and justice required could be made. Parol evidence is inadmissible to affect it. *Haverhill B. Props. v. Co. Comrs.*, 103 Mass., 120; *Brewer v. B. C. & F. R. Co.*, 113 Mass., 52, 56; *Brimmer v. Boston*, 102 Mass., 19; *Warner v. Franklin Co.*, 131 Mass., 848; *Taber v. N. Bedford*, 185 Mass., 162; *Lovell v. Co. Comrs.*, 6 Allen, 181; *Snow v. Fitchburg*, 186 Mass., 179, 182; *Steele v. N. Bedford*, 187 Mass., 255, 262; *Lynch v. Crosby*, 134 Mass., 818; *Ham v. Salem*, 100 Mass., 850; Gen. Stat., ch. 145, §§ 8, 9; Pub. Stat., ch. 186, §§ 7, 9.

As to the Special Commissioners, deriving their power to act in the premises from their judicial appointment, if they have acted within the limits of their legitimate authority, the court will not examine any question upon which they have passed. *B. & W. R. Co. v. W. R. Co.*, 14, Gray, 258, 258; *Wrentham v. Norfolk*, 114 Mass., 555, 561; *Northampton B. Case*, 116 Mass., 442, 445.

The objectors still are having the benefit of the use of the money the county has been compelled to pay for them. Indemnity to the county must include interest. *Haverhill B. Props. v. Co. Comrs.*, 103 Mass., 120, 128. The proper time to test who was benefited was the time of the hearing before the Special Commissioners. The Mass. Cent. R. R. Co. has no property to satisfy an assessment, and practically has no existence. *N. Bedford R. Co. v. Old C. R. Co.*, 120 Mass., 397; Laws 1883, ch. 64. But if these are not the parties benefited, the Cent. Mass. R. R. Co. is the party. Laws 1883, ch. 64, § 4; *N. Bedford R. Co. v. Old C. R. Co.*, (*supra*).

The court will so far supervise and control the proceedings of the Special Commissioners as to see that they act properly in discharge of the duties imposed upon them. *B. & W. R. Co. v. W. R. Co.*, 14 Gray, p. 258.

The case involves distinct rights between different parties depending on different questions. The appellant seeks to get an award more favorable for itself; if it does not succeed, it is to pay the costs of its appeal. Other parties have accepted the award and waived the right of appeal.

The appeal of Northampton was from an award in the nature of a separate judgment against it and opens no other question than the award in favor of the county against it. *Downing v. Coyne*, 121 Mass., 347; *Howe, Practice*, 448; *Todd v. Daniel*, 16 Pet. (41 U. S.), 521; *Forgay v. Conrad*, 6 How. (47 U. S.), 202, 203; *Milner v. Meek*, 95 U. S., 252 (XXIV. Law. ed., 444); *Farmer's L. & T. Co. v. Waterman*, 106 U. S., 265, 271 (XXVII. Law. ed., 115).

It is like an appeal from the decision of commissioners in an insolvent estate of a deceased person. Pub. Stat., ch. 187, § 11.

Morton, Ch. J., delivered the opinion of the court:

By the Statute of 1875, ch. 200, the County Commissioners of Hampshire County are required to make the public improvements therein provided for, paying the cost in the first instance out of the county treasury. After the completion of the work, this court is authorized to appoint three Special Commissioners, who shall determine and decree what towns, persons and corporations, including said county, are being benefited by said work, and what proportion of the cost of said work shall be paid severally by them. They are to make their report to this court and when it is accepted and entered therein, it is to be absolutely binding upon all parties interested; but any party affected by the decree and dissatisfied with the determination of the Commissioners may appeal to a jury and thus revise the "share determination" of the Commissioners. The statute vests in the Commissioners the authority, and makes it their duty, to decide all questions of law and fact which arise in the hearing before them, and the law furnishes no means of revising their decisions, whether upon law or fact, except by the appeal provided for in the statute. They have no authority to reserve questions of law for the determination of this court, and cannot by so doing vest in the court jurisdiction to hear and determine such questions. *Northampton v. Case*, 116 Mass., 442. In this case the Commissioners determine that the railroad built by the Massachusetts Central R. R. Co. has been benefited by the work done by the County Commissioners and submit to the Supreme Judicial Court, the question as to which of these parties shall pay for such benefits. This they have no right to do. It is their duty to decide this question, and the only mode of revising their decision is by an appeal by the party aggrieved, upon the hearing of which the question can be raised in this court. If any effect could be given to their reservation, the result would be that the party finally held liable to pay for these benefits, would lose his right of appeal. He could not know that he was aggrieved until it was too late to appeal.

The report of the Commissioners is imperfect and incomplete. No judgment can be rendered upon it as it stands, and we are therefore of opinion that it must be recommitted until the award is amended and returned to the court, and the case is ready for some final judgment; it is premature to raise any questions of law under it. The reservation must be discharged and the report recommitted to the Commissioners.

Order accordingly.

William TURNBULL *et al.*

v.

Silas H. POMEROY *et al.*

Where a firm had for many years been employed by a manufacturer, to sell his wares, and had been paid commissions on the sales and guaranty of such wares, and the manufacturer died, leaving by will all of his estate in the manufacturing business to his heirs, with the view of continuing the business, and appointed a member of such firm one of the trustees of his estate to continue the business of manufacturing, until his minor son should reach majority, the business to be continued in all respects as during the lifetime of the testator; such trustee may, on behalf of the firm of which he is a member, continue to charge and collect such commissions for the sale and guaranty of the manufactured wares, as are incident to the prosecution of the manufacturing business, under the terms of the will, until the expiration of the trust, on the coming of age of the minor heir.

(Berkshire—Decided September 18, 1885.)

BILL IN EQUITY, to test the right of a trustee under a will to receive compensation by way of commissions on goods belonging to the trust estate and consigned to him for sale and guaranty.

The facts are stated in the opinion.

Messrs. W. C. Endicott, T. P. Pingree and F. P. Goulding, for plaintiffs:

Defendants objected to so many goods being consigned to Turnbull & Co., on other grounds which amounted to a waiver of any objection on the ground of illegality of the commissions. *Brewer v. Winchester*, 2 Allen, 389.

The facts disclose no case for equitable relief in favor of defendants. The *cestui que trust* not only had full information and complete understanding of all the facts of the transaction, but also, if it amounted to any breach of trust, he was a participant in it. At most, the transaction would be voidable by a beneficiary not consenting, and the maxim *Volenti non fit injuria* applies. *Twin-Lick Oil Co. v. Marbury*, 91 U. S., 587 (XXIII., Law. ed., 328); *Pom. Eq.*, §§ 958, 1077; *Coles v. Trecothick*, 9 Ves., 234; *Ex Parte Bennett*, 10 Ves., 381, 394; *Knight v. Majoribanks*, 2 Macn. & G., 10; *Luff v. Lord*, 11 Jur. N. S., 50; *Denton v. Donner*, 23 Beav., 285; *Spencer v. Newbold*, 80 Pa. St., 317; *Duncomb v. N. Y. H. & N. R. R. Co.*, 84 N. Y., 190; *Risley v. Indianapolis, etc., R. R. Co.*, 63 N. Y., 240.

"Where the trustee is also an attorney, and acts as such, on behalf of the estate, he is not even entitled to full costs or attorney's fees, as against the *cestui que trust*, but can only be allowed for costs actually out of pocket or disbursements." *Pom. Eq.*, § 1084.

This rule has also been applied where the legal business has been done by the trustee's partner who is not himself a trustee. *Lincoln v. Windsor*, 9 Hare, 158; *Christophers v. White*, 10 Beav., 528; *Lyon v. Baker*, 5 DeGex. & Sm., 622.

As is said by Wells, J., in *Blake v. Pegram*, 109 Mass., 553: "We are not prepared to hold that a lawyer, acting as trustee and having occasion to perform professional services in behalf of his trust, may not be allowed, in any case, to receive from the trust fund the usual professional compensation for such services." In that case the charges for services were not allowed, because it was considered to be included in a general charge for extra services. But in *May v. May*, 109 Mass., 255, a charge of \$100 per month was allowed beyond the commissions where the guardian, besides taking charge of the estate, also had the personal charge of his ward.

In Pennsylvania, a trustee who, after his appointment as trustee, acted as counsel for the trust, was held entitled to his fees for services, in addition to commissions. *Lourie's Appeal*, 1 Grant, 373; *Pedrick's Estate*, 5 Phila., 478; *McElhenny's Appeal*, 10 Wr. (46 Pa. St.), 848.

In New Hampshire, *Wendell v. French*, 19 N. H., 210, the court says: "And if the executor has, moreover, performed the duty of a counselor at law, it would ill accord with the purposes of justice, and would not be promotive of the best interests of parties even, to hold that for such services rendered and duties performed, he is not entitled to receive an adequate compensation commensurate with their real value and importance."

In *Kendall v. N. E. Carpet Co.*, 18 Conn., 392, the plaintiff accepted the assignment of a carpet manufacturing company and carried on the business on his own responsibility and made large advances, under an agreement with one of its members that he would be compensated for his services as though he had no interest in the business, and it was held that he could recover extra compensation for these services.

In Maryland, also, where an executor acted as overseer of a plantation of the estate, he was allowed a reasonable compensation, as such, in excess of regular commissions. *Lee v. Lee*, 6 Gill & J., 320. So, also, where a trustee acted as counsel. *Post v. Mackall*, 8 Bland, 529; *Bank v. Martin*, 3 Md. Ch., 225; see, *Harris v. Martin*, 9 Ala., 900; *Morgan v. Nelson*, 43 Ala., 586.

There is every presumption of fact that the full equivalent of the amount of the commissions was received by the trust fund, in the price of the goods sold. *Duncomb v. N. Y. H. & N. R. R. Co.*, 84 N. Y., 190, 198; *Barnes v. Brown*, 80 N. Y., 527; *Ricard v. Laytin*, 2 Demorest (N. Y.), 587; *Twin-Lick Oil Co. v. Marbury*, (*supra*).

Whether the trustee may receive an individual profit is a question of construction of the terms of the trust. *Imperial Merc. Assoc. v. Coleman*, L. R., 6 Ch., 558; *Albion Co. v. Martin*, 1 Ch. Div., 580.

The trust has received the benefit and there is no evidence that it did not cost all that was charged. *Pom. Eq.*, § 1077; *Duncomb v. N. Y. & N. R. R. Co.*, 84 N. Y., 190, 198.

Mr. H. L. Dawes, for defendants.
Messrs. Geo. M. Stearns and A. Prentice, for defendant, Pomeroy:

The will of the testator provided that the trustees should have a "fair and reasonable compensation for their services in administering said trust." The law in this State would have

given the same. *Longley v. Hall*, 11 Pick., 124; *Dixon v. Homer*, 2 Met., 420; *Urann v. Coates*, 117 Mass., 41.

Wm. Turnbull could not properly fill both positions, and having consented to act as trustee is held to act wholly for the interest of the trust. *Claffin v. Farmers', etc., Bank*, 25 N. Y., 293; *Butts v. Wood*, 37 N. Y., 319; *Collier v. Munn*, 41 N. Y., 143; *Bain v. Brown*, 56 N. Y., 285.

If he made money out of the trust estate, such money became at once an asset of the estate in his hands. *Morse v. Hill*, 136 Mass., 60-64.

"If trustees are factors or brokers * * * they can make no charges against the trust estate for services rendered by them in their professional capacity to the estate of which they are trustees. * * * This rule is so strict that if the trustee has a partner and employs such partner, no charge can be made by the firm." *Perry, Trusts*, 3d ed., § 432; *Collins v. Carey*, 2 Beav., 128; *Lincoln v. Winsor*, 9 Hare, 158; *Christophers v. White*, 10 Beav., 532; *Lyon v. Baker*, 5 DeG. & Sm. 622; *Green v. Winter*, 1 Johns. Ch., 87; *Gardner v. Ogden*, 22 N. Y., 327; *Collier v. Munn*, *supra*.

If the trustee is a member of a firm and the trust fund is invested in the business of the partnership, the firm must account. *Perry, Trusts*, § 846; *Eager v. Barnes*, 31 Beav., 579.

This claim ought not to be allowed the trustee. It is not claimed that Turnbull has suffered any loss by reason of these warranties. *Urann v. Coates*, *supra*, though such services, if beneficial to the trust estate and rendered in good faith, might be taken into consideration upon the question of the compensation of the trustee. *Id.*; *Hardy v. Phoenix Foundry Co.*, 7 Vict. L. R., Law, 211.

It does not appear that by reason of the acts of defendant the plaintiffs have been led to do or omit to do something which otherwise he would not have omitted or not done. *Plymouth v. Wareham*, 126 Mass., 476-478.

The plaintiff trustees insisted, contrary to defendant's objection, upon pouring this flood of gain into the coffers of one of them. They never called upon him to state his objection or cared for or listened to it. He now raises the objection, as appears by the master's report, and is in time to preserve his rights. *Phillipson v. Gatty*, 7 Hare, 516.

The owners of this estate have not yet fallen into possession, and are not yet estopped from objecting to any misapplication of the trust funds. *Hanchett v. Briscoe*, 22 Beav., 496; *Browne v. Cross*, 14 Beav., 105.

It devolves upon the trustees, seeking to maintain claims against the interests of the *cestuis que trust*, to show as a fact that they did not know the law and the effect of their acts. No such showing is made in this case. *Perry, Trusts*, § 851, and cases cited.

Interest should be allowed as damages. *Manning v. Manning*, 1 Johns. Ch., 528; *Holden v. N. Y. & Erie Bk.*, 72 N. Y., 299; *Elliott v. Sparrell*, 114 Mass., 404.

Holmes, J., delivered the opinion of the court:

William Turnbull is one of five partners making up the firm of William Turnbull & Co.,

and has forty-seven per cent of the net profits. He is also one of the trustees under the will of Theodore Pomeroy. The question submitted to us by agreement of all parties is whether a considerable sum paid to that firm for commissions and guaranty on sales of goods manufactured by those trustees was properly so paid, or whether the whole or some part of it ought to be accounted for as assets of the trust. The trust is a peculiar one. The testator after expressing his hope, that one or both of his sons will carry on the business, a manufacturing business formerly carried on by his father and subsequently carried on by himself, and reciting that his son, Theodore L. Pomeroy is a minor, gives all the manufacturing property to William Turnbull, Silas Harris Pomeroy (the testator's eldest son), and Charles Atwater in trust, "To continue and carry on without interruption, till my son Theodore L. shall arrive at the age of twenty-one years, the manufacturing business now carried on by me under said name of L. Pomeroy's Sons, in the same general manner as said business is now carried on, subject to such changes in detail as in the judgment of said trustees the best interests of said trust may require, taking up and continuing said manufacturing business as the same shall be found at my decease."

At the time of the testator's decease it had long been his habit to consign about half of the goods of his manufacture to William Turnbull & Co., allowing them commissions and guaranty in the same manner as done by the trustees. It should be added that the testator was a member of the firm, and that by his will his estate remained interested in it, for some time after his death.

Upon these facts and the language of the will, we think that a charge of commissions and guaranty may be allowed to Turnbull & Co., and that William Turnbull may be allowed his share of such charges without controverting any general proposition touching allowances to trustees. Nevertheless it is to be remembered that the English rule, refusing compensation for professional or business services, which it was not the duty of the trustees to render and for which he might have employed and paid another, is only a special application of the general rule, which refuses trustees compensation for services as such, of any kind; a rule which does not prevail here.

Of course a trustee cannot contract with himself, and it may very well be that a contract between trustees and a firm of which one of them was a member would stand no better. But when it is once admitted that a trustee may be paid for ordinary services, it is hard not to admit also that there may be circumstances under which he may be allowed an additional sum for extraordinary services which it was not his duty to render; the allowances not standing on contract any more than in the common case, but being subject to the discretion and control of the court. *Urann v. Coates*, 117 Mass., 41-43; *Blake v. Pegram*, 109 Mass., 541, 559; *Bainbridge v. Blair*, 8 Beav., 588.

In this case the only purpose of the trust is to impose upon the trustees duties which are unknown to the usual trusts for investment and distribution. They are appointed to continue and carry on without interruption a great man-

ufacturing concern for a limited time, to tide over the minority of the testator's younger son, and then to hand it over to the sons so that they may in turn continue the business. The trust could not last more than six years and it might have been ended in six months by the death of Theodore L. Pomeroy, the minor.

Not only must we suppose that the testator meant to authorize his trustees to act in the way which was not expedient from a business point of view, but when we find him directing them to "take up and continue said manufacturing business as the same shall be found at my decease" for the temporary purpose that we have mentioned, we think it pretty clear that he contemplated the continuance of his long-established employment of William Turnbull & Co. as his selling agents. We cannot regard a relation so important to the success of his manufacture as beyond the scope of his direction as to how the business should be taken up and continued. If the testator authorized the consignments to Turnbull & Co., of course he did not limit his authority to a gratuitous employment. It must be taken that he expected them to be paid and paid at the usual rates.

We do not understand that there is any dispute between the parties as to the reasonableness of the sums received, if commissions are to be allowed to Turnbull & Co. There is nothing in the will so explicit as to withdraw the rates of compensation from the supervision of the court. The contract between the trustees and the firm is not conclusive so far as William Turnbull is concerned and it seems to follow that the interest of his partners is also subject to our jurisdiction. *Collins v. Carey*, 2 Beav., 128; *Lyon v. Baker*, 5 DeGex & Sm., 622.

The charges, we understand, are usual and proper if any charge is proper. At all events the question is not before us.

The allowance to the trustees, set forth in their account, obviously did not purport to be compensation for anything except their duties as such in superintending the manufacture. It is true that the commissions in one view might logically have been brought into that allowance, but they were not and appear as a deduction from the amounts received for cloths sold.

Decree accordingly.

Charles ARPIN

v.

Matthew OWENS.

The payee of a bill of exchange, like the indorsee of a promissory note, taking it in good faith, for a valuable consideration, may maintain an action against the acceptor, whether the bill was accepted before or after it was purchased by the payee, and want of consideration between the drawer and acceptor cannot be pleaded by the acceptor in defense of such action.

(Berkshire—Decided October 23, 1885.)

ACTION on foreign bill of exchange. The case is stated in the opinion.

Mr. E. H. Beer, for plaintiff:

The burden of showing a consideration for acceptance is not on the plaintiff, unless he took the draft after dishonor or with notice of a lack of consideration. 1 Pars. Bills & N., 1st ed., 179, 180 and note (w); *Estabrook v. Boyle*, 1 Allen, 412; *Smith v. Livingston*, 11 Mass., 342, 344; *Sullivan v. Langley*, 120 Mass., 437.

It was error, though plaintiff waived the right to argue the case, not to submit the question of consideration and all other questions of disputed fact to the jury. P. S., ch. 153, § 5; *Commonwealth v. Barry*, 9 Allen, 278-9; *Banfield v. Whipple*, 14 Allen, 14.

Even if plaintiff had notice as set up in the answer, it would be no defense to this action. *Patten v. Gleason*, 106 Mass., 439.

If there was any claim of fraud and collusion between plaintiff and Boudreau to defraud Owens, it being not set forth in the answer, no proof could be introduced. 1 Pars. Bills & N., 1st ed., 180, note (w); *Multry v. Mohawk Valley Ins. Co.*, 5 Gray, 541, 543.

Defendant having admitted, by his answer, due acceptance, the question of consideration between the drawer and drawee is not open between the parties to this action. 1 Pars. Bills & N., 1st ed., 179, 180, note (w); 181, note (x); 3 Kent, Com., 11th ed., 100, 110; Bigelow, Bills & N., 2d ed., 48.

Nor is that question open, though plaintiff took draft before acceptance. 1 Pars. Bills & N. (*supra*); *Fowler v. Strickland*, 107 Mass., 552.

The plaintiff, even though not payee, but obtaining draft after maturity from said bank, an indorsee for value before maturity, takes it with all the rights that the bank then had. Bigelow, Bills & N., 2d ed., 188; *Baxter v. Little*, 6 Met., 10.

And then it would not even be necessary to prove beneficial interest in plaintiff to maintain this suit. *Nat. Pemberton Bk. v. Porter*, 125 Mass., 335.

The plaintiff took the draft in the usual course of business. 3 Kent, Com., 11th ed., 89, 90; *Bank of Bengal v. Macleod*, 3 Moore, Ind. App., 1; 7 Moore, P. C., 35; *Smith v. Livingston*, 111 Mass., 342.

Messrs. S. Proctor Thayer and C. J. Parkhurst, for defendant:

The plaintiff did not ask for any instructions limiting the effect of the evidence admitted: hence, no exception will lie to its admission, if competent for any purpose whatever. *Earle v. Earle*, 11 Allen, 1; *Downs v. Hanley*, 112 Mass., 237; *Potter v. Baldwin*, 133 Mass., 427; *Penn Mut. L. Ins. Co. v. Crane*, 184 Mass., 56.

The plaintiff did not object to the evidence on the ground that it was not admissible under the pleadings, hence no exception will lie on that account, although the pleadings are referred to in the exceptions and made a part thereof. *Jones v. Sisson*, 6 Gray, 288; *Bass v. Edwards*, 126 Mass., 445; *Clarke v. Charter*, 128 Mass., 483.

The bill of exceptions does not show why the evidence of the defendant and Moran was objected to, for what reason it was admitted or that the plaintiff was prejudiced in the slightest degree by its admission; hence no exception thereto will lie. *Burghardt v. VanDusen*, 4 Allen, 874; *Kingman v. Tirrell*, 11 Allen, 99.

The evidence of the defendant and Moran was competent to show the circumstances un-

der which the plaintiff came into possession of the draft, that he took the same with notice, that said draft was drawn upon the defendant to be accepted upon a condition yet to be performed, and that the defendant relied upon the acts of the plaintiff as an inducement to the acceptance of the draft and was misled and deceived thereby. *Fowler v. Brantly*, 14 Pet. (39 U. S.), 818; *Merriam v. Granite Bk.*, 8 Gray, 259; *First Nat. Bk. v. Goodsell*, 107 Mass., 153; *Hinckley v. U. P. R. R. Co.*, 129 Mass., 52; *Watkins v. Bowers*, 119 Mass., 383, and cases cited.

The plaintiff became the owner and holder of the draft after its maturity by paying the amount thereof to the Merchants' Bank of Canada, on account of his liability as indorser thereof, and his title thereto dates only from the time of such payment and not from the time of the discount of said draft. *Demmon v. Boylston Bk.*, 5 Cush., 194; *Lancaster Bk. v. Taylor*, 100 Mass., 18.

The plaintiff did not discount or purchase the draft on account of an actual acceptance of the defendant, and, therefore, does not rest on the high ground of a holder for value, without notice or anything to put him upon inquiry. *Merriam v. Granite Bk.* (*supra*); *Hinckley v. U. P. R. R. Co.* (*supra*).

The admitted rule of the Merchants' Bank of Canada as to the discount of drafts, governs the contract of acceptance and is a part thereof. *Fowler v. Brantly* (*supra*); *Carolina Nat. Bk. v. Wallace*, 36 Am. Rep., 694.

The plaintiff's indorsement of the draft as payee, its discount by him, at the Merchants' Bank of Canada, upon his statement in writing that the hay for which it was drawn had been shipped, misled the defendant, induced him to accept said draft, contributed to the success of the fraud, and estops the plaintiff from recovery thereon. *Gloucester Bk. v. Salem Bk.*, 17 Mass., 33-42; *Bierce v. Stocking*, 11 Gray, 175; *Nat. Bk. No. America v. Bangs*, 106 Mass., 444; *Levin v. Vannear*, 187 Mass., 533; *Ellis v. Ohio Life Ins. & Tr. Co.*, 4 Ohio St., 628.

The defendant, in accepting the draft, acted under a mistake as to a material fact and is not bound by his said acceptance. *Fernald v. Bush*, 131 Mass., 591, and cases cited; *Foster v. MacKinnon*, 4 L. R. C. P., 704.

The plaintiff did not take the draft or make advances upon the faith of the acceptance or of any promise of the defendant or of any actual receipt by him of the hay, but solely upon the faith of the drawer's signature and implied promise that the defendant should have funds to meet it. The alleged consideration for the defendant's acceptance, moved from the drawer and not from the plaintiff and, upon this point, the plaintiff declined to go to the jury. The plaintiff having taken the draft prior to its acceptance, must show a consideration moving from the defendant to him and, not being able to do so, cannot recover. Met. Cont., 209; Add. Cont., 8th ed., 680, 1041; Chit. Cont., 8th ed., 58; *Exchange Bk. v. Rice*, 98 Mass., 288; *Exchange Bk. v. Rice*, 107 Mass., 44; *Rogers v. Union Stone Co.*, 130 Mass., 581, and cases cited.

W. Allen, J., delivered the opinion of the court:

This was an action by the payee of a foreign bill of exchange against the acceptor. The bill was dated February 23, payable in thirty days after date, and was accepted March 1. There was evidence that the plaintiff took the bill from the drawer on the day of date, for value, in the regular course of business.

The court ruled that the burden was on the plaintiff to prove that the defendant had waived a consideration for the draft and that, if the jury should find that he received no consideration, they should find for the defendant. There was evidence of want of consideration between the drawer and the defendant, and evidence bearing upon other grounds of defense which is not material, as the ruling presented but one question for the jury.

For the purposes of the ruling, the plaintiff must be taken to be a *bona fide* purchaser of the bill, for value and without notice of want of consideration, and the question presented is, whether, in an action by the payee of a bill, who took it before acceptance, against the acceptor, want of consideration between the drawer and acceptor is a defense; in other words, whether, in such an action, the rule to be applied as to want of consideration as a defense is that which obtains between the maker and payee of a note, or that between the maker and indorsee. The rule is stated thus in Byles on Bills, 6th Am. ed., 206: "Between immediate parties, that is, between the drawer and acceptor, between the payee and drawer, between the payee and maker of a note, between the indorsee and indorser, the only consideration is that which moved from the plaintiff to the defendant, and the absence or failure of this is a good defense to an action. But between the remoter parties, for example, between the payee and the acceptor, between the indorsee and acceptor, between indorsee and remote indorser, two distinct considerations, at least, must come in question; first, that which the defendant received for his liability; and, secondly, that which the plaintiff gave for his title. An action between remote parties will not fail, unless there be absence or failure of both considerations."

The payee of an accepted bill holds the same relation to the acceptor that an indorsee of a note holds to the maker. There is a very close resemblance between an accepted bill and an indorsed note. The indorsed note is evidence of a debt originally due from the maker to the payee and assigned and made due to the indorsee; the bill is evidence of a debt originally due from the drawee to the drawer, assigned and made due to the payee; and the rule that the title of the assignee cannot be impeached by showing want of consideration for the original debt, is applicable equally to the indorsee of a note and to the payee and to the indorsee of an accepted bill. The reason applicable alike to payee and indorsee, is tersely stated by Vaughan, J., in *Low v. Chifney*, 1 Bing. (N.C.) 287: "How was he to know what had passed between the drawer and acceptor." See, *Davis v. Randall*, 115 Mass., 547.

It is contended by the defendant that the rule does not apply to the case at bar, because the acceptance was after the bill was purchased by the payee; and that, therefore, it was not taken by him on the faith of the acceptance. There is no ground for this distinction. It is immaterial

when an acceptance is made; it may be made at any time, and the rights of the payee and of indorsee are the same after it is made, whether they were acquired in anticipation of it or subsequent to it. It is held in this State, that, upon the question whether a promise to accept made by the drawee to the drawer is an acceptance as to the other parties, the knowledge of the promise and presumed reliance upon it in becoming parties, is material. *Exchange Bk. v. Rice*, 98 Mass., 288. But where, as in the case at bar, there is an acceptance upon the bill, it makes no difference in the rights of payees or indorsees, whether they become such before or after the acceptance. See, *Grant v. Hunt*, 1 C. B., 44; *Wynne v. Raikes*, 5 East, 514; *Powell v. Warriner*, 1 Atk., 211.

The instrument is negotiable before acceptance, and the acceptance is an acknowledgment of the debt it represents and an absolute promise to pay it to the person who is or shall become the holder of the bill, and to allow a want of consideration for the acceptance to defeat the right of a *bona fide* holder whether he became such before or after the acceptance, would be contrary to the nature and purpose of bills of exchange and to the uniform usage in regard to them.

Exceptions sustained.

Milson S. JENKINS, (*Plff.*) *Appt.*

John T. WOOD, Executor.

1. An executor does not, by giving bond to pay his testator's debts and legacies, make the debts his own so that an action will lie against him personally for them.
2. An action of contract will not lie against an executor personally upon a judgment against him as executor.

(Essex—Decided Sep. 3, 1885.)

CONTRACT upon a judgment against the defendant as executor of the will of Abigail Barker.

Appeal by the plaintiff from a judgment ordered by the Supreme Court for the defendant upon a statement of agreed facts, as follows:

Abigail Barker, of Boxford, died in August, 1877, leaving a will in which the defendant was named executor, and, after a trifling legacy of five dollars to another person, residuary legatee. The will was duly proved, the defendant was appointed executor and gave a bond in the penal sum of five hundred dollars, conditioned to pay all debts due from the deceased and the legacies provided in the will, and took the entire estate. The defendant duly published notice of his appointment, and no further proceedings were had in the probate court; the defendant filing no inventory, and no account, nor ever representing the estate as insolvent.

The estate of the said Abigail Barker at her decease consisted of certain land in Boxford, and bank stocks.

December 28, 1878, the present plaintiff brought suit against the present defendant as

executor as aforesaid, to recover a debt due from the said Abigail Barker, and, at the September Term, 1879, of the superior court, recovered judgment in said suit. Execution, duly issued upon this judgment, was placed in the hands of a deputy-sheriff, who made demand upon the defendant for sufficient goods or property of the said Barker to satisfy the same, and the defendant refusing to satisfy said execution, it was in part satisfied by a sale of certain real estate of said Barker and so returned to court.

Thereupon suit was brought by the present defendant, as executor aforesaid, upon said bond, and judgment was rendered in favor of the plaintiff, and execution issued for the amount of the penal sum of said bond, which amount was paid and applied in part satisfaction of the aforesaid original judgment. Thereupon the present suit was brought. No insufficiency of assets was set up in the original suit, but it was tried upon its merits. More than two years have elapsed since the defendant was appointed executor and filed his bond and published notice of his appointment, and the date of the writ in the present action.

This court having held (184 Mass., 115), that this action was barred by the Statute of Limitations, the plaintiff was allowed to file an amended declaration, contending that the defendant was liable upon his promise for the debt without regard to the amount of the assets, which liability could be enforced more than two years after the giving of the bond.

The defendant offers to prove that, at the time the defendant gave the said bond, he was ignorant of the plaintiff's claim and supposed that the estate of Abigail Barker was ample to pay all liabilities, when in fact the estate, with the plaintiff's claim allowed, was insolvent, and the plaintiff has already received a larger amount upon his claim than he would have received if the estate had been administered upon as an insolvent estate. But at the time of the trial of the action in which the plaintiff recovered his original judgment, the defendant had knowledge that said estate would be insolvent if the present plaintiff prevailed in said action, but the defendant supposed that he had a good defense to said action, and would prevail. The defendant has administered all the goods and effects of the said Abigail Barker, that have come to his hands as executor, except as such administration may be modified by the foregoing agreed facts. To this offer of proof the plaintiff objects, upon the ground that it is incompetent and immaterial for the defendant to prove the allegations in his offer, or either of them, but if it is competent and material, the plaintiff admits said allegations to be true.

The foregoing agreed case is submitted to the superior court, judgment to be entered thereon for the plaintiff or defendant. If for the plaintiff, the case is to be sent to an assessor to determine the amount due upon said original judgment. It is agreed that the answer heretofore filed by the defendant may be considered as filed to the amended declaration of the plaintiff.

Upon this agreed case the court ordered a judgment for the defendant, and the plaintiff appealed.

Mr. W. S. Knox, for plaintiff:

An executor who gives the bond provided for

in Pub. Stat., ch. 129, §§ 6, 7, is excused from re-turning an inventory, and takes the entire property, except that a lien is preserved on the real estate in favor of a creditor, unless sold to a *bona fide* purchaser; but his undertaking to pay the debts and legacies is substituted for the property, and is not lessened by his bond, which is merely an additional or collateral security. *Amherst College v. Smith*, 184 Mass., 543; *Jones v. Richardson*, 5 Met., 247. On giving the bond he is personally liable to a creditor of the estate. *Thayer v. Winchester*, 133 Mass., 447.

The penal law having proved insufficient, the plaintiff is remediless unless he can maintain this action; for the remedy as to waste, etc. (Pub. Stat., c. 166, § 10), is ineffectual where the executor has been excused from inventory and account; the defendant's averment that he supposed the estate solvent was incompetent. *Neucomb v. Goss*, 1 Met., 338.

In other States the principle is recognized that the debts of testator become the debts of the executor. *Tarbell v. Whiting*, 5 N. H., 63; *Flanders v. George*, 55 N. H., 486; *Olmstead v. Brush*, 27 Conn., 535.

The action being on defendant's promise to pay the debts, is governed by the ordinary limitations of personal actions. *Ames v. Jackson*, 115 Mass., 508; *Heald v. Heald*, 5 Me., 387; *Whittaker v. Whittaker*, 6 Johns., 112; and see *Jenkins v. Wood*, 184 Mass., 115, where the point was alluded to.

Messrs. D. & C. and C. G. Saunders, for defendant:

The only personal liability imposed on duly appointed executors or administrators by the statutes, is the liability for costs incurred in suits brought by them in such capacity. Pub. Stat., ch. 144, sec. 10.

Process against executors or administrators, for debts due from the deceased testator or intestate, shall run only against the goods and estate of the deceased in their hands, and not against their bodies or estate. Pub. Stat., ch. 166, sec. 5.

This statute applies to all executors, whether or not they have given bonds to pay the debts. *Nat. Bk. of Troy v. Stanton*, 116 Mass., 485; *Jenkins v. Wood*, *ubi supra*.

This action is barred by the special Statute of Limitations, in favor of executors. *Holden v. Fletcher*, 6 Cush., 235; *Wood v. Jenkins*, *ubi supra*.

W. Allen, J., delivered the opinion of the court:

It having been decided that the special Statute of Limitations is a bar to the action on the judgment against the executor, the plaintiff now attempts to hold the defendant personally as the judgment debtor. It is argued that the bond given by the defendant to pay debts and legacies, implies a promise to pay debts and legacies and rendered the defendant liable for them as debtor. But this is inconsistent with the liability of the defendant as executor. That he is so liable, and that the bond is collateral to that liability to secure its enforcement, is too obvious and well settled to be questioned; see, *Jones v. Richardson*, 5 Met., 247; *Colwell v. Alger*, 5 Gray, 67; *Holden v. Fletcher*, 6 Cush., 235; *National Bank of Troy v. Stanton*, 116 Mass., 435; *Jenkins v. Wood*, 184 Mass., 115.

The debt was one from the testator, and the statute prescribes the only mode in which the executor can be held personally liable for a debt of his testator. Public Statutes, c. 166, secs. 6-10; statute 1784, c. 82, sec. 9, provided in relation to the estates of deceased persons, that all writs of attachment and execution should run only against the goods or estate of the party deceased in the hands of executors or administrators, and that the proper goods or estate of an executor or administrator should not be attached or taken in execution for the debts or legacies of the testator or intestate, but upon a suggestion of waste founded upon a return of the sheriff, that he could not find any goods or estate of the testator or intestate, "In which case a writ commonly called *scire facias* shall be issued out of the clerk's office of the same court against such executor or administrator, which writ being duly served and returned, if the executor or administrator make default of appearance, or coming in shall not show cause sufficient to the contrary, execution shall be adjudged and awarded against him of his own proper goods and estate to the value of such waste where it can be ascertained; otherwise for the whole sum recovered, and for want of goods or estate against the body of such executor or administrator." The re-enactments of this statute down to the Public Statutes, though dividing it into separate sections and changing the phraseology, have not changed its meaning. This excludes the anomalous action of debt in a judgment against an executor or administrator in a suggestion of waste, which was sustained in England but never adopted in this State. See *Wheatley v. Lane*, 1 Wms. Saunders, 219; 3 Wms. Executors, 1968, *et seq.*

The mode prescribed by the statute is the only mode in which an execution on a judgment against an executor, for a debt of his testator, can be issued against the executor personally. What will be evidence of waste to charge, under its provisions, an executor who has given bond to pay debts and legacies, is a question which does not arise in the case before us, and which we have not considered.

Judgment for defendant.

COMMONWEALTH*

v.
Certain Intoxicating LIQUORS, (Patrick H. MORRISON, Claimant).

The fact that two buildings are connected with a passage way, where there is no common inclosure within which they stand, and each is in all respects adapted for independent use and actually thus used, except so far as the basement was concerned, is not sufficient to constitute them one building, so as to be covered by a search warrant, describing the premises to be searched as a certain building on the corner of the street, occupied as a store and place of common resort.

(Worcester — Decided October 22, 1885.)

*See, following case.

SEIZURE of liquors under search warrant. The facts sufficiently appear in the opinion.

Mr. Edgar J. Sherman, for Commonwealth:

The warrant was legal and valid. It sufficiently described the premises and the buildings thereon for the purposes of identification, and, it not appearing that there was any difficulty in ascertaining from the description in the complaint and warrant the premises intended to be searched, the statute is complied with. Pub. Stat., ch. 100, § 32; *Commonwealth v. Intoxicating Liquors*, 100 Mass., 182, 187; 113 Mass., 13, 208, 455; 107 Mass., 886; 117 Mass., 427; 6 Allen, 596.

The buildings described in the warrant were, in fact, occupied by Morrison, the claimant, for the illegal sale of intoxicating liquors; and the fact that other persons used and occupied other and disconnected portions thereof, in nowise invalidated the proceedings or affects the forfeiture. *Commonwealth v. Intoxicating Liquors*, 122 Mass., 8; 113 Mass., 19; *Commonwealth v. Ledy*, 105 Mass., 381.

Messrs. J. W. Corcoran and Herbert Parker, for claimant.

Devens, J., delivered the opinion of the court:

The complaint and warrant described the premises to be searched as "A certain building, the cellar under the same, and the out-buildings within the curtilage thereof, situate in the southwest corner of Grove and Beacon Streets, so called, in said Clinton, and occupied by said Patrick H. Morrison as a store, dwelling-house and place of common resort kept therein."

The premises actually searched consisted of a basement under a building at the corner of Grove and Beacon Streets, a covered passage way by which access was had to a basement under another building and the latter basement. These buildings were conveniently known at the trial as A and B, and it was in the basement of the latter that the liquors claimed, were seized. A small quantity was seized which was found in the passage way, but we do not understand that this is here in controversy. If so, the description of the premises would be sufficient, clearly, to include this passage way and would justify the seizure of the liquors there found, as this was certainly an out-building immediately connected with the building A.

It was ruled at the trial, that "The complaint and warrant covered both of said buildings." The correctness of this ruling depends on the inquiry whether these buildings could be held to be so connected and identified, each with the other, as legally to constitute but one, or whether the building called B could be held by legal indentment from its nature, situation and use, as an out-building to A.

The buildings A and B had each distinct access to their basements from Beacon Street. The upper portions of each were approached from Grove Street on a level by reason of the different grade of this street which was higher than that of Beacon Street. The building A was approached therefrom by passing around the south end of A. The stories of each building were occupied by several tenants other than the occupant of the basement. There was a

retaining wall about eight feet from Beacon Street in the space between the two buildings, extending from one to the other, which supports the land on the Grove Street side. A passage way, one side of which was made of rough boards and which also was provided with an entrance on Beacon Street, extended from A to B.

With the distinct modes of access, use and construction described, the fact that they were connected by this passage way, would not make of them the same building described as at the corner of Grove and Beacon Streets. Nor could it be held to be "an out-building within the curtilage thereof." Curtilage has been heretofore defined to be the fence or inclosure of a piece of land around a dwelling-house, usually including the buildings occupied in connection therewith. *Commonwealth v. Barney*, 10 Cush., 480. There was in this case no common inclosure within which the two buildings stood, nor was the building itself of that class ordinarily understood as an out-building, which is one that, from its character, is to be used in connection with the main building and may thus be held to be a parcel thereof, even if not immediately attached thereto, as the barns, sheds, wood and storehouses belonging to a dwelling-house.

In all respects adapted for independent use and actually thus used, except so far as the basement was concerned, the building B was not made, nor could it properly be described as an out-building, because a rough passage way, temporary in its structure, afforded access to it from A. The instruction of the learned Judge was, on this point, therefore, erroneous.

Exceptions sustained.

COMMONWEALTH*

v.

Augustus F. MEAD.

Where there was evidence tending to show that the place searched was a resort for persons who did not live there and that a number of persons were found there in a state of intoxication, it cannot be said, as a matter of law, that all the evidence was not sufficient to sustain the verdict, that defendant kept intoxicating liquors with intent to sell.

(Essex—Decided November 5, 1885.)

COMPLAINT for keeping intoxicating liquors with intent to sell.

The case appears in the opinion.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth:

The rulings and instructions of the court were correct. The evidence introduced was properly submitted to the jury and was sufficient to warrant a conviction. *Commonwealth v. Daily*, 183 Mass., 577; *Same v. Glennan*, 116 Mass., 46; *Same v. Campbell*, 116 Mass., 32; *Same v. Gayley*, 122 Mass., 334; *Same v. McCluskey*, 123 Mass., 401; *Same v. Kahlmeyer*, 124 Mass., 322; *Same v. Hayes*, 114 Mass., 282; *Same v.*

*See, preceding case.

Intox. Liquors, 105 Mass., 595; *Same v. Doe*, 108 Mass., 418.

The evidence of the occurrence, on May 18, was properly received. *Commonwealth v. Gayley (supra)*; *Same v. Jennings*, 107 Mass., 488; *Same v. McCluskey (supra)*.

The instructions of the court as to the defendant's owning or keeping for sale the liquors in question, were ample and correct. *Commonwealth v. O'Reilly*, 116 Mass., 15; *Same v. Jennings (supra)*.

Mr. F. L. Evans, for defendant:

The charge that the defendant unlawfully kept for sale intoxicating liquors, with the intent unlawfully to sell the same, must be proved beyond reasonable doubt. The facts proved at the trial were too scanty and indecisive to furnish any of the elements of such certainty. *Commonwealth v. Intox. Liquors*, 105 Mass., 595.

By the Court:

There was evidence tending to show that the house in which the defendants lived was a place of common resort for persons who did not live there; that persons under the influence of liquor were seen to come from the house, especially on Sundays; that, at the time the officers searched the premises, a large number of men were found there, one of whom was intoxicated; that there were signs of recent drinking of beer in the house; and that there was found a pile of sawdust wet with beer, indicating that beer had voluntarily been spilled upon it.

There was also evidence which was clearly competent, that less than a month before the visit of the officers, the defendant, personally, was engaged in receiving and laying in a stock of beer or of some kind of liquor, on the evening of May 18, 1884.

We cannot say, as a matter of law, that all the evidence was not sufficient to justify the jury in finding that the defendant kept intoxicating liquor with intent to sell it.

Exceptions overruled.

Lorin C. WOODWARD

v.

William G. HAM.

The demand of a mortgagee of chattels, upon an attaching officer, for all the mortgaged chattels attached, is specifying only a portion thereof, is defective as to the residue; even though referring to the book and page of the mortgage record.

(Hampshire—Decided October 22, 1886.)

REPLEVIN brought against a deputy-sheriff to recover a horse, harness, wagon and frame shop-building, by plaintiff, who held a mortgage of all the property, after demand on the defendant for the amount of his mortgage.

The defendant claimed that the mortgage was given in fraud of creditors, and asked the Judge to rule that the plaintiff could not maintain his action because the demand did not allege that the mortgage covered the personal property attached by the defendant and now

replevied; and that as the demand did not allege that the shop-building was covered by the mortgage, the defendant was entitled to judgment for its return; but the Judge refused so to rule, and the defendant alleged exceptions.

Mr. J. C. Hammond, for plaintiff:

The entire attachment was dissolved on failure to pay within ten days the mortgage debt. The case shows the identity of the property attached with the property mortgaged, and it nowhere appears that anyone was misled from want of a complete schedule in the notice. A general description or reference is sufficient; P. S., ch. 161, §§ 74, 75, not expressly requiring a particular one. *Harding v. Coburn*, 12 Met., 333, 339; *Winslow v. Merchants' Ins. Co.*, 4 Met., 306. The rule is recognized by P. S., ch. 191, § 8, as to builders' liens.

As to the horse, wagon and harness, given back to the debtor, the mortgage was fully foreclosed. As to the shop-building, it may be assumed the attachment was by recording in the town clerk's office and not by manual possession; and probably the mortgagee's attention was not called to the fact of attaching the shop. The remark in *Moriarty v. Lovejoy*, 23 Pick., 321, implying that an exact schedule is necessary, was *obiter dictum*.

Mr. R. O. Dwight, for defendant:

The demand was insufficient to defeat the attachment of the shop, P. S., ch. 161, § 75, requiring "a just and true account of the debt or demand for which the property is liable." This involves a designation of the chattels. The existence of such mortgage may easily be concealed at the changed residence of the mortgagor, and no record is required of the release of the chattels from the mortgage. *Moriarty v. Lovejoy*, 23 Pick., 321, 323.

The plaintiff's designation of part of the articles estops him from claiming the shop not enumerated in his demand, the defendant being thus led to believe that it was released from the incumbrance. As to the other chattels, the mortgagee was restored to his rights by the receiptor's return thereof. *Hayward v. George*, 13 Allen, 66.

The defendant having lost his ten days' opportunity, was harmed by the plaintiff's representation, lulling him into false security for the intervening year of delay. *Pickard v. Sears*, 6 A. & E., 469; *Howard v. Hudson*, 2 El. & Bl., 10; *Andrews v. Lyons*, 11 Allen, 849.

The demand being insufficient, the foreclosure did not affect the defendant's rights to the property. *Wing v. Bishop*, 9 Gray, 223.

Devens, J., delivered the opinion of the court:

The only question which the defendant seeks to present by his exceptions, is, whether the demand made by the plaintiff, who was the mortgagee of property attached by the defendant as a deputy-sheriff, was defective and insufficient to defeat such attachment, so far as a certain frame shop building was concerned.

Mortgaged personal property of a debtor is subject to attachment, upon the condition that the party making the same shall, within ten days, pay or tender to the mortgagee the sum for which it is liable, after the same is demanded. The mortgagee, when demanding payment of the money due him, is to state in

writing a just and true account of the debt or demand for which the property is liable to him, and the failure to pay within the ten days vacates the attachment. P. S., ch. 161, §§ 74, 75. Such a demand necessarily involves, in some intelligible form, a designation of the property which the mortgagee claims to be subject to his incumbrance, as by an enumeration of the articles, a statement that it is all the personal property attached or some specified portions thereof then in the hands of an officer. It may be that a reference to the mortgage itself, if upon the public records, for the enumeration of the articles claimed, would be sufficient. *Moriarty v. Lovejoy*, 23 Pick., 320; *Harding v. Coburn*, 13 Met., 333, 340.

But we have no occasion to consider this question. The demand made by the mortgagee does not refer to his mortgage for an enumeration of the articles claimed by him as subject to the attachment; it refers to it only to show that it covers the horse, wagon and harness attached. If the defendant had examined that mortgage and found that a frame building was specified therein, he might well have supposed it to be a different one from that attached, or that it had been released from the mortgage, as the plaintiff mortgagee had not, in his demand, claimed that the building attached was covered by the mortgage, or made any reference thereto.

The articles specified having been returned to the mortgagor the day after the demand by the receiptor, to whom the sheriff released them, the mortgagee was restored to his rights and was enabled fully to foreclose his mortgage thereon. The defendant could not, therefore, retake them or levy execution against the mortgagor thereon. *Robinson v. Mansfield*, 13 Pick., 142.

But as the plaintiff's demand was not sufficient to vacate the attachment of the building which both parties concede to be personal property, the foreclosure of the mortgage thereon, however effective as against the mortgagor, could not change the defendant's right to this property. *Wing v. Bishop*, 9 Gray, 223. In replevin, when part of the goods replevied are found to belong to the plaintiff and part to the defendant, judgment is rendered for each, accordingly.

Exceptions sustained.

Samuel TAYLOR

v.

CAREW MANUFACTURING CO.

1. If, with knowledge that a business is carried on in a place which is unsafe or dangerous, a workman engages in it, he takes the risks incident to the employment; and it is for him to show, in an action brought by him for damages for injuries sustained in pursuit of the employment, that he was in the ex-

NOTE.—When the employé voluntarily assumes the risk of his employment, the employer is not liable for injury resulting. See, *McGrath v. New York & N. E. R. Co.* (R. I.), *ante*, 124.

ercise of due care at the time of the accident.

2. Where, in such action, plaintiff's statement of his own conduct, made by him as witness in his own behalf, shows that he appreciated the risk which attended his actions in moving about rapidly in the pursuit of his employment, in a dark cellar, in which he knew there was a deep well-hole, but did not know whether or not there was a protecting fence around it, although ordered by the foreman to "hurry up the work," was a taking of the risk of his employment, and was such evidence of want of care on his part as will defeat a recovery in the action.

(Hampshire——Decided October 22, 1885.)

TORT to recover damages for injuries to the person of an *employee* caused by negligence of the employer in not providing a safe place for carrying on the business.

The case is stated by the court.

Messrs. George M. Stearns and W. H. Brooks, for plaintiff.

Messrs. E. W. Chapin & W. G. Bassett, for defendant:

As to the prayer of defendant to take the case from the jury, if there was any evidence which could properly be submitted to the jury and upon which they could legally find a verdict for the plaintiff, the verdict must stand. *Heywood v. Stiles*, 124 Mass., 275.

The ruling asked should have been given on the second ground. It appeared, from his own testimony, that his negligence contributed. *Butterfield v. West. R. R. Co.*, 10 Allen, 532; *Wright v. B. & M. R. R. Co.*, 129 Mass., 440, 443. The hazard of walking rapidly into a hole 3 feet 6 inches deep, is as well known as the hazard caused by the unprotected and exposed situation of persons standing on the platform of a car about to start or in motion. It precludes the idea of due care. He purposely took the risk. *Gavett v. M. & L. R. Co.*, 16 Gray, 501, 507.

As said in *Huddleston v. Lowell Machine Shop*, 106 Mass., 282, where the injury was from breaking and falling through a floor, by a workman in his master's machine shop, where it was his duty to pass, he knowing that the floor was dangerous and that there were holes in it, if it was sufficient to put him on his guard at the time, he cannot recover. See, *Pingree v. Leyland*, 135 Mass., 398; *Seymour v. Maddox*, 16 Q. B., 326; *Priestley v. Fowler* 3 M. & W., 1; *Cummings v. Collins*, 61 Mo., 520; *Wilson v. Charlestown*, 8 Allen, 187; *Gilman v. Deerfield*, 15 Gray, 577.

The act of the foreman in telling him to hurry was not the act of the defendant, but of a co-laborer, whose employment by defendant was not claimed to be a negligent act. *McDermott v. Boston*, 133 Mass., 349; *Kenney v. Shaw*, 133 Mass., 501; *Johnson v. B. T. B. Co.*, 185 Mass., 209, 212; *Williams v. Churchill*, 187 Mass., 243.

The admission of plaintiff, the posture of the case, and the evidence from plaintiff, who showed no other use or care of the elevator than that by himself and the men under him, MASS.

excluded the conclusion that there was want of ordinary care and diligence on the part of the defendant corporation in constructing the elevator or in employing agents and workmen to care for and manage it. *Lamb v. West. R. R. Corp.*, 7 Allen, 98; *King v. B. & W. R. R. Corp.*, 9 Cush., 112.

Defendant was not bound to furnish plaintiff a place entirely safe to do his work. The cases cited illustrating the application of the rule, seem to illustrate it no better than this case. *Coombs v. N. B. Cord. Co.*, 102 Mass., 572; *Sullivan v. India Mfg. Co.*, 113 Mass., 396; *Ladd v. N. B. R. R. Co.*, 119 Mass., 412; *Lovejoy v. B. & L. R. Co.*, 125 Mass., 79; *Pingree v. Leyland* (*supra*); *Moulton v. Gage*, 138 Mass., 390.

The testimony offered from McElwain and other witnesses was competent. A comparison of defendant's elevator arrangements, including the hole in the basement for guide irons, with similar arrangements in other similar mills, would have been helpful in testing whether that degree of care which men of ordinary prudence and capacity would take under like circumstances in the conduct and management of their own affairs, had been observed by defendant. It was competent though not controlling. *Crocker v. People's M. F. I. Co.*, 8 Cush., 79, 82; *Raymond v. Lowell*, 6 Cush., 524; *Shrewsbury v. Smith*, 12 Cush., 177; *Bradford v. Drew*, 5 Met., 188; *Packard v. N. Bedford*, 9 Allen, 200; *Cass v. B. & L. R. R. Co.*, 14 Allen, 448; *Lane v. B. & A. R. R. Co.*, 112 Mass., 455, 463; *Taylor v. Monroe*, 43 Conn., 36; *Dorsey v. Phillips & Colby Const. Co.*, 42 Wis., 584.

Devens, J., delivered the opinion of the court:

The plaintiff recovered only on the first count of his declaration, which alleged negligence on the part of the defendant in failing to guard or fence the elevator well in the basement where plaintiff was set to work; so that he, while using due care, fell therein and was injured. There was no recovery on the second count, because of the ruling of the Presiding Judge. This count was for a failure to furnish such safeguards as, under certain circumstances, are provided for by chapter 104, § 14, P. S.

Without adverting at this moment to the questions raised as to the admissibility of evidence offered by defendant, the first inquiry is, whether there was any evidence on behalf of the plaintiff upon which the jury could legally have found a verdict in his favor. If there was, the question of its weight or value cannot be considered by us. *Heywood v. Stiles*, 124 Mass., 275.

The jury would, perhaps, be warranted in finding that the defendant was negligent in leaving the well or elevator hole, which was situated in a dark basement where the servants were obliged to go, for many purposes, open and unguarded by fence or any other suitable protection. It was the duty of the defendant to find and provide for its servants, a reasonably safe place to do their work. *Coombs v. New Bedford Cordage Co.*, 102 Mass., 572; *Boyle v. Mowry*, 122 Mass., 251.

It is for the plaintiff to show, not merely that the place was unsafe and that he was injured thereby, but that he himself was in the exercise of due care. His evidence fails to

show this, if it appears that knowing and appreciating the danger arising therefrom, he voluntarily exposes himself thereto. Business is sometimes carried on in buildings or places obviously unsafe and if, with a knowledge that a business is thus conducted, the workman engages in it, he takes the risks which he must know are incident thereto. *Huddleston v. Lowell Machine Shop*, 106 Mass., 282.

When one capable of choosing and contracting for himself, with full notice of the risk he assumes, voluntarily runs a machine which, by reason of a known defect exposes him to a particular and obvious danger, he is held to assume and take the risk of injury from that source. *Pingree v. Leyland*, 135 Mass., 398. The evidence on the question of his due care comes from the plaintiff; it is not aided by the testimony of the other witnesses. From this, it appears that he had been in the employment of the defendant for several years; that he was hired by the foreman to make size and do whatever the foreman desired; that he was at the mill when the elevator was put in; that he used it at times; that he knew of the existence of the elevator well; that on the morning of the accident he was ordered by the foreman to go down into the basement to help put on an engine belt, "to hurry" so that the foreman could start up; that he went down, the morning being very dark; that he examined the first four belts by feeling of them (not being able to see whether they were on or off); while passing under them he started along the line of the main shaft, for the last belt and "being nearer the elevator well than" he "thought," he "walked into it," that he did not know whether there was or was not any fence to the well. He further stated, on cross examination, that he was looking for the elevator well to shun it, and was thinking of it; that he knew it was there somewhere, but did not know exactly where; that he was walking quite fast because Mr. Gardner, the foreman, had told him to hurry and that he went into the elevator hole so quick, that he did not know whether he was stepping long or short.

From this evidence it appears that he knew of the existence of the well-hole, of the danger to which it exposed him; that he had no reason to suppose it to be guarded and he does not anywhere state that he did so suppose. Under these circumstances, he took the risk of a danger which he knew and appreciated. Indeed, his description of the accident shows distinctly, a want of due care in performing that which he undertook. In the darkness which prevailed in the basement room, to walk quickly, when his eyes afforded him practically no assistance, without, either by hands or feet attempting to find the hole, which he knew was there somewhere, although he "could not tell exactly where," was a failure on his own part to take proper precautions.

The plaintiff suggests "That although he might often have gone down the elevator, yet he had always got out on the front side, while at the time of the accident, he fell in on the back side, where he had never been before; also that he had never before approached the hole by the line of the shafting;" but, as he was fully aware of the existence of the well-hole, he incurred the risk of approaching it in the way

which he actually attempted, and if that way was, for him, unusual, greater care and caution were required on his part.

The case of *Lawless v. Conn. River R. R. Co.*, 136 Mass., 1, upon which the plaintiff relies, is distinguishable; in that case the plaintiff who was a brakeman in the service of the defendant company, claimed to have been injured while engaged in coupling a locomotive engine to a car, by reason that the draw-bar and bunter of the engine (the same device serving for both purposes) was too low for the purposes for which it was designed and used, so that it was liable to pass under the draw-bar or bunter of the car to which it was to be attached, and that it did so on the occasion of the accident, thus causing the injury to the plaintiff. It was in dispute whether the plaintiff knew or could have ascertained, with due care that the draw-bar of the engine and the car were of unequal height; and it was held that the instruction, that if the plaintiff knew that the draw-bars were of unequal height, and that there was danger of their passing each other and knew the probability and extent of the danger thereby, and rode upon the platform of the engine when about to make the coupling, then he was not in the exercise of due care and cannot recover. It was further held that the instruction requested by the defendant was properly modified, by the insertion of the words above inclosed in brackets. That the fact that the plaintiff knew of the defect in the engine, if it were shown, would furnish strong evidence of carelessness on his part, was not questioned, but it was also deemed that he might know of the defect thus existing, without knowing or appreciating the probability and extent of danger therefrom. In the case at bar, the plaintiff knew of the defect, and he consented to incur the risk which he ran in passing along the floor, in the uncertain light, to examine and aid in putting on the belts. The probability and extent of danger to be anticipated from walking into a well-hole of the depth of this, was obvious to every capacity, and the plaintiff's statement of his own conduct shows that he appreciated it.

For the reasons above stated we are of opinion that, upon the evidence, the defendant was entitled to the ruling that no sufficient evidence was offered by the plaintiff of due care on his own part, and that he took upon himself the risk involved in the position of the well-hole.

Exceptions sustained.

Noah WOLCOTT

Hilas O. WOLCOTT *et al.*

1. A decree of the Probate Court admitting a will to probate is final and conclusive upon all the world, until revoked by the court which passed it.
2. It cannot be reviewed by writ of error, or *certiorari*, nor be set aside in equity for fraud.

(Hampden—Decided October 23, 1885.)

PETITION to revoke, annul and make void a decree passed by the Probate Court ap-

proving and allowing a will and appointing an administrator of the estate of decedent with the will annexed.

Messrs. Dwight & Casey, for petitioner.
Mr. E. H. Lathrop, for respondents, Geo. W. Jones and Martha J. Jones:

All persons interested in an estate are bound by the proceedings in the Probate Court, the court having jurisdiction thereof, and due notice having been given. *Dublin v. Chadbourn*, 16 Mass., 483; *Laughton v. Atkins*, 1 Pick., 535-547; *Crippen v. Dexter*, 13 Gray, 330.

The petitioner admits "that the evidence and the way to the same was from the first locked up in the bosom of Hilar O. Wolcott." Assuming that the witnesses, Smith and Parsons, would testify as alleged, the unlocking of "the bosom of Hilar O. Wolcott" is cumulative only. *Plymouth v. Russell Mills*, 7 Allen, 438.

The petitioner is guilty of laches because of great delay. *Andrews v. Sparhawk*, 13 Pick., 400; *Phillips v. Rogers*, 12 Met., 405; *Plymouth v. Russell Mills* (*supra*); *Boston & Me. R. R. Co. v. Bartlett*, 10 Gray, 384; *Evans v. Bacon*, 99 Mass., 213.

Morton, Ch. J., delivered the opinion of the court:

A decree of the Probate Court, admitting to probate a will, is final and conclusive upon all the world, until revoked by the court by which it was passed. It is in the nature of a judgment *in rem*. It cannot be reviewed by writ of error or *certiorari*, and it cannot be set aside in equity for fraud. *Waters v. Stickney*, 12 Allen, 1, and cases cited. This court, sitting as a court of equity, has no jurisdiction to revoke and annul a decree of the Probate Court, duly passed, approving and allowing a will.

Bill dismissed.

John F. BEAN

v.

Jonathan C. FRENCH.

Where a clause in a deed is strictly an exception, the part excepted remains in the grantor as of his former title; but where the effect of the clause is to create some right or easement, not before existing, it is a reservation operating by way of an implied grant; and on its acceptance by the grantee in the deed, the reservation containing no words of inheritance, the vendor has only a life estate in the easement.

(Worcester—Decided October 24, 1885.)

ON EXCEPTIONS.

Case of construction of an easement by reservation in a deed. The terms of the deed are stated in the opinion.

Mr. James H. Bancroft, for plaintiff.
Messrs. F. W. Blackman and B. W. Potter, for defendant.

Morton, Ch. J., delivered the opinion of the court:

The defendant claims a right of way over the plaintiff's lot under the deed from Merri-

field to Cobleigh. This deed contains the following clause: "Reserving, however, to myself the privilege of a bridle road in front of the house." The question in the case is not whether the easement thus created, was appurtenant to the land retained by the grantor, but, rather: what was its character? *Dennis v. Wilson*, 107 Mass., 591.

It is the settled rule that, in a deed to an individual, the word "heirs" is necessary to create an estate of inheritance in the grantee if he takes to his own use and not in trust. *Buffum v. Hutchinson*, 1 Allen, 58; *Sedgwick v. Laffin*, 10 Allen, 430.

The same rule applies to a revocation which operates by way of an implied grant. *Curtis v. Gardner*, 13 Met., 457; *Jamaica Pond Co. v. Chandler*, 9 Allen, 159.

When a clause in a deed is strictly an exception, taking out of the grant some portion of the grantor's former estate, as if one should convey his farm, excepting the wood lot, the part excepted would remain in the grantor as of his former title, because not granted. But when the effect of the clause is to create some right or easement not before existing, it is, properly speaking, a reservation, and is generally considered as operating by way of an implied grant.

In the case at bar, Merrifield, while he was the owner of the lots now held by the plaintiff and the defendant, had the right to pass and re-pass over any part of his estate, but no right of way, properly speaking, existed over the plaintiff's lot. This easement or servitude in favor of the lot retained by Merrifield was a new interest in real estate, created by the reservation and its acceptance by the grantee in the deed. As the reservation contains no words of inheritance, it follows, according to the authorities cited above, that Merrifield had only a life estate in the easement and that the ruling of the Superior Court was correct.

Exceptions overruled.

Charles A. HOPPIN

v.

City of WORCESTER.

Damages are not recoverable from the master for personal injuries sustained through negligence of fellow-servants in constructing an unsafe staging, where proper materials therefor had been furnished.

(Worcester—Decided October 23, 1885.)

TORT brought by the plaintiff against the defendant, for negligence in erecting a staging for the purpose of shingling a building owned by the defendant, upon which the plaintiff was at work, and which fell by reason of a defective and insufficient bracket, causing the injury complained of.

At the trial before Justice Blodgett, there was evidence tending to show, that the committee on highways duly appointed by the defendant City, directed the highway commissioner of the City to erect said building; that said commissioner employed one Gates, a master carpenter and builder, to furnish the labor and tools required in the erection of the build-

ing, under the commissioner's superintendence; that there was no plan of the work furnished by said commissioner or committee; that general directions as to dimensions and construction were given by said commissioner, who was a farmer and not a carpenter, and gave no directions as to the detail of building nor as to said staging; that the said City was to furnish and did furnish all the materials for the erection of the building and paid said Gates for his own services, and for the services of journeymen carpenters employed by him; that after the frame of said building was up and boarded, Gates directed one Green, a journeyman carpenter employed by him, to build a staging to shingle the building, and to use therefor certain brackets which belonged to Gates, and were used in building the staging; that while said Gates and three other workmen under him, including the plaintiff, were at work on the staging, the bracket gave way and broke by reason of imperfection and insufficiency therein, and the plaintiff fell twenty-two feet to the ground and was greatly injured thereby.

There was evidence tending to show that said bracket was unfit and unsafe for the purpose for which it was used, and was the sole cause of the accident; there was also evidence that no materials or appliances were furnished by the defendant for the building of the staging except those used by Green. There was no evidence of any failure by the defendant to furnish lumber and materials when requested by Gates; and it was in evidence and uncontroverted, that the commissioner of highways, when the work began, requested Gates to make out a schedule of whatever lumber was needed in erecting said building.

On the above facts, the court ordered a verdict for the defendant, and the plaintiff alleged exceptions.

Mr. James H. Bancroft, for plaintiff.

Mr. Frank P. Goulding, for defendant.

W. Allen, J., delivered the opinion of the court:

If the plaintiff was the servant of the defendant in the erection of the building, he was the fellow-servant with Gates and Green, so far as they were employed in the construction of the staging. *Colton v. Richards*, 123 Mass., 484; *Killea v. Faxon*, 125 Mass., 485.

It is argued that Gates, in supplying the defective bracket, acted as the agent of the defendant in furnishing materials, and not as its servant to construct the staging, and was not, in that respect, a fellow-servant with the plaintiff. But Gates had no authority from the defendant to furnish materials for it; and it was not as its agent for that purpose, that he used his own brackets to support the staging. If not strictly tools required to be furnished by him, they were implements prepared and kept by him for the purpose of supporting stagings, which he might use under his contract with the defendant. He had no other authority from the defendant for furnishing them. The defendant employed him to furnish the labor and tools in the erection of the building from materials to be furnished by the defendant, and it provided for furnishing all materials needed. The negligence which the evidence tends to prove, is that of servants in constructing an

unsafe staging, and not that of the master in not furnishing proper materials.

Exceptions overruled.

The COMMONWEALTH

t.

Franklin ESTE.

1. Where a town treasurer credits himself with lawful payments made out of the proceeds of notes drawn by him as treasurer, but fails to charge himself with the notes, he **cannot be charged with embezzlement as to the portion of the proceeds used and intended to be used lawfully**, even if the use was contrived as part of a scheme to defraud the town.
2. Embezzlement retains so much of the character of larceny, that **it is essential to the commission of the crime that the owner be deprived of the property embezzled by an adverse holding or use.**

(Worcester—Decided October 21, 1885.)

INDICTMENT, for embezzlement by a town treasurer.

The case is stated in the opinion.

Mr. E. J. Sherman, Atty-Gen., for the Commonwealth.

Messrs. John R. Thayer and L. H. Wakefield, for defendant.

Holmes, J., delivered the opinion of the court:

The evidence of the defendant's embezzlement may be summed up in a few words as follows: while Treasurer of the Town of Southboro, he made two notes in authorized form and applied a large portion of their proceeds to payment of interest due from the town to the State. In his account with the town, he credited himself with the payments so made, but did not charge himself with the notes nor with any part of their proceeds. The exceptions do not disclose whether there was evidence how his balance stood at the time of the earlier of these transactions, but at the time of the later, his account showed that he was chargeable with \$1,680.35, which was diminished by \$1,515 on the books, by the credit mentioned. The error was carried through the books until he went out of office and he then settled his accounts by his books. He had paid the two notes out of his private funds after he ceased to be treasurer; and there was other evidence of a fraudulent intent which we shall mention hereafter. But there was nothing to show that he made the notes or received their proceeds with intent to use them otherwise than as he used them in fact, and it will be noticed that whatever the probabilities, it is possible that he used the whole proceeds in paying proper town charges, as he certainly did the greater part.

We deem it clear that whatever part was so used and intended to be used, was not embezzled, even if the use was contrived as part of a scheme to defraud the town. The fact that the payment was a means of embezzling other money in the future or covered up an embezzlement of other money in the past, would no

make it an embezzlement of the money paid, neither would the fact that he represented it to the town (not to the payees) as payment of other town money, that is, as a payment from his balance on hand and not from the notes. Embezzlement retains so much of the character of larceny, that it is essential to the commission of the crime that the owner should be deprived of the property embezzled by an adverse holding or use.

No doubt, questions may arise as to what is a sufficient deprivation or adverse holding, as is shown in *Commonwealth v. Mason*, 105 Mass., 163, and cases cited; see, also, *Rex v. Hall*, Russ. & Ry., 463, 464; *S. C.*, 2 Russ. Cr., 5th ed., 333; *Reg. v. Richards*, 1 C. K., 532; *S. C.*, 2 Russ. Cr., 5th ed., 206. But the principle remains, and when property is held at every moment as, and for the master's property, fraud as to the source from which it comes or fraudulent intent as to something else, is not a sufficient substitute for the missing element. To this extent we entirely agree with the English cases of *Reg. v. Poole*, Dears. & B., 345; *Rex v. Halloway*, 2 C. & P., 127, and Denison, 370; *Rex v. Webb*, 1 Moody, 431.

We think, therefore, that the fourth ruling requested should have been given. Justice to the defendant also required that a similar instruction should have been given as to the other transaction not embraced in that request.

The court seems to have had chiefly in view another aspect of the case. As has been stated, whether the defendant credited himself with the payment of \$1,515, his accounts showed him to be chargeable with \$1,680.85. His actual balance does not appear nor whether he did have that amount on hand, in fact. The fraud, if there was one, may have been intended to cover up an old deficiency. But treating his account as an admission, the jury might have found that he did then have that amount on hand and, as his account was never corrected and his actual cash balance at the time of final settlement within six months was less even than that required by his account, they might have found that, at the date of the entry or within six months thereafter, he withdrew and embezzled \$1,515 from the bank account.

It seems to have been partly, at least, with reference to this view, that the jury were instructed that "If the defendant failed to charge himself with the \$1,800 received from the Marlboro Bank, on his treasurer's account, and by so doing made himself better off, and actually defrauded the town out of that amount, the jury might convict, provided he did this with a fraudulent intent to convert. That the same would be true with regard to the \$2,000 transaction with the state Treasurer." But this language was misleading, even if it did not embody an error of law, in the sense in which it was spoken. The failure to charge himself alone, apart from the credits for payments which are not mentioned by the court, could only have been a step toward embezzling the proceeds of the notes, a part of which at least the defendant is shown not to have embezzled; yet the idea is conveyed that an embezzlement to the amount of the notes and, it would seem of their proceeds, might be found on this ground. We do not think that the later portion of the charge clearly removed this possible error.

On the other hand, the credits for payments, if we are to take the language quoted as tacitly referring to them, while they may have laid a foundation for an embezzlement of funds on hand, if the defendant had them, could have done so only to the extent of such charges which were less than \$1,800 and \$2,000, respectively.

Further, it is at least as likely that the way in which the defendant, in fact, made himself better off, by crediting or by failing to charge himself, whatever his intent, was by concealing an old deficiency which, of course, would not be embezzlement. Although the instruction would have created a certain impression in the jury's mind, assume, for the purpose of this decision that the jury might have found that the defendant embezzled the whole amount laid in the indictment, but, if so, the two parts of each sum must have been got at in different ways: one part corresponding to the credit embezzled from the bank account; the other part, being the rest of the proceeds of the note not shown to have been paid for the town. We also assume that an embezzlement of any sum from either source, notes or balance on hand, would have warranted a general verdict of guilty. *P. S.*, ch. 203, § 44; *Commonwealth v. O'Connell*, 12 Allen, 451. But this very uncertainty of the grounds on which the verdict might go, made it imperative that the jury should be correctly instructed with reference to each of the alternatives.

For the reasons given, the exceptions must be sustained.

The first instruction requested was properly refused. The evidence of embezzlement was not confined to that presented by the books, and the court could not be required to select that portion and pass upon what its effect would have been in the absence of the rest.

Evidence was admitted of similar embezzlements two years before and only connected with the offense charged by payments of interest out of the defendant's private funds for the purpose of concealment. As these payments might have been made from comparatively innocent motives, the question is raised whether the evidence is taken out of the ordinary rule which excludes the proof of other similar but distinct offenses. See, *Commonwealth v. Tuckerman*, 10 Gray, 173; *Commonwealth v. Choate*, 105 Mass., 451, 458; *Commonwealth v. Jackson*, 132 Mass., 16, 18; *Commonwealth v. Bradford*, 126 Mass., 42, 45; *Commonwealth v. Shepard*, 1 Allen, 575, 581. But it is not necessary to decide this question in order to dispose of the case.

Exceptions sustained.

COMMONWEALTH

v.

Peter HAGAN.

The statute which provides that a licensed innholder may supply intoxicating liquor to guests, who have resorted to his house for food and lodging,

NOTE.—As to who is a guest at an inn, see, *Burbank v. Chapin*, ante, 79; also, *Hancock v. Rand*, 34 N. Y., 1, and cases there cited.

clearly **excludes those who resort there for the purpose of procuring and drinking intoxicating liquor on Sundays.**

(Plymouth—Decided October 24, 1885.)

INDICTMENT, charging defendant with keeping and maintaining a liquor nuisance, and selling liquors on the Lord's Day, and of selling to minors contrary to the statute.

Mr. Edgar J. Sherman, Atty-Gen., for the Commonwealth.

Mr. Hosea Kingman, for defendant:

To constitute a guest, in legal contemplation, it is not essential that a person should be a lodger nor have refreshments at an inn. *Mason v. Thompson*, 9 Pick., 280, 285.

A person, licensed as a common victualler and to sell intoxicating liquors to be drank on the premises, may be convicted of keeping a public bar, within P. S., ch. 100, § 9, cl. 5, if he sells and delivers, *not in connection with food*, intoxicating liquors indiscriminately, to such persons as may call for them, over a bar or counter, although there is no public display of the liquors and the bar is also used for luncheon purposes. *Commonwealth v. Rogers*, 185 Mass., 536.

W. Allen, J., delivered the opinion of the court:

The only exception is to the instructions given and to the refusal to give instructions asked, in regard to what would show that a person to whom intoxicating liquor was sold on the Lord's Day at an inn, was a guest of the inn within the meaning of P. S., ch. 100, § 9, cl. 2, which provides that a licensed innholder "may supply such liquor to guests who had resorted to his house for food and lodging."

The instructions asked by the defendant and the objections urged by him to the instructions given, are founded on the supposed general meaning of the word "guest." It is not worth while to consider whether a person who resorts to an inn for the purpose of drinking, becomes thereby a guest within any meaning of the word as used in the statute itself, and limited to persons who resort to the house for food and lodging, and clearly excludes those who resort there for the purpose of procuring and drinking intoxicating liquor.

The rulings and instructions were correct.

Exceptions overruled.

COMMONWEALTH

v.

Elizabeth EVERSON *et al.*

Ignorance of law is no defense.

(Franklin—Decided November 2, 1885.)

INDICTMENT, for the sale of intoxicating liquors.

Mr. E. J. Sherman, Atty-Gen., for the Commonwealth:

The Presiding Judge adopted the language of this court in his instructions delivered to the jury. *Com. v. Rogers*, 185 Mass., 536.

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The evidence offered was properly refused. *Mr. H. Winn*, for defendants.

By the Court:

1. It is too clear to call for any discussion, that the defendant's ignorance of the law is no defense, and that the evidence offered for the purpose of proving such ignorance was rightly rejected.

2. The rulings upon the question whether the defendants kept a public bar were in accordance with the decision in *Commonwealth v. Rogers*, 185 Mass., 536, and were sufficiently favorable to the defendant.

Exceptions overruled.

Stephen D. COMINS

v.

The TURNER'S FALLS CO.

Exceptions taken in the court below cannot be heard in this court, until the case has been finally disposed of or is ripe for judgment in the court below.

(Franklin—Decided October 23, 1885.)

EXCEPTIONS, taken in the Superior Court. The complaint was for flowage under Pub. St., ch. 190, against defendant, a Corporation created under the Act of Feb. 23, 1792, owner of a dam constructed shortly after the passage of the last named Act.

Messrs. Conant & Conant, for plaintiff:

The height of the dam was fixed and established by St. 1880, ch. 148, as it was March 29, 1880, the time of the approval of said Act. The raising was done solely by virtue of the power conferred by said Act, and for the purpose of obtaining an increased supply of water for manufacturing purposes. *Comins v. Turner's F. Co.*, 188 Mass.

NOTE.—Statute 1880, ch. 148, is as follows:

§ 1. The Turner's Falls Co. may maintain and use its dams, locks and canals, as at present constructed, or any portion thereof, and may construct other dams, locks and canals connected therewith, for the purpose of creating a water power to use or lease to other persons or corporations for mechanical or manufacturing purposes. And for the purposes aforesaid, the said Turner's Falls Company shall have all the powers and privileges and be subject to all the duties, liabilities and restrictions set forth in chapter sixty-eight of the General Statutes and the Acts in amendment thereof and in addition thereto, and chapter two hundred and twenty-four of the Acts of the year eighteen hundred and seventy and the Acts in amendment thereof and in addition thereto; but this grant shall in nowise impair the legal rights of any stockholder in said company.

§ 2. The Turner's Falls Co. is hereby relieved from the obligation to support its locks, dams and canals, for the purposes of navigation, and its said canal is hereby discontinued as a navigable highway.

§ 3. This Act shall not take effect until it is accepted by a majority in interest of the stockholders present or lawfully represented and voting at a legal meeting called for that purpose.

Where the owner of a mill and of land flowed, sells the land and retains the mill and dam without expressly reserving the right to flow the land conveyed, he loses the right and cannot set up an implied reservation. *Preble v. Reed*, 17 Me., 169; *Burr v. Mills*, 21 Wend., 290.

It is a general rule that reservation of easements will not be implied in favor of a grantor, although there may be implications of a grant to a grantee. *Wheelodon v. Barrows*, 12 Ch. Div., 31; *Johnson v. Jordan*, 2 Met., 240.

If a grantor intends to reserve any rights in the estate granted, it is his duty to reserve them expressly in the grant. *Suffield v. Brown*, 4 DeG. J. & S., 69 Eng. Ch., 135; *Crossley v. Lightowler*, 2 L. R. Ch. App., 478.

At the time of filing the complaint the defendant was flowing the land for an entirely different purpose, viz.: manufacturing purposes, under St. 1880, ch. 148.

No reservation can be implied for a way to land for any other purpose than to use it in the same condition it happened to be at the time of the conveyance. *London v. Riggs*, 13 L. R. Ch. Div., 798.

A grant arising out of the implication of necessity cannot be carried further than the necessity requires. *Viall v. Carpenter*, and cases cited, 14 Gray, 126.

An easement to take water to fill a canal, ceases when the canal no longer exists. *National M. Co. v. Donald*, 4 H. & N., 8.

Grants by implication are not favored in this Commonwealth, but are limited to cases of strict necessity. *Buss v. Dyer*, 125 Mass., 287; *Carbrey v. Willis*, 7 Allen, 364; *Warren v. Blake*, 54 Me., 276; *Dollif v. Boston & M. R. R.* 68 Me., 173.

Mr. Austin DeWolf, for defendant.

Morton, Ch. J., delivered the opinion of the court:

It is the rule, settled by numerous decisions, that exceptions taken in cases pending in the Superior Court, cannot be heard in this court, until the case has been finally disposed of or is ripe for judgment in the court below. Interlocutory judgments or rulings cannot be heard until after a final disposition of the case in the Superior Court. *Boyce v. Wheeler*, 133 Mass., 554, and cases cited; *Crompton C. Works v. Worcester*, 119 Mass., 375. This rule applies to the case before us. In *Marshall v. Merritt*, 13 Allen, 274, which, like this case, was a complaint under the Mill Act, exceptions were taken to a ruling at the hearing upon the question whether a warrant should issue to impanel a jury to assess the complainant's damages, and were entered in this court before the jury trial was had, and it was held that they would be dismissed as prematurely entered, because there had been no final determination of the case in the Superior Court.

Exceptions dismissed.

Chester SMITH, *Appt.*,
v.

Edmund S. DICKINSON.

In proceedings under the statute for the relief of poor debtors, Pub. Stat., ch.

162, § 50, the right of appeal, given "in like manner as from the judgment of a trial justice in civil actions" is confined to "a party aggrieved by the judgment." Ch. 155, § 28. Hence, where the debtor was convicted, under some specifications of fraud and acquitted upon others, the creditor is not a party aggrieved so as to give him the right of appeal.

(Hampshire——Decided October 24, 1885.)

THIS case was originally before a magistrate upon three charges of fraud filed by the appellant against the defendant, pending his application to take the oath for the relief of poor debtors. The debtor was found guilty on two charges and not guilty on the other, and was sentenced to imprisonment in jail for the term of two months, from which findings and sentence the creditor appealed to the Superior Court. After trial and verdict in the Superior Court the case was reported for the determination of the Supreme Court. *Appeal dismissed.*

Messrs. Hamlin & Paige, for appellant:

That the creditor has the right of appeal, in a case like that at bar, would seem to have been the understanding of this court heretofore, though the precise point has not been adjudicated, so far as we are aware. *Fletcher v. Bartlett*, 10 Gray, 491; *Stockwell v. Silloway*, 100 Mass., 296; *Mowry's Case*, 112 Mass., 395; *Morse v. Dayton*, 125 Mass., 47.

The proceedings partake so far of a criminal nature that, by both the Declaration of Rights and by the provisions of statute law, the charges must be fully, plainly and formally described to the party charged before he can be held to answer them. *Chamberlain v. Hoogs*, 1 Gray, 172.

Proceedings under or upon the first charge of § 17, of ch. 162, are substantially distinct in nature, character and object, from those under or upon the following charges of said section, and when charges of fraud have been made, whether before the arrest of the debtor or pending his examination, they constitute a distinct and independent "suit at law" to be tried and determined upon its own merits, regardless of any other proceeding whatever. *Fletcher v. Bartlett* (*supra*); *Mowry's Case* (*supra*); *Lockhead v. Jones*, 137 Mass., 25; *Macaig's Case*, 137 Mass., 470.

If it be said that by the voluntary discharge of the debtor he is out of the control of the court, we reply that he is no more out of the control of the court than he is in case the magistrate finds that he has no property and is not guilty of fraud, from which latter finding the creditor takes an appeal. But that has been no objection to entertaining an appeal by the creditor, and if a verdict were obtained against the debtor, and he sought to evade sentence, doubtless he could and would be brought before the court by a proper warrant. *Chamberlain v. Hoogs*, 1 Gray, 172; *Ingersoll v. Strong*, 9 Met., 447; *Collamore v. Fernald*, 3 Gray, 318; *Anderson v. Edwards*, 123 Mass., 273.

Mr. J. C. Hammond, for defendant.

Holmes, J., delivered the opinion of the court:

There is no doubt that a strong argument may be made that each charge, filed as provided in Pub. Stat., ch. 162, § 49, stands like a separate count; that conviction upon one and acquittal upon another are like separate judgments for the plaintiff and defendant, respectively, and that each party may appeal from the judgment against him by virtue of § 50. But, if this view was correct, it would seem to follow that by this appeal as from a judgment, § 50; see ch. 155, § 28, the appeal in such a case would only open the judgment appealed from, and that the charges found in favor of the appellants could not be retried; whereas, it has been decided that an appeal opens the case for trial upon all the charges of fraud. *Morse v. Dayton*, 125 Mass., 47.

In that case it was assumed, as the ground for the decision, that there was but one judgment, although the debtor was acquitted on some specifications and found guilty on another. *Id.*, 49. It is true that we find on looking into the papers of that case, that all the specifications fell under the second charge of fraud named in Gen. Stat., ch. 124, § 5; Pub. St., ch. 162, § 17. Whereas, in the present case, the charges of which the debtor was found guilty, fell under the second, but that of which he was acquitted, fell under the fifth, and the argument, perhaps, is somewhat stronger for treating the judgment as distinct when the charges are distinguished by statutes, than when the different specifications only support the same statutory charge. But we think that the decision in *Morse v. Dayton* did not contemplate any such nice discrimination, and we see no satisfactory reason for it.

Two different conveyances in fraud of creditors are just as distinct frauds as one such conveyance, and contracting a debt with the intention not to pay for it. We may add that § 50 seems only to contemplate a single judgment and that the opposite view might lead to two sentences, one by the magistrate and a further one in the superior court, which is hardly within the words of § 52. If, then, we are to take it that there was but one judgment in the present case, that judgment was in favor of the creditor, and he was not aggrieved by it. See, *Commonwealth v. Graves*, 112 Mass., 282.

An appeal by the debtor would have opened all the charges, and unless the debtor appealed, it did not matter to the creditor upon which of the alleged frauds the judgment was based. The sentence, to be sure, might have been heavier upon a conviction upon all the charges, but a creditor has no private interests in the sentence, although it is incident to a proceeding in his private interest. *Stockwell v. Silloway*, 100 Mass., 287, 294; and it is contrary to the analogies of the law to allow an appeal for the sole purpose of enhancing the punishment. See, *Commonwealth v. Cummings*, 3 Cush., 212; Pub. Stat., ch. 155, § 58.

There can be no doubt that the right of appeal given by Pub. Stat., ch. 162, § 50, "in like manner as from the judgment of a trial justice in civil actions," is confined to "a party aggrieved by the judgment." Ch. 155, § 28.

The appeal to this court is well taken, notwithstanding the want of jurisdiction of the superior court. *Commonwealth v. O'Neil*, 6 Gray, 343-345.

Creditor's appeal to the Superior Court dismissed.

Bridget E. HASTINGS *et al.*

Arthur B. LOVEJOY.

In an action against a tenant for rent, it is competent for the defendant to prove as a defense, that after delivery of the lease, plaintiff made an oral agreement that the rent should be reduced; the consideration being, a change in the business position of the defendant which might be of advantage to the plaintiff, and of detriment to defendant, should plaintiff fail to keep his promise.

(Suffolk—Decided October 21, 1886.)

DEBT. Reserved on verdict by direction. This was an action to recover a balance of rent, on a written ten year lease under seal for the four years, from 1877 to 1880 inclusive. At the trial, before Justice Field and a jury, it appeared that the plaintiffs leased to the defendant certain premises for a term of years, at an annual rental of \$12,500; that in 1876, while the lease was in force, the defendant lessee said to the plaintiffs that his business was unprofitable, that he was unable to pay the rent called for in the lease and that he must fail, unless the plaintiff's lessors would agree to reduce the rent, which they verbally agreed to do, for the year 1876, \$2,000, and for the three succeeding years \$2,500. In 1877, the defendant made the same representations as he did in 1876, excepting that he stated that he would take a partner in the business and would borrow \$40,000. This partner, however, never signed the lease. For the year 1876, the lessors gave the defendant a receipt in full for the rent as reduced, but the payments and receipts for the three following years were on account.

The Presiding Judge ruled, against the objections of the defendant, that the plaintiffs were entitled to the balance of rental during these four years, being the difference between the rent paid by virtue of the verbal agreement and the rent reserved in the lease, viz.: the sum of \$2,000 for the first year, and the sum of \$2,500 for each of the other three years; and the defendant stating that he had no other defense to the action, the Presiding Judge directed the jury to render a verdict for the plaintiffs for the full amount claimed, and reserved the case for the consideration and determination of the full court.

If the ruling of the Presiding Judge is correct, the verdict is to stand; otherwise, the case is to be remitted for a new trial.

Mr. A. E. Pillsbury, for plaintiffs.

Messrs. George A. Torrey and Thomas F. Nutter, for defendant:

The first time the question whether payment by a negotiable instrument is a good accord and satisfaction, came before the court was in the case of *Munroe v. Perkins*, 9 Pick., 298.

Had the defendant failed and abandoned the business and premises, plaintiffs would have been put to their claim for damages. *Latimore v. Harsen*, 14 Johns., 330.

An agreement, required by the Statute of Frauds to be in writing, may be varied by parol, and it is no objection to this doctrine

that the contract becomes thereby partly written and partly oral. *Cummings v. Arnold*, 8 Met., 486.

In *Stearns v. Hall*, 9 Cush., 81, it was held that the time of performance of a written contract within the Statute of Frauds may be enlarged by a subsequent oral agreement. To the same effect are: *Whittier v. Dana*, 10 Allen, 326; *Fleming v. Gilbert*, 3 Johns., 520; *Keating v. Price*, 1 Johns. Cas., 22; *Grafton Bank v. Woodward*, 5 N. H., 99; *Thrall v. Mead*, 40 Vt., 540; *Stryker v. Vanderbilt*, 25 N. J. L., 482; *Rhodes v. Thomas*, 2 Ind., 638; *Cox v. Carroll*, 6 Iowa, 350.

Although the contract was in writing, the manner of payment might be modified by subsequent agreement. *Shaffer v. Sawyer*, 123 Mass., 294.

Parol evidence is admissible to prolong the time of performance of a written contract and to change the place of delivery. *Robinson v. Batchelder*, 4 N. H., 40.

In *Batchiff v. Pemberton*, 1 Esp., 85, Lord Kenyon held that a parol waiver of claim for damages under a sealed charter-party was good.

A contract in writing, whether under seal or not in all its terms, involving mutual duties, may, by a subsequent parol agreement, be modified, altered or rescinded, and no other consideration is necessary to support such agreement than the mutual consent of the parties. *Robinson v. Bullock*, 66 Ala., 554.

A party agreed in writing to construct a building for an agreed price. Prices went up and he said he could not do it. The owner told him to go ahead and he would pay what was right. This verbal agreement was held good. *Bishop v. Busse*, 69 Ill., 407; *Cooke v. Murphy*, 70 Ill., 96; *Marinell v. Graves*, 59 Iowa, 613; *Hewitt v. Brown*, 21 Minn., 163; *Cox v. Bennett*, 1 Green, 165; *Bruin v. Saunders*, 1 Cow., 250; *Dearborn v. Cross*, 7 Cow., 48; *LeFevre v. LeFevre*, 4 Serg. & R., 241; *Shaw v. Turnpike Co.*, 2 Pa., 454; *McDonald v. Mountain Lake Co.*, 4 Cal., 335.

Where both parties acted under the arrangement and it was executed and carried into effect, it is no answer to say that the receipt in full was not conclusive in that the rent was not promptly paid. *Nicoll v. Burke*, 8 Abb. (N. C.), 220.

To show that we are aware of the law of this Commonwealth, we cite some of the cases upon which the plaintiffs rely to prove that if a creditor agrees in the most solemn manner to accept the sum of fifty dollars in full satisfaction of a debt of one hundred dollars, accepts the same and gives a receipt in full, he can still recover the balance. *Harriman v. Harriman*, 12 Gray, 341; *Curran v. Rummell*, 118 Mass., 482; *Luthrop v. Page*, 129 Mass., 19.

This doctrine has, however, been exceedingly distasteful to the courts. Hence, it has been held, that although the payment of a smaller sum of money is not a satisfaction of a larger, yet the giving of any commodity other than money, and entirely irrespective of its value, is sufficient; and the courts do not inquire into the value in any case. "Even a pepper corn may be sufficient." *Barry v. Goodrich*, 98 Mass., 335; *Couldery v. Bartrum*, 19 Ch. Div., 399.

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The slightest consideration is sufficient to sustain the accord and satisfaction. A withdrawal of a false plea is a good consideration. *Cooper v. Parker*, 14 C. B., 118.

Payment at a different place is a sufficient consideration. *Jones v. Perkins*, 29 Miss., 139; *Harper v. Graham*, 20 Ohio, 105.

An acceptance of \$150 and costs and expenses of suit amounting to \$18, is a good accord and satisfaction for a debt of \$299. *Mitchell v. Wheaton*, 46 Conn., 315.

A threat to go into bankruptcy is a sufficient consideration. That is precisely the case at bar. The defendant said he should fail if the rent was not reduced. *Hinckley v. Arty*, 27 Me., 362.

Any object or thing besides money is sufficient. The check of a third person is good accord and satisfaction. *Guild v. Butler*, 127 Mass., 386.

Payment by draft is a good accord and satisfaction. *Reid v. Hibbard*, 6 Wis., 175.

So is the debtor's negotiable note. *Sibree v. Tripp*, 15 Mees. & W., 23.

Even a blank acceptance of third party is good. Alderson, B., quaintly says, "Perhaps it may be worth something as an autograph." *Curlewis v. Clark*, 3 Exch., 375.

Finally, we come to the very case at bar, that payment by the debtor's negotiable check is a good accord and satisfaction. *Goddard v. O'Brien*, 9 Q. B. D., 37; approved, *Foakes v. Beer*, L. R., 9 App. Cas., 605.

The last point that the court, if they find that the case of *Cumber v. Wane*, 1 Strange, 426, has any application to the case at bar, should overrule the whole doctrine of bad law to which it has given rise. Courts in America have bowed down to this fetish long after the very court which set it up has substantially demolished it. It has been doubted and denied repeatedly in England. *Sibree v. Tripp* (*supra*); *Goddard v. O'Brien* (*supra*).

Every court that has mentioned the doctrine, has spoken of it with abhorrence. In addition to above cases see, *Brooks v. White*, 2 Met., 288; *Kellogg v. Richards*, 14 Wend., 116; *Smith v. Ballou*, 1 R. I., 498. The Supreme Court of the United States utterly repudiates the doctrine. *Henderson v. Moore*, 5 Cranch (9 U. S.), 11. Also, the Courts of Pennsylvania. *Muliken v. Brown*, 1 Rawle, 391.

C. Allen, J., delivered the opinion of the court:

While recognizing and giving effect to the rule of law, that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained existing debt of a larger amount, because such agreement is without consideration, courts have, nevertheless, often declared that the rule is not to be extended beyond its precise import, and especially if a consideration for such agreement is found to exist, of which the law can take notice, that courts will not inquire into its adequacy. *Langdon v. Langdon*, 4 Gray, 189; *Brooks v. White*, 2 Met., 285; *Simmons v. Almy*, 103 Mass., 35. The question what will constitute a sufficient consideration for such agreement has been discussed in many cases. *Fitch v. Sutton*, 5 East, 280; *Brooks v. White*, *ubi supra*; *Perkins v. Lockwood*, 100 Mass., 250; *Train v. Gold*, 5

Pick., 385; *Warren v. Skinner*, 20 Conn., 559; Met. Cont., 192, 1 Sm. Lead. Cas., 444.

It is also now well settled that, ordinarily, a written contract, before breach, may be varied by a subsequent oral agreement, made on a sufficient consideration as to the terms of it, which are to be observed in the future. Such a subsequent oral agreement may enlarge the time of performance or may vary any other terms of the contract or may waive or discharge it altogether. *Cummings v. Arnold*, 3 Met., 486-489; *Holmes v. Doane*, 9 Cush., 185; *Goodrich v. Longley*, 4 Gray, 379, 383; *Emery v. Boston Ins. Co.*, 188 Mass., 398; *Goss v. Nugent*, 5 Barn. & Ad., 58. This rule in Massachusetts has been held applicable to a case where the original contract fell within the operation of the Statute of Frauds. *Cummings v. Arnold*, *ubi supra*; *Stearns v. Hall*, 9 Cush., 81. But in the present case there is no question under the Statute of Frauds. In reference to contracts under seal, it was formerly held, especially in England, that they could not be thus varied; but in the United States the tendency of judicial decisions has been to apply the same rule in this respect to sealed instruments as to simple contracts.

In *Munroe v. Perkins*, 9 Pick., 298, the plaintiff, by an instrument under seal, agreed to erect a building at a fixed price, which was not an adequate compensation, and, having done part of the work, refused to proceed, but upon a parol promise by the defendant that he should be paid for his labor and materials, and should not suffer, he went on and finished the building, and it was held that he was entitled to recover in *assumpsit* upon the parol promise. The court said: "The parol promise, it is contended, was without consideration; this depends entirely on the question whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterwards went on upon the faith of the new promise and finished the work. This was a sufficient consideration." In *Mill Dam Foundry v. Hovey*, 21 Pick., 417, it was held that the time of performance of a sealed agreement to make certain plane irons within one year might be extended by a new agreement afterwards entered into between the parties, not under seal, but upon a sufficient consideration. In *Blasdel v. Souther*, 6 Gray, 151, it was said by Chief Justice Shaw, in general terms, "We suppose there is no doubt that a valid oral contract may be made upon the basis of a pre-existing contract, either by specialty or by an unsealed written instrument, modifying, changing and altering the terms of the written agreement." See, also, *Barker v. Troy & Rut. R. Co.*, 27 Vt., 766; *Laurence v. Dacey*, 28 Vt., 264; *Fleming v. Gilbert*, 3 Johns., 528; *Languorthy v. Smith*, 2 Wend., 587; *Lattimore v. Harsen*, 14 Johns., 330; *Stryker v. Vanderbilt*, 25 N. J. L., 482; *McGrann v. North Lebanon R. R. Co.*, 29 Pa. St., 82; *Cooke v. Murphy*, 70 Ill., 96; 1 Sm. Lead. Cas., 8th Am. ed., 666.

In the present case we are of the opinion that it was legally competent for the defendant to prove, as a defense to the plaintiffs' action for the rent, that after the delivery of the lease, the

plaintiffs, for a good consideration, entered into an oral agreement that, for the future, the rent should be reduced, and that the defendant's testimony and his offer of proof, in respect to the plaintiffs' alleged agreement in the fall of 1877, were sufficient, if believed, to warrant the jury in finding that the plaintiffs were not entitled to recover the amount so agreed to be abated. Agreeing to take in a partner for the ensuing three years, and to borrow the sum of \$40,000 and put the same into the business, provided the rent should be reduced, and actually fulfilling that agreement, in consequence of the plaintiffs' promise to reduce the rent, and continuing the business under these circumstances for three years, constituted a change of position on the part of the defendant, which might be of advantage to the plaintiffs and also of detriment to the defendant, provided the plaintiffs' promise should not be kept. *Train v. Gold (supra)*; *Hubbard v. Coolidge*, 1 Met., 92; *Peck v. Requa*, 13 Gray, 407; *Rollins v. Marsh*, 128 Mass., 116; *Hinckley v. Arey*, 27 Me., 362; *Moore v. Detroit L. Works*, 14 Mich., 266.

In respect to the claim of rent for the first year, now in controversy, the true construction to be put upon the defendant's testimony, as reported, is a matter of doubt. It is open to the construction that he was merely expressing an opinion or fear that he should not, thereafter, be able to pay the rent in full, but that he should fail in business at some time in the future, unless a reduction in the rent should be made. Inasmuch as there must be a new trial, when the whole case will be open, we do not now determine the question whether the defendant's testimony, in respect to the plaintiffs' alleged agreement in the fall of 1876, was sufficient to warrant a finding in the defendant's favor upon that item.

New trial granted.

George W. JOHNSON *et al.*

Charles W. GIBBS.

1. It was the intention of the Legislature to put **state paupers**, bound as apprentices by the inspectors of the state almshouse, **upon the same footing as town paupers**, bound out by the overseers of the poor, and to give to such **inspectors the same powers**, with the same **limitations and incidents as those vested in the overseers**.
2. **Actions upon indentures**, by inspectors, binding out as apprentices state paupers, **are barred**, unless brought during the term of apprenticeship, or within **two years** after the expiration thereof.

(Hampden — Decided October 23, 1885.)

SUIT upon an indenture of apprenticeship of a pauper, for a breach of the covenant. The case is stated by the court.

Mr. Geo. M. Stearns, for plaintiffs.

Messrs. W. S. Kellogg and Whitney & Dunbar, for defendant.

The general system of legislation upon the subject-matter may be taken into view, in order to aid the construction of one statute relat-

ing to the same subject; and it is proper to consider other statutes in *pari materia*, whether they be repealed or unrepealed. *Church v. Crocker*, 3 Mass., 17, 21; *Thayer v. Dudley*, 3 Mass., 296; *Holbrook v. Holbrook*, 1 Pick., 248-254; *Mendon v. Worcester*, 10 Pick., 235; *Commonwealth v. Cambridge*, 20 Pick., 267; *Goddard v. Boston*, 20 Pick., 407.

"The best ground of exposition of any statute is, to take the entire provisions of the Act and ascertain, if possible, what the Legislature intended." Shaw, *C. J.*, in *Cleveland v. Norton*, 6 Cush., 380.

"Statutes are to be construed according to the intention of the makers, if this can be ascertained with reasonable certainty; although such construction may seem contrary to the ordinary meaning of the letter of the statute." Wilde, *J.*, in *Stanicle v. Raymond*, 4 Cush., 314.

"Many cases may be comprehended within the equity of a statute, the letter of which may be enlarged or restrained according to the true intent of the makers of the law." *Whitney v. Whitney*, 14 Mass., 88.

Whenever an Act of the Legislature confers powers which are recited in another Act, the Act to which reference is made is to be considered and treated as if it were incorporated into and made a part of the Act which contains the reference. *Turney v. Wilton*, 36 Ill., 385.

By § 18, ch. 80, R. S., in an action upon the indenture, the court may discharge the minor from his apprenticeship. If minors bound by inspectors are not within the provisions of this section, then the powers to bind, granted to inspectors, are not the same but practically greater than the powers possessed by overseers of the poor.

Within the authority of 36 Ill., 385, ch. 80, R. S., is to be considered and treated as if it were incorporated into and made a part of the Act of 1852, ch. 275.

Although the Statute of 1852 is silent in regard to the duties and powers of inspectors to bring actions on the indenture and the period within which such actions must be brought, yet this action is within the equity and intention of R. S., ch. 80, § 17 (P. S., ch. 149, § 17), and is barred thereby. *Brown v. Pendergast*, 7 Allen, 427.

Morton, Ch. J., delivered the opinion of the court:

This is a suit upon an indenture of apprenticeship, dated June 27, 1863, executed by the inspectors of the state almshouse at Monson, of the one part, and the defendant, of the other part. The term of the apprenticeship expired on the first day of June, 1867.

The question presented by the bill of exceptions is whether the special Statute of Limitations hereafter referred to, is a bar to the action. This depends upon the construction of the General Statutes which were then in force.

The chapter on "Masters, Apprentices and Servants" provides that children may be bound as apprentices, by their parents or guardians, or, if they are paupers, by the overseers of the poor of the town to which they are chargeable, and "That every master shall be liable to an action on the indenture for a breach of any covenant on his part therein contained." Gen. Stat., ch. 11, §§ 1-18.

The 16th section provides that "No such action shall be maintained, unless commenced during the term of apprenticeship or service, or within two years after the expiration thereof." Standing by itself, this provision by its literal construction may refer only to actions commenced by parents, guardians or overseers of the poor, the actions previously mentioned in the chapter. But in a previous chapter, relating to state almshouses and state paupers, it is provided that "The inspectors shall have the same power to bind as apprentices minors who are inmates of the institution under their charge, as is vested in overseers of the poor." Gen. St., ch. 11, § 38.

We cannot doubt that it was the intention of the Legislature to put state paupers bound as apprentices by the inspectors of the state almshouses, upon the same footing as town paupers, bound by the overseers of the poor, and to give to the inspectors the same powers, with the same limitations and incidents as those vested in the overseers. It has been the policy of the Legislature from our earliest history, to exempt indentures by public officers binding paupers, whether state or town paupers or apprentices, from the operation of the general statutes of limitations, by which an action upon a sealed instrument may be brought at any time within twenty years after a breach, and to require an action upon such indenture to be brought within two years after its term expires. St. 1793, ch. 59, § 5; R. S., ch. 80, § 17; Gen. St., ch. 10, § 16; Pub. St., ch. 109, § 17.

There is no reason to suppose that the Legislature intended to change this policy when, in 1852, it made provisions for the support of state paupers in state almshouses and gave, to the inspectors thereof, the same powers to bind as apprentices inmates who were minors, as those vested in overseers of the poor. St. 1852, ch. 275, § 7.

There is no ground for any distinction, in this respect, between state paupers and town paupers, and we are of opinion that, within the intention and reasons of § 16, of ch. 111, of the General Statutes, actions upon indentures by inspectors of the state almshouses binding as apprentices state paupers, are barred, unless brought during the term of apprenticeship or within two years after the expiration thereof.

Exceptions overruled.

Elizabeth A. SCOTT, *Appt.*,

v.

W. R. FORD, *Admr.*

Amelia J. SCOTT, *Appt.*,

v.

The SAME.

A gift of money is not completed until its acceptance by the donee and, in the case of money on deposit, delivery and acceptance of the bank book constitute a completed gift; but where the deposit was made without the knowledge of the donee and the deposit book was retained

by the donor, the **intention** of the donor to make the gift and of the donee to complete the contract **must be shown**, and the declarations of the donor and her acts, while holding the book, are competent to prove a completed gift.

(Hampshire—Decided October 23, 1885.)

ACTIONS originally brought against the Berkshire Savings Bank, to recover certain deposits made in the bank by Betsey Ford and her administrator, the defendant appearing as a claimant. It appeared at the trial that the said Betsey Ford, an aunt of the plaintiffs, made deposits in said bank until they amounted to \$1,000, when she took out two bank books in the names of the plaintiffs, and made deposits thereon; that the donor always kept the bank books in her possession until her death; and that before her death she frequently sent to the plaintiffs orders to sign to draw money on the bank books in their names; and that they did not know that any money had been so deposited for them until the donor sent them the orders to sign, said orders being found, with the books, on the donor's decease. The defendant, among other things, offered evidence to show, by the declarations of the donor, that her intention in making said deposits in the names of the plaintiffs was to avoid the provision of the by-laws of the bank, that deposits of over \$1,000 could not draw interest. The court refused this offer of evidence.

The jury returned a verdict for the plaintiff, and the defendants took exceptions to the rulings and refusals to rule.

Mr. W. G. Bassett, for plaintiffs.

Mr. D. W. Bond, for defendant:

A deposit in a savings bank, of a person's own money, in the name of another, without any notice of such deposit to the person in whose name it is deposited, and with no delivery of the pass book to such person, is not a completed gift by the depositor to the person in whose name it is deposited. *Clark v. Clark*, 108 Mass., 522; *Jewett v. Shattuck*, 124 Mass., 590; *Broderick v. Waltham Sav. Bk.*, 109 Mass., 149.

The court will take notice of the existence of a by-law similar to the one in this bank. *Brook v. Boston Five Ct. Sav. Bk.*, 104 Mass., 228; *Sweeney v. Same*, 116 Mass., 384; *Pierce v. Same*, 129 Mass., 425; *Clark v. Clark (supra)*; *Id. v. Pierce*, 134 Mass., 260.

If the plaintiffs had refused to sign the orders, the money deposited could have been collected by Betsey Ford of the bank. *Broderick v. Waltham Sav. Bk. (supra)*.

"And any evidence that the deposit was made in this form for any other purpose than to transfer the title to the person to whom it is credited, so that he may draw it for his own use and benefit, would of course be competent evidence upon the question whether a gift was ever intended." *Id. v. Pierce (supra)*.

Evidence of this class was admitted in *Brook v. Boston Five Ct. Sav. Bk. (supra)*.

Plaintiff is not a party between the depositor and the Savings Bank. She could maintain no action upon it. As to her the contract is merely evidence by way of admission, subject to be controlled by any competent evidence as to the actual facts. *Id.*

Declarations of a grantor prior to the making of an alleged fraudulent conveyance are competent for the purpose of learning the intention of the grantor. *Bridge v. Eggleston*, 14 Mass., 245.

"If the alleged trust arises from a mere gift of personal property, delivery of the writing by which it is declared, is perhaps of less importance, and the court will consider all the facts showing the intention of the donor." *Gerrish v. New Bedford Inst. for Sav.*, 128 Mass., 159, 161.

W. Allen, J., delivered the opinion of the court:

Mrs. Ford, the claimant's intestate, deposited her money in the savings bank in the names of the plaintiffs, and the claimant is entitled to it, unless his intestate made a gift to each of the plaintiffs of the money deposited in her name. *Broderick v. Waltham Sav. Bk.*, 109 Mass., 149; *McCluskey v. Provident Inst. for Sav.*, 103 Mass., 300.

To constitute a gift to the plaintiff, the deposit must have been put in her name, with the intention of making a gift of it to her, and it must have been accepted by her.

The difference between this case and *Sweeney v. Boston Five Ct. Sav. Bk.*, 116 Mass., 384, is, that in that case, the donee was present when the deposit was made; and the donor delivered the deposit book to her. The delivery and acceptance of the book was conclusive evidence, both of the intention of the donor to make the gift and of the acceptance of it by the donee. In the case at bar, the deposit was made without the knowledge of the donee, and the deposit book was retained by the donor. The intention of the donor to make a gift is open to inquiry, and the acceptance of it by the donee completes a contract between her and the bank, and cannot be presumed but must be shown. If the evidence shows that the donor intended that the deposit should belong to the donee, and received and held the book for her until acceptance by her, it shows a complete gift, even though it might have been revoked before acceptance.

Upon the question of the intention of Mrs. Ford, in making the deposits, the letter of the bank to her, and her declarations relating to it are competent; the length of time between the declarations and the deposits affects the weight but not the competence of the evidence.

Upon the question of Mrs. Ford's intention in holding the book before the gift was perfected, whether she held it as owner or as the agent or depositary for the plaintiff, her declarations and acts while holding it, showing the character of the act, are competent. The taking of the order from the plaintiff for payment to herself was an act, the significance of which depended upon her intent in it, whether exercising dominion over the deposit as owner, or recognizing the dominion of the plaintiff; and her declarations and letters respecting it, preceding and accompanying it, are competent.

The letter to the plaintiff, Elizabeth A., was sufficiently identified as coming from Mrs. Ford, by containing the order, and being acted on as hers by the plaintiff, and sufficiently appeared to relate to the order, and should have been admitted; each plaintiff relied upon a particular

occurrence as proving the completion of the gift to her.

The declarations offered, of the donor, in relation to making her will were after the gift was completed, if it ever was, and were either incompetent or immaterial and were properly excluded. See, *Valentine v. Wheeler*, 116 Mass., 481; *Whitwell v. Winslow*, 182 Mass., 307.

The donor made the deposit and kept the book for the plaintiff, intending it as a gift to her; the gift would not be perfected until accepted by the donee; and acceptance implies a mutual act of the parties, or an act by one, assented to by the other, equivalent to an acceptance of a chattel upon delivery. An act would perfect the gift of the legal interest, which, had the deposit been in the donor's name in trust, would have been sufficient to perfect the gift of the equitable interest, as in *Gerrish v. New Bedford Inst. for Sav.*, 128 Mass., 159. An acceptance and a complete gift might be inferred from the fact that the donor informed the donee of the gift, with the express or implied assent of the donee. Any act or speech between the parties, which should show a mutual understanding that the gift was made, would be sufficient evidence. The instructions to the jury were substantially correct, though not verbally accurate; but there was error in the exclusion of evidence.

Exceptions sustained.

John BARRETT

Mary MURPHY.

1. In determining the position of a starting point in a deed, designated as the "northeast corner of land sold to A," such point being the southeast corner of land of B, the adjoining owner; in an action of ejectment between A and B, holding under a common grantor, evidence as to what monuments were in existence and pointed out at the time of the conveyance to B, is competent.
2. Although the description begins at a true corner and not at a monument, yet, if any monument existed at a point different from the true corner and was, contemporaneously with the conveyance, pointed out by the grantor or by his authority, its existence may be shown, not to vary the description in the deed, but to apply the language of the grant and to locate the subject-matter.
3. Natural or artificial objects may be established as bounds and monuments, by proof that they were recognized and accepted as such by the parties.
4. Where a deed relied upon in the case, mentions a "contemplated new road," a plan or map of the tract including the land in suit, made by direction of the grantor prior to the deed, on which a "contemplated street" is laid down, is admissible in evidence, although not expressly referred to.

(Berkshire—Decided October 20, 1885.)

EJECTMENT. On exceptions.

The facts are stated in the opinion.

Mr. Mark E. Couch, for defendant;

"The southeast corner of land I sold Bailey" can never be said to be a known and certain monument, so as to control courses and distances mentioned in deed to Richard and Eliza Murphy, until the conveyance to Bailey be produced in evidence or its absence properly accounted for, and secondary evidence of the description therein contained be given. *Bagley v. Morrill*, 46 Vt., 94; *Cornell v. Jackson*, 9 Met., 150, 154.

Not the land occupied by Bailey, but the lot described in his deed, shall fix such southeast corner. *Cleveland v. Flagg*, 4 Cush., 76, 81; *Inhabitants of Wellfleet v. Inhabitants, etc.*, 9 Allen, 137; *Sparhawk v. Bagg*, 16 Gray, 583.

Harrington's line began at Bailey's true corner, notwithstanding the stake. *Cleveland v. Flagg* (*supra*.)

The northeast corner of the land of Harrington, as a monument in the deed to Richard and Eliza Murphy, must be fixed by reversing the first course therein mentioned and measuring back south on the road, four rods from O'Hearn's southeast corner, which is a known and fixed monument. *Seidensparger v. Spear*, 17 Me., 123; *Noyes v. Dyer*, 25 Me., 468; *Otis v. Moulton*, 20 Me., 205; *Lincoln v. Edgecomb*, 28 Me., 275; *Wilson v. Inloes*, 6 Gill (Md.), 121; *Dobson v. Jones*, 8 Jones (N. C.), 495; *Wilson v. Hildreth*, 118 Mass., 578, 581.

The evidence that Harrington went with the agent of the grantor, who pointed out to him a stake, should have been excluded. *Bartlett v. Emerson*, 7 Gray, 174; *Ware v. Brookhouse*, 7 Gray, 454; *Daggett v. Shaw*, 5 Met., 223; *Flagg v. Mason*, 8 Gray, 556, 557; *Cleveland v. Flagg*, 4 Cush., 76, 81.

Even if the evidence as to said stake was admissible, still "So frail a witness as a stake is scarcely worthy to be called a monument or to control in the construction of a deed." *Cox v. Freedley*, 33 Pa. St., 124, 130.

The center of the contemplated street mentioned in the deeds should be fixed at a point eight rods from the elm tree. *Walker v. Boynton*, 120 Mass., 349, 351; *Stark v. Coffin*, 105 Mass., 329, 330; *Boston v. Richardson*, 18 Allen, 140.

The descriptions in the deeds to Dennis Buckley are implied covenants that there is such a way at the place therein stated: *i. e.*, eight rods from the elm tree. *Thomas v. Poole*, 7 Gray, 84; *Tufts v. Charlestown*, 2 Gray, 272.

It was error not to give instruction asked for in second and fourth requests. *Keenan v. Caranagh*, 44 Vt., 268, 276; *Bagley v. Morrill*, 46 Vt., 94, 99, 100.

The court should have given the fifth instruction asked for. *Seidensparger v. Spear* (*supra*); *Cox v. Freedley* (*supra*).

Devens, J., delivered the opinion of the court:

It was for he defendant to establish his title to the locus in dispute. Prior to the deed of Robinson to Harrington of the lot which the defendant now holds, Robinson had made a bond for a deed of the lot north of it now held

by the tenant, to one Bailey. In fact, no deed was ever made by Robinson to Bailey, but in the description which Robinson gives of the tract sold to Harrington, he defines it as "commencing at the southwest corner of land I sold to Bailey." It is not controverted by either party that this refers to the tract which Robinson had agreed to convey, but had not actually conveyed to Bailey. The bond was not produced and the demandant apparently did not desire to avail himself of it in locating the tract of land conveyed to him, as it did not appear that any effort had been made to obtain it.

Robinson had originally owned a tract of land extending along Furnace Street in North Adams, from north to south, which he conveyed in nine distinct parcels, all bounding on Furnace Street, and across which tract there was a street contemplated by him between the second and third parcels as they were numbered from the north, running easterly at a right angle to Furnace Street. This street is not included in any of the deeds and has never in fact been opened as such. The first lot from the north, conveyed by Robinson, was the extreme northern one, known as the Buckley lot, while that of the demandant is the extreme southern lot. The lot known as the O'Hearn lot, is the seventh lot from the north, and was conveyed by Robinson about a year and a half after the deed to Harrington.

The bond for a deed made to Bailey by Harrington having been surrendered, or, if a conveyance was made, that having been surrendered subsequent to the deed to O'Hearn, Robinson made the deed to Richard and Eliza Murphy under which the tenant claims. The description in this deed is as follows: "Beginning at the northeast corner of land of William Harrington, thence northerly on the road four rods to land of E. O'Hearn, thence westerly eleven and one half rods on said O'Hearn's lot," etc. The northeast corner of the Harrington lot and the southeast of the Bailey lot, afterwards the Murphy lot, were the same and the contention of the demandant is that the northeast corner of the Harrington lot, as a monument in the deed to Richard and Eliza Murphy, must be fixed by reversing the course first mentioned and measuring back south on the road from O'Hearn's southeast corner which is a known and fixed monument.

But the descriptions, in the deeds of the demandant and tenant, were not fixed by commencing from the same point as those in the deeds of the lots which were north of them, including the O'Hearn lot and, even if the southeast corner of this lot was thus definitely fixed, the previous grant of the Harrington lot could not be fixed thereby, as that might permit a grantor to alter the boundary of the lot he had granted to the injury of his grantee, by a subsequent act. Even if the southeast corner of the O'Hearn lot is now a known and fixed monument, it was not so at the time when the deed to Harrington was made. *Leonard v. Quinlan*, 121 Mass., 579. Nor do we perceive any answer to the contention of the tenant, that if all the deeds introduced by demandant of the lots north of those of the demandant and tenant be considered they fail to support the demandant's theory as to the location of the O'Hearn line.

Before any conveyance had been made, a plan,

known as Brown's plan, had been prepared by direction of Robinson. He did not refer to it in his deeds, although he then had it. There was evidence not controverted, that in making his conveyance Robinson began ten and one half feet north of the northern boundary as exhibited on that plan, at an elm tree which is now conceded to be the true corner, although it is not mentioned *eo nomine* in the conveyance. The deed of the second lot to Buckley, bounds on the "contemplated new road leading from the old road westerly, which is to be two rods wide." The plan of Brown shows a "contemplated street," eight rods south from the northern boundary of the lots as marked on that plan, running westerly, nearly at right angles from Furnace Street. No evidence appears as to any other "contemplated street" than the one thus exhibited. Its width, course and position correspond. As the Brown plan did not commence at the elm tree, but ten and one half rods south of it, this contemplated street was ten and one half rods further south than that which appears upon the plan used at the trial, known as Smith's survey, which was merely a chalk mark, intended to delineate the lots according to their admeasurement, and made long subsequent to any of the conveyances. "The contemplated street," was also the northern boundary of the third lot sold; it was a lot of land on the south side of the new road "commencing on the southeast corner of said new road," etc. All the lots south of it, including the O'Hearn lot, were bounded from this lot, and thus all of them, according to the Brown plan, would extend ten and one half feet further south than as they appear on the Smith survey, relied on by the demandant. The O'Hearn line being thus fixed, the *locus* in dispute would be included within the tenant's boundary.

Upon this whole subject, the jury was instructed in a manner not objected to, except so far as certain specified requests were refused. The demandant has no proper ground of exception to the refusal of the Presiding Judge to give the second, fourth and fifth instructions which, in various forms, request that the jury should, as a matter of law, adopt the O'Hearn line as exhibited on the survey made by Smith for the demandant, as fixing the southeast corner of the tenant's land.

The remaining exceptions relate to questions of evidence, although two of them are to the refusal of the Presiding Judge to instruct according to the request of the demandant. Upon the question where the northeast corner of the Harrington and the southeast corner of the Bailey, now Murphy, lot was, which was the vital one in the case, evidence as to what monuments were in existence and what were pointed out at the time of the conveyance was competent. While Harrington's line began at Bailey's true corner, and not at any stake or other monument, if such existed at any point differing from the true corner, in determining that corner the existence of such monuments might be shown. If, at the time of the conveyance or so nearly connected therewith that it might fairly be held to be contemporaneous, such a monument was pointed out by the grantor or by his authority, if, thereby it was not sought to alter or vary any written description in the deed, the

evidence would be admissible to apply the language of the grant and locate the subject-matter of it. When uncertainty arises in the application of a description, evidence is received of all the facts and circumstances of the transaction, the position and character of the land for the purpose of ascertaining the real intention of parties. Natural or artificial objects may be established as bounds and monuments by proof that they were recognized and accepted as such by the grantor and grantee. *Gerrish v. Towne*, 3 Gray, 87-89; *Chester Emery Co. v. Lucas*, 112 Mass., 432-434; *Hoar v. Goulding*, 116 Mass., 132; *Dunham v. Gannett*, 124 Mass., 151.

The testimony of Harrington, therefore, that the stake was pointed out to him as the point where the northeast corner of his lot and the southeast corner of the Bailey lot was, by the agent of Robinson, specially authorized thereto by the grantor, was competent. This was done at the time of the delivery of the deed and might be deemed the act of Robinson, it having been done by his agent having the necessary power and capacity.

The evidence of John C. Bailey that he knew of the stake and had seen it up to 1879, where Harrington claimed it to have been shown to him, was also competent, and the evidence that he and Manning, they owning lots 4 and 5, respectively, had built their division fence to correspond with the line indicated by this stake, tended to show that its position had been called to their attention.

The evidence of Robinson that the stone wall was the southern boundary of the Harrington lot, was competent, in connection with the evidence that had been given without contradiction by him, that the stake was pointed out, by his authority, as the northeast corner, and that it was four rods from the wall. The demandant was not entitled to the instruction that it was not to be considered as tending to fix the northeast corner; in connection with the monument at the stake it had some tendency to show where that corner was.

The plan made in 1872 by Brown, was admissible. The demandant relied upon deeds which spoke of a "contemplated new road." It was important to determine its location, width, course, etc., and upon this question it was competent, as tending to fix these things, to show that there was then in existence a plan on which was laid down "a contemplated street," even if the plan was not expressly referred to. It afforded evidence, also, to confirm the contention that stakes had been set up such as were relied on as fixing the corner. The plan would also be admissible, in the discretion of the court, as a sketch, tending to show that the "contemplated street" was really ten and one half feet further south than as claimed by the demandant. *Paine v. Woods*, 108 Mass., 160.

The testimony of Robinson that the lot he sold Bailey was "No. 2 on the plan," was simply a general statement of its location. He did not undertake to define thereby its corners or boundaries, but to state its position with reference to the other lots delineated. In regard to this, as to the other evidence, as the bill of exceptions shows that the Judge instructed the jury in a manner not objected to, otherwise than by refusing the instructions requested, it must be presumed that

all necessary caution was given to prevent any improper use thereof.

It was competent, also, to show by Smith, on cross examination, that his plan did not correspond with the fences as they now exist. It was proper thus to rebut any inference which might have been drawn, that it did, and to show that it was a survey only as made by starting from the elm tree and taking the courses and distances therefrom. Even if the fact was quite immaterial as to the present position of the fences, the extent to which a witness may be cross examined on such matters is, ordinarily, entirely within the discretion of the presiding judge. *Rand v. Norton*, 6 Allen, 38; *Commonwealth v. Lyden*, 113 Mass., 452; *Wallace v. Taunton Street R. Co.*, 119 Mass., 91.

The refusal to give the third request for ruling was not insisted on at the argument.

Exceptions overruled.

William G. BASSETT

Charles T. PARSONS *et al.*

1. When, by **contract**, a party puts his future conduct as to the **payment of money** out of his own power and into that of another, the latter has a **present right**, within the view of the law, although his **enjoyment** may depend upon events apart from human will; hence, under a **contract of insurance** on the life of a person, the **right** of the beneficiary to **have the sum paid** at the period named therein, is **property** from the moment the contract is made, and **passes to his assignee** appointed in insolvency proceedings.
2. Where, **after action** brought against defendant, but before the special precept of **attachment** was **issued**, there was a policy outstanding on the life of the defendant by the terms of which the **sum insured** had become **absolutely payable** to him, the title to the fund vests in the **assignee** in insolvency, of the defendant, **appointed before** the service of trustee process upon the **insurance company**, and the company is entitled to its **discharge** from the writ.

(Hampshire—Decided October 24, 1885.)

TRUSTEE process. Priority of right of assignee in insolvency to fund arising from a life insurance policy. *Trustee discharged.*

The facts sufficiently appear in the opinion. *Messrs. Hill & Wainwright*, for plaintiff: The trustee appeared generally, and, as the court had jurisdiction of the subject-matter, such general appearance waived all defects. *Lawrence v. Bassett*, 5 Allen, 140; *Loomis v. Wadhams*, 8 Gray, 558; *Ames v. Winsor*, 19 Pick., 249.

The insurance commissioner was the trustee's true and lawful attorney to accept service of this writ, and the trustee had a place of business and an agent in this Commonwealth. Pub. Stat., ch. 119, § 202. See, trustees' answer to plaintiff's fourth interrogatory and officer's return on special precept.

The sum insured by the policy was due and payable to Chas. T. Parsons at the time of the service of this writ. *Pierce v. Charter Oak L. Ins. Co.*, 188 Mass., 151.

The promise of the company was to pay him, and the sum insured became his absolutely, free from any trust whatsoever in favor of his children. *Pierce v. Charter Oak L. Ins. Co.* (*supra*); *Brigham v. Home L. Ins. Co.*, 131 Mass., 319; *Ætna L. Ins. Co. v. Mason*, 14 R. I., 583.

Property acquired by the insolvent, subsequent to the assignment, does not pass to the assignee and cannot legally be claimed by him. Pub. Stat., ch. 157, § 46.

Messrs. D. W. Bond and J. C. Hammond, for C. T. Parsons and J. Crafts, assignee.

Holmes, J., delivered the opinion of the court:

This action was brought April 13, 1880; a special precept of attachment was issued Nov. 9, 1884, and the Continental Life Insurance Company was summoned as trustee. At both dates there was a policy outstanding on the life of the defendant, by the terms of which the sum insured had become absolutely payable to him, Nov. 1, 1884, just before the service of the trustee process. After the bringing of the suit and before the service of the trustee process, the defendant had gone into insolvency and his assignee had been appointed, who appears as claimant of the fund. The defendant also makes a claim as trustee for his children, on the ground of the language in the policy, "Do insure for the benefit of the children of Charles T. Parsons."

On these facts we are of opinion that the trustee was rightly discharged.

It is perfectly plain that the contract with the defendant, that "If the said insured (*i. e.*, the defendant), shall survive until the first day of November, 1884, then the said sum insured shall be paid to him," passed to the assignee by the assignment, unless it was held by the defendant in trust, as he contends. The defendant's right under the contract to have the sum so paid was "property" within Pub. Stat., ch. 157, § 46, from the moment the contract was made. *Pierce v. Charter Oak L. Ins. Co.*, 188 Mass., 151. It is true that the promise was to pay in a certain event only. But the event was beyond the control of the promisor, and when, by contract, a party puts his future conduct, as to paying or not paying, out of his own power and into that of another, the latter has a present right, in the view of the law, although his enjoyment may depend upon events apart from human will. An opposite view would deprive policies of insurance, or contracts for the carriage and safe delivery of goods, the act of God and the public enemy excepted, of the character of property.

It is objected that the assignee does not rest his claim upon the assignment. The claim reads: "If the amount due, was, at the time of the issuing of said special precept of attachment, by the terms of said policy, the property of said Charles T. Parsons and liable to attachment as his estate, the same belongs to him, the said Crafts, as assignee aforesaid, and he therefore claims the same," etc. Even if the assignee assigned a wrong reason for his claim, his claim is absolute, and the trustee's

answer discloses a good reason for it, unless the children are entitled, on the facts which have been mentioned. But we do not read the claim as made on the ground that the fund was liable to attachment at the date of the special precept, long after the assignment, and therefore passed to the assignee. We do not read it as setting forth any ground, except what is implied by the allegation that he is assignee. The reference to the liability of the fund to attachment, is simply for the purpose of admitting, by implication, that if it is held to belong to the children, the assignee had no title.

As the trustee must be discharged whether the assignee or the defendant's children have the better right, it is unnecessary to consider whether the children have any interest in the promise which has been discussed, by reason of the earlier words, "Do insure the life of Charles T. Parsons, * * * for the benefit of his children," etc., or whether, by reason of his surviving until Nov. 1, 1884, the contract has ceased to be an insurance, and has become a simple debt to Parsons to his own use.

Trustee discharged.

Daniel KIETH

v.

NEW HAVEN & Northampton R. R. CO.

1. Where a car is received from another road, it is the duty of the receiving company to furnish proper inspection by competent and suitable inspectors, acting under proper superintendence, rules and instructions, and a neglect so to do is negligence in the company which will render it liable for personal injuries to an employé the road, resulting from such neglect.
2. The fact that the jury were permitted to view the inspector and consider his appearance and conduct with a view to aid them in determining whether he was a person of suitable qualification and of sufficient intelligence to be intrusted with the duties of inspector; and the fact that, in most cases of a view, the jury acquire information that they may properly treat as evidence, are no grounds for setting aside the verdict.

(Hampshire—October 24, 1885.)

ACTION of tort, for damages to employé for personal injuries resulting from negligence of a railroad company in not providing for proper inspection of the instrumentalities furnished for operating its road. *Exceptions overruled.*

The case is stated in the opinion.

Messrs. D. W. Bond and John B. O'Donnell, for plaintiff:

The instructions to the jury were full and not excepted to, except as there was a refusal to take the case from the jury as requested by the defendant. The superintendence of the inspector, sufficiency of the rules, regulations and instructions given, and his competency and suitability were all submitted as evidence to be

considered. *Skeritt v. Seanlan*, 11 Irish Rep. C. L. Exch., 389; *Packer v. Hinckley L. Works*, 122 Mass., 490.

Upon the evidence and ruling of the court, the jury were warranted in finding that there were no rules, regulations or instructions given or communicated to said Russell, directing or binding him to acts or conduct absolutely necessary, to the proper discharge of his duty. *Arilla v. Nash*, 117 Mass., 318.

The testimony of Sweeny and Opdyke showed that the defendant paid little attention to the inspection of cars and trains at North Adams. *Arilla v. Nash (supra)*; *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass., 401; *Mackin v. Boston & A. R. R. Co.*, 135 Mass., 201.

Although Russell heard of the accident, he had no recollection of having inspected that train or any particular train; could not remember having seen any defective ladders. This, with other circumstances, was evidence of his incompetency. *Campbell v. New Eng. Mut. L. Ins. Co. (supra)*; *O'Connor v. Boston & L. R. Co.*, 135 Mass., 353; *Mackin v. Boston & A. R. R. Co.*, (supra).

Russell, the alleged inspector, was a witness; and what he said about the way in which he did his work, together with all the other evidence and circumstances in the case, was competent evidence, to submit to the jury as to whether or not he was a competent and suitable man for the position of inspector. *Commonwealth v. Emmons*, 98 Mass., 6.

The jury may find, from the appearance of a young man fully grown, without any other evidence, that he is not twenty-one years of age. *Commonwealth v. Emmons (supra)*.

If there was the slightest evidence from the plaintiff, the weight of it is for the jury. *Commonwealth v. Munsey*, 112 Mass., 287; *Leishmann v. London, B. & S. C. R. Co.*, 23 L. T. (N. S.), 712.

As all the evidence is not reproduced, this court cannot say as matter of law that there was no evidence in the case to be submitted to the jury. *Spaulding v. Knight*, 118 Mass., 528; *Forryth v. Hooper*, 11 Allen, 419; *Murphy v. Boston & A. R. R. Co.*, 133 Mass., 121.

Meers, Geo. M. Stearns, J. C. Hammond and H. B. Stevens, for defendant.

Devens, J., delivered the opinion of the court:

The instructions to the jury were full, and were excepted to only so far as there was a refusal to take the case from the jury, upon the ground that there was no sufficient evidence of any want of competent and sufficient inspectors whom the defendants were bound to provide, or proper superintendence and instruction of them; as the car, by a defect in which the injury to the plaintiff was received, came from another road, the duty of the defendant was not to furnish a proper instrumentality, but to make proper inspection, and this duty was performed by the employment of sufficient, competent and suitable inspectors, acting under proper superintendence, rules and instructions. *Mackin v. Boston & A. R. R. Co.*, 135 Mass., 201.

The jury were permitted to consider the appearance and conduct of the inspector, who was called as a witness to aid them in determin-

ing whether he was a person of suitable qualifications and of sufficient intelligence to be intrusted with so responsible a duty. What this appearance and conduct were, how they would be likely to impress a jury, are matters that are not reported and from their nature could not be. It is impossible for us to say that in addition to the other evidence,—as that which tended to show that the car was defective; that although informed of the accident the same night, the inspector had no recollection of having inspected the train or having seen defective ladders; that he did not remember having inspected any particular train before it started out—his appearance and conduct in the presence of the jury might not be legally sufficient to satisfy them that he was an incompetent person. In *Commonwealth v. Emmons*, 98 Mass., 6, the jury were premittted to find from the appearance of a young man, without other evidence, that he was not twenty-one years old. The same principle applies when the inquiry, as in the case at bar relates to intelligence and understanding as well as physical capacity.

The fact that the jury, in most cases of a view, acquire a certain amount of information which they may properly treat as evidence, as it was held in *Tully v. Fitchburg R. R. Co.*, 134 Mass., 499-503, presents no insuperable obstacle to the granting a new trial on the ground that the verdict was against the weight of evidence. A new trial was granted in that case for the reason that the court was unable to see that "The jury from the view, could have acquired any knowledge of material facts which were not put in evidence in court, or that the Presiding Judge could have supposed that they had such knowledge." The case at bar is the converse of the one cited. It may well have been that the jury did acquire a knowledge of material facts as to the intelligence of the inspector by his examination as a witness.

Exceptions overruled.

Rufus E. LYMAN

Inhabitants of HAMPSHIRE COUNTY.

1. Where the intention of the Legislature was to impose the duty of keeping a bridge in repair jointly upon the county and a town, both are liable for damages occasioned by a want of repairs; and the fact that the town officers have always made the necessary repairs, receiving one half of the expense thereof from the county, does not relieve the county from its liability.
2. If the case does not come within the rule that in actions of tort, non-joinder of defendants is no defense, either in abatement or in bar, the county should have availed itself of such defense at an early stage of the case.

(Hampden—Decided November 2, 1885.)

ON exceptions. *Overruled.*

Action of tort to recover for personal injuries sustained by plaintiff by a defective bridge. The answer was a general denial.

Plaintiff died before the trial and his administrator continued prosecution of the suit.

There was evidence tending to show that after dark, Lyman, the plaintiff, was injured in his back by reason of getting his left leg into the hole made by a plank being too short; that the hole had existed for two years substantially as it was when the injury occurred and that the selectmen had knowledge of its existence. The only evidence to charge the defendant with liability for a defective condition of the bridge was "An Act for Erecting and Maintaining a Bridge over Westfield River, in the Town of Norwich, in the County of Hampshire," passed Feb. 10, 1795, and the testimony of the Commissioners of Hampshire County, each of whom testified that neither he nor the County had any notice of the alleged defect prior to said alleged injury.

The verdict was for plaintiff, and defendants alleged exceptions.

Mr. E. H. Lathrop, for plaintiff:

There was evidence of due care on the part of the plaintiff and it was properly left to the jury. *Bigelow v. Inhab. of Rutland*, 4 Cush., 247; *Woods v. Boston*, 121 Mass., 337; *Hill v. Seekonk*, 119 Mass., 85; *French v. Taunton Branch R. R. Co.*, 116 Mass., 537; *Mayo v. Boston & M. R. R. Co.*, 104 Mass., 137; *Hunt v. Salem*, 121 Mass., 294.

Previous knowledge of a defect on the part of the plaintiff is material only to the point whether he had used due diligence in avoiding the danger. It is a question for the jury. *Reed v. Northfield*, 13 Pick., 94; *Frost v. Waltham*, 12 Allen, 85; *Alger v. Lowell*, 3 Allen, 402; *Barton v. Springfield*, 110 Mass., 181.

The notice was sufficient. *Lyman v. Hampshire*, 138 Mass., 74.

The County and Town are joint tort feorsors and may be sued jointly or separately. *Lou v. Mumford*, 14 Johns., 426; *Buddington v. Shearer*, 22 Pick., 427; 2 Hilliard, Torts, 242; 1 Chit. Plead. pl., 78.

Mr. Wm. G. Bassett, for defendants:

One half of the bridge was to be at the expense of the County. The County was neither to build nor repair it. The justices were not made the agents of the County either as to building or repairing. The whole matter was committed to them by the Legislature as a tribunal. *Wheeler v. Worcester*, 10 Allen, 591, 604; *Brimmer v. Boston*, 102 Mass., 19, 22.

In *Malden & M. R. R. Co. v. Charlestown*, 8 Allen, 245, agents of the several parties liable to contribute to the repairs of the bridge were appointed by statute and were made the agents of the plaintiff, which had been compelled to pay for the neglect of its agent.

But the provisions of the Statute of 1795 as to maintaining and repairing were repealed by general legislation following it on the subjects of ways and bridges. R. S., ch. 25, § 1; ch. 146, § 8; *Hove v. Starkweather*, 17 Mass., 240; *Brown v. Lowell*, 8 Met., 172, 174; *Tracy v. Goodwin*, 5 Allen, 409, 410; *Commonwealth v. Kelliher*, 12 Allen, 480; *N. L. N. E. R. Co. v. B. & A. R. R. Co.*, 102 Mass., 386, 389.

The remedy is afforded by statute, "begins with it, is regulated and limited by it, and ends with it." *Sawyer v. Northfield*, 7 Cush., 494; *Hill v. Boston*, 122 Mass., 351.

There was no evidence which excluded

fault on the part of plaintiff. There is no presumption of the absence of contributory negligence in the absence of evidence. The case is governed by *Crafts v. Boston*, 109 Mass., 519.

Knowledge of a defect, while not conclusive evidence of negligence, is some evidence of it, and his conduct must be explained to entitle plaintiff to recover. *Mahoney v. Met. R. R. Co.*, 104 Mass., 73, 75; *Horton v. Ipswich*, 12 Cush., 488, 492.

Incaution and imprudence might have helped him into the hole. They were not negated. *Wilson v. Charlestown*, 8 Allen, 137; *Holly v. Boston G. L. Co.*, 8 Gray, 123, 132.

The approach of a team would not excuse Mr. Lyman from looking for the hole, and there is no evidence that he looked for it. *Wheeler v. B. & A. R. R. Co.*, 135 Mass., 225, 230.

There was no evidence of want of care on the part of the County. It was to exercise reasonable care and diligence. Stat. 1877, ch. 234, § 2; Pub. Stat., ch. 52, § 18; *Hayes v. Cambridge*, 136 Mass., 402.

The evidence did not show that the neglect, if any, was not the neglect of the town. Not to light the entire bridge was not negligence. *Randall v. E. R. R. Co.*, 106 Mass., 276.

The County was not the party by law obliged to repair the same, but at most only half of the same. Its liability is by statute made to correspond to its obligations. The evidence failed to show concurrent negligence of Town and County. *Wheeler v. Worcester*, 10 Allen, 591, 601; *Little Schuylkill Nav. R. R. & Coal Co. v. Richard's Admr.*, 57 Pa. St., 142.

Morton, Ch. J., delivered the opinion of the court:

The general laws provide that highways, townways and bridges shall be kept in repair at the expense of the town, city or place in which they are situated, when other provision is not made therefor, and that any person injured by a defect therein may recover of the county, town, place or persons by law obliged to repair the same, such damage as he has sustained thereby to his person or property. Gen. Stat., ch. 44, §§ 1-22; Pub. Stat., ch. 52, §§ 1-18.

The statute of February 10, 1795, which has not been repealed, provides, in § 1, that the justices of the courts of general sessions of the peace, shall order a bridge to be erected over the Westfield River in the Town of Norwich, in the County of Hampshire, "one half of which to be at the expense of said County and the other half to be borne by said Town of Norwich."

The 2d section provides that the bridge "shall hereafter be maintained, repaired and supported in manner as is hereinafter directed," that is, one half at the expense of the County and the other half at the expense of the town. It then appears that "other provision" is made for the repair of this bridge than the general obligation imposed upon the town in which it is situated. The statute does not distinctly say that the bridge shall be kept in repair by the County and Town, but it was in substance, the same language used in the 1st section of the General Statutes above quoted. That section provides that ways and bridges "shall be kept in repair at the expense of the town, city or

place in which the same are situated;" and this has always been held to impose that the repairs are to be made by such city, town or place.

The intention of the Legislature was to impose the duty of keeping the bridge in repair jointly upon the County and Town, and both are liable for damages occasioned by a want of repairs, because both are the parties "by law obliged to repair the same." The fact that the officers of the Town of Huntington, in which the bridge is situated and which is the successor of the Town of Norwich mentioned in the Act, have always made the necessary repairs of the bridge, receiving one half of the expense thereof from the County, does not relieve the County from liability; in so doing, they are created as the agents of both parties obliged by law to make the repairs.

The same construction was given to a statute similar to the one before us, in the case of *Malden & Melrose R. R. Co. v. Charlestown*, 8 Allen, 245.

It follows that the Superior Court rightly refused to rule, as requested by the defendant, that the County is not by the statute obliged by law to repair the bridge so as to make its liability for injury sustained by its defective condition.

The defendant wished the Superior Court to rule that it was liable only for one half of the damages sustained by the plaintiff, which ruling was rightly refused. The special statute, as we have seen, imposes upon the County and Town the joint duty and obligation to keep the bridge in repair. The General Statutes give to a person injured by want of repair, an action of tort against the party obliged by law to keep in repair. If the case can be taken out of the general rule, that in an action of tort non-jointer of defendants is no defense either in abatement or in bar, so that the defendant could in any way avail itself of the defense that the Town is not joined as co-defendant, it should have availed itself of such defense by way of abatement at an early stage of the case, when the Town could have been made a party by amendment. Not having done so, it is liable for the whole damages.

The defendant contends that there was no evidence of want of diligence by the County, or that the plaintiff was using due care. But the hole into which the plaintiff stepped was a large and dangerous one, and there was evidence that it had existed for two years and that the officers of the County were very frequently on the bridge. It was a question of fact for the jury to determine whether the County might have had notice of it by reasonable diligence, and whether the injury to the plaintiff might have been prevented by reasonable care and diligence on the part of the County.

So, the question whether the plaintiff was using due care, was for the jury to determine. The evidence tends to show the manner in which the accident happened. One of the witnesses testified that he saw the plaintiff walking on the bridge carefully, apparently about ten feet from the hole, and when he next saw him, his left foot and leg were in the hole. In the absence of any evidence to show negligence on his part, the jury might fairly infer that he was walking with the care ordinarily used under the same circumstances and accidentally

stepped into the hole. The fact that he had previous knowledge of the defect is not conclusive evidence of his negligence, and the question of his due care was rightly submitted to the jury.

The sufficiency of the notice given to the County after the accident happened, was decided when this case was before us last year. *Lyman v. County of Hampshire*, 188 Mass., 74. *Exceptions overruled.*

Asenath S. BROWN

v.

E. G. MURDOCK.

1. When an infectious disease exists in a town, the board of health has authority under the statute to use all possible care to prevent the spread of the infection and to give the public notice, by displaying flags and by all other means, which in their judgment shall be most effectual for the common safety; yet, this care is to be exercised in the modes prescribed by law, and with that regard to the rights of others, in their persons and property, shown by other sections of the statute to be required.
2. The rule of damages in such cases, as to the personal property taken from the infected premises and destroyed, should be what the property was worth at the time, and requiring the jury to consider how much its value had been affected by its exposure.

(Hampden—Decided November 7, 1885.)

ON exceptions. *Overruled.*

This was an action of tort. The declaration contained two counts. The first count alleged that the defendant forcibly entered a certain boarding-house of the plaintiff's, situate in the Town of Palmer, in said county, and took and held and kept possession of the same, and took and carried away and broke and destroyed a quantity of household furniture, wearing apparel, family supplies and other personal effects, the property of the plaintiff, a schedule of which was annexed to plaintiff's declaration, and marked "A." The second count alleged that the defendant converted to his own use the property mentioned in said schedule. The defendant's answer was, first, general denial and, second, that a contagious disease, dangerous to public health, known as smallpox, existed in said boarding-house; that a portion of said property was infected with said disease; that the defendant was a member of the board of selectmen and board of health, in said Palmer, and that whatever was done by him was done for the purpose of preventing the spread of said disease and for the safety of the inhabitants residing in the vicinity of said boarding-house.

The jury returned a verdict for plaintiff and defendant took exceptions which were allowed.

Messrs. Geo. M. Stearns and S. S. Taft, for plaintiff:

It is the duty of the court to instruct *seriatim*

upon the various propositions. He is not required to state principles of law, even if correct, etc. *Hovess v. Grush*, 131 Mass., 207-211.

"Other instructions" given are presumed to have been complete and correct when the bill of exceptions omits to state what they were. *Woods v. Woods*, 127 Mass., 141; *Hovess v. Grush*, *supra*, 216.

The statute gives no authority to take possession of the property of anyone, to the exclusion of him who is entitled to the lawful possession. *Spring v. Hyde Park*, 137 Mass., 554.

The court was "not required to state principles of law, even if correct." *Hovess v. Grush*, *supra*.

The language "what it was worth" employed by the court, is the same used by the lower court and sustained by this court in *Selkirk v. Cobb*, 13 Gray, 313-314.

The right of the board of health to regulate "rests upon the police power of the State." *Spring v. Hyde Park*, *supra*.

The reasonableness of the regulation will be passed upon by the court when "the facts upon which it would depend" are reported. *Commonwealth v. Patch*, 97 Mass., 221.

If the defendant did "prevent entrance to or exit from such boarding-house," it was plainly not only an "invasion of plaintiff's rights," but gross inhumanity and an outrage.

This sentence of the instructions is to be taken in connection with what follows, and if as a whole the instructions do not mislead, no exception will be sustained, even though a single passage may be erroneous. *Jackman v. Bowker*, 4 Met., 235.

Mr. C. L. Gardner, for defendant:

Within the scope of their statutory powers, the judgment of the board of health, as to the extent to which they were required by the circumstances to exercise them, was conclusive. *Bay State Brick Co. v. Foster*, 115 Mass., 431; *Morrison v. Howe*, 120 Mass., 565.

The instructions asked for in the third prayer embraced an essential proposition of law, and should have been given. 3 Bl. Com., 167; 2 Greenl. Ev., § 642.

The instruction asked for in the sixth prayer should have been given. It was in accordance with the principle of law that a public officer is not responsible for the tortious acts of his agent. *Story*, Ag., §§ 319-322.

The true rule of damages was stated in the defendant's twelfth prayer, and the jury should have been so instructed. *Gardner v. Field*, 1 Gray, 151; *Stickney v. Allen*, 10 Gray, 352.

In *Selkirk v. Cobb*, 13 Gray, 313, the property converted had no value other than what it was worth for the purpose of sale, and in *Stickney v. Allen*, *ubi supra*, the property had no market value and was, therefore, subject to the special rule which the court applied.

The case resulted in a mistrial, and any valid objections to rulings, not distinctly raised at the trial, should now be duly considered and passed upon by this court. *Bond v. Bond*, 7 Allen, 1.

None of the points raised in this case are covered by *Spring v. Hyde Park*, 137 Mass., 554; the question in that case being as to the right of a board of health to impress a person's house and furniture for hospital purposes without

proceeding under Pub. Stat., ch. 80, §§ 43-48 inclusive.

Devens, J., delivered the opinion of the court:

Before considering the instructions requested by the defendant, it is proper to call attention to the different and distinct duties and powers of the board of health, when a person ill with an infectious disease is found in a house, so sick that he cannot be removed, and when he is not so sick but that he may be removed with safety. In the latter case the board of health may make provision in the manner it judges best for the safety of the inhabitants, by removing the person "to a separate house, or otherwise," and by providing nurses and other assistance or necessities. Pub. Stat., ch. 80, secs. 40, 41, 75. Section 40 contemplates that, if the person under such circumstances is taken care of where he is, it will be by virtue of some contract that he shall be thus provided for. *Spring v. Hyde Park*, 137 Mass., 554, 557. If it is necessary to remove him, ample provision is made therefor. Should he object to the removal, a warrant authorizing the removal may be issued by two justices of the peace. Pub. Stat., ch. 80, § 43.

A suitable place to which he can be removed may be provided by the authority of the sections of the same chapter, which authorize contracts to be made for hospitals and houses, etc., to be impressed upon proper proceedings had. Pub. Stat., ch. 80, §§ 43-48, 70-75. If a person cannot be removed without danger to health, the house or place where he remains shall be considered a hospital, and all persons residing in or in any way concerned within the same shall be subject to the regulations of the board of health as before provided, § 75. By reference to the preceding section it is seen that, where a hospital is established, the physicians, nurses, attendants, the persons sick therein, and all persons approaching or coming within the limits thereof, and all furniture or other articles used or brought there, are subjected to such regulations as the board of health may prescribe. These sections do not authorize the taking possession by the board of health, acting without a warrant, of premises to the exclusion of the owner thereof, or the person entitled to lawful possession, even where one is too sick to be removed; but authorize such premises, and the use thereof, to be subjected to regulations of a very stringent character. The § 41 contemplates, that when a person cannot be removed, a contract may be made for his comfort where he is, and in such case persons in the neighborhood may be removed, and other precautions taken. Assuming in behalf of the defendant, who acted for the board of health, that all he did was done honestly for the purpose of preventing the spread of the smallpox, and for the safety of the inhabitants, it was necessary that he should act within the authority given him by the statute, and the general instructions set forth in this authority clearly and distinctly. We proceed to consider such of the numerous requests for instructions made by the defendant, that seem to call for remarks in this connection. Although the disease was of a dangerous type, the case presents no evidence that the plaintiff and those of her guests who were also infected could not have been removed

without danger to health, or that the defendant acted upon the theory that they could not. Nor does it appear that the defendant, in that which he did, acted in any way by virtue of any contract with the plaintiff, or by authority from her, but always *in invitum*. The defendant contends that he was entitled to the instruction that he was authorized to station such persons as he might deem necessary on or near the premises, to guard against ingress or egress, for the purpose of preventing the spread of the disease. We are not prepared to say that if the infected persons could not have been removed, the board of health, either under the authority of § 41, which permits the board "To take such measures as it judges necessary for the safety of the inhabitants," or that by § 75 which, under such circumstances, permits the board to consider the place as a hospital and subject it to regulations as such, might not have forbidden ingress and egress, except under such restraint as the board might impose; but the mere fact that smallpox existed on the plaintiff's premises did not authorize the defendant thus to control them in the absence of any contract with or authority from the owner. While, when such a disease exists in a town, the board of health is to use all possible care in preventing the spread of the infection, and to give the public notice, by displaying red flags and by all other means which in their judgment shall be most effectual for the common safety, this care is to be exercised in the modes prescribed by law, and with that regard to the rights of others in their persons and property which is shown by other sections of the statute to be required. By the general authority to take such measures as are deemed necessary for the safety of the inhabitants, it is not intended to confer unlimited authority on the board to control persons and property at its discretion. As the case at bar does not require us to consider what would have been the right of the board of health in case the persons infected could not have been removed, so it does not what would be its right in case there could be a removal, and ingress and egress were forbidden. It is to be observed that while §§ 40, 41, 75, 76, 77, do not ordinarily apply, so far as removal of patients from their homes is concerned, to cases of smallpox, the present case is within the exception to the rule, as those infected were persons residing in a boarding-house, § 82. Similar considerations apply to the second request of the defendant. The defendant did not act under those provisions of the statute which authorize the removal of nuisance causes of sickness, § 2. This right to take possession of the house or any portion of it, to fumigate, etc., depended upon the inquiry whether the infected persons could be removed therefrom. If they could not, the authority given under §§ 41 and 75 might entitle the defendant to take the necessary steps to fumigate such part thereof, as these persons infected occupied, or such as were liable by their occupation to infection; but no such case as this is shown to have existed. Certainly the whole request could not have been granted, as this would have justified the taking possession of all infected articles, if in the judgment of the defendant this was necessary to prevent the spread of the disease. When there are infected articles that should be cleansed or de-

stroyed, provision is made for the issuing of a warrant by two justices, to be executed by the sheriff under the direction of the board of health, by virtue of which such articles may be seized and destroyed under the usual safeguards which attend the execution of legal process, §§ 40, 48.

The remaining requests do not appear to call for extended comment. The third is somewhat involved in expression, but it was given sufficiently in holding the defendant only liable in case he controlled the house, to the exclusion of the plaintiff. The fourth, fifth, sixth and ninth requests were covered by the instructions, that the defendant was responsible for the acts by himself or his agent. The seventh and eighth required the Judge to select particular pieces of evidence, and to rule as to the effect to be given to them when there was more evidence on the same point. This the defendant could not properly ask. The tenth and eleventh requests were given in substance. The rule for damages as to the personal property, that it should be what the property was worth at the time, and requiring the jury to consider how much their value had been affected by their exposure, was correct. *Selkirk v. Cobb*, 13 Gray, 313.

Exceptions overruled.

Samuel H. EMERY, Jr.,

v.
David H. BIDWELL *et al.*

1. **Facts stated upon information and belief** in the answers of a trustee in proceedings by trustee process are to be **conclusively** taken as true; even though an adverse claimant has appeared in the case to maintain his right.
2. Where the **plaintiff seeks** to contradict the answers of the trustee, a bill in aid of trustee process and for the removal of an **obstruction** or impediment placed by the trustee **in the creditor's way**, cannot be maintained.

(Suffolk—Decided October 23, 1885.)

BILL IN EQUITY. *Dismissed.*

This is a suit brought for a discovery of the assets of defendant Bidwell, in the hands of defendant Harris, administrator of the estate of Bidwell's father. Plaintiff had previously begun an action at law in the Superior Court on certain promissory notes, against Bidwell, which action is still pending. In that action, plaintiff summoned Harris as trustee of Bidwell. Harris appeared and answered that Bidwell was indebted to the estate in excess of his share therein, and that, therefore, he, Harris, had nothing in his hands as trustee. Thereupon plaintiff applied to the Superior Court to frame issues to try the validity of the alleged indebtedness to the estate, which was refused; and thereupon he filed this bill which is now demurred to for want of equity.

Further allegations of the bill are stated in the opinion.

Messrs. Emery & McClure, for plaintiff.

Messrs. W. F. & W. S. Slocum, for defendants:

The statute provides for the examination of the trustee under oath, and the effect to be given to his answers, viz.: that they shall be conclusive of the facts stated in them. Pub. Stat., ch. 183, § 12; *Bostrick v. Buss*, 99 Mass., 469; *Cardany v. N. E. Furniture Co.*, 107 Mass., 116, 117; *Gouch v. Tolman*, 10 Cush., 104, 105; *Nutter v. Framingham, etc., R. R. Co.*, 181 Mass., 231.

The discovery cannot go further than the statute remedy against the trustee.

The discovery, if made, could not be evidence against the answer of the trustee in the action at law. *Ahrend v. Odiorne*, 118 Mass., 261, 269, and cases cited; *Walker v. Brooks*, 125 Mass., 241, 248, and cases cited.

It is a well settled principle that a bill in equity cannot be maintained for a discovery unless it can be used for some beneficial purpose. *Chapin v. Coleman*, 11 Pick., 337.

The presumption is that the court ruled correctly in this matter, that the answers of the trustee covered the whole ground, and the proposed issues of fact were facts that were covered by the answers of the trustee, as in *Gleason v. Gage*, 2 Allen, 410; *Willard v. Sturtevant*, 7 Pick., 194.

Nor can this bill be sustained as a bill of discovery in aid of the plaintiff in the settlement of the account of the defendant Harris as administrator in the Probate Court, or of the adjustment and set-off of the indebtedness of David H. to the intestate against his distributive share in the estate under Pub. Stat., ch. 186, § 22.

There is an adequate remedy at law as against the administrator. He is bound to answer under oath before the Probate Court any matter relating to his accounts. Pub. Stat., ch. 144, § 2. As against all parties, he may be interrogated and required to answer under oath in all proceedings in the Probate Court. Pub. Stat., ch. 156, § 33; Stat. 1879, ch. 186, § 1; *Wilson v. Webber*, 2 Gray, 561; *Ahrend v. Odiorne (supra)*.

The plaintiff cannot maintain the bill under the general jurisdiction of a court of equity in regard to a creditor's bills, inasmuch as he has not recovered judgment in an action at law against David H. Bidwell. *Carver v. Peck*, 131 Mass., 291, 293, and cases cited. Nor is the bill sustainable under the special jurisdiction conferred by Pub. Stat., ch. 151, § 2, cl. 11, because, 1, the distributive share of the debtor, David H., can be attached and taken on execution; Pub. Stat., ch. 183, § 31, 22; and 2, because the property plaintiff asks the court to direct the defendant Harris, as administrator, to reach and apply, is not within this State. *Carver v. Peck (supra)*.

Harris, as administrator, has no authority to act in the State of Colorado, to foreclose the mortgage or collect the choses in action. *Noonan v. Bradley*, 9 Wall., 394 (76 U. S., XIX., Law. ed., 757); *Norton v. Palmer*, 7 Cush., 523; 2 Kent, Com., 12th ed., 429, note 1.

This court will not require an administrator to act as to assets of his intestate in another State. *Kansas Construction Co. v. Topeka R. R. Co.*, 135 Mass., 34.

Nor can Harris be required to apply the real estate to payment of the distributive share of one of the heirs at law, or as a set-off against

it; he has no power over the real estate unless it be to sell it under license of the court for payment of debts, for want of sufficient personal property. *Drinkwater v. Drinkwater*, 4 Mass., 354; *Lobbell v. Hayes*, 12 Gray, 236, 238.

The Probate Court has the jurisdiction in the first instance, over these matters, and this court has jurisdiction upon an appeal from the Probate Court, and not otherwise. Pub. Stat., ch. 136, § 22; Stat. 1879, ch. 225, §§ 1, 2; *Allen v. Edwards*, 136 Mass., 158, 140, 142; *Foster v. Foster*, 184 Mass., 120.

The bill fails to show that the plaintiff has not a plain and adequate remedy at law for all of the alleged frauds which the plaintiff claims to have been committed. This court has no concurrent jurisdiction in a case of fraud where there is a plain and adequate remedy at law. *Suter v. Mathews*, 115 Mass., 253.

A bill is demurrable, if it fails to show that the plaintiff is without remedy at law. *Jones v. Newhall*, 115 Mass., 244, 252-3.

Henry A. was then alive. His estate was his own. He could do as he pleased with it so far as his son, David H., was concerned. The creditors of David H. had no claim upon or interest in the estate of Henry A. He could commit no fraud upon the creditors of David H. in any disposition he pleased to make of his own estate. *Broadway Nat. Bk. v. Adams*, 133 Mass., 170, 174; *Hall v. Williams*, 120 Mass., 345; *Foster v. Foster*, 133 Mass., 179; *Durant v. Mass. Hospital L. Ins. Co.*, 2 Lowell, 575; *Nichols v. Eaton*, 91 U. S., 716 (XXIII. Law. ed., 254).

C. Allen, J., delivered the opinion of the court:

The remedy which the statutes furnish to a creditor, by way of trustee process, is subject to the express statutory limitation, that "The answers and statements sworn to by a trustee, shall be considered as true, in deciding how far he is chargeable; but either party may allege and prove any facts not stated nor denied by the trustee, that may be material in deciding that question." Pub. Stat., ch. 183, § 17. In construing the similar provision in earlier statutes, it has been held in several cases, that facts stated upon information and belief in the answers of a trustee are to be conclusively taken as true; and this is so, even though an adverse claimant has appeared in the case to maintain his right. *First Nat. Bk. of Clinton v. Bright*, 126 Mass., 535, and cases there cited. Nor can a plaintiff be allowed to put interrogatories to the person summoned as trustee, with a view merely to contradict or impeach his testimony. *Nutter v. Framingham, etc., R. R. Co.*, 131 Mass., 231.

In the present case, the plaintiff in his bill sets forth, that the trustee, in his answers, alleged that the defendant was indebted to his father's estate at the time of his father's decease, upon four notes, in the sum of \$6,410.71, with interest thereon; and that said sum, with interest being set off against the share or claim of the defendant as heir or distributee of the estate of his said father, will exceed his distributive share in the estate. The plaintiff thereupon proceeds to set forth, in substance, that this statement of the trustee was not true and that the defendant did not owe to his father's estate the amounts represented by said notes.

but that the notes, or some of them, were made without consideration, and are fraudulent and void. The plaintiff thus seeks to contradict the answers of the trustee, which cannot be done, as a bill in aid of the trustee process, and for the removal of an obstruction or impediment placed by the trustee in the creditor's way, it cannot be maintained. If the plaintiff can show that the trustee has answered falsely, he has another remedy, by an action against the trustee under § 20.

Nor can the bill be maintained under Pub. Stat., ch. 151 § 2, cl. 11, to reach and apply property which cannot be come at to be attached. The property in question is such as in its nature can be come at to be attached, and the trustee process is the proper remedy for that purpose. Pub. Stat., ch. 183, § 22; *Wheeler v. Bowen*, 20 Pick., 563; *Boston Bk. v. Minot*, 3 Met., 507; *Vantine v. Morse*, 104 Mass., 275.

The plaintiff's difficulty is, that in pursuing this appropriate remedy, he encounters the oath of the trustee upon the vital point; but this does not bring his case within Pub. Stat., ch. 151, § 2, cl. 11, which stands and must be construed with Pub. Stat., ch. 183, §§ 17, 22, already referred to and which was not designed to enable a creditor to evade their effect by resorting to another form of remedy, under which he could contradict the oath of the administrator.

Nor can the bill be maintained as a bill for discovery. It is brought for relief as well as for discovery, and, not being maintained for relief, cannot be maintained for discovery; moreover, in such case the Statute of 1883, ch. 223, § 10, is explicit, that there shall be no discovery, under oath, and besides, if a discovery were obtained, of facts inconsistent with the trustee's answers, it would not be available to charge him in the action.

The remedy of the plaintiff is limited by the statutory provisions respecting the trustee process. Independently of his attachment, his only right to inquire in a court of equity, for his own sole benefit, into the transactions between the defendant and his father, is that conferred by Pub. Stat., ch. 151, § 2, cl. 11; and his case does not come within that statute. As an attaching creditor, he is bound by the trustee's answers.

Bill dismissed.

Thomas B. HALL *et al.*

v.

William P. HALL *et al.*

Where a testator devised his estate "to the issue or children" of his said two daughters who may then be living "to be equally divided among all such issue or children, share and share alike;"

the words "issue or children" cannot be read as meaning "child or children" but, that all issue of the said daughters take *per stirpes*.

(Suffolk—Decided October 22, 1885.)

BILL IN EQUITY, for construction of a will.

The case is stated by the court.

Messrs. S. N. Aldrich, L. W. Howes and Chas. M. Hemenway, for defendants, Jonathan Dwight and Anna B. Baker:

The natural and popular meaning of "issue" is children, and the word is more frequently used in this sense than in any other. The popular meaning of the word should be adopted in looking for the testator's intention rather than the arbitrary and technical definitions of the early English cases. 2 Redfield, Wills, 48,* and *note* (3d ed.).

In 4 Kent's Com., p. 278, *n.*, it is said, the term "issue" may be used either as a word of purchase or limitation, but it is generally used by the testator as synonymous with child or children.

Although "issue" in its strict legal significance (especially as laid down in the earlier English cases) has had attached to it the meaning—all lineal descendants; yet, when this word is used in a will, it has always been construed in a more restricted sense, as meaning "children," if necessary to give effect to the testator's intention as shown by the will. *King v. Savage*, 121 Mass., 803; *Sibley v. Perry*, 7 Ves., 522.

By all the later cases in this country, and by our law writers, "issue" seems to be regarded as synonymous with "child or children," unless controlled by the context; and in England the former technical construction of the word is abandoned wherever possible by engrafting innumerable exceptions on the old rule. 2 Redfield, pp. 38* to 44,* and *notes*, 35* *n.* (3d ed.); 4 Kent's Com., 278.

It is impossible in this case to construe "child or children," as issue, since, when in a substitutional gift to "issue" the issue are directed to take their parent's share "issue" is always construed as children. *Sibley v. Perry* (*supra*); *King v. Savage* (*supra*); *Fruen v. Osborne*, 11 Sim., 132; *Smith v. Horsfall*, 25 Beav., 628; *Bradshaw v. Melling*, 19 Beav., 417; *Maynard v. Wright*, 26 Beav., 285; *Stevenson v. Abingdon*, 31 Beav., 305.

If the testator knew that "issue" meant more than "children," he could hardly fail to see this contingency, and it seems highly improbable that he intended such a provision. *Stehman v. Stehman*, 1 Watts (Pa.), 466.

From the connection of the words, "issue" is here equivalent to "such issue" or "children." *Merceron's Trusts v. Merceron*, 35 L.T. (N. S.),

NOTE.—Distribution of estate, among heirs, children of brothers and sisters, see, McKelvey v. McKelvey, (Ohio), 1 West. Rep., 68.

Distribution among children and the issue of a deceased child, see, Gibbens v. Gibbens, (Mass), ante, 98.

Provisions in case of death without children; child, children and issue distinguished; see, Barney v. Arnold, (R. I.), ante, 138, and note.

MASS.

A general residuary devise or bequest carries lapsed or void devises, but does not include any gift which falls of the residue only, see Church v. Church (R. I.), ante, 139.

Distribution *per stirpes* and *per capita*, see, Nichols v. Shepard, (N. H.), ante, 162.

In class gifts children share equally, see, Webster v. Welton (Conn.), ante, 191, and note.

701; *Eastwood v. Arison*, 88 L. J. Exch., 74; *Malcolm v. Taylor*, 2 Russ. & My., 416; *Kidman v. Kidman*, 40 L. J. Ch., 859; *Smyth v. Power*, Ir. R., 10 Eq., 192.

Words occurring more than once in a will should, in general, be presumed to be always used in the same sense. *Foster v. Wybrants*, Ir. R., 11 Eq., 40; *Ridgeway v. Mintkithick*, 1 Dr. & War., 84.

Unless issue was used in place of child in the expression "issue or children," it is probable that the "or children," which would otherwise have no meaning, was added to explain "the issue," and is equivalent to *videlicet*. This view is taken in *Hill v. Hill*, 74 Pa. St., 173 (176).

Messrs. **B. F. Brooks** and **H. G. Nichols**, for defendant, Parker.

Holmes, J., delivered the opinion of the court:

The trustees under the will of Thomas Bartlett ask the instructions of the court to whom and in what proportion they shall convey in pursuance of the following clause:

"In trust lastly, at the decease of the said surviving daughter, to grant, surrender and convey the estates aforesaid, with all accumulation or income then unexpended to the issue or children of my said two daughters, Maria Hall and Ann Dwight, who may then be living, to be equally divided among all such issue or children, share and share alike, to them and their respective heirs and assigns forever, in fee simple."

As a first step toward the interpretation of the language it is proper to state that in our opinion "issue or children," cannot be read as meaning either "issue, or in other words, children" or "child or children," but that the words "issue or" must be taken to have been intended to add something to the substantial meaning of the clause, and to enlarge the scope of the limitation. See, Pub. Stat., ch. 3, § 8, cl. 11. If there had been no children but only grandchildren of the testator's daughters, it would have been hard to persuade any court that there was an intestacy so far as this clause was concerned, yet that would be the result of the interpretation proposed. And as to the latter of the two "child or children," we may add that the immediately preceding words "equally to be divided among all such" (issue or children) imply that "issue" may embrace more than one person.

If, then, the word "issue" enlarges the scope of the limitation, the question arises whether we can avoid the conclusion that, all issue of

whatever degree are to take equal shares, a conclusion repudiated by both the arguments addressed to us. See, *Cancellor v. Cancellor*, 2 Dr. and Sm., 194.

We agree that the greater reasonableness of a different disposition or a consideration of what it is likely on general principles that a testator would have wished, cannot be allowed to change the interpretation of the words used if the meaning is plain apart from such considerations. But a majority of the court has reached the opinion, although not without hesitation and doubt, that a meaning more likely to meet what the testator would have desired than that last suggested can be extracted from the words themselves.

We take the disjunction "or" in the phrase "issue or children" to signify that issue take only in the alternative that a child, the parent of such issue, is not living. And if issue more remote than children are only to take in place of children, their respective parents, and not along with them in equal shares, then, in the absence of anything further, such issue will naturally take the share of the parent that they replace. We should at least expect to find a substitution, and not that the death of a child of one of the testator's daughters, leaving children, should diminish the share of other children, possibly of the other daughter, and this result is reached if we regard the children of daughters as the units for the equal division "share and share alike," as we well may in view of our opinion, already stated, that issue only come in by way of substitution for children. It is true that the property is to be equally divided among all such issue, etc. But this does not necessarily mean that each of such issue shall have an equal share with every other or with a child. It is satisfied if all such issue share in a division which is equal, or between the living children, and the issue of deceased children taking *per stirpes*. Our opinion derives some support from *Horsepool v. Watson*, 3 Ves., 883. Perhaps the term of the language may be explained by noticing that while either of the testator's daughters was living the collective children of a deceased daughter did not take an equal share in the income with the surviving daughter, and that it was intended to make the change in the proportion when the last daughter died.

It is not disputed that if the principle of representation applies, it applies equally when the issue are of a remoter generation than great grandchildren of the testator.

Decree accordingly.

SUPREME COURT OF NEW HAMPSHIRE.

Henry M. THOMPSON *et al.*

v.

Sherman PARIS.

The foreclosure of a mortgage, in strict pursuance of the modes prescribed by the Statute of this State, which provides that "The right of the mortgagor and all persons claiming under him, to redeem any mortgaged premises, shall be forever barred and foreclosed," bars the right of redemption, of the mortgagor, and all persons claiming under him, including minor heirs.

(Sullivan——Decided July 31, 1885.)

BILL IN EQUITY to redeem a mortgage.

D The facts are stated in the opinion.

Messrs. Batchelder & Faulkner, for plaintiffs.

Messrs. A. S. Wait, H. W. Parker and Ira Colby, for defendant:

Conveyances, even for a valuable and adequate consideration, made by a debtor reserving a benefit to the grantor, are void as to existing creditors. *Smith v. Smith*, 11 N. H., 459; *Albee v. Webster*, 16 N. H., 363.

Deeds of trust, with no mention made of the purposes of the trust or who is to be the beneficiary, are within the Statute of Frauds, which provides that no trust concerning lands excepting such as may arise or result by implication of law, shall be created or declared, unless by an instrument signed by the party creating the same or by his attorney. There is a very substantial difference between our Statute of Frauds upon this subject, and that of 29 Car. 2, ch. 3, § 7. The latter Statute is, "All declarations or creations of trusts," etc., shall be manifested and proved by some writing. Whether this difference in language is to be regarded as material and substantial, is somewhat discussed in 1 Perry, Trusts, § 81, and the writer seems to favor the conclusion that the difference in the two statutes is only verbal. *Titcomb v. Morrill*, 10 Allen, 15.

The same Statute does not require that the trust itself be created by writing, but only that it be manifested and proved by writing; meaning that there should be evidence in writing that there was a trust and what the trust was. 1 Greenl. Ev., § 266.

Where a conveyance of real estate is made to a grantee as trustee, without setting forth for whom or for what purpose he is trustee, parol evidence is admissible to establish the fact. *R. R. Co. v. Durant*, 95 U. S., 576 (XXIV. Law. ed., 391).

By the Statute, to enable the court to execute a trust, there must be sufficient written evidence to show that there is a trust and what that trust is. But the court held that the subject of the trust being a chattel and not lands, was not within the Statute, and therefore might be shown by parol. *Sturtevant v. Jaques*, 14 Allen, 523.

This supposed trust in favor of Mrs. Thompson cannot be helped out by means of parol evidence. *Shaw v. Spencer*, 100 Mass., 382.

If, before the statute, a man had bargained and sold his lands for a valuable consideration without having limited the use to the heirs of the bargainee, chancery, which considered the intention of the parties, would have decreed an estate in fee. 1 Sand. Us. & Tr., ch. 2, § 4; *Shelley's Case*, 1 Co., 219 b.

The conveyance from Curtis through Frink to Mrs. Thompson was a conveyance of an assumed right of the mortgagee holding possession under an unexpired mortgage, after it had been redeemed by the mortgagor. By such a conveyance she could take nothing. Besides, it was a conveyance occasioned by payment of the property of the husband within § 1, ch. 2342, L., 1860; Gen. L., ch. 183, § 1; *Voght v. Ticknor*, 47 N. H., 543.

It was done while the husband was in embarrassed circumstances, and the effect was to withdraw the property from the reach of his creditors. This rendered the transaction fraudulent and void as to subsequent as well as existing creditors. *Smith v. Lowell*, 6 N. H., 67; *Paul v. Crooker*, 8 N. H., 288; *McConihe v. Sawyer*, 12 N. H., 396; *Carlisle v. Rich*, 8 N. H., 44; *Coolidge v. Melvin*, 42 N. H., 510; *Ladd v. Wiggin*, 35 N. H., 421.

Our Statute provides that the right of the mortgagor and all persons claiming under him, to redeem any mortgaged premises, shall be forever barred and foreclosed by the mortgagee. Gen. L., ch. 186, § 14.

To obtain license of the probate court to sell real estate, it is not necessary that minors, entitled by the terms of the Statute to notice of the petition, should have guardians appointed. *Boody v. Emerson*, 17 N. H., 577.

There being in that Statute no provision requiring notice of possession to be given, it has been very fully settled, that no notice to anybody was necessary in order to effect a foreclosure under it by the taking and holding of possession. *Kittredge v. Bellows*, 4 N. H., 438, per Richardson, C. J.; *Gilman v. Hadden*, 5 N. H., 30; *Downer v. Clement*, 11 N. H., 40; *Howard v. Handy*, 35 N. H., 324, per Eastman, J.

Under a similar Statute in Massachusetts the decisions have been the same. *Hobbs v. Fuller*, 9 Gray, 98; so, also, *Pitts v. Aldrich*, 11 Allen 39, and *Whitney v. Guild*, 11 Gray, 496.

Elizabeth A. Thompson had a right by her contract to bind her heirs according to the terms of this Statute. Williams, in loaning his money, had a right to rely upon her contract of mortgage, incumbered by no other conditions than those imposed by the language of the Statute. Indeed, that language is in legal contemplation a part of the contract and furnishes the rule for its construction. *Pitts v. Aldrich*, (supra); *Whitney v. Guild*, (supra).

A decree of foreclosure against an infant heir by a sale cannot be opened on his petition in order to allow him to redeem, or to go into a hearing on the merits; it can only be reexamined so far as to ascertain whether the decree was itself regular. *Sayle et al., Infants*, 2 Vent., 350, and note 351; *S. C.*, 1 Eq. Cas. Abr., 280; *Booth v. Rich*, 1 Vern., 295 and note; *S. C.*, 1 Eq. Cas. Abr., 280; *Mallack v. Galton*, 3 P. Wm., 352; *Cooke v. Parsons*, 2 Vern., 429; *S. C.*, 1 Eq. Cas. Abr., 280-1; *Bishop, etc., v. Beavor*, 3 Ves., 314, 317; *Goodier v. Ashton*, 18 Ves., 88; *Williamson v. Gordon*, 19 Ves., 114;

Kelsall v. Kelsall, 2 Mylne & K., 409, 414-15; *Scholefield v. Heafield*, 7 Sim., 667; 8 C., 8 Sim., 470; *Bail v. Harris*, 8 Sim., 485, followed by *Chancellor Kent*, in *Mills v. Dennis*, 8 Johns. Ch., 367.

This same rule prevailed among the civilians. *Ayliffe*, Roman Civil L., 219.

Browne, 1 Civil L., 188, states that a minor's estate might be sold by a creditor to satisfy a mortgage debt.

That minor heirs are bound to fulfill a contract of sale made by the ancestor, is directly held in *Hill v. Ressegieu*, 17 Barb., 162; 2 Britt., 145, 187-8.

Bingham, J., delivered the opinion of the court:

The plaintiffs, Henry M., Edward, Jr., and Frederick P. Thompson, were the children of Edward and Elizabeth A. Thompson. Both parties claim title under Elizabeth, the plaintiffs as her heirs, and the defendant under her conveyance.

September 15, 1876, a title to the land in question was in Elizabeth, and she mortgaged it to James H. Williams to secure the note of herself and husband for \$3,500. February 1, 1877, Elizabeth died, leaving the plaintiffs her minor heirs. No administration was taken on her estate nor guardian appointed for the children. July 25, 1879, Williams entered upon the mortgaged premises for the purpose of foreclosure, and perfected the same according to the Statute, without knowing of the existence of the plaintiffs, and they had no knowledge of the proceedings for foreclosure.

December 2, 1880, Williams quitclaimed to Edward, the father and natural guardian of the plaintiffs, all his interest in the premises for his debt and costs in the foreclosure, and both parties supposed that it passed a perfect title.

The defendant, October 27, 1882, relying upon the record of a foreclosure and the representations of Edward as to the validity of his title, loaned him in good faith, \$16,000, and took a mortgage to secure its payment, on the premises in question. The defendant is in possession of the premises under process of law for the purpose of foreclosing his mortgage for condition broken.

The plaintiffs claim that they are not barred from redeeming the Williams mortgage by the foreclosure; first, because they had no knowledge of it, and second, because of their minority.

Aside from the Statutes and decisions of this State, the plaintiffs, on well recognized general principles, would be entitled to redeem. In proceedings in chancery for the foreclosure of mortgages in other jurisdictions, all persons in interest are made parties and notified of the proceedings or they are not bound by the decree, and so far as the statutes of this State have not provided independent methods of foreclosure, and do not control and govern the substance and form of foreclosures in Chancery, the same may now exist. *Wendell v. Bank*, 9 N. H., 404, 417; *Green v. Cross*, 45 Id., 580.

It does not appear that the plaintiffs had notice in fact of the proceedings of foreclosure on the Williams mortgage, and this raises the question whether the notice required by the second mode, in ch. 122, § 14, of Gen. Laws, is all the

notice they would have been entitled to if they had been of age. It appears that the statutory notice was duly given.

Downer v. Clement, 11 N. H., 40, was a bill in equity to redeem mortgaged premises, by a second mortgagee, on which the first mortgage had been foreclosed by the statutory method, of which the plaintiff was not notified, and it was decided that he was not entitled to notice and that his right to redeem was foreclosed. The court, after stating the general doctrine, said: "But we are of opinion that the question whether the proceedings of the defendant have foreclosed the right to redeem the land, is settled conclusively by the Statute of this State relating to mortgages," citing *Kittredge v. Bellows*, 4 N. H., 424, and *Gilman v. Hidden*, 5 N. H., 80, to sustain the position, in which cases it is said, in substance, that it is not necessary to give notice other than that required by the Statute, to the mortgagor or his assigns, but they are bound to take notice of the statutory proceedings or abide the consequences.

Howard v. Handy, 35 N. H., 315, was a bill to redeem by the owner of the equity who had no knowledge of the statutory foreclosure, and on page 326 it is said by the court that "The general publication of notice of an entry to foreclose in some newspaper printed in the county, must under the Statute, be held to be a sufficient notice to all persons interested, that the foreclosure has been commenced. If this notice is not actually brought home to a party interested to know of the entry, as was the fact with the complainant, it must be treated as a misfortune for which there is no remedy."

In *Pitts v. Aldrich*, 11 Allen, 39, a bill in equity to redeem by the widow of the mortgagor, who had released her right of dower in the mortgage, it was held that it was not necessary to make her a party to the proceedings of foreclosure, under the Massachusetts Statute, and the court on page 40 say: "The decisions of other States requiring the wife or widow, to be made a party to proceedings in equity for foreclosing a mortgage in which she has released her dower, have no application in this Commonwealth, where a statute mode of foreclosure is provided which does not require that she be joined or notified"; still the wife, in Massachusetts, who has released her dower in a mortgage, may join with her husband in a bill to redeem (*Davis & v. Wetherell*, 13 Allen, 60), although it is not necessary to make her a party or notify her of proceedings to foreclose the mortgage brought under the Statute.

It is believed that the practice in this State has generally been not to join the wife in the legal proceedings brought to obtain the possession of land mortgaged by the husband, in which she has released her dower, for the purpose of foreclosing, yet it seems never to have been questioned that her right to redeem has been foreclosed.

It is a greater statutory innovation to say that minor heirs who may bring a bill to redeem at any time after condition broken, by next friend or guardian, should be foreclosed without being made parties or notified. Their disabilities are not greater than those of married women at common law, and we are not aware why the statutory foreclosure may not apply to them in this respect as well as to married women.

This brings us to the second inquiry, whether the plaintiffs are excepted from the operation of the foreclosure because of their minority. It is true that in proceedings at common law, no valid judgment can be rendered against a minor without the appointment of a guardian *ad litem*, and that the deeds of minors are voidable; but this does not answer the inquiry. It is not what their rights are at common law or in chancery, but, what they are now, as modified and controlled by the Statute, what the intention of the Legislature was in enacting it, and how it should be construed. It is plain that it was not the design of the Statute to re-enact the chancery method of foreclosing mortgages, but to go aside from it and establish a new and substantially independent system. It was first enacted in this State February 16, 1791, and is based upon the idea that a mortgage deed conveys land on the failure of the mortgagor to perform its condition, with the right of the mortgagee to enter, take the rents and profits and foreclose, in some form, the equitable right of the mortgagor to redeem; that this being the contract of the parties to the mortgage, when the mortgagor fails to perform the condition, the mortgagee, under his authority in the deed, may enter, take the profits and commence the foreclosure provided by law; that mortgages made subsequent to the Statute would necessarily refer to it and be governed and controlled by it, in all matters affecting their validity, construction or discharge (*Chamberlain v. N. H. F. Ins. Co.*, 55 N. H., 249); and that the perfection of the title of the mortgagee in the land would depend upon his doing certain things authorized by the deed, no matter who might then be the owner of the equity.

So the Act of 1791 provides, in substance, that if the mortgagor, his heirs, executors, administrators or assigns do not redeem within one year after the mortgagee or the persons claiming under him have entered and taken peaceable possession, for condition broken, or within one year after the mortgagee or those claiming under him shall have been in peaceable and continued actual possession, after the condition broken, whether the possession in either case shall have been gained by process of law or peaceable entry, without such process, the right shall be foreclosed. The Statute makes the entry of the mortgagee for condition broken, peaceable possession and the time it is to continue the essential things for him to do to foreclose, while the only thing for the mortgagor, his heirs, etc., to do to prevent a foreclosure is to redeem, and this they must do within one year from the entry, and no exception is made of minor heirs or any other party holding under the mortgagor. The language of the Statute is general, and includes all the heirs of the mortgagor, unless good reasons can be found for an exception or limitation.

The Statutes as to the foreclosure of mortgages in the editions of 1797, 1815 and 1830, named the heirs of the mortgagor among others, as persons that may redeem to avoid a foreclosure, making no exception, in either edition, of minor heirs. In the Revised Statutes it is in substance provided that the mortgagor and those claiming under him may redeem. R. S., ch. 181, §§ 14, 17. The language of the General Statutes and of the General Laws is alike

and is that "The right of the mortgagor and all persons claiming under him, to redeem any mortgaged premises, shall be forever barred and foreclosed by the mortgagee in the following modes," etc. Gen. L., ch. 186, p. 14.

It cannot be well claimed that this Statute does not mean the same it would if it had specially named that the heirs of the mortgagor shall be forever barred and foreclosed, nor that the language does not include all his heirs, whether adults or minors, but if a doubt exists it would seem that the language used in the early Statute removes it.

It is said, however, that all statutory provisions are construed as meaning to include in the scope of their effect only such persons as have such a legal status that their rights can be affected thereby. This may be true in instances where the Legislature has no power to do so, or perhaps where, for good reasons, it is plain that it did not intend to do it, but in this instance the Legislature had the power and apparently has exercised it; at least, it has used language that includes the plaintiffs if it intended to do so.

The mortgagee, by foreclosing the mortgage, only appropriates the land in the manner authorized by the ancestor, the mortgagor, to the payment of the debt for which it was pledged. The contract is that he may do this at any time after condition broken. The heirs claim, in substance, that by reason of their minority the contract is suspended as to them and that a statutory foreclosure cannot be made under the Statute with reference to which the deed was made. But we think it was the intention of the Legislature that the mortgagee should have the right to proceed with the statutory foreclosure according to the letter of the Statute, that the plaintiffs are bound by the deed of Elizabeth, and that Williams had the right to foreclose it in the manner provided by Statute under the authority given him by Elizabeth in her mortgage deed. *Pitts v. Aldrich*, 11 Allen, 40.

The Legislature in authorizing an administrator, under the license of the probate court, to execute a deed of land which the ancestor contracted to convey (Gen. L., ch. 201, § 10), is an instance of its providing for the completion of the contract of an ancestor without special reference to the heirs, in order that justice may be done. Also in § 11, of the same chapter, it is provided that when it shall appear by the will of a deceased person that it was his intention that his executor should dispose of his real estate for any lawful purpose, the judge may license him to sell the same for the purpose intended.

In *Boody v. Emerson*, 17 N. H., 577, it was held that to obtain license of the probate court to sell real estate, it is not necessary that minors entitled by the terms of the Statute to notice of the petition should have guardians appointed, and in the opinion of the court on this point it is said that it is not necessary to do more than the Statute requires, which has a direct bearing on the question now raised; that when the Statute creates a new system, substantially independent of the common law, it is necessary to do only what is required by the Statute. *Hobson v. Roles*, 20 N. H., 41; *Worster v. Company*, 41 N. H., 16.

In the last case Chief Justice Bell, in discuss-

ing the facts proved and the requirements of the Statute not shown to have been complied with, uses this language: "Probably, if the other facts necessary to constitute a foreclosure were also proved it would be competent evidence of these facts against everybody."

So far as the Statute has received construction by the court, it has been that where its provisions are complied with, the foreclosure is a bar to the right of every one to redeem, claiming under the mortgage. *Kittredge v. Bellows*, 4 N. H., 424; *Gilman v. Hidden*, 5 N. H., 30; *Downer v. Clement*, 11 N. H., 40; *Howard v. Handy*, 35 N. H., 315; *Deming v. Comings*, 11 N. H., 474; *Green v. Cross*, 45 N. H., 580; *Wheeler v. Scully*, 50 N. Y., 667; *Mills v. Dennis*, 3 Johns. Ch., 367; *Wilson v. Bronch*, 77 Va., 65; 46 Am. Rep., 709, 715; *Hall v. Bumstead*, 20 Pick., 2.

We think this was the intention of the Legislature and the correct construction to give the Statute.

It is true that it is the policy of the law to guard the rights of minors, and this is entitled to its weight in the construction of the Statute, but it is also true that it is the policy of the law in this State, that our public land records shall state completely and truthfully our land titles, and this is also entitled to its weight.

It may be that the construction that would enable the plaintiff to recover would not harm the usefulness of the Statute, or the confidence that is and should be placed in the reliability of our land records, as a protection against latent rights, if they exist, but do not appear of record, and are in no way made known to the public, but it is to be feared that it would.

The case at bar is a marked instance of the wrong if not the fraud that may be practiced upon innocent purchasers arising from such a result, and to what extent the titles to other lands may be affected in a like manner is not known.

Our conclusion is that the plaintiffs are barred by the foreclosure of the Williams mortgage.
Bill dismissed.

Blodgett, J., did not sit; the others concurred.

JUDGE OF PROBATE

v.

Mary J. ELLIS *et al.*

A promise, by an administrator, to pay a claim against the estate does not bind either the estate or the sureties on his bond, so as to take the case out of the limitation contained in the statute.

(Merrinack — Decided July 31, 1885.)

NOTE.—In an action by an administrator, founded on a contract made with himself, to recover the price of assets of the estate, the *ante mortem* indebtedness of decedent cannot be interposed as a counterclaim. *Thompson v. Whitmarsh* (N. Y.), 1 Cent., 4. In an action against the administrator, complainant must show a lawful indebtedness or demurrer will be sustained. *Windell v. Hudson* (Ind.), 1 West. R., 182.

DEBT on a probate bond brought at the request of the New Hampshire Savings Bank. Facts found by the court. The writ is dated July 15, 1884. The defendant, Ellis, was appointed administratrix of the estate of Joseph B. Ellis, March 27, 1878. The other defendants are sureties on her bond. The estate was not settled in the insolvent course. The note sought to be recovered by means of this suit was dated July 8, 1877, and signed by Joseph B. Ellis, as surety for one John Ellis. The bank presented the note to the administratrix, who acknowledged it as a valid claim against the estate, and has since made a number of payments on it, the last being \$109.73, Oct. 15, 1884. The other defendants had no knowledge of those payments. They pleaded performance of the condition of the bond. The plaintiff replied, alleging non-payment of the above note as a breach, to which the defendants rejoined that the note was barred by G. L., c. 198, § 5.

Mr. S. C. Eastman, for plaintiff:

Whoever sues upon a probate bond must show a claim as a creditor, heir or legatee, and that there was a just debt. *Rogers v. Wendell*, Rockingham, Nov. 8, 1815.

If a claim is admitted, it need be no further liquidated. *Judge of Probate v. Briggs*, 5 N. H., 69.

If the executrix had admitted the debt to be justly due and afterwards refused to pay, it might have been considered a breach of the conditions of this bond. *Judge of Probate v. Locke*, 6 N. H., 396.

No action, founded upon the probate bond, lies until after a decree of distribution by the probate court, unless the executor has expressly admitted the claims to be due. *Judge of Probate v. Adams*, 49 N. H., 150.

By the solvent course, it is unnecessary that a claim be established by a judgment to enable a creditor to sue the administrator on his bond if the claim is not disputable, and the administrator admits its validity, but unduly neglects or refuses to pay it. *Judge of Probate v. Couch*, 59 N. H., 506.

A neglect to give notice to the administrator extinguishes the claim and the administrator cannot remove the bar, however just the claim. *Gookin v. Sanborn*, 8 N. H., 492; approved in *Hodgdon v. White*, 11 N. H., 216.

But the Legislature, in 1872, practically destroyed the reason for this ruling. This section applies equally to the neglect to present and to that to sue. *Webster v. Webster*, 58 N. H., 247; *Page v. Whidden*, 59 N. H., 508.

In *Walker v. Cheever*, 39 N. H., 420, there was no presentation of the claim within two years, and no recognition of its validity by the executors.

In *Amoskeag Mfg. Co. v. Barnes*, 48 N. H., 25, the claim was not presented within two years; but the court held that if such presentation could be shown, a promise by executors would not bind the estate, unless suit was brought within three years.

In *Hall v. Woodman*, 49 N. H., 295, the court approves the doctrine of *Amoskeag Co. v. Barnes*, although not involved in the case before it.

In *Clough v. McDaniel*, 58 N. H., 201, the question involved in the case at bar is expressly reserved and no opinion given.

The court has also made an express exception to the conclusiveness of the statute as a bar, where the fraud of the executor has prevented the presentation of the claim. *Sugar River Bank v. Fairbank*, 49 N. H., 181.

The Supreme Court of Massachusetts has held the law, on a similar statute, to be other than is contended for here. It has decided that both limitations are conclusive bars, which cannot be removed. *Brown v. Anderson*, 13 Mass., 201; *Dawes v. Shed*, 15 Mass., 8.

These decisions have since been followed and may now be regarded as the settled law in that State. *Robinson v. Hodge*, 117 Mass., 222.

Messrs. Chase & Streeter, for defendants.

Allen, J., delivered the opinion of the court:

The bond was required and given to secure the administratrix's performance of her duty; and her duty was not in conflict with the three years' Statute of Limitations, which was designed to secure the speedy settlement of estates. Her promise bound neither the estate nor her sureties. *Amoskeag Mfg. Co. v. Barnes*, 48 N. H., 25; *Hall v. Woodman*, 49 N. H., 295, 304; *Brewster v. Brewster*, 52 N. H., 52, 60; *Clough v. McDaniel*, 58 N. H., 201, 202; *Robinson v. Hodge*, 117 Mass., 224, and cited cases.

The observations in *Judge of Probate v. Couch*, 59 N. H., 506, and other cases upon which the plaintiff relies, relate not to a waiver of the Statute by such a promise, but to a certain distinction between the solvent and the insolvent courses of settlement. While in the latter, the administrator is not authorized to pay claims not judicially established, in the former, having sufficient funds to pay all the debts, he should admit those that are indisputable and pay them without useless expense or delay, instead of forcing creditors through the idle ceremony of suit and judgment. The duty of rapidly and economically executing his trust, by making such admission and payment promptly, is not a duty or a power of procrastinating by waiving the Statute of Limitations.

Judgment for the defendants.

Bingham, J., did not sit; the others concurred.

STATE

v.

George LEAVITT

Where the crime and penalty of one section of a statute, making the sale of intoxicating liquors a criminal offense, differs from those in another section, an indictment which charges the sale of intoxicating liquors in language equally applicably to both sections is **insufficient**.

NOTE.—On indictment for sale without a license in quantities less than a quart; evidence sufficient to convict. See, *Hamilton v. State (Ind.)*, 1 West. R., 146.

Sale of, to inebriate; presumption of buyer's condition. *Brow v. State (Ind.)*, 1 West. R., 180.

Keeping liquor nuisance, evidence of sale; and of character of premises. *State v. Hoxsie*, (R. I.), *ante*, 22.

N. H.

(Merrimack—Decided July 31, 1885.)

INDICTMENT, charging that the respondent "Not being an agent of any town, place or city for the purpose of selling intoxicating liquors, did sell one quart of intoxicating liquor to a certain person whose name is to the jurors aforesaid unknown."

The respondent moved to quash the indictment, because it does not sufficiently inform the respondent of the offense with which he is charged and does not indentify the offense so as to protect him from a subsequent prosecution for the same offense, or enable the court to render a proper judgment upon it.

Messrs. Hon. M. W. Tappan, Atty-Gen., and Leach, for the State.

Messrs. Henry Robinson and Fred H. Gould, for respondent:

It is not sufficient that the indictment charge the offense in the same generic terms employed in its definition; it must state the species; it must descend to particulars. *Heard, Crim. Law.*, 45; *U. S. v. Cruikshank*, 92 U. S., 558 (XXIII., Law. ed., 593); *Commonwealth v. Chase*, 125 Mass., 202; *Ree v. Chalkley*, Russ & R. C. C., 258.

The generic term of the statute alone, will not suffice in the indictment, the species under it being required for identification. *Bishop, Stat. Crimes*, 2d ed., § 440.

Two different punishments for the same offense, with no variations in its elements and no modifying discretion in the court, cannot in the nature of things subsist together. *Bishop, Stat. Crimes*, 2d ed., § 168.

Here are two entirely separate and distinct offenses clearly defined, to either of which the general term "intoxicating" might properly apply; for ale and cider after the process of fermentation is completed, may be intoxicating, as well as rum, gin, brandy, etc., if not to such an extent; and a jury upon a proper indictment, may so find them in individual cases. *State v. Biddle*, 54 N. H., 379.

An indictment for being a common seller of spirituous liquor does not charge the respondent with being a common seller of ale, porter and cider; and evidence of sales of ale, porter and cider is not admissible under such an indictment. *State v. Adams*, 51 N. H., 568.

The word "intoxicating" includes a larger class of cases than "spirituous." All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous. *Commonwealth v. Herriek*, 6 Cush., 465, 468; *Walker v. Prescott*, 44 N. H., 511; *Commonwealth v. Grey*, 2 Gray, 501, 502; *Commonwealth v. Livermore*, 4 Gray, 18, 20.

The construction of statutes defining terms as in General Laws, ch. 1, § 31, cannot govern in construing this indictment.

The construction of the statutes is governed by the legislative definitions; that of indictments is governed entirely by the ordinary use of language. *State v. Canterbury*, 28 N. H., 195.

The definition in the construing section appears to be given as a rule to determine the meaning of the statute, not as a rule to be applied in construing the same when used in an indictment. *State v. Adams (supra)*.

By an express provision in the Constitution of the United States, the accused shall enjoy

the right to be informed of the nature and cause of the accusation. Particularity in the indictment is required. *Heard*, Crim. Pl., 98.

This constitutional right is construed to mean that the indictment must set forth the offense "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged." *U. S. v. Mills*, 7 Pet., 142 (82 U. S., VIII., Law. ed., 637.)

Every ingredient of which the offense is composed must be accurately and clearly alleged. *U. S. v. Cook*, 17 Wall., 174 (84 U. S., XXI., Law. ed., 539.)

The indictment must show on the face of it the particular offense committed. *Com. v. Hall*, 15 Mass., 240.

An indictment which may apply to either of two different definite offenses, and does not specify which, is bad. *Heard*, Crim. Pl., 111; *Ree v. Marshall*, 1 Moody (C. C.), 158.

The respondent is not sufficiently informed to demur or to plead to the indictment understandingly and would be unable to plead a conviction or an acquittal or even a pardon, in bar of subsequent proceedings; and there is positive doubt as to the judgment, if any, to be rendered, and the penalty to be inflicted. *Ree v. Horne*, 2 Cowp., 673; *Commonwealth v. Slack*, 19 Pick., 307; *U. S. v. Cook* (*supra*); *U. S. v. Reese*, and *U. S. v. Cruikshank*, 92 U. S., 225, 558 (XXIII., Law. ed., 567, 598).

The indictment is all the more vague and uncertain in this case, because the name of the person sold to is alleged as unknown, which is a doubtful practice in itself. *Bishop*, Stat. Crimes, 2d ed., § 1037.

Descriptive allegations in criminal pleading are required to be reasonable, definite and certain. *Heard*, Crim. Law, 45; *O'Connell v. Queen*, 11 Cl. & F., 351; *U. S. v. Cruikshank* (*supra*).

The allegation of the sale of one quart does not sufficiently charge the sale of a quantity less than ten gallons, because the "one quart" may be a part of a larger quantity. *Commonwealth v. Odlin*, 23 Pick., 275; *State v. Adams* (*supra*).

Bingham, J., delivered the opinion of the court:

General laws, chapter 109, § 13, provides that "If any person not being an agent of a town for the purpose of selling spirits, sell or keep for sale any spirituous liquor, in any quantity, he shall be fined \$50; and for any subsequent offense he shall be fined \$100 or be imprisoned not exceeding ninety days, or both."

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Section 15 provides that "If any person, not being an agent of a town for the purpose of selling spirituous liquors, shall sell or keep on sale, cider, in less quantities than ten gallons, except when sold by the manufacturer at the press, or in an unfermented state, or lager beer or other malt liquors not included in the list of these already prohibited by law in any quantity, such person shall be fined \$10 and for any subsequent offense \$50."

The crime and penalty of the 18th section are different from those in the 15th; and the indictment not informing the respondent of which of the crimes he is charged, is bad for uncertainty. *State v. Messenger*, 58 N. H., 348. Neither does it show which of the two sections the respondent is accused of violating. *State v. Sherburne*, 58 N. H., 159; *State v. Narramore*, 58 N. H., 273, 275; *State v. Adams*, 51 N. H., 568. *Indictment quashed.*

Smith, J., did not sit; the others concurred.

HAZEN

v.

CONCORD RAILROAD CO.

A hypothetical case may be discharged without a decision.

(Hillsborough—Decided July 31, 1885.)

CASE.

The plaintiff claims to recover for a loss of services and society, caused by injuries received by his wife through the negligence of the defendant. In an action brought by her against it, she has recovered damages for her injuries. The parties desired the opinion of the court on the question whether the plaintiff can recover for loss of her services, or for loss of her society.

Messrs. Wadleigh & Wallace, for plaintiff.

Messrs. J.W. Fellows, and **C. H. Barus**, for defendant.

Doe, Ch. J.: It is not deemed advisable to investigate the questions of law mooted in this hypothetical case. The plaintiff and his wife may have so exercised their equal rights as to give neither any ground of fact for a claim of loss of either services or society.

Case discharged.

SUPREME COURT OF NEW HAMPSHIRE.

L. B. CLOUGH *et al.*, Exrs., *Appts.*,

v.

Joseph B. CLARK, Admr.

A decree of the Judge of Probate, does not necessarily discharge the administrator and close the settlement of the estate; and an appellant, from the disallowance of a claim by the Commissioner of Insolvency, is not barred by such decree, from prosecuting his appeal to final judgment; nor, if his claim is established, from placing it on the list with the other creditors.

(Hillsborough—Decided July 31, 1885.)

APPEAL from the disallowance of a claim by the Commissioner of Insolvency, upon the estate of Moses Fellows.

At the March Term, 1885, the defendant pleaded that since the commencement of that Term he had settled his administration account in the Probate Court, and it being thereupon found that the estate had been wholly expended in defraying the expenses of the last sickness and funeral of the deceased and the expense of administration, a decree was entered discharging the defendant from all claims of creditors against said estate.

Messrs. Clough & Clark and Chase & Struler, for appellants.

Mr. C. R. Morrison, for defendant.

Bingham, J., delivered the opinion of the court:

The plaintiffs have the right to try their case unless barred by the facts stated in the defendant's plea.

Section 25, ch. 199, G. L., provides that if the estate of any person deceased, after deducting the allowance made the widow, shall be expended in defraying the expense of the last sickness, and funeral of the deceased and expenses of administration, the administrator, on the settlement of his account and due notice to the heirs and others interested in the estate, shall be wholly discharged, by decree of the judge, from all claims of creditors against the estate, without other proceedings.

The decree stated in the plea comes within the language of the statute and the inquiry is, what is the meaning of the statute? Is it that the estate shall be discharged under all circumstances and for all time, from the payment of its debts, or that the liability of the administrator shall be suspended as to the claims of creditors, so long as the estate of the deceased in his hands remains as at the date of the decree?

The settlement of the estate is not necessarily closed and the administrator discharged by the decree; but he continues to be administrator, and the settlement of the estate may proceed until it is completed. It is possible that assets may come to the hands of the administrator that should be applied in payment of the debts. We think the effect of the decree is to suspend the liability of the administrator to pay the debts, so long as the assets in his hands continue as at the date of the decree, and that it

does not discharge the administrator or the estate from their payment, in case assets are found.

In this view, the plaintiffs may prove their debt, while the evidence is at hand, and have it placed on the list of claims ready to receive their distributive share, should there be anything to distribute.

Demurrer sustained.

Allen, Smith and Clark, JJ., did not sit; the others concurred.

Benjamin F. TUCKER

v.

George H. ADAMS *et al.*

1. **Spirituuous liquor** does not lose its character of **property** by being illegally kept for sale.

2. The **provisions** of Gen. Laws, ch. 117, §§ 1, 2, **requiring every firm to file** with the town clerk a **certificate** of their names and residences, do not affect a **suit against a partner** upon a cause of action not growing out of the affairs of his firm.

3. When a **sheriff, attaching** partnership goods as the **property** of a member of the **firm**, takes a receipt for them from another member, and leaves them in the **possession** of the firm, the paramount partnership title is a **defense in an action** on the receipt.

(Merrimack—Decided July 31, 1885.)

TROVER for spirituuous liquor and other saloon goods, by a sheriff against a receptor of attached property. *Discharged.*

Facts found by the court.

The goods were the property of Fife and the defendant, partners in the firm of Fife & Co. The plaintiff's attachment of them was made in a suit brought by Hoyt against Fife, on a debt due from Fife to Hoyt, and contracted before the partnership of Fife & Co. was formed. The goods were left in the saloon of Fife & Co., where they were attached. Fife had given Adams mortgages of a large part of them as security for a note given for money loaned by Adams to Fife, and contributed by Fife as his share of their capital; and the mortgages were recorded. It was understood that Adams was to be a silent partner, and that his name was not to be disclosed; and the certificate required by Gen. Laws, ch. 117, § 1, was not filed by the town clerk. On the day of the attachment, the plaintiff demanded of Adams an account on oath of the amount due on his mortgages, and an account has not been given.

Messrs. Albin & Martin, for plaintiff.

A partnership would be deemed void because illegal, if it contemplated a business which the law expressly prohibits. Pars. Part., 9, 10; Story, Part., § 6; 5 Wait, Act. & Def., 106; *Bartle v. Nutt*, 4 Pet. (39 U. S.), 184; *Gordon v. Howden*, 12 C. & F., 237; 1 Story, Eq. Jur., § 296.

Where one, by his words or actions, intention-

ally causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief so as injuriously to affect him, he is precluded from averring a different state of things as existing at that time. 6 Wait, Act. & Def., 689; *Drew v. Kimball*, 48 N. H., 282; *Richardson v. Chickering*, 41 N. H., 380; *Mitchell v. Reed*, 9 Cal., 204; *Strong v. Ellsworth*, 26 Vt., 366.

In this equitable estoppel, the party is forbidden to set up his legal title, because he has so conducted himself that to do it would be contrary to equity and good conscience. *Horn v. Cole*, 51 N. H., 287-292.

It is not necessary to the estoppel that the declarations of conduct should be intended to deceive any particular person or persons; if they were intended to deceive generally and made under such circumstances that it must have been understood that they were likely to deceive, and any person using due diligence was in fact deceived by them, it is enough. *Horn v. Cole*, 51 N. H., 297, and cases there cited.

Mr. Charles P. Sanborn, for defendants:

The officer making the attachment could not legally take possession of the property, exclude Adams from possession, nor divert it from the use for which it was held. *Treadwell v. Brown*, 48 N. H., 291.

Doe, Ch. J., delivered the opinion of the court:

The goods did not lose the character of property by being illegally kept for sale, or being used in an illegal business. Whatever difficulties either partner might encounter in enforcing the partnership contract against the other, the title of their chattels was not destroyed by the unlawfulness of their traffic.

The evidence concerning the mortgages raises no question of law. It is not found as a fact that the plaintiff in interest had any knowledge of the mortgages when he ordered the attachment, or acted upon a belief that they showed the true state of the title, or was misled by them, or was induced to change his position by the mortgagee's representation that the goods were the property of Fife. The facts of an estoppel are not stated in the reserved case.

The provisions of Gen. Laws, ch. 117, §§ 1, 2, requiring every firm to file with the town clerk a certificate of their names and residences, and relieving a plaintiff from certain consequences of the nonjoinder of a partner as a defendant in an action against a firm, are not applicable in this case. The defendant, having neglected to render the demanded account, cannot set up the mortgages as a defense. Whether he can be relieved on a bill in equity upon ch. 29, Laws of 1883, is a question not raised by the case. The attached goods remained in the rightful possession of the defendant and his partner, and their paramount title, asserted by the defendant, is a defense in this suit. *Hill v. Wiggin*, 31 N. H., 292, 302; *Clement v. Little*, 42 N. H., 563, 570. Some other process is necessary for reaching the interest of Fife in such partnership property as may be left after the payment of partnership debts.

Case discharged.

Bingham, J., did not sit; the others concurred.

Samuel W. DEARBORN *et al.*

v.

Charles A. NEWHALL.

1. Whether a verdict has or has not been recorded, and whether the jury have or have not separated, the case may be recommitted to them for the correction of a mistake in the verdict.
2. Whether justice requires a recommitment, and whether injustice results from it, are questions of fact, to be determined at the trial term.

(Rockingham — Decided July 31, 1885.)

ASSUMPSIT. On defendant's exceptions. *Overruled.*

The defendant bargained with the plaintiffs for the wood on a lot in Hampton, at \$2 a cord; and, after removing a part, he refused to take the rest, claiming that the plaintiffs had induced him to make the bargain by false and fraudulent representations. In this action, the plaintiffs attached the wood remaining on the lot, as the property of the defendant, and caused it to be sold on the writ. Two days after a verdict had been returned for the plaintiffs, one of the jurors by whom the case had been tried informed the court that a remark made by the clerk and overheard by him, had caused him to think the jury had made a mistake; that they had treated the money received by the officer from the sale of the attached wood as a payment received by the plaintiffs from the defendant; and that the verdict was for the balance due the plaintiffs beyond that amount. The court caused the jurors to be called by the clerk, stated to them what one of them had said and inquired if they had treated the money received by the officer as a payment to the plaintiffs. Several jurors replied in the affirmative. The court then instructed the jury that the money received by the officer was not a payment to the plaintiffs and should not be deducted as a payment, but was security for any judgment the plaintiffs might recover, and directed them to retire and correct their verdict, if it was erroneous on that point; and a second verdict was returned in which the mistake was corrected. The counsel of both parties left town when the case was first submitted, and had not returned when it was resubmitted. Judgment was ordered on the second verdict, and the defendant excepted.

Messrs. Marston and Eastman, for defendant.

Messrs. Wiggin & Fuller, for plaintiffs:

All courts of record possess the power, at any time, to correct mistakes and to make their records conform to the truth of the case, and they are the sole judges of the necessity and propriety of allowing such amendment, and of the amount and character of the proof required to set the court in motion. *Balch v. Shaw*, 7 Cush., 282; *Fay v. Wenzell*, 8 Cush., 315.

That verdicts are amendable like other records, see, *Chapman v. Coffin*, 14 Gray, 454; *Copen v. Stoughton*, 16 Gray, 366; *Cogan v. Ebdon*, 1 Burr., 383; *Brown v. Dean*, 123 Mass., 266; *Commonwealth v. Carrington*, 116 Mass., 37.

The general rule seems to be that until the verdict is recorded, the jury may be required to reconsider it and to correct any mistake

which they have made. *Brown v. Dean*, 123 Mass., 266; *Commonwealth v. Carrington* (*supra*).

No statute forbids the course taken at the trial term, and "In this State legal rights are no longer sacrificed by judicial legislation, prohibiting their use of modes of procedure reasonably necessary for their vindication." *Rutherford v. Whitcher*, 60 N. H., 110; *Metcalf v. Gilmore*, 59 N. H., 417.

Whether this was a case calling for the exercise of the court's corrective power, is peculiarly a question for the trial Term; and having been there decided, by the very judge and jury, before whom the cause was tried, the law Term will not revise that decision. *Wentworth v. Jefferson*, 60 N. H., 158; *Smith v. Cushman*, 59 N. H., 519; *Dumas v. Hampton*, 58 N. H., 134; *Fuller v. Bailey*, 58 N. H., 71; *Daniels v. Lebanon*, 58 N. H., 284; *Lefavor v. Smith*, 58 N. H., 125.

Doe, Ch. J., delivered the opinion of the court :

In some jurisdictions a recorded verdict cannot be amended by the jury after their separation; but in this State a different practice prevails. The error in this case could be corrected, whether the verdict had or had not been recorded and whether the jury had or had not separated. Their separation increased the danger of wrong being done by their amendment of the verdict. The increased danger raised the question whether justice required a recommitment of the case for reconsideration; and when, on reconsideration, the verdict was amended, there was a question whether justice required a judgment on the amended verdict. Both questions were matters of fact to be determined at the trial Term. *Nims v. Bigelow*, 44 N. H., 376; *Dalrymple v. Williams*, 63 N. Y., 361.

The court could inquire of the jury touching their verdict and the grounds upon which they proceeded, for the purpose of ascertaining whether the case had been properly tried. *Walker v. Sawyer*, 13 N. H., 191, 196; *Smith v. Powers*, 15 N. H., 546, 563; *Johnson v. Haverhill*, 35 N. H., 74, 87.

The inquiry could be made after the jury, being discharged from the case, had separated. *Clough v. Clough*, 26 N. H., 24.

The reason for making the inquiry did not suspend either the power of inquiry or the power of recommitment. For an immaterial reason, a proper inquiry was made, upon proper answer; the case was properly recommitted; and, by the correction of an undoubted and natural mistake, justice was legally done. The recording of an erroneous verdict, award or judgment does not necessarily render all its errors incurable, and the separation of jurors, referees or other judges, does not necessarily disable them to undo the injustice of such a mistake as the jury fell into in this case.

Exception overruled.

Clark, J., did not sit; *Blodgett, J.*, dissented; the others concurred.

C. H. BROOKS *et al.*

v.

R. R. HOWISON.

1. The necessity of a **plenary remedy** for the infringement of a **legal right**, accepted as a general rule of the common law, **authorizes** and requires the invention and use of convenient **procedure for ascertaining and establishing the right and obtaining the remedy.***
2. When a single **action of assumpsit** is an adequate and convenient **mode of recovering money** which one of several common **owners of a chattel** expressly or impliedly promised to pay his co-tenants for his exclusive use of it, the promisees **may join** in such action at common law, and their **several rights** in the damages may be established and enforced by a necessary **form of judgment** and execution.
3. Where their **shares of the value** of his use of the common property are to be **allowed as a payment** to him by them as his **co-sureties**, and their **claim**, and other related affairs are entitled to a joint and complete adjustment which cannot be made at law, the **inadequacy of remedy** at law, is a ground of chancery jurisdiction.
4. **Justice may require the prosecution** of an action **at law and a bill in equity**, on the **same cause** of action at the same time.

(Hillsborough — Decided July 31, 1885.)

ASSUMPSIT, for the use of furniture owned by the nine plaintiffs and the defendant as tenants in common. *Case discharged.*

The declaration contained common counts and a special one. To the former the defendant pleaded the general issue; to the latter he demurred, on the ground that there could not be a joint recovery. The demurrer was sustained, and the plaintiffs excepted. The plaintiffs having filed a bill in equity on the same cause of action, the defendant moved for an order requiring them to elect in which suit they would try the matter in controversy. The motion was denied, and the defendant excepted. By consent, both suits were tried together by the court.

The plaintiffs and the defendant having been sureties on a note for Vose, who gave them a mortgage of the furniture as security, the defendant paid the amount due on the note and took it.

Mr. R. M. Wallace, for plaintiffs.

Mr. Geo. B. French, for defendant.

Upon the evidence, the plaintiffs must be nonsuited for improper joinder, they not appearing to be a wheel within a wheel, having a joint title or interest distinct from the defendant, with a separate unity. *Smith v. Woodman*, 28 N. H., 520, 528; *Wright v. Cobleigh*, 21 N. H., 339, 342; *Mooers v. Bunker*, 29 N. H., 420, 428, 429, 430.

The plaintiffs ought to have been put to their election to stand on one or the other case. In equity, where it is a rule that he who asks equity shall do equity, it is wrong to allow a

* See, *Walker v. Walker*, *post*, 260.

multiplicity of suits to go forward at the same time about the same matter, which are not auxiliary to each other, since one of the grounds of equitable jurisdiction is to prevent multiplicity of suits. *Bailey v. Collins*, 59 N. H., 461; *Eastman v. Company*, 47 N. H., 78, 74, 80.

This equity suit is in no sense auxiliary to the suit at law, and nothing in *Metcalf v. Gilmore*, 59 N. H., 417, sanctions bringing "from the arsenals of the law" a new weapon until the old one is withdrawn or burst.

The cases we have cited in the 28th, 29th and 31st N. H., show that there could be no recovery on the common counts in *assumpsit*; the declaration must be special under the statute and there need be no plea in abatement for misjoinder. *Mooers v. Bunker*, 29 N. H., 422, 426, 428.

The action for money had and received which once accompanied *assumpsit* in the Laws of 1834, p. 150, ch. 154, disappeared in the Revised Statutes, and as the statute was remedial a party suing must allege in such manner as to bring himself under the statute. *Olcott v. Thompson*, 59 N. H., 154.

What the defendant would have done under different circumstances, what were his silent thoughts, feelings and inclinations is immaterial. But his use, not being hostile to any lawful arrangement of the plaintiffs, not interfering with any common use proposed by them, did not render him liable to them without his express consent, which he never gave and which they do not allege he ever gave. *Barron v. Marsh*, 63 N. H., 107.

It is not worth while to discriminate and determine whether this was a tenancy in common, or strict joint tenancy; for it seems that in either case the right of the possession is the same; and use and accountability and non-accountability are the same, 2 Kent, 351, note g; Coke, Litt., 200 a, except as to survivorship. Schouler, Pers. Prop., § 168.

To adjust controversies between those who are so unfortunate as to have once been chattel communists, and to determine how far each proprietor shall enjoy or dispose of what ought to be either sold and divided, or else managed upon some special agreement, is a task which our courts are reluctant to assume. *Blood v. Blood*, 110 Mass., 545; *Field v. Craig*, 8 Allen, 357. *Quære*: whether the statements in *Barney v. Leeds*, 54 N. H., 143, 144, apply in case of personal property?

The mortgage must be construed as taken for the benefit of each mortgagee to the extent he needed indemnity; that is the only sensible and just construction. *Woodman v. Barker*, 2 N. H., 479; Schouler, Per. Prop., § 159.

But in joint tenancy there is no greater obstacle to one's possessing with a co-tenant an indivisible thing, than there is in the case of tenancy in common, and he who fails by due diligence to enter into his privileges, in the one case is as remediless as in the other; *vigilantibus non dormientibus æquitas subvenit*. 2 Kent, 351, note (g).

It will be conceded by all that, prior to the Stat. of 3 & 4 Anne, ch. 16, § 27, the courts of common law gave no remedy for the recovery by a co-tenant of another co-tenant of rents, fines, etc., received beyond his proportion un-

less he could be shown to be a bailiff of the plaintiff. Story, Eq., § 446.

A bailiff is one who has the administration and charge of lands, goods and chattels, to make the best benefit for the owner. Bac. Abr. Account.; Coke, Litt., 172.

So far as rent is concerned, if there were ten lessees of ten separate tenements belonging to ten joint owners, and one of the ten joint owners received of one of the lessees any rent covering the whole rent for any space of time, that rent he must divide with the rest; had this principle been applicable to sole occupation by one joint owner, he could not have used any fractional part of the land without accounting for a proportional part of its products. *Henderson v. Eason*, 79 Eng. C. L., 709; see, *Hayden v. Merrill*, 44 Vt., 386; *Pico v. Columbet*, 12 Cal., 414.

In 1706 came the remedial Statute 4 Anne, ch. 16, based upon the practice in chancery of granting an account, and thereafter the courts of law and equity found themselves acting to the same intent, to meet the same wrong superseding the other. 8 Com. Dig., 6.

From the rarity of joint tenancies or tenancies in common of chattels independent of partnership transactions, giving rise to an income by way of rents and profits for their use and possession by strangers, it is difficult to find cases in the early reports parallel with those relating to realty. There may be a few cases in admiralty like *Horn v. Gilpin*, 1 Ambl., 255, or *Strelly v. Winson*, 1 Vern., 297, but no great weight is to be given to them.

It is far better to trust the court which rendered the decision in *McMahon v. Burchell*, 2 Phill., 127, and *Pulteney v. Warren*, 6 Ves. Jr., 98.

Although the Statute 4 Anne provided a remedy in the shape of an account, this precise form got into disfavor so much so that by judicial construction *indebitatus assumpsit* was sustained whenever an action of account would lie under the statute. *Cutler v. Currier*, 54 Me., 81, 90; *Goven v. Shaw*, 40 Me., 56.

Made acceptable by this construction, the statute came along with the common law to this country. *Goven v. Shaw* (supra), 58; *Brigham v. Eccleth*, 9 Mass., 538, 540; *Jones v. Harraden*, 9 Mass., 540; *Munroe v. Luke*, 1 Met., 459, 463; *Webster v. Calef*, 47 N. H., 294; *Reynolds v. Wilmeth*, 45 Iowa, 693. We fail to find any practice under it in New Hampshire.

The statute, ch. 164, Laws 1834 has been regarded as purely remedial. *Olcott v. Thompson*, 59 N. H., 154.

So far as chattels are concerned, at first, it only embraced copartnership chattels, and never aimed to afford any remedy for recovering for the use of such, and even the sections as to realty provide that there must be exclusive possession against the will and without the consent of the co-owner, to lay a foundation for damages. *Perley v. Brown*, 12 N. H., 498; *Wright v. Cobleigh*, 21 N. H., 389.

Outside of partnership, the joint ownership of chattels for the purpose of deriving an income was probably somewhat unusual, and it probably was thought that replevin and trover afforded ample remedies for all recognized wrongs in that direction. *Odiorne v. Lyford*, 9 N. H., 511; *Carr v. Dodge*, 40 N. H., 408; *Weld*

v. *Oliver*, 21 Pick., 562; *Delaney v. Root*, 90 Mass., 506; *Blood v. Blood*, 110 Mass., 545; *Southworth v. Smith*, 27 Conn., 855; *Farr v. Smith*, 9 Wend., 338; *Mercereau v. Norton*, 15 Johns., 179.

From a statute passed in Maine in 1848. Rev. Stat., ch. 61, § 1, *Cutler v. Currier* (*supra*), we see what they regarded as wrongs proper to be redressed and what they considered were the only real deficiencies of 4 Anne, ch. 16.

The Statute 4 Anne as construed by an overwhelming majority of authorities, in number and weight, did not include redress for sole use and occupation, nor recognize it as a wrong or injustice. *Webster v. Calef*, 47 N. H., 289, 294.

The leading case in England is *Henderson v. Eason*, 79 Eng. C. L., 701 (1851). This case follows the decision in equity. *McMahon v. Burrell* (*supra*); 79 Eng. C. L., 705.

The court in Vermont thinks the first decision reported in 12 Adol. & Ell. (N. S.), 986, was right. This was argued before only two Justices and the written opinion is very brief. It did not commend itself to the Lord Chancellor and has never been treated as the law of the English courts nor to any great extent of this country. *Henderson v. Eason*, as finally decided, has received very frequent mention in the courts of the U. S. It is cited in *Webster v. Calef* (*supra*), and the reasons upon which it is based are found partly in *Burleigh v. Ford*, 59 N. H., 539. It is in harmony with Massachusetts decisions, some antedating it by many years. *Brigham v. Ereleth*, 9 Mass., 538; *Jones v. Harraden*, 9 Mass., 540; *Sargent v. Parsons*, 12 Mass., 149, 153; *Fanning v. Chadwick*, 3 Pick., 424; *Munroe v. Luke*, 1 Met., 464; *Calhoun v. Curtis*, 4 Met., 414; *Wilbur v. Wilbur*, 13 Met., 404; *Balou v. Wood*, 8 Cush., 54, 55; *Shepard v. Richards*, 2 Gray, 424; *Badger v. Holmes*, 6 Gray, 118; *Peck v. Carpenter*, 7 Gray, 288; *Brown v. Wellington*, 106 Mass., 319; *Blood v. Blood* (*supra*); *Sisson v. Tate*, 114 Mass., 497, 501.

In the case, *Shepard v. Richards*, there was a common possession and reception of crops. In *Sisson v. Tate* we have a case in equity as, also, in *Blood v. Blood*, and Massachusetts, notwithstanding the hypercritical distinctions attempted to be drawn in *Hayden v. Merrill*, 44 Vt., 336, has taken an unmistakable stand in this matter.

In Indiana we are sustained fully by *Crane v. Waggoner*, 27 Ind., 52.

In Michigan we are sustained by *Everts v. Beach*, 31 Mich., 136; *Wilmarth v. Palmer*, 34 Mich., 347.

In Florida we are supported by *Gilmer v. Bird*, 15 Fla., 421.

In Minnesota we have full support from *Kean v. Connelly*, 25 Minn., 222; *Hause v. Hause*, 20 Minn., 252.

In Kentucky we have in support of our position, *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh, 138.

In Iowa we are sustained by *Reynolds v. Wilmeth*, 45 Ia., 693. In this case the court goes over the authorities very fully and expresses itself very confidently. "We feel no hesitancy," it says, "in taking this ground."

In California we have a very clear and full discussion of the question and this view is adopted. *Pico v. Columbet*, 12 Cal., 414. This case de-

cides that there is no remedy at law or in equity. *Howard v. Throckmorton*, 59 Cal., 79; *Balch v. Jones*, 61 Cal., 234; *Goodenow v. Eber*, 16 Cal., 461. This case sustains *Pico v. Columbet* and reiterates its views.

In Texas the same view is entertained in *Neil v. Sheckelford*, 45 Tex., 119.

In Alabama we call attention to *Pope v. Harkins*, 16 Ala., 321, which might at sight be cited against this view, but it relates to rents actually received.

In Illinois the Revised Statutes, ch. 76, § 1, and ch. 2, § 1, cover more ground than 7 Anne, ch. 16. So we get no decision there.

In North Carolina we cannot find cases that come down on all fours. In *Linker v. Benson*, 67 N. C., 154, and in *Caldwell v. Neely*, 81 N. C., 114, we find that mere possession of a chattel or exclusive use and appropriation of profits does not amount to ouster nor to a wrong demanding redress.

In New Jersey, in *Buckelew v. Snedeker*, 12 C. E. Greene, 82, it is said: "A tenant in common is not chargeable to his co-tenant for the latter's share of the rental value of the premises, which are equally open to, and may be occupied by both." *Filbert v. Hoff*, 42 Pa. St., 97, illustrates the subject of ouster and exclusion.

Vermont and Virginia are accompanied in this view by South Carolina and Georgia with decisions where there apparently was no such consideration of the subject as to give much weight to the conclusions reached. *Thompson v. Bostick*, 1 McMullan, Eq., 75 and 1 McMullan, 69, with *Hancock v. Day*, 1 McMullan, Eq., 69; *Shiels v. Stark*, 14 Ga., 435; *Jones v. Mussey*, 14 S. C., 292; these appear to be the only States where the matter has received consideration.

See, also, *Freem., Co-ten. and Par.*, §§ 251, 258, 270, 271, 272, 274 & 275; *Adams, Equity*, 232; *Taylor, Land. and T.*, p. 89 (7th ed.), § 5, § 115, note 3; *Schouler, Pers. Prop.*, § 156; *Story, Eq.*, § 916.

Plaintiffs cannot stand in the mortgagor's shoes without doing all that he would have to do to get credit for use. He must pay the debt or tender payment or show that the use coupled with cash tendered or paid has overpaid the debt; and in such case even he does not recover the use. *Osgood v. Pollard*, 17 N. H., 272.

As showing the rights and duties of mortgagees, see, *Jones, Mort.*, §§ 1115, 1116, 1117, 1122, 1123, 1126; *Hubbell v. Moulson*, 53 N. Y., 225; *Strong v. Blanchard*, 4 Allen, 538; *Shaef-fer v. Chambers*, 2 Halst. (N. J. Eq.), 548; *Jones, Chat. Mort.*, §§ 699, 700, 703, 707, 710, 773; *Leach v. Kimball*, 34 N. H., 568, 574; *Murray v. E-ski-ne*, 109 Mass., 597; *Landon v. Emmons*, 97 Mass., 88.

After defendant paid the Vose note he might, perhaps, have insisted that he was subrogated to all the rights of the sureties under the Vose mortgage of indemnity. But subrogation in such cases is not pure and simple; it is not an absolute title or lien cast upon one by operation of law against his will; it is a right to an assignment which one can have, if he needs it for his assistance and asks it. *Brandt, Sure. and Guar.*, § 260; *Baylies, Sure.*, etc., 859.

The Vose note is defunct, for when this latter mortgage was taken, everything that at-

tached itself as security to the Vose note disappeared. And mere words and understandings are as ineffectual as epitaphs to revive or reform the dead. *Pray v. Maine*, 7 Cush., 253; *Bryant v. Smith*, 10 Cush., 169.

Doe, Ch. J., delivered the opinion of the court:

Both parties put their contention on the ground that, between themselves and for the purposes of this case, the nine plaintiffs and the defendant have the rights of owners of the furniture in common. Each of them necessarily has an equal right to its possession. It came rightfully into the defendant's possession, and his right to keep it is equal to that of each of the plaintiffs. But, mere possession of the property, a part of which is carpets, is very different from the consuming use he had made of it, a year and a half in his hotel. If it were possible for him to carry his use of his share to the point of destruction without injury to the plaintiffs, they could not complain of his doing what he pleased with his own. But his right to wear out his one tenth part is not a right to wear out their nine tenths; and his right to use his share is as far from a right to make a profitable or unprofitable use of their shares without compensation, as from a right to retain all money received by him for a bailee's use of the whole.

If our common law, instead of being in general a system of natural principles, necessarily adopted by custom and common consent, and necessarily conformable to the progress of society, were an ancient legislative code enacted by a court, much of it would be ill adapted to the situation and wants of this country, and repugnant to what are universally regarded as indispensable arrangements of modern life. Other harsh and repulsive doctrines, as well as the feudal tenure of land, *Cole v. Lake Co.*, 54 N. H., 242, 279, 285, 286, growing out of social conditions that have ceased, and incompatible with the increase of trade, productive industry and personal estate, have become obsolete; and the law has not fixed a day when the precedents of its adaptation to the mutability of human affairs shall no longer be in force. The unwritten rules of ownership in common, prospectively implied from the exigencies of business by an enlightened public sense of expediency, obligation and right, do not expand each share-owner's necessary right of possession into an unnecessary right of uncompensated use; nor make the undivided title a pretext for denying him any necessary remedy, in contract or tort, for a contractual or tortious violation of his proprietorship; nor restrict the co-tenants' rights of action against each other to cases of destruction, ouster, or an actual or constructive appointment of a bailiff, liable to account for what he ought to receive, or merely for his receipt of something from a third person; nor forbid an equitable contract to be inferred in a case like this by the trier of the facts, from the character and destination of the property, the market value of its use, and other circumstantial evidence of the understanding upon which the owners' community of interest was formed, and upon which it remains unless removed by mutual agreement. Emphasis is to be placed upon the simple merits of the controversy, and while the legal fiction of a contract implied by

law may be invented and used to enforce the performance of a legal duty, *Scera v. True*, 53 N. H., 627; *Kelley v. Davis*, 49 N. H., 187, it is not the function of the distinction between unity and severalty of title to turn aside the legal justice of the case.

The title of none of the shares being disputed, and the defendant's use being in its extent and effect what it was, it might not be easy for a jury to find there was not an original and unchanged understanding that he should account for the plaintiffs' shares of the market value of such a use. They had notified him he must pay. He understood they claimed he should allow the value of the use as a payment on the Vose note, or, in other words, should allow nine tenths of that value on the debt of contribution due him from them as his co-sureties on the note. He expected to pay in that way if he could not avoid payment without giving up the furniture. Two or three times, when spoken to about payment, he told them they might take the property; but when they proposed to take it, he was not ready to give it up, and retained it. They understood he was to pay for the use; as co-sureties and co-mortgagees, they expected the use would be allowed as a payment on the Vose note; and he, finding they would not permit his use without such payment, necessarily came to the same understanding. Their minds met in an implied agreement. His use of the common property was worth \$300; of which sum by the agreement one tenth belonged to him, and nine tenths to the nine plaintiffs. When he refused to perform the agreement, the plaintiffs were entitled to an adequate action.

The necessity of a plenary remedy for the infringement of a legal right, accepted as a general rule of the common law, authorizes and requires the use of convenient procedure for ascertaining and establishing the right, and obtaining the remedy. *Walker v. Walker*, post, 250. If the defendant's promise had been to pay his co-tenants their shares in money, and had not been connected with any other transaction requiring a joint settlement, the suit in *assumpsit* would have been a common-law remedy, appropriate, complete, and not taken away by Gen. Laws, ch. 220, § 2. An action at law by one partner or tenant in common against his copartner or co-tenant may be inadequate by reason of a practical difficulty in that procedure of adjusting complicated accounts, or related rights, or giving other relief than the establishment of a title, the return of property to its owner, and the payment of damages in money. The examination of the parties on oath, which formerly could be effected only in a court of equity, was regarded as authorized by the confidence they were supposed to have reposed in each other; and inadequacy of remedy in this direction at law was a basis of chancery jurisdiction. 1 Ch. Pl., 39. But no one of these difficulties is presented by the cause of action stated in the declaration in this case.

These ten owners could join in a suit against a trespasser, and in *assumpsit* against their lessee for rent of the common property hired by one contract, because a joint action would be just, economical, sufficient and convenient. For the same reason, this joint action could be maintained by nine tenths of the owners against their co-tenant on his promise to pay them nine tenths

of the value of the use in money. For some purposes the distinct and divisible character of the owners' interests in the property and the damages, would be a material element of their rights; but as a mere technical theory, causing no actual obstruction of justice in a joint suit, it would not make ten suits necessary for the ten, nor nine suits necessary for the nine. There would be no obstacle of procedure requiring severance of action in either case. The plaintiffs might as conveniently join in the exercise of their several rights of action for divisible shares of damages, as in the exercise of their several rights of letting or selling divisible shares of the property. Their rights of recovering their shares of \$300 in money could be established in this action of *assumpsit*, either by several judgments or one judgment in severalty, and could be enforced either by several executions or one execution in severalty. *Chauncey v. Ins. Co.*, 60 N. H., 428, 432; *Cole v. Gilford* [*supra*]. The value of the use could be as easily ascertained in this suit as in an action of all the owners or one of them against a stranger; and the value being found, nine tenths of it would be the shares of the plaintiffs, whose joinder, instead of being injurious to the defendant, would avoid multiplicity of suits and multiplicity of costs in a single controversy that should be settled in one suit, or in as few suits as possible.

The joinder of the plaintiffs is not error; the demurrer should have been overruled; and the exception on this point is sustained.

But while the declaration, stating a cause of action at law on a promise to pay money, is not bad for misjoinder of parties, the facts found at the trial show that their rights require a different mode of procedure, and other remedy than an execution of damages in *assumpsit*. The defendant was to pay the plaintiffs their shares of the \$300, not in money, but by allowing that sum on the Vose note. Three of the plaintiffs are insolvent; and the other six and the defendant are entitled to an application of the whole sum of \$300 as a payment. There is a balance of contribution to be paid the defendant by the six solvent plaintiffs; for the collection of that balance, he should not be put to more litigation; and a complete adjustment cannot be made in *assumpsit*. There should be a computation of the balance due him; that amount should be deposited with the clerk for him; and when the deposit is made, there should be a decree that the note be deposited with the clerk to be canceled. *Strafford v. Welch*, 59 N. H., 487. Here is work for the bill in equity which was tried with the *assumpsit*, and which may be allowed as an amendment of the declaration in that action. *Metcalf v. Gilmore*, 59 N. H., 417.

The defendant's motion that the plaintiffs be required to elect whether they will try the matters in controversy on the declaration at law, or on the bill in equity, was rightly denied. They were properly allowed to avail themselves of both forms of action, subject to the modes of trial to which either party was entitled. A plaintiff may need an action of contract and an action in tort, or counts in both forms, to meet the meritorious contingencies of his case. *Rutherford v. Whitchee*, 60 N. H., 110. A final adjustment and decree will be made at the trial term.

Case discharged.

N. H.

Bingham, J., did not sit; the others concurred.

Mary A. COWLES

v.

CONTINENTAL LIFE INSURANCE CO.

A reduced, "**non-forfeiture**," "**paid up**" policy of life insurance, held, upon certain stipulations, not to be forfeited for non-payment of interest.

(Rockingham—Decided July 31, 1885.)

ASSUMPSIT, on a policy of life insurance dated May 30, 1870.

Facts found by the court.

By the terms of the contract, the defendant was to receive ten annual premiums, each consisting of a note for \$42.80, and a certain sum of money. At the end of twelve years, or the previous death of the insured, the defendant was to pay \$1,000, "deducting therefrom all indebtedness to the said Company on account of this policy, if any then existing; *Provided, always*, and * * * this policy is granted by the said Company, and accepted by the assured, upon the following express conditions and agreements: * * * 3. * * * that if the assured shall not pay the said annual premiums on or before noon of the several days hereinbefore mentioned for the payment of the same, and the interest annually in advance on any outstanding premium notes, *

* * then, and in every such case, this policy shall cease and determine, and said Company shall not be liable for the payment of the sum insured or any part thereof, except as hereinafter provided. 4. That if, after the receipt by this Company of two or more annual premiums, default shall be made in the payment of any subsequent premium, when due, then, notwithstanding such default, this Company will convert this policy into a "paid up" policy for as many tenth parts of the sum originally insured as there shall have been complete annual premiums paid."

Three annual premiums were paid in notes and money. When the fourth was due, the plaintiff sent the defendant the policy, the interest due on the outstanding premium notes, and a written notice and quitclaim, in a form prescribed by the defendant, requesting a reduction of the insurance to \$300, "agreeing to pay said Company, annually in advance, the interest on all outstanding notes given in part payment of annual premiums." The policy was returned, with the following written upon it, and signed by the defendant secretary: "This policy having lapsed after three annual payments, is hereby recognized as binding upon the Company for $\frac{3}{10}$ thereof, or \$300, subject to the terms and conditions in this policy, and in the quitclaim to the Company." No interest was paid after 1879; and the question is, whether the reduced insurance was forfeited by the non-payment of interest on the three premium notes.

Mr. A. L. Mellows, for plaintiff:

Courts cannot adopt a construction of any legal instrument, which shall do violence to

the rules of language or the rules of law. The terms of the contract are to be understood in their plain, obvious and popular sense. 2 Pars. Cont., 2d ed., 7, § 2; 1 Add. Cont., 336, ch. 2, ¶ 220; Smith, Cont., *327.

Mr. William H. Hackett, for defendant:

The saving clause providing for paid up policies applies only where forfeiture is by reason of failure to pay the premiums. By a failure to pay interest or to pay outstanding notes given for cash portion of premiums, the right to a paid up policy is taken away and forfeiture becomes absolute. The saving clause does not apply in these two latter cases.

A similar question arose in *Cont. Life Ins. Co. v. Robinson*, 13 Ins. L. J., 292, and cases there cited; *Ins. Co. v. Bonner*, 36 O. S., 51; *Thompson v. Ins. Co.*, 104 U. S. (XXVI., Law. ed., 767), 258; *Atty-Gen. v. N. Am. Life Co.*, 82 N. Y., 172; *N. Y. Life Ins. Co. v. Statham*, 93 U. S. (XXIII., Law. ed., 789), 80; *Cont. Life Ins. Co. v. Kamp*, Ohio Sup. and Ct. Comrs., Mar. 6, 1884.

Doe, Ch. J., delivered the opinion of the court:

A significant clause of the contract is a conspicuous marginal advertisement describing the writing as a "Non-Forfeiture Endowment Policy." The forfeiture clause, qualified by the provision for a "paid up" policy, does not mean that the reduced, "paid up," "non-forfeiture" insurance is annually forfeitable for non-payment. The strict construction for which the defendant contends would leave the insured exposed to a danger from which the reduction and conversion of the policy would be generally understood to relieve him; and it is not to be presumed that the document was ingeniously drawn up for the purpose of fraudulently obtaining money by non-forfeiture pretenses. All parts of the contract taken together can be and should be reasonably and liberally understood as designed to accomplish the scheme of non-forfeiture for non-payment, which men in general would believe the policy invited them to accept.

The original contract did not make the non-payment forfeiture clause applicable to the promised "paid up" policy into which the original could be converted; and the conversion, written upon the original, is reasonably construable as a performance of the promise, and not a violation of it. Forfeiture for non-payment was a condition to which the reduced insurance was not to be subject. The plaintiff's agreement (in the quitclaim) to continue the annual payment of interest on the notes was, like each of the notes, a mere agreement to pay money, and not a contract of forfeiture. An intention of the plaintiff to suffer, and of the defendant to inflict, so severe and contradictory a penalty as the forfeiture of a "non-forfeiture," "paid up" policy, for a failure to pay interest, cannot be fairly inferred from the terms of a contract making non-forfeiture for non-payment so prominent an inducement, and providing, as a remedy for non-payment, the deduction of interest and all other indebtedness from the amount of insurance payable by the defendants. The plaintiff is entitled to judgment.

Case discharged.

Clark, J., did not sit; the others concurred.

Orville F. ROGERS

Charles C. KENRICK.

1. A verdict is not set aside for the admission of evidence, competent for some purpose and not shown to have been offered or used for a purpose for which it was incompetent.
2. The use of a chalk in the plaintiff's closing argument is not made a cause for a new trial by the fact that it was not exhibited before the close of the defendant's argument. The justice of the defendant's having an opportunity to reply, if he is surprised by it, is a question of fact to be determined at the trial.

(Belknap—Decided July 31, 1885.)

TRESPASS *quare clausum*. Judgment on the verdict.

The question was the locality of a boundary line on the west side of the plaintiff's land, and the east side of the defendant's. The plaintiff claimed the establishment of one line by agreement; a second he claimed to be the true line; a third was claimed by the defendant. The verdict was for the second. The plaintiff claimed under Rogers, who bought of Cross, now deceased. Subject to the defendant's exception, the plaintiff testified that while he, as agent of Rogers, was negotiating with Cross for the land now owned by the plaintiff, Cross went with him upon the land, and pointed out its boundaries as claimed and occupied by him; and, subject to exception, the plaintiff gave the locality of the line pointed out by Cross on the west side of his land. Subject to exception, the plaintiff's counsel, in the closing argument, was allowed to use a chalk diagram, then for the first time exhibited.

Messrs. Pike & Parsons, for plaintiff:

It is well established, that incompetent evidence will not set aside a verdict, rendered upon such grounds as to make its admission immaterial. *Currier v. B. & M. R. R. Co.*, 34 N. H., 498, 507; *Chamberlain v. Davis*, 33 N. H., 121, 128; *Watson v. Walker*, 33 N. H., 131, 145; *Gerrish v. Gerrish*, 63 N. H., 128.

A new trial will not be granted on account of the introduction of incompetent evidence, if it was introduced to prove a point which the jury by their verdict did not find to have been proved. *Parker v. Griswold*, 17 Conn., 309; *Baldw. Conn. Dig.*, 465, § 83.

The plaintiff claimed the line pointed out by Cross as an agreed line. Evidence that the plaintiff's grantor was in possession up to that line, was evidence tending to prove that issue. *Enfield v. Day*, 7 N. H., 457, 468; *Dudley v. Elkins*, 39 N. H., 78, 84; *Thompson v. Major*, 58 N. H., 242, 244.

The line between adjoining owners of land may be established by a parol agreement, and such agreement, when executed, is conclusive upon the parties, and all claiming under them. *Orr v. Hadley*, 36 N. H., 578.

No reason is perceived why every declaration accompanying the act of possession, whether

in disparagement of the claimant's title, or otherwise qualifying his possession, if made in good faith, should not be received as part of the *res gesta*, leaving its effect to be governed by other rules of evidence. *Hunt v. Haven*, 56 N. H., 89, 100; *Bell v. Woodward*, 46 N. H., 315, 335; *South Hampton v. Fowler*, 54 N. H., 197, 199, 200; *Fellows v. Fellows*, 37 N. H., 76; *Tappan v. Tappan*, 36 N. H., 101, 121; *Blake v. White*, 13 N. H., 267; 1 Greenl. Ev., 2d ed., § 109.

The true rule on this subject is that laid down in *Daggett v. Shaw*, 5 Met., 228, 226.

The declaration of a person made upon land, while he was in possession thereof under an undisputed claim of title, that his line extended to a certain boundary which he pointed out at the time, is admissible in evidence, after his decease, in favor of those who claim under him, on the trial of a question arising subsequently concerning the boundary line of the same tract of land. *Wood v. Foster*, 8 Allen, 24; *Bartlett v. Emerson*, 7 Gray, 174, 176; *Ware v. Brookhouse*, 7 Gray, 454; *Flagg v. Mason*, 8 Gray, 556; *Long v. Colton*, 116 Mass., 414, 415; *Adams v. Swansea*, 116 Mass., 591, 596; *Hunnicutt v. Peyton*, 102 U. S., 333, 363, 364, 366 (XXVI., Law. ed., 113, 119, 120); *Ecans v. Hurt*, 34 Tex., 111; *State v. Gurnee*, 14 Ky., 111; *Smith v. McNamara*, 4 Lans. (N. Y.), 169, 172; *Boner v. Earl*, 18 Mich., 367, 377; *Sheaffer v. Eakman*, 56 Pa. St., 144, 151; *Dawson v. Mills*, 32 Pa. St., 302, 395; *Abb. Tr. Ev.*, ed. 1880, 700, 711, notes 3, 4.

It seems immaterial under most of the cases whether the owner making them be living or dead at the time of the trial. *Smith v. Powers*, 15 N. H., 546.

The phraseology in the case of *Smith v. Forrest*, 49 N. H., 230, is in accord with that in *Adams v. Blodgett*, 47 N. H., 219, where the same expression is used that the declarant would have "no interest to misrepresent," and the expression of the earlier cases that the declarant must have "no interest" abandoned.

The general presumption and fair legal inference are, that every man knows the situation of his real property, both as to its boundaries and possession. *Smith v. Forrest*, 49 N. H., 230, 236.

The place to raise this question was at the trial Term. All facts necessary to be found to establish the competency of evidence are to be determined by the court at the trial term, and this finding is conclusive. *Bundy v. Hyde*, 50 N. H., 116; *Walker v. Curtis*, 116 Mass., 98.

Interrogatory 72 of the deposition of Jones was properly excluded upon two grounds. It was asked after the cross examination by the party who called the witness, and was not asked to explain any answer upon cross examination, or with reference to any new matter elicited upon cross examination, and could not be put except by leave of court. *Rules*, 1875, No. 49, p. 17; 1 Greenl. Ev., 2d ed., § 487.

The finding of the court in excluding it, was a finding that it had been previously asked and answered, and was a finding of a fact, at the trial Term, within the province of the court; such finding is conclusive. 1 Greenl. Ev., 2d ed., § 431; *Bundy v. Hyde*, 50 N. H., 116; *Guterson v. Morse*, 58 N. H., 165; 59 N. H., 55, 70, 219, 237, 332, 343, 588.

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The propriety of the use by the plaintiff's counsel, in his closing argument, of the chalk described in the case, was a matter of fact to be determined at the trial Term, and is not open to exception. *Ordway v. Haynes*, 50 N. H., 159, 162.

The chalk in this case was not sent to the jury room. The whole question, however, whether any drawing offered shall be used before the jury, or sent to their room, it is well settled, is to be determined by the court at the trial Term. *Brown v. Wiggin*, 59 N. H., 327; *Commonwealth v. Holliston*, 107 Mass., 232; *Hollenbeck v. Rowley*, 8 Allen, 473, 475.

The chalk was used by counsel in accordance with the uniform practice of the bar, as we understand it, and its use is certainly within the rule in regard to the rights of counsel in argument laid down by Judge Fowler in *Tucker v. Henniker*, 41 N. H., 323, where he says that "his illustrations may be as various as the resources of his genius."

Messrs. **Barnard & Barnard**, for defendant:

The rule of law in New Hampshire in regard to the admissions of the declarations of deceased persons, as to the boundaries of real estate, as we understand, is, if the deceased person, from his situation, had the means of knowledge and no interest to misrepresent, his declarations are admissible. *Lawrence v. Haynes*, 5 N. H., 33; *Great Falls Co. v. Worster*, 15 N. H., 412; *Gibson v. Poor*, 1 Foster, 440; *Prescott v. Hawkins*, 2 Id., 191; *Melvin v. Marshall*, 2 Id., 379; *Adams v. Stanyan*, 4 Id., 417; *Adams v. Blodgett*, 47 N. H., 219.

If the declarations are those of a deceased owner of the land, and made while he is such owner, they are admissible against his privies in estate, but not in their favor, unless they were in disparagement of his title. *Shepherd v. Thompson*, 4 N. H., 213; *Pike v. Hayes*, 14 N. H., 19; *Smith v. Powers*, 15 N. H., 546; *Morrill v. Foster*, 33 N. H., 379; *Smith v. Forrest*, 49 N. H., 230.

Doe, Ch. J., delivered the opinion of the court:

The evidence of Cross' declarations showed his assent to the line he pointed out, and, with evidence of the assent of the owner on the other side, would tend to prove an agreed line which might be material, although it is neither of the lines claimed by these parties. It does not appear that the evidence was offered or used for the purpose of determining the true line, as distinguished from an agreed one, or for any purpose for which it was not competent, or that it was material or prejudicial.

The use of the chalk in argument raises no question of law. The propriety of the objective illustration and the justice of the defendant's having an opportunity to reply, if he was surprised (the plaintiff's right of final reply being maintained), were questions of fact to be determined at the trial.

Judgment on the verdict.

Carpenter, J., did not sit; the others concurred.

Nathan WALKER

v.
John C. WALKER.

1. The necessity of a **plenary remedy** for the **infringement of a legal right**, accepted as a general rule of the common law, authorizes and requires the invention and use of convenient procedure for ascertaining and establishing the right, and obtaining the remedy.*
2. A real action lies at common law for a remainder of land in fee expectant on the termination of a life estate, and such an action is a **plain, adequate and complete remedy** for the remainder man whose title is disputed.
3. **Ch. 43 of Laws, 1883**, does not authorize a bill in equity to establish the title to real estate, in a case in which there is a plain, adequate and complete remedy at law.

(Strafford—Decided July 31, 1885.)

IN EQUITY. *Case discharged.*

Demurrer to a bill, in which the following facts are alleged. March 25, 1876, the plaintiff Nathan, by deed conveyed a farm in Durham to himself for life, and to the defendant John, after the death of Nathan; and the same instrument conveyed to John all the personal property of which the grantor should die possessed. The deed provided that it should be void if John should neglect suitably to support Nathan on the farm, and this condition John has not performed. Prayer that the deed be declared void, and for general relief.

Messrs. Dodge & Caverly, for plaintiff: *Smith v. Jewett*, 40 N. H., 530, cited by defendant, is not a similar case. In that case the possession and the right of possession were in the widow by devise for life upon condition that the said wife support the daughters, the reversion to the said two daughters.

The case of *Ricker v. Blanchard*, 45 N. H., 47, cited by defendant, is further from the matter at issue than is *Smith v. Jewett*.

It is a case of mortgaged premises, and the question arose whether or not an absolute forfeiture had been incurred, and as equity holds a mortgage to be but an incident of the debt, and if debt can be discharged without forfeiture does not enforce the penalty; the decision in that case was opposed to forfeiture. It seems to have no bearing on this case.

"Equity has jurisdiction over the cancellation of all deeds, bonds and contracts." 1 Story, Eq., §§ 692-707. "Likewise of all forfeitures for condition broken." 2 Story, Eq., 1302-1326.

Mr. Samuel M. Wheeler, for defendant: Bill in equity to cancel a deed made by the plaintiff to his son, the defendant, in consideration of love and affection, and conditioned for the support, etc., of the father, the plaintiff. Such a condition is a condition subsequent.

Rollins v. Riley, 44 N. H., 9, is precisely this case so far as determining that it is a condition subsequent, and the court in that case so regarded it.

A court of equity will not lend its aid to divest an estate for a breach of a condition sub-

sequent. *Smith v. Jewett*, 40 N. H., 530; *Ricker v. Blanchard*, 45 N. H., 47; 2 Story, Eq., § 1315, note, §§ 1319, 708, 8d ed.; Story, Eq. Pl., § 521.

Equity is not the proper tribunal for trying title to land, and this case is one involving title to real estate. So the defendant has a right to have that issue settled by a jury. Bill of Rights, Act, 20; Barbour, Eq. Dig., 327 §§ 1, 2; *Manners v. Manners*, 1 Green, Ch., 384, N. J.; *Marsh v. Reed*, 10 Ohio, 347.

Doe, Ch. J., delivered the opinion of the court:

The necessity of a plenary remedy for the infringement of a legal right, accepted as a general rule of the common law, *Edes v. Boardman*, 58 N. H., 580, 590, authorizes the use of convenient procedure for ascertaining and establishing the right and obtaining the remedy. *Metcalf v. Gilmore*, 59 N. H., 417, 433-435; *Webster v. Hall*, 60 N. H., 7; *Clough v. Fellows*, 61 N. H., 183, 184.

As a real action is necessary for the recovery of land held by an undivided title, so a life estate and the remainder in fee may require one real action for the former and another for the latter. Although, in legal quality, the remainder is technically called less, in value it may be more than the life estate. The division of the entire title into two parts does not destroy the private right of resorting to the law for an unavoidable and indisputable settlement of the disputed title of either part, nor suspend the public duty of allowing the controversy to be conveniently brought into court for a prompt adjudication, which, being spread upon the public record, will conclusively show, without extrinsic and controvertible evidence, whether the plaintiff or the defendant is the owner of the property, described and claimed in the declaration.

When the fee simple of a tract of land is claimed by A and also by B, a real action, in which an explicit determination of their conflicting claims will be made and recorded, is the right of each party, because as a matter of common law, each is entitled to a convenient and adequate form of procedure; and, as a matter of fact, a real action is such a form. This right is not affected by a possibility, or a certainty, that a like result would be reached in trespass, or some other personal action. If A, instead of bringing a pertinent suit, conveys to C a life estate of apparently brief duration, and to D the remainder worth a hundred times as much as the short-lived freehold, and each grantee brings a real action against B, there is no more common-law authority to deprive the more valuable and enduring estate of its full and appropriate remedy, than to turn the claimant of the freehold out of court without trial, and compel him to resort to a personal action that may be indecisive and inadequate. For the freehold, a personal action may be less inadequate than for the remainder. B, by taking possession of the land, or going upon it, may give C an opportunity to assert his right of possession in an action of trespass; but if B, having purchased the life estate, is in rightful possession, claiming both estates, but exercising only the right of a life tenant, or if, claiming the remainder only, he sustains his

*See, *Brooks v. Howison*, ante, 243.

claim by no act, he is armed with a formidable objection against D's maintaining any personal action that has yet been invented. The vested estate of the remainder man, conveyable by his deed and applicable on execution in payment of his debts, but incapable of being adjudged to be anybody's property in any suit brought to ascertain who the owner is, would exhibit a serious defect, imposed by a misconception of the necessity and convenience which are the common law of procedure.

In an action of some form, the plaintiff is entitled to a judgment settling the disputed ownership of this remainder. If his heirs, devisees or grantees may obtain such a judgment in a writ of entry after his decease, he is not obliged to leave them a contest which he, for various cogent reasons, may wish to begin and end. By his death or by any delay, important evidence may be lost. He may be unable to carry on the farm. An estate in it for his life may be of trifling value, and insufficient for his support, and he may be prevented by the defendant's apparent title from making a disposition of the remainder necessary for his sustenance. With an abundant estate, he may be thrown upon the public charity by the defendant's recorded deed and false claim. The plaintiff's grantee of the remainder claimed by the defendant, would be the grantee of such a risk of litigation as prudent men do not knowingly purchase. A false claim, raising a cloud over the title of the plaintiff's farm that may reduce him to the relief of the pauper law, is a violation of his legal right, and a wrong that is not remediless. The question is, not whether his case is one of such hardship as to require a real action, but whether in any case of extreme necessity a real action lies for a remainder of land in fee expectant upon a life estate. Necessity and convenience create forms of action which may be employed in cases in which there are appropriate remedies.

The defendant may contend that he performed the condition of the deed as long as he was permitted by the plaintiff, who expelled him from the farm which the defendant has neither occupied nor entered since his expulsion. He may do nothing for which trespass would lie. His fault may be an omission to support the plaintiff, and a denial of that omission. The sole question may be, whether a certain kind of support, which the plaintiff refuses to receive from him, was suitable; and the circumstances may be such that no form of personal action heretofore introduced would insure such a decision of that question as would be an adjudication of the contested forfeiture of real estate. In an action of trespass, the defendant could not plead soil and freehold; he does not claim a freehold; and his plea might not answer the plaintiff's purpose; it might not inevitably result in a judgment expressly and specifically establishing the title of the remainder. *Metcalf v. Gilmore*, 61 N. H., 174, 187, 189; *Palmer v. Russell*, 43 N. H., 625; *Arnold v. Arnold*, 17 Pick., 4; *Dutton v. Woodman*, 9 Cush., 255, 281; *Gilbert v. Thompson*, 9 Cush., 848; *Johnson v. Morse*, 11 Allen, 540; *Morse v. Marshall*, 97 Mass., 519, 523; *White v. Chase*, 128 Mass., 158, 159; *Foye v. Patch*, 182 Mass., 105, 111; *Stapleton v. Dee*, 132 Mass., 279, 281.

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The defendant may think it for his interest to avoid such a judgment in the plaintiff's lifetime, and may be comparatively indifferent to a judgment or several judgments, for the damage the plaintiff may recover. The plaintiff has no assurance that in trespass the title would be either tried or determined without a trial, or that, if it were tried and determined in his favor, parol evidence would not be necessary to show what was tried and what was adjudicated; and a judgment needing parol evidence to prove the matter in issue and the point decided, falls far short of his certain and adequate remedy. His title, established by such a judgment, might not be a desirable investment. It might be clouded, doubtful and unsalable, as it is now and will continue to be, while it depends upon the view a jury or other tribunal may take of such evidence as can be found on the question whether the defendant has suitably supported the plaintiff. Some might fear that, on the question whether the forfeiture was put in issue and decided in an action of trespass, the opinion of the tribunal would be influenced by their view of the merit of the question of forfeiture. Many might decline to negotiate for a judgment title requiring parol evidence to sustain it against the defendant's recorded and apparently unclouded proprietorship of the remainder. A satisfactory remedy for the owner of the fee, the life estate or the remainder, is something more speedy, less harassing and less expensive than a suit at law and a subsequent suit in chancery for the removal of a cloud; and the burden of proving by extrinsic evidence that his title was settled in a personal action, *Morgan v. Burr*, 58 N. H., 470, however heavy or light the burden might be in chancery or in negotiations with purchasers, would be an unnecessary inconvenience.

"The manner of allegation in our courts may be said to have been first methodically formed and cultivated as a science in the reign of Edward I. From this time, the judges began systematically to prescribe and enforce certain rules of statement, of which some had been established at periods considerably more remote, and others apparently were then, from time to time, first introduced. None of them seem to have been originally of legislative enactment, or to have had any authority except usage or judicial regulation." Steph. Pl., 123.

Till the end of Edward IV., the possession was not recovered in an *ejectione firme*, but only damages. Hale, Hist. Com. Law, ch. 8, 201.

The action of ejectment is said "to have been invented in the reign of Ed. II., or in the early part of that of Ed. III." "In favor of this mode of remedy, the courts determined that the plaintiff was entitled not only to recover the damages claimed by the action, but should also, by way of collateral and additional relief, recover possession of the land itself. * * * In consequence of the establishment of this doctrine, which gave an ejectment an effect similar to that of a real or mixed action, claimants of land were led to have recourse to it in lieu of those inconvenient remedies. Regularly, indeed, none could resort to this form of suit but those who had sustained ouster from a term of years, such being the shape of the complaint; but it

was rendered much more extensive in its application, by the invention of a fictitious system of proceeding. * * * This fictitious method, being favored and protected by the courts, passed into regular practice; and the consequence is, that ejectment has long been the usual remedy for the specific recovery of real property." Steph. Pl., 12, 13.

"In ejectment, the whole method of proceeding is anomalous, and depends on fictions invented and upheld by the courts for the convenience of justice, in order to escape from the inconveniences which were found to attend the ancient forms of real and mixed actions." Steph. Pl., 32.

By less exercise of the inventive faculty, a judgment for land, enforceable by a writ of possession, could be rendered in trespass, or other personal action in which the title is settled; and the construction of a form of real action is no more difficult than the invention or the reconstruction of the personal action of ejectment.

The assize of novel disseisin is said to have been invented by Glanvil, *Chief Justice*, under Henry II., as a more convenient remedy for the recovery of lands when the owner had been recently disseised. The disseisin by election, used in this assize, was a mere fictitious suggestion, inserted in the process to give the assize jurisdiction of a trespass, by one of those astute contrivances which have not been uncommon in the history of English law. As a remedy for the recovery of a freehold, this assize at length went nearly, if not altogether, out of use, and was succeeded in practice by the writ of entry, which was in its turn supplanted by the action of ejectment in which no freehold was recovered. *Tuppan v. Tuppan*, 36 N. H., 98, 113, 114, 115, 116; 3 Bl. Com., 184.

The religious houses "Had the honor of inventing those fictitious adjudications of right which are since become the great assurance of the kingdom, under the name of common recoveries." 2 Bl. Com., 271.

The invention of the action of replevin is ascribed to Glanvil. Steph. Pl., 5th Am. ed., App. cx.

The objection to the invention of a form of action is based on the idea that the remedial forms of the common law come from some other source than human design; or that courts, continuously charged by that law with the duty of allowing convenient forms of remedy to be used, are empowered by the same law to permit the use of forms capable of prohibiting the performance of the duty by themselves and their successors; or, that the introduction of the whole existing remedial system of the common law, by progressive development through many ages, recent and remote, has been an unlawful usurpation of legislative power by judges, who would have defeated justice by permitting no common law procedure whatever, but whose illegal precedents are law. Until it is shown whose and what authorized edict, of ancient or modern date, annulled the common-law principle that requires the invention and use of common-law procedure, and commands common-law courts to allow convenient remedies, the duty imposed by that principle cannot lawfully be left unperformed. The test of the legality of a form of action, or other pleading, is not the time of its invention, but its utility as a method

of vindicating rights entitled to the best forms and methods that can be produced.

The plaintiff has a plain, adequate and complete remedy in a real action, in which there must be a decisive record of a manifestly conclusive decision of the question of forfeiture; and at the trial term he may have leave to amend his bill by filing a declaration at law. In abundant caution, one count can be drawn in the form of an ordinary writ of entry. A judgment upon such a count would leave the life estate open to no contention. A plea of non-tenure of the freehold might raise a question, the decision of which is not now called for. Another count, not alleging a disseisin of the freehold, may be in a plea of land, wherein the plaintiff demands of the defendant a tract of land lying in, etc., bounded, etc.; whereupon the plaintiff complains and says that within twenty years last past he was seised of the demanded premises in his demesne as of fee, and being so seised, he executed and delivered to the defendant a deed, etc., stating the substance of the deed; and the defendant accepted the same, and undertook to perform the condition thereof, but has failed to perform said condition, whereby he has forfeited the estate in remainder conveyed to him by said deed, and said estate has reverted in the plaintiff. But the defendant still claims said estate. Wherefore the plaintiff prays judgment establishing said forfeiture in his title in fee simple absolute, against the defendant, and a writ of possession, and other process, for executing said judgment, defending his rights, and giving him the relief to which he is by law entitled.

Another count may be in a plea of land, wherein the plaintiff demands against the defendant a certain estate of remainder in a described farm; and whereupon the plaintiff Nathan says: March 26, 1876, Nathan, owning said farm and retaining therein an estate for his own life, conveyed the remainder to John. by deed duly recorded, on condition that John suitably support Nathan during his life. John has not performed the condition of the deed; and by breach of the condition has forfeited said estate in remainder, but still claims said estate; and his claim and record of title are a cloud upon Nathan's title, and prevent his making either an absolute or a conditional sale of the farm, or of a remainder therein, or making thereof any convenient disposition upon which he can depend for the necessities of life, and for the support and care required by the infirmities of his old age, whereby he is exposed to destitution and disabled to secure the comfortable maintenance which his farm would enable him to obtain but for the defendant's false and wrongful claim, and the defendant's title, forfeited in fact for breach of the condition subsequent, but apparently valid on the record of deeds. Wherefore, the plaintiff prays that his deed to the defendant be adjudged void; that the forfeiture of the remainder thereby conveyed be established by a judgment; and that the judgment be enforced by a writ of possession. Another count in some form of personal action, can seek a judgment of forfeiture of the remainder of the personal property. However defective such a declaration may be, it can easily be made sufficient.

A judgment determining the title of the re-

mainder will be conclusive without service of any process for its enforcement. *Orrington v. Proctor*, 12 Cush., 433, 437; *Farwell v. Rogers*, 99 Mass., 33, 35.

It was held sixty-nine years ago that a judgment for such a remainder can be executed by a writ of possession during the life estate of a third person. *Penniman v. Hollis*, 13 Mass., 429, 432.

If the plaintiff holds both estates, merged in a fee, there will be no difficulty, practical or theoretical, in the service of a writ of possession. The defendant was to live on the farm while he performed the condition of his deed, *Wales v. Melton*, 1 Gray, 512; and if the condition is broken, the plaintiff may need a process of ouster. The judgment, and any necessary process for carrying it into effect, being directed to the ends of justice, cannot be obstructed by imaginary barriers of form. *Davis v. Bradford*, 58 N. H., 476, 480.

"Any person in possession of real property, claiming an estate of freehold therein, or an unexpired term of not less than ten years, may maintain a bill in equity against any person who makes a claim adverse to his estate. * * * ; and * * * the court shall determine the whole question of title." Laws of 1883, ch. 43. This Act was intended for the relief of persons whose possession of land should be held to be an obstacle in the way of their maintaining actions at law for the establishment of their disputed titles; 20 Am. Law Reg., 561; and not to give a bill in equity to those who have a plain, adequate and complete remedy at law. It is an application of the general unwritten rule, affirmed in Gen. Laws, ch. 209, § 1, that inadequacy of redress at law is a ground of chancery jurisdiction. The construction of the Act of 1883 is controlled by the presumption that the Legislature did not intend to authorize a chancery suit for the enforcement of a forfeiture, and the divesting of an estate in law for breach of condition subsequent, in a case in which the remedy at law is ample.

Case discharged.

Blodgett, J., did not sit; *Carpenter, J.*, dissented on the question of introducing a new form of action; the others concurred.

PARSONS

v.

HATCH *et al.*

A sale of goods is not rendered void by the want of a change of possession as against a creditor who has knowledge of the sale, and assents and becomes a party to it by deriving from it a valuable security.

(Carroll—Decided July 31, 1885.)

TROVER, for machinery and other property attached in a mill, by the plaintiff, a deputy sheriff, as the property of Beck & Mitchell, who had sold it to the defendants. The attaching creditors, who are the plaintiffs in interest, claim that there was not a sufficient change of possession. A verdict was ordered for the defendants.

N. H.

Messrs. Worcester & Gafney, for plaintiff.

Messrs. E. A. Hibbard and J. H. Hobbs, for defendants:

The possession should be such as might fairly lead those around, if they had any interest in the matter, to a reasonable belief that there has been a sale and change of property. *Clark v. Morse*, 10 N. H., 240.

In *Parker v. Pattie*, 4 N. H., 176, and in *Paul v. Crooker*, 8 N. H., 288, there was an undisputed secret trust.

In *French v. Hall*, 9 N. H., 137, the sale was sustained although the property when attached was in the possession of the vendor.

In *Page v. Carpenter*, 10 N. H., 80, the property was left in the sole possession of the vendors, and the opinion of the court was based on the ground that this gave the vendors "an opportunity to treat the property as their own and thereby obtain a false credit."

In *Shaw v. Thompson*, 43 N. H., 130, the horse remained in the vendor's possession at all times, excepting an hour or two, from the sale in March until the attachment in November.

In *Lang v. Stockwell*, 55 N. H., 561, and in *Plaisted v. Holmes*, 58 N. H., 293, there was a secret trust, as well as a concurrent possession.

In *Cutting v. Jackson*, 56 N. H., 253, the vendor retained exclusive possession and Smith, J., bases his opinion partly upon the ground that the trade "was not attended with such publicity as would naturally give notoriety to the sale."

In *Sumner v. Dalton*, 58 N. H., 295, the Judge must have found that the defendants took the mortgage without notice of the sale and in good faith, and were misled by a want of exclusive possession in the plaintiff.

In *Towns v. Rice*, 59 N. H., 413, the wagon, when attached, was in the possession of the vendor where it had been left by the vendee. But the explanation was held sufficient.

In *Flagg v. Pierce*, 58 N. H., 348, the vendor retained exclusive possession of the oxen until the defendant attached them.

In *Parker v. Marvell*, 60 N. H., 30, the vendor retained exclusive possession of the wagon, except that the vendee "used it several days" and returned it to the vendor, and there was also a secret trust.

In *Sanborn v. Putnam*, Grafton Co., March adjourned Term, 1882, the Judge ruled that there was no change of possession, and to this there was no exception.

In *Coolidge v. Melvin*, 42 N. H., 510, in which there was a trust and the vendor remained in possession, the opinion of Bellows, J., furnishes a key to all the grounds on which a sale may be held void as to creditors, but it contains nothing prejudicial to these defendants.

The defendants, if not entitled to hold the property as purchasers, would be entitled to hold it under the mortgage of Feb. 14, 1882, which although canceled at the time of the sale, would be revived and renewed if the sale should be declared void. *Ladd v. Wiggin*, 35 N. H., 421.

There is no necessity for any description of the debt or liability intended to be secured by mortgage. *Barker v. Barker*, Belknap Co., March adjourned Term, 1883.

Hammond v. Barker, 61 N. H., 53, is an ad-

ditional authority to the point that the mortgage, though canceled, will be restored if the purposes of justice require it.

Doe, Ch. J., delivered the opinion of the court:

The plaintiffs in interest had been employed by the vendors as workmen in the mill. Having knowledge of the sale, and being informed by the vendees that they took possession and would run the mill, they continued their work, upon the faith of the vendees' promise to be responsible for future wages and to pay wages previously earned, if there should be a profit. They had the benefit of all the notice any change of possession could have given and were so far parties to the sale as to have no cause to complain of any want of completeness in the change of possession. There was no need of a more thorough change to inform them of a contract of which they had all the knowledge they could desire and to which they assented by deriving from it a valuable security. *Coburn v. Pickering*, 3 N. H., 415, 426.

Judgment on the verdict.

Allen, J., did not sit; the others concurred.

SISKINS' PETITION.

Chapter 96, Laws 1888, requiring certain persons committed to jail to be discharged by the jailer at the expiration of a certain time, does not restrict the power of discharging them under Gen. Laws, ch. 268, § 9.

(Hillsborough—Decided July 31, 1888).

PETITION, presented to a Justice of the court in vacation, and adjourned into the law Term, for the discharge of the petitioner from jail for inability to pay a fine and costs imposed by the Police Court of Nashua. The petitioner was not entitled to a discharge under ch. 96, Laws 1888.

Doe, Ch. J.: Chapter 96, Laws 1888, limits certain terms of imprisonment, and does not restrict the power of discharge given by Gen. Laws, ch. 268, § 9.

Norris C. GAULT

v.

CONCORD R. R. CO.

1. A request, made by the payer of a disputed claim, that the payee will not disclose the settlement, is not competent evidence of the payer's admission of liability.
2. The effect of a bridge as an obstruction of a river, may be a subject for the testimony of experts, and their opinions are not excluded by the question being the issue to be decided.
3. An allusion of counsel to the importance of the case to his client, not found

to be unfair or prejudicial in fact; held, not to be of such a character as to shew a mistrial as a matter of law.

(Merrimack—Decided July 31, 1888.)

CASE for the unskillful and improper construction of the defendant's bridge at Hookset Falls, causing the river to overflow the plaintiff's land. *Verdict for the defendant.*

To show the defendant's admission of liability, the plaintiff called Hazelton, who testified, in the absence of the jury, to the settlement of a similar suit brought by him against the defendant, their payment of the damages he demanded, the continuance of his case after its settlement and his keeping the settlement secret at defendants' request. The court, finding the settlement was a compromise of a claim, the validity of which the defendant denied, and was not an attempt to conceal or suppress evidence, excluded the testimony, and the plaintiff excepted.

Subject to exception, three witnesses, called by the defendant and found by the court to be experts in hydraulic engineering, were allowed to testify that, in their opinion, the defendant's piers and abutments do not obstruct the stream so as to affect it at the plaintiff's land, a mile above the bridge; and that the piers are properly located and constructed. The jury were instructed that the propriety of location and construction was immaterial; that the plaintiff could recover if the bridge caused his land to be overflowed.

Subject to exception, the defendant's counsel, in his closing argument, said if the case is important to the plaintiff, as he had claimed in his opening statement, it is much more important to the defendant, on account of the forty-eight pieces of land on the river situated like the plaintiffs; the jury should not be diverted from the consideration of the facts on which alone a true verdict could be rendered, and should not be influenced by prejudice; many of the plaintiff's witnesses, owning lands on the river, were interested; if the plaintiff should prevail, their opportunity for bringing suits would come, and the plaintiff would be a witness for them.

Messrs. Copeland & Jones, for plaintiff:

The jury should have been allowed to hear the evidence and draw from it what inferences they might; inferences which, we believe, could but have been unfavorable to the defendant. Wharton, Leg. Max., 144.

The opinions of experts are not admissible when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study, in order to qualify a man to understand it. *Jones v. Tucker*, 41 N. H., 546, and cases cited; also, see, 1 Greenl. Ev., 14th ed., 580, and notes.

The question put to the experts being the very questions to be decided by the jury, was an improper one to be asked. 1 Greenl. Ev., 581, 14th ed., and notes 4 and b.

Improper argument of counsel is a good ground for granting a new trial. We would ask the court to consider the able and somewhat lengthy discussion of that subject in *Tucker v. Henniker*, 41 N. H., 317, 322; also, see, *Brown v. Scineford*, 44 Wis., 282; 28 Am. Rep., 582.

590, where Ryan, C. J., says: "And if counsel persevere in arguing upon impertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side which may be good ground for a new trial, or for a reversal in this court. Also, see, *State v. Foley*, 45 N. H., 466; *Zollar v. Janerin*, 47 N. H., 326.

Messrs. J. W. Fellows and Chase & Streeter, for the defendant.

Doe, Ch. J., delivered the opinion of the court:

The defendants attempted to conceal nothing but their settlement of Hazelton's suit. The salutary policy of encouraging the settlement of suits and other controversies, by protecting the payer against his act of payment being used as an admission of his liability, allows him to stipulate for the secrecy which the law preserves. The request that Hazelton would not divulge the compromise, was no more an admission than the compromise itself. The settlement of suits is not to be discouraged by a narrow application of a principle so essential to the interests of society. The rule, so administered as to require a resistance of every claim, the settlement of which would practically make other claims irresistible, would be a hardship, subjecting claimants, in many cases, to expensive litigation which they ought not to be thus compelled to undergo.

The testimony of the experts was admissible on the effect of the bridge as an obstruction of the river. Their opinions on that question were not excluded by its being the issue submitted to the jury. Opinions on questions of identity, handwriting, sanity, and the value of property, are not rejected on the ground that those are the questions to be decided.

Argumentative allusions to the importance of the case to either party, are apt to take an objectionable form and to be carried to an extent inconsistent with legal fairness of trial. In this case it does not appear that the subject was presented on either side upon a statement of any fact not proved, or in a manner suggesting the justice or benevolence of a verdict rendered on an illegal ground, or diverting the tribunal from a due consideration of the evidence. While the allusions on both sides were probably unnecessary, irrelevant and dangerous, the second does not seem to have been an excessive reply to the first, nor to have been of such a character as to make it a matter of law that there should be a new trial, the fact of unfairness and prejudice not being found.

Judgment on the verdict.

Smith and Bingham, JJ., did not sit; the others concurred.

NORTH HAVERHILL WATER CO.

2.

Parker METCALF.

When a claimant of an aqueduct title uses the water without an actual promise, express or implied, to pay for the use, *assumpsit* on the fiction of a prom-

N. H.

ise implied by law, is not an appropriate form of action for settling the disputed title.

(Grafton——Decided July 31, 1885.)

ASSUMPSIT for water furnished to defendant by plaintiffs. *Case discharged.*

The case was sent to a referee who found for plaintiffs, subject to the opinion of the court, on the following statement of facts:

The plaintiffs, Paul A. Meader, Martin S. Meader, Thomas B. Jackson, Jefferson Pennock and Nathan P. Rideout, constituted an association or partnership, at the date of the writ for supplying water to people living in the Village of North Haverhill. The water was conveyed in an aqueduct from the Glynn spring, so called, about three fourths of a mile to the Village of North Haverhill. The plaintiffs were not incorporated but owned the spring and aqueduct as tenants in common, each owning an undivided fifth part. Defendant is the owner of a hotel in North Haverhill called the Burbeck stand. He purchased of the plaintiff, Thomas B. Jackson, on November 8, 1872. Jackson bought of E. L. Burbeck, on November 13, 1871. At that time Burbeck was a member of the North Haverhill Water Co., and owned an undivided fifth part of the Glynn spring and the aqueduct leading therefrom. The partners held their interests by recorded deeds. On January 31, 1872, E. L. Burbeck sold to the plaintiff, Jackson, "all his right, title and interest in and to a certain spring of water situated on what is called the Glynn lot, together with all pipe, pipes and fixtures belonging to said aqueduct; the interest being an undivided fifth part." The consideration named in the deed is \$250.

At the hearing, the defendant asked a witness the following questions: "Was there an understanding between the members of the partnership as to the ownership of the water—as to who owned it—as to who owned the water that ran to such proprietor's premises?" The question was objected to by plaintiffs and ruled out on the ground that the deeds were the best evidence. The point was saved to defendant.

It was understood between the partners that each should take what water he required at his premises, and no account of it should be kept; that the water of one should be offset against the water of another, and the accounts of the partners for water used by them should be evened up in that way. The balance of the water was sold to people of North Haverhill, who wished to purchase.

The deed from Jackson to defendant, says nothing about the water or aqueduct. It conveys the Burbeck stand "with all the privileges and appurtenances." At that time it was not a hotel. The water from the spring was running to the premises. Jackson called the attention of defendant to the water, and the great convenience of it. Nothing was said about the right to use the water without paying the Company for it. Both parties acted in good faith. Defendant thought he bought the right to use the water without paying the Company for it; Jackson thought he sold the fixtures and the right to use the water by paying the Company the usual price.

Since he sold to the defendant, Jackson has accounted to the Company for the water taken by defendant and may be regarded as the plaintiff in interest. Defendant never acquired any interest in the water or aqueduct, unless he did so by his deed of the Burbeck stand. At the date of the deed, the land where the spring was did not belong to the plaintiff Jackson.

Mr. Geo. W. Chapman, for plaintiff:

The defendant procured his own deed and accepted it and is bound by it and bound to be content with what it expressly and by implication conveys to him, pursuant to an open, fair and honest contract. This position is clearly settled and established in the cases of *Spaulding v. Abbot*, 55 N. H., 423; *Coolidge v. Hager*, 43 Vt., 9, and other cases referred to in these cases. These cases were considered by the referee, and we say his conclusion in this case was correct by express authority. His position is further directly sustained by *Philbrick v. Ewing*, 97 Mass., 133.

It is well settled that a conduit or pipe to conduct water to a house, will pass as appurtenant to a grant of a house. *Brown v. Nichols*, Moore, 682; *Nicholas v. Chamberlain*, Cro. Jac., 121.

As to the question asked a witness by defendant, the ruling was correct. See, *Purbush v. Goodwin*, 25 N. H., 451-2; *Peaslee v. Gee*, 19 N. H., 273; *Sanborn v. Clough*, 40 N. H., 826.

Mr. G. F. Putnam, for defendant:

Where a grantor conveys premises in this way without reserving the water, it passes with the conveyance to the grantee, if grantor owns it. *New Ipswich, etc., Factory v. Batchelder*, 3 N. H., 190; *Dunklee v. Wilton R. R. Co.*, 24 N. H., 495; *Gibson v. Brockway*, 8 N. H., 469; *Spaulding v. Abbot*, 55 N. H., 424; *Seavey v. Jones*, 43 N. H., 441; *Nicholas v. Chamberlain*, Cro. Jac., 121; *Allen v. Scott*, 21 Pick., 29; *Grant v. Chase*, 17 Mass., 447; *Vt. Cent. R. R. Co. v. Hills*, 23 Vt., 681; *Stevenson v. Wiggin*, 56 N. H., 311; *Coolidge v. Hager*, 43 Vt., 9.

When an easement has become appurtenant to a dominant estate, a conveyance of that estate carries with it the easement belonging to it, whether mentioned in the deed or not, although not necessary to the enjoyment of the estate by the grantee. And an easement may be acquired by express grant, implied grant, and by prescription. *Spaulding v. Abbot (supra)*.

Upon principle and authority it is considered that the deed from the defendant and wife to J., standing alone, would have conveyed the water as it was then running, with a right to the spring and aqueduct sufficient for its continuance as an appurtenance to the house and land. *Coolidge v. Hager (supra)*, 15.

Plaintiff was the owner in the spring to a much larger extent than was necessary to keep the water running as it then was, and being the owner, he made a conveyance without any reservation, and thereby conveyed to the defendant the water as it was then running, with a right to the spring and aqueduct, sufficient for its continuance. This is perfectly consistent with all the decided cases from *Nicholas v. Chamberlain (supra)*, to the present time; while any course of reasoning which leads to a different result, to a certain extent overturns all the decided cases from that time down. See,

Vt. Cent. R. R. Co. v. Hills, 23 Vt., 684; *Owen v. Field*, 102 Mass., 90, in relation to authorities before cited; and *St. 80, Stanwood v. Kimball*, 13 Met., 533; *Gray*, 370; *Pettingill v. Oliver v. Dickinson*, 100 Me., 14.

The right to take water from a spring or well is held to be an interest in land. *Goodrich v. Burbank*, 12 Allen, 461; *Hollenbeck v. McDonald*, 112 Mass., 247; *Hankey v. Clark*, 110 Mass., 265.

And a right to an aqueduct may be so created as to exist independently of any particular parcel of land owned by the grantee thereof. *Goodrich v. Burbank (supra)*.

It is a familiar principle that a deed shall operate so far as it legally can. *Church v. Meeker*, 34 Conn., 427.

Another familiar principle, always recognized in the construction of deeds, is, that if a grant will not convey all that is described and intended to convey, it shall be construed to convey all that was in the power of the grantor to convey. *Lau v. Hempstead*, 10 Conn., 27.

As the court had the authority to protect the rights of the plaintiff in interest, when the writ is in the name of a nominal plaintiff, so it may protect the defendant against a suit by one person in the name of another, where the plaintiff on the record has no interest and the real plaintiff has no right. *Berry v. Gillis*, 17 N. H., 17; *Phelps v. Mahurin*, 6 N. H., 536.

And where a party negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, he cannot afterwards dispute that fact in an action against the person he has himself assisted in deceiving. *Bigelow, Estop.*, 500, 501.

Where a man has been silent when, in conscience, he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent. *Id.*

Where a person made a conveyance purporting to convey real estate, but the conveyance being so imperfectly drawn it did not convey it, the grantor was held to be estopped to set up title to the premises, he having received pay for them from the grantee. *Brown v. Manter*, 21 N. H., 529; *Thompson v. Banks*, 43 N. H., 540.

Any rights in the land which a grantor, with full covenants of warranty, may acquire after the execution of his deeds, will inure to his grantee by way of estoppel. *Jewell v. Porter*, 31 N. H., 34; *Kimball v. Blaisdell*, 5 N. H., 533; *Kimball v. Schoff*, 40 N. H., 190; *Morrison v. Underwood*, 20 N. H., 372; *Hayes v. Tabor*, 41 N. H., 529.

A party will be estopped from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence, provided such denial will operate to the injury of the latter. *Davis v. Sanders*, 11 N. H., 259; *Gurnsey v. Edwards*, 26 N. H., 224.

Where one, by his words or conduct, causes another to believe in the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as actually existing at the same time. *Davis v. Handy*, 37 N. H., 65; *Simons v. Steele*, 86 N. H., 73;

Odin v. Got, 43 N. H., 288; *N. H.*, 298; *C. Wyman v. F. Little*, 5 N. H., 91; *Mann v. Stevens v. Denn*, *Bank v. Shailor*, 20 Conn., 568; *Wilson*, 22 Conn., 184.

A party is estopped to set up his title, where he has permitted it to be sold under such circumstances that concealment of his title would be a fraud on the grantee, if he was permitted to set it up afterwards. *Parker v. Brown*, 15 N. H., 184.

A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action by or against the person whom he has himself assisted in deceiving. *Stevens v. Dennett* (*supra*).

Indeed, the doctrine seems to be well established by authority that the conduct and admissions of a party operate against him in the nature of an estoppel, wherever in good conscience and honest dealing he ought not to be permitted to gainsay them. *Stevens v. Dennett* (*supra*).

The test of the application of the doctrine of estoppel is not ownership of the property, but rather the acts, conduct, representations and admissions of one party, influencing and changing the acts and position of the other. *Barney v. Keniston*, 58 N. H., 188.

A party in possession of a mill upon a canal, claiming title under a deed which was made to him under an order of the court, and bound to repair the canal, cannot excuse himself from the liability to repair, upon the ground that the order was defective and the deed therefor passed no title. *Woburn v. Henshaw*, 101 Mass., 193.

Acceptance of a devise estops the devisee to set up a title in opposition to the will, at law as well as in equity. *Smith v. Smith*, 14 Gray, 532; see, *Coe v. Talcott*, 5 Day, 92; *Smith v. Moodus Water Power Co.*, 35 Conn., 392.

Whatever the motive may be, if one so acts or speaks that the natural consequence of his words and conduct will be to influence another to change his condition, he is legally chargeable with an intent, a willful design, to induce the other to believe him and to act upon that belief, if such proves to be the actual result. *Preston v. Mann*, 125 Conn., 123.

If a party negligently and silently stands by and allows another to contract, on the faith and understanding of a fact which he can contradict, he cannot afterwards contradict that fact as against that person who may be injured thereby. *Roe v. Jerome*, 18 Conn., 158; *Taylor v. Ely*, 25 Conn., 258; *Mitchell v. Levatt*, 30 Conn., 590.

Where the defendant knew that the plaintiff proposed purchasing a piece of land adjoining the defendant's land, and explained to the plaintiff where his, defendant's, line was, and the plaintiff made the purchase relying upon the defendant's representations, it was held that the defendant was estopped from disputing the title up to that line. *Spiller v. Scribner*, 36

Vt., 247; *Halloran v. Whitcomb*, 43 Vt., 312.

A mere failure to give notice of a right, where another, without knowledge of the facts, is investing his money and where it may be fairly concluded that he would not do so if informed of the facts, will generally preclude a subsequent setting up of the claim thus concealed. *Fletcher v. Holmes*, 25 Ind., 458-470.

Messrs. Bingham, Mitchells & Batchelor, also for defendant.

Whether a right of way or other easement is embraced in a deed, is always a question of construction of the deed, having reference to its terms and the practical incidents belonging to the grantor of the land at the time of the conveyance. 2 Waite, Act. & Def., 688.

A grant of a thing will include whatever the grantor had power to convey, which is reasonably necessary to the enjoyment of the thing granted. *Riddle v. Littleton*, 58 N. H., 509; *Dunklee v. R. R. Co.*, 24 N. H., 489; *Winchester v. Hees*, 35 N. H., 48; *Johnson v. Jordan*, 2 Met., 240; Washb. Eas., 8d ed., 45.

As the aqueduct was built to and by the dwellings of the five original owners, a branch was run from the main aqueduct to the house of each one, through which branch have since run two gauged streams, which it was understood and agreed each owner should be entitled to by virtue of his membership of the association. This was a division and partition of the water rights which they owned in common, and with the two gauged streams running to each, the others had no concern and could not interfere, and over them they had no control or ownership. *McLellan v. Jenness*, 5 Am. Rep., 270; *S. C.*, 43 Vt., 183.

In *L. & N. R. R. Co. v. Koelle*, 104 Ill., 455, it was held that a right of way to three persons for a switch, conveyed by one deed, for one consideration, conveyed to each grantee an easement for the benefit of his respective land; and that, in a deed of the land of each, the right of way passed as an appurtenant. The switch, or way, was built jointly or at the joint expense of the grantees.

The case of *Furmer v. Ukiah Water Co.*, 56 Cal., 11, is also directly in point. See, also, *Cave v. Crafts*, 53 Cal., 135; *Legg v. Horn*, 45 Conn., 409.

If the right to the water did not pass to the defendant, it must be because it was an easement in gross and attached to the person, and not annexed to an estate. But the law will never presume an easement in gross when it can fairly be construed to be appurtenant to some other estate. Washb. Eas., 40; 2 Wait's, Act. & Def., 665; *Peck v. Conway*, 119 Mass., 546; *Bowen v. Conner*, 6 Cush., 134; *Karmulder v. Krotz*, 18 Iowa, 352; *Winthrop v. Fairbanks*, 41 Me., 309; *Whitaker v. Brown*, 46 Pa. St., 197; *Dennis v. Wilson*, 107 Mass., 591.

Jackson's pretended deed of this water right is insufficient to pass it, as against anyone except Burbeck and his heirs. It has but one witness, while two or more are necessary, as it is a conveyance of an interest in real estate. Gen. Laws, §§ 8, 4, ch. 135; *Stone v. Ashley*, 18 N. H., 38; *Brown v. Eastman*, 16 N. H., 588; *Cram v. Ingalls*, 18 N. H., 613; *Barker v. Bean*, 25 N. H., 412; *Gage v. Gage*, 30 N. H., 420.

If plaintiffs did not acquiesce in defendant's claim to the water, they should have stopped

it. They had control and could stop it; and so long as they permitted the water to run in the defendant's pipes, he had a clear right to use it, and from its use the law will raise no implied promise to pay rent. *Aqueduct Co. v. Page*, 52 N. H., 472.

Doe, Ch. J., delivered the opinion of the court:

No promise, express or implied, was in fact made by the defendant to pay for his use of the water. The water right claimed by him is also claimed by the plaintiff in interest; and the suit is brought to settle the disputed aque-

duct title. The fiction of title, by law contrary to the fact made, is used, for the sake of the law, to enforce the performance of a legal duty. *See* 58 N. H., 627; *Kelley v. ...*, 114, 277, 187.

The law does not leave any title unsettled for want of an adequate procedure, but no fiction is made for the convenience of the plaintiff. *sumpsit* does not lie. *See* 1, 451.

Case discharged.

Blodgett, J., did not concur.

CASES

DETERMINED IN THE

Supreme Judicial Court of Maine,

FROM SEPTEMBER 1, 1885.

CHIEF JUSTICE,

HON. JOHN A. PETERS.

ASSOCIATE JUSTICES,

HON. CHARLES W. WALTON,

HON. CHARLES DANFORTH,

HON. WILLIAM WIRT VIRGIN,

HON. THOMAS H. HASKELL.

HON. ARTEMAS LIBBEY,

HON. LUCILIUS A. EMERY,

HON. ENOCH FOSTER,

JOSEPH W. SPAULDING, Esq., Reporter.

Herb BLAKE

R. S. USSELL.

In an action to recover a statutory penalty, founded on and described in two separate and distinct statutes, the declaration will not be adjudged bad, on demurrer, because of the allegations "by force of the statutes" and "contrary to the form of the statutes."

(Decided September 19, 1885.)

ON exceptions to the ruling of the court in overruling a demurrer to a declaration in an action of debt brought under the Statute of 1881, ch. 79, § 4, which provides: "If any officer of a corporation charged by law with the duty of making and causing to be published any statement in regard to such corporation shall neglect so to do, such officer, in addition to the penalties already provided, shall forfeit the sum of five hundred dollars, to be recovered by action of debt, or action on the case, to the use of the person suing therefor." The defendant was treasurer of the Dexter Woolen Mills and failed to publish the statements required of him by R. S., 1871, ch. 48, § 8.

Mr. Morrill Sprague, for the plaintiff.

Mr. Josiah Crosby, for defendant:

R. S., ch. 181, § 12, relieves indictments from difficulties arising from such technicalities; omission of the words "against the peace," "contrary to the form of the statute" and of

some other allegations required by the common law, is not now necessarily fatal in them. But in the language of Judge Cutting in *Penley v. Whitney*, 48 Me., 351:

"Penal statutes still retain that one attribute of legal strictness" viz.: that the offense must be charged "against the form of the statute," citing *Lee v. Clarke*, 2 East, 338, 340.

If the offense is created by one statute, to charge it against the form of the statutes in the plural is fatal. This distinction has been twice recognized by this court in *Butman's Case*, 8 Me., 113—Indictment; *Morrison v. Witham*, 10 Me., 421—Penalty. It is so stated in Chitty's Pleadings, Vol. 1; Hawkins' Pleas of Crown, Indictment, § 117.

Hawkins says the difficulty may be avoided by using the phrase *Contra formam statuti* with an apostrophe after the last so that the word may stand either for *statuti* or *statutorum*.

This rule is given also without qualification. Oliver's Precedents, p. 450, 1st ed., under title "debt."

Oliver's Precedents has governed the practice in Maine for the last 50 years.

This distinction has been recognized also as the rule of the common law by the British Parliament. In 3 Jacob's Fisher's Digest, pp. 31, 85, it is stated:

"By 14 and 15 Vic., ch. 100, § 24, no indictment for any offense shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute' instead of 'against the form of the statutes' or *vice versa*."

Both the laws creating the offense, R. S., ch. 48, sec. 8, and the law giving this action *qui tam* to the plaintiff, Stat., 1871, sec. 4, are unconstitutional. Those enactments are both in conflict with the Bill of Rights of Maine, sec. 9.

"Sec. 9. Sanguinary laws shall not be passed; all penalties and punishments shall be proportioned to the offense; excessive bail shall not be required nor excessive fines imposed nor cruel nor unusual punishments inflicted."

NOTE.—The statute giving an action brought against a telegraph company, for neglect to transmit a message is not unconstitutional, because it applies to interstate messages. *Western U. Tel. Co. v. Ferris*, (Ind.) 1 West. R., 211.

The action does not abate on the death of the plaintiff; it is not an action of tort for personal injuries. *Western U. Tel. Co. v. Scircle* (Ind.), 1 West. R., 214.

Pleadings in action, see *Western U. Tel. Co. v. Walker*, Id., 210, 211, 214.

Virgin, J., delivered the opinion of the court:

The plaintiff seeks to recover a forfeiture provided by Statute 1881, ch. 79, sec. 4. His cause of action is founded on and described in the provisions of two separate and distinct statutes. The offense consists in neglecting certain statutory requirements. The requirements are enumerated and defined in R. S. of 1871, ch. 48, sec. 8; while the supplement of the offense, viz.: the neglect, together with the forfeiture and the remedy, is prescribed in Stat., 1881, ch. 79, sec. 4.

Neither of the statutes alone creates the offense. The allegations in the declaration "by force of the statutes," etc., and "contrary to the form of the statutes," etc., are literally and technically correct.

As the provisions of R. S., ch. 48, sec. 8, have long since been repealed, and none of the penalties therein prescribed were sought to be recovered in this action, we do not consider it our duty to examine the constitutionality of its provisions.

Exceptions overruled.

Peters, Ch. J., Danforth, Emery, Foster and Haskell, JJ., concurred.

Nellie BIRMINGHAM *et al.*

v.

Albert A. LESAN.

1. Where a devisee takes real estate at the expiration of a life estate upon condition that he maintains the life tenant and provides for her decently, from the proceeds of the real estate or otherwise, and for that purpose he is authorized to use the real estate by farming the same, and in case of his failure to provide for the life tenant, she was empowered to call on the selectmen to provide for her, in her own house, he takes the estate upon condition subsequent.
2. When he has failed to perform the condition subsequent, the heirs of the deviser have a right to create a forfeiture by an entry therefor, although the will contained no clause to that effect.
3. Such a forfeiture cannot be enforced by proceedings in equity.
4. When one holds property upon condition subsequent, it is as if no condition existed, until entry for breach of the condition.
5. A bill in equity cannot be amended by engrafting upon it anything which arose after the commencement of the suit. That must be presented by supplemental bill.
6. When the cause of action did not exist at the time the suit was commenced, the suit cannot be maintained by a supplemental bill, setting out the cause of action after it had arisen.

(Decided October 15, 1885.)

BILL IN EQUITY. *Dismissed.*

The plaintiffs claim title as heirs of James McDermott, and the defendant claims under the

will of the same McDermott through Mehan. The following are the essential provisions of the will:

"Article 1. I will that after the death of my just debts, I give and bequeath unto Catherine McDermott, all the personal property of every name and description, that I own and possess at the time of my death, said Catherine to use a certain portion of the same for putting a headstone at my grave and defraying my funeral expenses.

Article 2. I give and devise to my wife, Catherine, all the real estate I may die seized of, to hold the same during her life for her maintenance, but not to sell the same, she said real estate to go to John Mehan at her death, if any remains, provided she said Mehan maintains and provides for said Catherine decently from the proceeds of the farm or otherwise; and providing the said Mehan fails to provide for the said Catherine, then the said Catherine is empowered to call on the selectmen to provide for her in her own house.

Article 3. I give and devise to my wife, Catherine, one half of the lower part of my dwelling-house, west side during her natural life, the other half of said house to be used by John Mehan, if he wishes, but not to sub-let.

Article 4. I will that the said Mehan be allowed to use the place for the purpose of maintaining himself and my wife by farming the same; the said Mehan to put a headstone at said Catherine's grave, and Mehan fails to do so. I will that the selectmen do so from the proceeds of the estate."

Barker, Vose & Barker, for the plaintiffs.

Chas. P. Stetson, for the defendant.

Virgin, J., delivered the opinion of the court:

It has already been adjudged that the testator's widow took a life estate in the farm of which he died seized. 76 Me., 482.

And now, upon careful consideration of all the terms of the will, we have concluded that the devise to Mehan was upon condition. It is very plain that the testator did not intend that he should take an absolute fee by implication in the remainder, with a charge upon him personally to support the life tenant; nor a life estate in the remainder with a life charge upon the estate devised (*McLellan v. Turner*, 15 Me., 486, and cases there cited; 3 Greenl. Cruise, 268-4, and cases in note; *Taft v. Morse*, 4 Met., 523; *Gardner v. Gardner*, 8 Mason, 178, 207): "for only what remains at her death" is devised to him.

Was it a condition precedent or subsequent? As there are no technical words which distinguish them (4 Kent., 125), whether it be one or the other, depends upon whether the testator intended that a compliance with the requisition annexed to the estate devised should be a condition of its acquisition, or merely of its retention. 2 *Jaffa*, Wills (R. & T. ed.), 509.

It cannot be deemed a condition precedent, because Mehan is authorized by the express terms of the will to provide for the life tenant "from the proceeds of the farm." And while "proceeds" may mean "produce" or "income," it also signifies "money or other thing of value obtained from the sale of the

t through. Dic.; and the testator must have intended to use it in the latter sense, inasmuch as the estate was to go to Mehan, at the widow's death, "if any remained," and he could not sell her of it for her support, unless he had a lease, and a title on condition subsequent. He could not devise to him, together with the next of kin, a life interest, with a power of sale, and a condition subsequent, in case he failed "to provide for" her, then she "is empowered to elect on the selectmen," etc., cannot be considered a conditional limitation, as in *Stearns v. Godfrey*, 16 Me., 158; and *Brattle Sq. Church v. Grant*, 3 Gray, 148; because the limitation over is too indefinite, no third person being named. 4 Kent, 127.

Considering the whole will together we are of opinion that the devise to Mehan was upon condition subsequent. *Stark v. Smiley*, 25 Me., 201; *Marwick v. Andrews*, 25 Me., 525; *Thomas v. Record*, 47 Me., 500.

Mehan having failed to perform the condition, the heirs of the deviser had the right to create a forfeiture by an entry therefor, although there was no clause in the will to that purport. *Thomas v. Record* (*supra*); 4 Kent, 123. But no such entry was made before this suit was commenced. And while equity will, under well recognized circumstances, relieve a party from a forfeiture, a court of equity does not lend its aid to divest an estate for a breach of a condition subsequent and thereby enforce a forfeiture. 4 Kent, 131; *Sto. Eq.*, sec. 1819; *Smith v. Jewett*, 40 N. H., 584.

Moreover, the title passed to Mehan subject only to be defeated on breach of the condition; and until an entry for the breach, it remained in him as if no condition ever existed. The complainants, therefore, at the commencement of this suit, placed themselves in the attitude of praying for the removal of a cloud from a title which they did not hold, by the cancellation of a mortgage upon a farm of which they had no possession. *West v. Schnebly*, 54 Ill., 523; *Sto. Eq.*, sec. 700, note 4; *Pom. Eq.*, sec. 1899, note 4.

But since the filing of their bill, viz.: on June 1, 1885, the plaintiffs made an entry for breach of the condition and they have amended their bill accordingly. In the absence of any statutory provision or general rule of court authorizing it, an original bill cannot be amended by incorporating therein anything which arose subsequent to the commencement of the suit; it can only be done by a supplemental bill. *Stafford v. Howlett*, 1 Paige, 200; *Campbell v. Borne*, 5 Paige, 34; *Downer v. Wilson*, 33 Vt., 1; moreover generally, matters which have occurred since the filing of the original bill and which are material to perfect the plaintiff's case, they be introduced into the record by supplemental bill. *Greenleaf v. Queen*, 1 Pet., (26 U.S.), 148; *Candler v. Pettit*, 1 Paige, 168; *Pinch v. Anthony*, 10 Allen, 470. But in the language of the court of the last named case: "We know of no case that goes so far as to authorize a party who has no cause of action at the time of filing his original bill, to file a supplemental bill, in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill."

Neither does Chan. Rule XXXIX. authorize this new fact of entry to be brought into the record by way of amendment, inasmuch as the

"circumstances of the case are not such as to require a supplemental bill."

Nor does the last clause of R. S., ch. 77, § 11, allow an event which occurred since the filing of the bill to be engrafted therein by amendment or reforming the bill. A statute intended to make such a radical change in the practice should be express and plain in its terms.

Our opinion therefore is that a new bill is essential. And now that the complainants are in possession they cannot try the title by writ of entry, but may maintain a proper bill to remove the cloud from it (*Davis v. Boston*, 129 Mass., 379), especially since they have revested the title in themselves by an entry for breach on the part of Mehan.

Bill dismissed, with costs.

Peters, Ch. J., Danforth, Foster and Haskell, JJ., concurred.

Emery, J., concurred in the result, but thought the proper remedy was under R. S., ch. 104, §§ 47, 48.

Inhabitants of SEARSMONT

v.

Inhabitants of THORNDIKE.

1. The departure of a minor daughter from home to obtain temporary employment, taking with her only such articles as she required for immediate use, does not constitute an emancipation of her by her father, even though she receive the wages for her labor for her own use.
2. When the home of a person is once established in a town it is not interrupted by temporary absences, leaving behind articles of apparel and bedding, expressing an intention to return, and in fact returning to visit, and to repair wardrobe, or on account of sickness. A home thus established and continued for five successive years will give a pauper settlement under the laws of this State.

(Waldo—Decided November 16, 1885.)

ACTION for recovery of expense of support of pauper. *Defendant defaulted.*

The facts are stated in the opinion.

Messrs. George E. Johnson and Brown & Carter, for plaintiffs:

Where a father relinquished all his parental rights and authority over his daughter who left the State and from that time treated her the same as though she was of full age, it makes a clear case of emancipation. *West Gardiner v. Manchester*, 72 Me., 509; *Lowell v. Newport*, 66 Me., 78.

The law does not allow any of the years of the pauper's residence while under age to be tacked to those after age, to make up the requisite number. *North Yarmouth v. Portland*, 73 Me., 110-111; *Brooksville v. Bucksport*, 73 Me., 111.

To establish a residence within the meaning of the statute, there must be personal presence, with the design, and the right, on the part of

the pauper, to make her father's house her home, coupled with his consent. *Corinth v. Lincoln*, 34 Me., 314; *Warren v. Thomaston*, 43 Me., 418; *Fayette v. Livermore*, 62 Me., 229; *North Yarmouth v. West Gardiner*, 58 Me., 211, 212, 215.

In order to constitute a settlement on the town by a residence of five years together, it must appear that she had her home at her father's house. *Corinth v. Lincoln* (*supra*).

Messrs. Wm. H. Fogler and R. F. Dunton, for defendants:

Danforth, J., delivered the opinion of the court:

An action to recover for supplies furnished a pauper, and the only question raised is whether the pauper had a settlement in the defendant Town. The case is before the court upon a report.

The witnesses are the father and step-mother of the pauper, and though there are some verbal differences in their statements of the facts, there is no real conflict in their testimony.

It appears that the father had lived in the Town of Waldo for fifty years previous to 1869, when he removed to the defendant Town and remained there until 1879, and then moved with his family into the plaintiff Town where he has ever since remained.

The daughter, who is the pauper, lived with her father in Waldo until 1867, when she was eighteen years old. She then went to Massachusetts for employment to earn something for herself, saying she should return in two or three years, leaving behind her some articles of apparel and bedding, being all the goods she had except what she took with her for use while she was absent. She did return, but not until after her majority. So far as appears, after she left and while she was a minor, the father received none of her earnings, nor did he contribute anything to her support, but it does appear that he provided her with clothing to take with her.

Under these circumstances, it is claimed that the daughter was emancipated and no longer followed or had her home with her father. But we fail to see any evidence which tends to such an inference. That a daughter should leave home for temporary employment, even though she might receive the proceeds for her own use, is not so uncommon an occurrence as to authorize an inference of any change in the parental and filial ties. It is the father alone who can emancipate the child. Here is no relinquishment on his part of the right of control over or repudiation of his parental obligations to the child; simply an assent to a particular course of life on her part for the time being; nothing inconsistent with his right to recall her or claim her earnings at any time in the future. Hence, there is an entire failure to sustain an emancipation as defined by the authorities. *Louell v. Newport*, 66 Me., 89-90, and cases there cited.

Hence, though absent when the father moved to Thorndike, the daughter's home, she being a minor, went with him. She then had a home derived from her father, established in the defendant Town, and that was her home when she became of age in October, 1870, and to that home she returned in 1872 or 1873. Her ab-

sence while a minor, for the purpose shown by the evidence, be that absence longer or shorter, would not interrupt that home. *Parsonsfield v. Kennebunkport*, 4 Me., 47.

As the father did not gain a settlement in Thorndike before the pauper arrived at her majority, it becomes necessary to ascertain whether she gained one there herself by a five years' residence after she became of age. As, at the beginning of that period or at the time when she became of age, she had an established home in Thorndike, the only remaining question is whether that home continued for the required time. Having been once fixed, if its continuance is not to be presumed until an interruption is shown, as held in *Brauer v. Linnacus*, 36 Me., 480, and *Chicopee v. Whately*, 6 Allen, 508, it would at least require less proof than it would to show both its establishment and continuance.

The only evidence relied upon to show the interruption of this home, is the several absences of the pauper. These, in the absence of any explanation, would hardly lead to any inference either way. It is clear enough that continued presence is not necessary to retain a home or residence. It is also quite obvious that it is, in most cases, difficult to find instances of absence without some connecting circumstances explanatory of its purpose. In *North Yarmouth v. West Gardiner*, 58 Me., 207, and *Ripley v. Hebron*, 60 Me., 398, it is held that "When a pauper leaves a town where he has resided, having no family, leaving no house or place therein to which he has any right to return, and having no effects save the clothes he wears, the law does not presume that he intends a temporary absence, and has a continuing purpose to retain a home in such town and return to it at some future period." The effect of these decisions is, at most, that when an absence is proved without the presence of certain circumstances understood to be indicative of an intention to return and to retain the home left for a time, the law will not presume that intention, but will leave it as a question of fact, with the burden upon the party relying upon it.

In the case at bar the absences are admitted, but the plaintiff proves all or nearly all the circumstances which are named and, by implication if not expressly, assumed as proof of a temporary absence and an intention to return. The case shows clearly that each time the pauper left it was for a purpose in its nature temporary; that she left behind wearing apparel and bedding, all the property she had except what was necessary for her immediate use; that she expressed an intention to and did, in fact, return, first, perhaps in part for a visit, as her purpose was not fully performed, but also as a home for the repairing of her wardrobe; afterwards, on account of sickness and, finally, and before the removal of her father from Thorndike, when sickness had become too severe for labor, permanently. In all this time there is no pretense that she had established any other home, and there is an entire want of proof of any abandonment of that she had with her father.

It is, however, claimed that her father's consent was wanting and without that, as she had no home in Thorndike except at her father's house, she could not gain a settlement in Thorn-

dike, and much stress is laid upon the remark he made to her when she left the last time, "That he should buy a farm in a year or two, and when he did she could come home." It is claimed that this was a virtual denial of a home to the daughter until the farm was bought. We do not understand such to be the proper interpretation of the language used. The daughter was then in poor health. She had then, on that account, been at home nearly one year. The father had received and, so far as appears, treated her as a daughter, providing for her as her necessities required and making his home hers. He did not say that when the farm was bought he would, as a matter of the future, give her a home, but, apparently lamenting the necessity in her then condition, of going away at all, he, recognizing that she then had a home with him, says, to that home you may then come, meaning, evidently, to remain permanently. Such we might expect from the ordinary feelings of a father, and such we deem the proper and fair construction of the language and the most in accordance with his subsequent conduct. She did come home before the purchase of the farm, was received and cared for without objection and has remained ever since.

It is argued that personal presence as well as intention, is necessary in order to constitute a home. Be it so. There is no specified time in which the personal presence must continue. It may be longer or shorter, as the absences may be longer or shorter, without interrupting it. It may be established or abandoned in one day. In 1872 or 1873, the case finds that she returned to her home then in Thorndike. True, she did not then expect to and did not long remain. But her then acts and words, as well as her previous and subsequent conduct, show that she came to it as her home and that it was not subsequently abandoned, but remained in the defendant Town until she removed with her father from there in 1879, giving more than the five years necessary, even if we reckon from 1873.

Defendant defaulted.

Peters, Ch. J., Virgin, Emery, Foster and Haskell, JJ., concurred.

Joseph B. PEAKS

v.

William D. BLETHEN *et al.*

Certain persons were permitted to build a public hall as a second story of a new schoolhouse and, after completion, an agent, authorized by the school district, executed an instrument called a lease, of the second story, to such persons, with necessary easements of ingress and egress, and with equitable provisions in regard to keeping the building in repair, etc., "so long as the building shall stand;" the building, in its several parts, was occupied in accordance with the agreement for nearly thirty years, when the district voted "to sell the schoolhouse and lot under the hall," and their agent did convey all their interest in the land and building thereon. In a

real action by the grantee against the occupants of the second story, held:

1. That the title to the second story was never in the district, it having insured to the builders before the execution of the instrument called a lease, by virtue of their having built it, under a license from the district, and the purpose of the paper was merely to regulate the use and give the easements.
2. That the vote to sell did not authorize a conveyance of the second story, and the deed could go no further than the authority.
3. That the defendants, having disclaimed all except the second story, with its easements, and being in possession, have at least a color of title, which is sufficient, as the plaintiff has failed to show a better one.

(Piscataquis—Decided November 16, 1885.)

REAL action. Before the court on stipulation. *Judgment for defendants.*

The facts are fully set forth in the opinion.

Mr. E. Flint, with Messrs. Lebroke & Parsons, for defendants:

It is true that school districts are confined strictly to the purpose for which the law vests them with power, that of building a schoolhouse for the district. *George v. School Dist.*, 6 Met., 510.

All a court can regard is the ultimate conclusion of a school district "as expressed in and by the record." *School Dist. v. Aitna Ins. Co.*, 54 Me., 509.

Incidental advantages to a district may influence its inhabitants in allowing a public hall to be constructed in the building erected for the schoolhouse of the district; and the question of allowing the construction of such a hall, is one of expediency, to be settled by the inhabitants of the district, who are the sole and final judges as to their legal wants. No power is vested in any other tribunal for the settlement of questions of this nature, and no appeal from their judgment can be allowed. *School Dist. v. Aitna Ins. Co.* (*supra*).

The defendants went into possession, fully believing that they had the rights purporting to be given them by their lease, and intending to hold that part of the demanded premises now claimed by them. If the lease afforded them no rights, they were mistaken, but nevertheless their intention was to claim an easement. Such intention may be presumed, even beyond the extent of occupation, as it was under a recorded lease. *Abbot v. Abbot*, 51 Me., 534; *Ricker v. Hibbard*, 78 Me., 107; *Barker v. Salmon*, 2 Met., 32; *Brown v. King*, 5 Met., 173; *Ashley v. Ashley*, 4 Gray, 197; *Boliver Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick., 241.

The case discloses the facts that the hall has been occupied without objection by its proprietors, up to the time of the commencement of this suit, and has been repaired by them and the district, agreeably to the terms of the indenture. These acts constituted a waiver of a claim to forfeiture. *Tallman v. Snow*, 35 Me., 342; *Jenks v. Walton*, 64 Me., 97-100; *Hooper v. Cummings*, 45 Me., 385; 104 Mass., 7.

After the conveyance by the district to plaintiff

iff, there was no person capable of making entry or claim. *Hooper v. Cummings*, 45 Me., 366; 25 Me., 530; *Trask v. Wheeler*, 7 Allen, 109.

The deed from the district to plaintiff utterly fails to disclose any intention on the part of the district to convey the upper story or hall, for it contains the following qualifying words: "Meaning to convey all the right, title and interest said school district has to said school lot and building." *Nash v. Bean*, 74 Me., 840.

The effect of conveying "all the right and title I have," by fair construction, means all that has come to me, and that I have not legally parted with. *Coe v. Persons Unknown*, 43 Me., 432; *Walker v. Lincoln*, 45 Me., 67; *Nash v. Bean*, 74 Me., 840.

In *Putnam Free School v. Fisher*, 38 Me., 326, the court says: "To make a recorded deed operate to disseise the owner, the grantee must actually occupy some portion of the premises."

The same doctrine was recognized in *Peters v. Foss*, 5 Me., 184; *Savage v. Holyoke*, 59 Me., 345; *Tebbetts v. Estes*, 52 Me., 566; *Estes v. Cook*, 22 Pick., 296.

If the plaintiff fails to show title to that part of the demanded premises not embraced in the disclaimer, he cannot recover, though the defendants show no title, excepting their possession, which is *prima facie* evidence of title. *Gibson v. Sav. Bank*, 69 Me., 579; *Chaplin v. Barker*, 53 Me., 275.

The use of an easement under claim of right by virtue of a contract either by parol or by deed, is an adverse use; this principle applies as well in case of easements, incorporeal hereditaments and interests in lands as to the title to land itself. *Ashley v. Ashley*, 4 Gray, 200; *Jewett v. Hussey*, 70 Me., 433; *Sumner v. Stevens*, 6 Met., 337; *Clapp v. Bromagham*, 9 Cow., 530; *Webster v. Holland*, 58 Me., 168; *Brown v. King*, 5 Met., 173.

The possession to give title, although adverse, is not necessarily hostile. *Jewett v. Hussey*, 70 Me., 433.

Brief statements, under our statutes, may be regarded as several pleas in bar. It is no objection that these several pleas of specifications are inconsistent with each other, or if some are found for the plaintiff, defendant may still prevail on one found for him. *Pejepscot Proprs. v. Nichols*, 10 Me., 261; *Moore v. Knowles*, 65 Me., 493; *Granite St. Bank v. Otis*, 53 Me., 133; *Clark v. Fozcroft*, 6 Me., 296.

The law is clear that the hall or upper story of this building was the property of the builders, as the builders had no title to the land and there was no agreement to purchase. *Osgood v. Howard*, 6 Me., 452; *Aldrich v. Parsons*, 6 N. H., 555; *Doty v. Gorham*, 5 Pick., 487; *Ashmun v. Williams*, 8 Pick., 402; *Tobey v. Webster*, 8 Johns., 468; *Fuller v. Tabor*, 39 Me., 519; 1 Washb. Real Prop., ed. 1860, 2.

If the intention of the parties is that the builder is to own the building, such intention must prevail. *Hinkley, etc., Iron Co. v. Black*, 70 Me., 479, *et seq.*; *Lapham v. Norton*, 71 Me., 83.

It is only an easement. An easement in real estate may be acquired by deed or by prescription which supposes a deed. *Morse v. Copeland*, 2 Gray, 805; 1 Washb. Real Prop., 399, *et seq.*, and notes.

The right of the public or of individuals, to

use the land of others for a definite purpose not inconsistent with the general right of property in the owner, is, in contemplation of law, an easement of franchise and not a right of property in the soil, although it deprives the owner of the soil of all useful or beneficial interest in the land. *Boston Water Power Co. v. Boston & W. R. R. Co.*, 16 Pick., 512; *Harback v. Boston*, 10 Cush., 297.

Each can maintain an action to vindicate and establish his rights, the former to protect and enforce his seisin of the fee, the latter to prevent a disturbance of his easement. *Morgan v. Moore*, 3 Gray, 322; *Hancock v. Wentworth*, 5 Met., 446; Washb. Eas., 8.

A privilege to enjoy so much of a dwelling-house as one may need during life, with a privilege at the fire, is but an easement to the person and servitude upon the estate. *Kingman v. Kingman*, 121 Mass., 251.

Pews in a meeting-house partake of the nature of realty, although the ownership is that of an exclusive easement for special purposes, since the general property in the house belongs to the parish or corporation that erected it. 1 Washb. Real Prop., 9.

The right to search for and dig and dispose of metals in the land of another, is not a title, but an easement. *Doe v. Wood*, 2 Barn. & A., 724.

The right to erect and maintain an icehouse on the land of another, not being by deed, was merely a license; but by deed, such right would have been an easement. *Jamieson v. Millermann*, 3 Duer, 255.

Where a license to one to erect a house on the land of another, which has not ripened into an easement by prescription or deed, is revoked, the holder may remove the house within a reasonable time. 1 Washb. Real Prop., 403; *Barnes v. Barnes*, 6 Vt., 388; *Ashmun v. Williams*, 8 Pick., 402.

The occupation of land, by one having an easement therein, may be permanent in its nature and practically exclusive, yet, no matter how extensive, such occupation and holding do not amount to a fee nor a freehold estate, but an easement only. *Proprietors, etc., v. Nashua & L. R. R. Co.*, 104 Mass., 9.

Though the use for which land is taken by a railroad company for its track, buildings and structures, is such as may require and authorize complete possession and control by the railroad, and of course, for a time uncertain, still the fee of the land remains in the original owner. *Proprietors, etc., v. Nashua & L. R. R. Co. (supra)*.

This hall or upper story is, as it appears, personal estate. *Ayer v. Phillips*, 69 Me., 52; *Proprietors, etc., v. Nashua & L. R. R. Co.*, 104 Mass., 12.

The word "heirs" in the brief statement of defendants, is used in the broad sense which good practice and full authority sustain. It means children or those who may take property, and is properly used, though only personal property is referred to. *Richardson v. Wheatland*, 7 Met., 169; *Daggett v. Slack*, 8 Met., 450; *Mace v. Cushman*, 45 Me., 260; *Martin v. Barrett*, 22 Me., 257; *Sweet v. Dutton*, 109 Mass., 592; *Tillinghast v. Cook*, 9 Met., 143; *Houghton v. Kendall*, 7 Allen, 75; *Haley v. Boston*, 108 Mass., 576; *Childs v. Russell*, 11 Met., 16.

The defendants have described the part or interest they claim and have disclaimed all the rest. It is one which the law ought to protect, at least against one who has not title to it and never had. Such plea and proof are a complete defense to the action. *Proprietors, etc., v. Nashua & L. R. R. Co.*, 104 Mass., 10.

But if any judgment should be rendered against defendants, it would be subject to such easement and rights as defendants have in the land or premises. *Proprietors, etc., v. Nashua & L. R. R. Co.*, 104 Mass., p. 12; *Jewett v. Hussey*, 70 Me., 433; *Ayer v. Phillips*, 69 Me., 50.

The court in *Scudder v. Worster*, 11 Cush., 574, says that where a case is to be tried without the intervention of a jury, all objections to pleadings are waived, "unless those questions are in direct terms reversed," and that "for obvious reasons this ought to be so." Also see, *Fay v. Duggan*, 135 Mass., 242. This applies in an action of dower, *Cook v. Walker*, 70 Me., 232, and in real actions. *Machias Hotel Co. v. Fisher*, 56 Me., 323; *Proprietors, etc., v. Nashua & L. R. R. Co.*, 104 Mass., 6.

The trustee and *cestuis que trust* had these rights and now have them. Such rights cannot have been forfeited. *Proprietors, etc., v. Nashua & L. R. R. Co.*, 104 Mass., 7, 8; *Davis v. Winery*, 61 Me., 140.

Danforth, J., delivered the opinion of the court:

This is a real action and comes to the law court with the stipulation that judgment shall be rendered "upon the facts and so much of the testimony as is legally admissible." No question is raised as to the competency of any of the testimony; no suggestion of any fact in dispute.

The defense is the general issue, with a brief statement under which the defendants claim certain rights in the premises which are specifically described, and disclaim the residue. No objection is made as to the time when this disclaimer was filed. To it the plaintiff files a counter brief statement, alleging, in substance, that, at the date of the writ and before and since, the defendants did claim right, title and interest in said premises, and were in the possession and occupation of the same. Thus is raised the real issue between the parties, and that is the title to the property described in the defendants' brief statement, and whether the defendants were in possession of and claiming title to that part disclaimed.

It may be that the brief statement on either side is not technically accurate. But if, under the stipulations in the report, any pleadings are required, these are sufficient to direct the attention of the court to the real issue, and lay the foundation in the record for the proper judgment.

The case shows that in February, 1852, School District No. One, in Dover, acquired an undoubted title to the lot of land described in the plaintiff's writ and subsequently built a schoolhouse thereon. The defendants disclaim any title to this lot and the building, except the second story, which was finished as a hall and anterooms, with certain privileges or appurtenances connected with it. To this second story, consisting of the hall and ante-

rooms, they, in substance, allege a title, and the remainder of the brief statement sets out certain easements which are, in fact, privileges or appurtenances connected with and belonging to the hall.

At a meeting holden in January, 1852, the district voted to build a schoolhouse and purchase a lot for the same. At an adjournment of the same meeting, with the subject-matter of building a schoolhouse still under consideration, it was "Voted that the building committee be authorized to permit any person or persons, desiring to do so, to put into said schoolhouse a second story to be used by them as a public hall, provided that such person or persons shall pay the extra expense of the same, the expense to be ascertained by said committee in contracting for the erection and completion of said house."

At a subsequent meeting, in February, 1852, under an article in the warrant as follows, viz.: "To see if the district will vote to authorize some person or persons, to execute a sufficient lease of the upper story of the contemplated schoolhouse, to the proprietors of the same"; it was "Voted that James S. Wiley be a committee in behalf of the district to execute a good and sufficient lease to Thomas S. Pullen and others, to add a second story to the schoolhouse about to be erected in this district, with a right to finish said second story into a hall and to hold the same as proprietors thereof, so long as said schoolhouse shall stand, and that said committee be instructed to insert in said lease such provisions as he shall deem equitable in regard to keeping said building in repair, its occupancy," etc.

In pursuance of this vote and after the schoolhouse with the hall was finished, Mr. Wiley, in behalf of the district, entered into a written contract with Thomas S. Pullen, Samuel Palmer and A. B. Chase, dated December 20, 1852. By this instrument it appears that Pullen, Palmer and Chase, under the permission given in the vote of the district, had built the hall at their own expense for their own use. In it they are recognized as the owners; they, their associates, executors, administrators and assigns are given permission to use it, when it was built, so long as the house shall stand, and when that is taken down, provision is made for the division of the material in proportion to the value of the parts of the same "owned and occupied by each other." It further gives the rights of ingress and egress as appurtenances to the hall and provides for the uses to which it may be put.

Much stress is laid upon this instrument by the plaintiff, as confirmatory if not the foundation of his title, claiming that it is a lease and that, as it is not for a certain number of years, no definite period for its termination being fixed, it cannot be a lease for years, and as there are no words of inheritance, it can only be a lease for the life of the three persons for whose benefit it was made, and as they are all dead, the lease itself has ceased to be. It is true that it was called a lease, and that the words "demise, lease and let" are used. But it is equally true that other words are used and that, whatever it may be called, it is to be construed like other written instruments as a whole, taking into consideration all its parts, as well as

the circumstances under which it was made and the purposes to be accomplished. *Jamaica Pond Corp. v. Chandler*, 9 Allen, 159-167.

A very important fact in this connection is, that the title to this hall was never in the district. It inured to Pullen, Palmer and Chase before the execution of the instrument called a lease, by virtue of their having built it under a license from the district. This fact is recognized in the instrument itself, and it cannot, therefore, be a violation of its terms to set up a title in accordance with what is so distinctly recognized in it. We can hardly presume that the parties intended to make any change of ownership by a lease of a piece of property to the owners of it, but in a case like this, when that property is so connected with other property that its use, to some extent, would involve the use of the latter, it is but natural and proper that a contract should be made between the different owners regulating that use. In this case, it is evident that the use of the hall might be of some benefit to the district and to the school. It could be of no injury, if used for proper purposes and at proper times. It is also evident that parties would not be willing to put their money into the hall without the assurance of the necessary easements to enable them to enjoy its use and for such a time as would make it profitable. Hence the use of the words "demise, lease and let" are fully justified by the easements conveyed and all the other provisions may have their full force consistently with the construction put upon the instrument by the parties, that the title to the hall was in the lessees and the purpose of the paper was to regulate the use and give the easement; a construction very largely for the benefit of the district.

In this view, the fact that there are no words of inheritance in the contract is of no importance, for it contains no grant of the hall, whether it is real or personal property, and the grant of the easements is only incidental to the hall and would probably have gone with it without the lease, with the exception, perhaps, of the length of time it was to be occupied; and that could only be terminated if at all by notice, which has never been given.

In accordance with this construction of the lease have been the acts of the parties since, showing that they so understood it. For about thirty years the district occupied its part of the premises, recognizing the right of the other party and, at the end of that time, in its sale to the plaintiff, still recognized it. The vote of the district under which the conveyance was made was as follows: "Chose C. H. B. Woodbury, agent, to sell the schoolhouse and lot under Odd Fellows Hall and convey the same;" thus authorizing the sale only of the premises less the hall; the easements, as privileges and appurtenances, going with the hall.

On the other hand, the builders of the hall, with their successors and assigns, have remained in unmolested possession of it for the same length of time. This possession is not only confirmatory of the construction now given the contract, but is confirmatory of and would be sufficient in itself, to establish a title in the defendants. This is not a possession of the hall by virtue of a license from and under the district, but under a claim of title, which claim is recognized by the district. The possession is

not hostile, for the district sets up no claim in opposition to it; both parties, in fact, claim and concede the title to be in the possessor, which is equally efficient in establishing it, as when there are opposite and conflicting claims.

The sale has another and an important bearing upon the result in this case. As already seen, the agent, by the vote of the district, was authorized to sell only the "lot and schoolhouse under Odd Fellows Hall." The schoolhouse and hall were begun and recognized all the way through, including this vote, as two separate and distinct pieces of property, though physically joined together. The meaning of the vote cannot therefore be misunderstood. It did not authorize a conveyance of the hall. The deed could go no further than the authority and, though a release of all the interest which the district had in the premises, it would convey no title to the hall; more especially as the district never had nor claimed any such title.

It is, however, contended that the hall was forfeited by a breach of the conditions under which it was occupied. But these were conditions of manner of occupation only and not of grant; and to whom would the hall go if forfeited? Not to the district, because it was not conveyed by the district. Besides it could not be forfeited without an entry, and none has been made and, since the conveyance, none can be made. *Hooper v. Cummings*, 45 Me., 366.

The plaintiff, in further maintenance of his title, introduces a deed from Emma P. Dennett, one of the heirs of Thomas S. Pullen, dated December 20, 1882, duly recorded. But the defendants have a prior deed from the same person, though unrecorded. The later deed is a mere naked release and, as the grantor had already parted with all her interest, it had no effect whatever even as against an unrecorded deed, even if the hall had been real estate. *Nash v. Bean*, 74 Me., 340; *Adams v. Cuddy*, 13 Pick., 468; *Jamaica Pond Corp. v. Chandler*, 9 Allen, 169.

It therefore clearly appears that the plaintiff has no title to that portion of the premises described in the defendants' brief statement. The case shows quite as clearly that, at the date of the plaintiff's writ or before or afterwards, the defendants were not in possession of and made no claim to any part of that to which a disclaimer has been filed. The only evidence to prove the fact of a claim of title is the record copy of the deed from Jonathan A. Smith to these defendants, dated December 20, 1882, which describes a portion of these premises. Smith, long before this time, had parted with all his interest in the lot, which, through direct or *means* conveyances, came to the district. There is no proof that this deed was ever delivered, or that possession was taken or claim made under it, but the contrary.

Some objections are made to the title of the defendants under Pullen, Palmer and Chase. But we have no occasion to examine them, for they have at least a color of title which is sufficient until the plaintiff shows a better one, which he has failed to do.

Judgment for defendants.

Peters, Ch. J., Virgin, Emery, Foster and Haskell, JJ., concurred.

SUPREME COURT OF CONNECTICUT.

William DONAGHUE *et al.*

v.

John H. CAFFEY, *Appt.*

1. In an action for libel brought by two or more partners, damages cannot be recovered for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business.
2. A mere animadversion in a circular upon a transaction had with a firm, in which it is stated that the members of the firm, naming them, "are not worthy of our support," even though coupled with the epithets "base treachery," "foul and unfair dealings," is not actionable *per se*.
3. Although the circular may not be libelous *per se*, yet if it carries on its face evidence of personal animosity, equivalent to actual malice, the general rule obtaining in this State, that the truth must be specially pleaded, if defendant wishes to take advantage of it, either for justification or in mitigation of damages, applies.

(Decided November 9, 1885.)

APPEAL from the Superior Court of Hartford County from the judgment against the defendant in an action of libel on a business firm. *New trial ordered.*

The case is stated in the opinion.

Messrs. O'Flaherty & Aberdeen, for defendant, appellant:

It is unquestionable that a partnership cannot suffer mental pain, or at least cannot recover damage therefor. *Townshend, Slander & L.*, 2d ed., 262, 298, top; *Vitus v. Follett*, 2 Hill, 318; *Beardsley v. Tappan*, 2 Blatchf., 588.

In any event, the plaintiffs should be restricted, in their claim for damage, to such damage as is alleged or set forth in their complaint; otherwise the defendant could never know what issue to make in the trial of a case, or what claim he would have to meet. Sec. 1, *Prac. Act of Conn.*

It was essential that said complaint should contain said allegation; and the same is fatally defective because of the omission so to do. *Mix v. Woodward*, 12 Conn., 287; *Burch v. Nickerson*, 17 Johns., 217; *Cheetham v. Tillotson*, 5 Johns., 457; *Sayre v. Jewell*, 12 Wend., 135, and cases cited; *Miller v. Maxwell*, 16 Wend., 9; see, *Forbes v. Lawson*, 3 Bing., 456.

Messrs. C. E. Perkins and J. G. Calhoun, for plaintiffs:

Mental distress, resulting from a tort of this kind, is included among those general damages which the law presumes and which need not be specially pleaded. *Seger v. Barkhamsted*, 22 Conn., 296; *Swift v. Dickerman*, 81 Conn., 294; *Adams v. Smith*, 58 Ill., 417.

A tortfeasor is responsible for all the immediate injury, occasioned by his wrongful act. *Swift v. Dickerman*, 81 Conn., 295.

A multiplicity of suits is to be avoided if possible, and for this reason, if for no other, the *CONN.*

plaintiffs may recover in a joint action for mental distress suffered in consequence of a libel of their joint business. *Le Fan v. Malcomson*, 1 H. L. Cas., 666; *Foster v. Lawson*, 3 Bing., 456; *Robinson v. Marchant*, 7 Adol. & El., 926.

If the plaintiffs are allowed to recover in this action, it will be a bar to separate actions brought for the mental anxiety suffered by each. *Holcomb v. Phelps*, 16 Conn., 127.

The damages awarded are small and not based solely or mainly on the mental suffering, nor does it appear that the jury increased the damages on that account, and to allow a new trial, where the amount in question is trivial and where the only gain that can possibly accrue to the defendant is a slight reduction in the damages, is only to gratify the same spirit that prompted the libel, and is against the uniform practice of this court. *Buddington v. Knowles*, 30 Conn., 26; *Burns v. Fredericks*, 37 Conn., 92; *Hull v. Bartlett*, 49 Conn., 66.

It is immaterial that the complaint alleges the charge to be false and malicious. Such an allegation was superfluous, as the law implies malice from the publication of words that are libelous *per se*. *Dale v. Harris*, 109 Mass., 193; *Gassett v. Gilbert*, 6 Gray, 94; *Brow v. Hathaway*, 18 Allen, 289; *Zuckerman v. Sonnenschein*, 62 Ill., 115.

Nor is a plaintiff permitted to prove the falsity of a charge, as his innocence is presumed. 1 *Greenl. Ev.*, § 419.

Where a matter is so essentially necessary to be proved, that, had it not been given in evidence, the jury could not have given such a verdict, then the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it, in fair and reasonable intentment, will be cured by a verdict. *Dale v. Dean*, 16 Conn., 586; *Moor v. Boswell*, 5 Mass., 306; *Wilson v. Coffin*, 2 Cush., 316.

Loomis, J., delivered the opinion of the court:

In admitting evidence to show the mental pain and distress of each of the plaintiffs, we think the court below erred.

The complaint is so drawn as to restrict the claim for damages to the injury to the joint business of the plaintiffs. The allegation is: "The plaintiffs are engaged in the liquor business in Hartford, under the name of Donaghue Brothers, and said circular" (referring to the alleged libel) "was so distributed among their customers for the purpose of injuring and destroying their business, and the effect of the same has been and will be to cause customers to decline and refuse to buy of the plaintiffs, whereby the plaintiffs have been and will be subjected to heavy pecuniary loss." Again: the alleged libel, upon which the complaint was founded, was clearly directed against the firm rather than the individuals composing it. At the outset, the circular proposes to state the defendant's experience with the firm of Donaghue Brothers and the word "firm" or its equivalent is repeated five or six times, and the conclusion from the facts stated is very explicit that "the firm of Donaghue Brothers are not worthy of our support."

From these considerations, the error in the ruling referred to will be sufficiently apparent

without any citation of authorities. We will only add that it is well settled, that in an action for libel by two or more partners, damages cannot be recovered for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business. *Falkard's Starkie, Slander & L.*, 4th Eng. ed., Wood's Notes, § 189; *Haythorn v. Lawson*, 8 Carr. & P., 196; *Taylor v. Church*, 9 Johns., 281.

Were the complaint for a distinct libel on the plaintiffs as individuals, it would still be objectionable, because it would make a joint claim of that which, in its nature, must be several. In England, under the new special rules that obtain there, it may perhaps be allowed, but not in this country.

In *Kinkle v. Davenport*, 88 Iowa, 855, it was held that a joint action for slander cannot be maintained. If the same slanderous words be at the same time spoken respecting several persons, they furnish each a ground for a separate action, but they have no community of interest and they cannot sue together.

But the plaintiffs' claim that if the ruling is conceded to be erroneous, a new trial ought not to be had, because the damages were small and the only gain to the defendant resulting from a re-trial would be a slight reduction in the amount. They cite in support of the principle: *Buddington v. Knowles*, 30 Conn., 26; *Burns v. Fredericks*, 37 Conn., 92; *Hull v. Bartlett*, 49 Conn., 66.

We do not think the principle of these decisions applicable to the case at bar, for the reason that all the damages allowed by the jury for mental suffering were improper and the case does not disclose any other damage proved or ever claimed. The mistrial, therefore, for aught we know, resulted in a judgment wholly erroneous.

But it may be suggested that nominal damages must have resulted from proof of the alleged libel without any evidence of actual damage. This would follow, if the words were actionable *per se*, otherwise special damage would have to be proved. Ought, then, the circular to be construed as containing a libel *per se*? We think not. All parts of the paper should be read in connection to collect the true meaning. If so read the severe epithets applied to the plaintiffs lose all their force, except as they attempt to characterize a single transaction, which is manifestly referred to as the sole foundation for all the statements made. That transaction or "experience" as the circular calls it, clearly shows that the epithets "base treachery," "foul and unfair dealings," are not to have their ordinary meaning. The gist of the whole matter is thus stated by the defendant: "I have been in the habit of buying nearly all my goods of them for years, but because I quit buying of them, they went to the Middletown Savings Bank of which I rented my place, and offered ten dollars more a month than I was paying, and, after getting their lease of the premises, served a notice on me to immediately vacate."

Now all this is a perfectly lawful transaction, whatever the intention, and how can we legally presume from such a statement that the plaintiffs were thereby degraded in the estimation of acquaintances or the public, or that they suffered loss in character, property or business?

Leaving out the epithets which express the defendant's opinion as to the character of the transaction he relates, the analogy is perfect between this case and that of *Homer v. Engelhard*, 117 Mass., 539, where it was held that to publish of a saloon keeper, that, "To get rid of a just claim in court, he set up as a defense the existing prohibitory liquor law; we feel it our duty to make such conduct publicly known, in order to caution beer brewers and liquor dealers," was not libelous.

In *Bennett v. Williamson*, 4 Sandf., 60, it was held not libelous *per se*, for the defendant to publish in a newspaper that the plaintiff requested the holder of a note, of which he was the maker, to wait for payment after the same had matured; that the holder waited accordingly and afterwards, the note being sued, the plaintiff pleaded the Statute of Limitations and got off "scot free."

The defendant further claims that the court erred in holding that the defendant could not, under the general issue, prove the truth of the alleged libel, inasmuch as it was alleged in the complaint to be false and malicious, making that an essential part of the plaintiffs' case and calling on them to prove it, and so allowing the defendant to disprove it under his general denial. This court has adhered inflexibly to the rule laid down in *Swift v. Dickerman*, 31 Conn., 295, and in other cases there referred to, that the truth must be specially pleaded, if the defendant wishes to take advantage of it, either for justification or for mitigation of the damages.

We discover nothing in the Practice Act which should change the rule. Upon principle, however, it would seem that if the matter charged is not libelous *per se*, so that the law would infer malice, and neither the libel itself nor the circumstances indicate any actual malice, the plaintiff might well be required to furnish evidence of the fact in order to recover, and the defendant be allowed to disprove it, even by showing the truth under a general denial. In this case, although the circular may not be libelous *per se*, yet it carries on its face evidence of personal animosity equivalent to actual malice, so that we think the general rule that has hitherto obtained in this State applies, and that the ruling referred to was correct.

The remaining question is, whether the court erred in overruling the motion in arrest, for any of the special reasons assigned by the defendant (for we shall confine ourselves to these alone).

A part of the reasons, it is evident, are inapplicable, upon our construction of the complaint and the alleged libel, and the remaining reasons, if true, were cured by the verdict. This is all we need say, except to call attention again to the Practice Act, which, in terms, requires that "All defenses, other than those to the jurisdiction or in abatement, shall be made by an answer or by a demurrer," and "All demurrers shall distinctly specify the reasons why the pleading demurred to is insufficient." And the spirit of the Practice Act accords well with the letter, in that its design is manifest, to have all formal and technical objections made known as early as practicable, so that the plaintiff may amend or proceed anew and the parties may, as expeditiously and inexpensively as possible,

reach and settle their controversy upon its merits. *Wall v. Toomey*, 52 Conn., 39; *Trowbridge v. True*, 52 Conn., 107; *Merwin v. Richardson*, 52 Conn., 238.

While we may regard the omission to demur to defects appearing on the face of the pleadings, as a waiver of the objection, yet we reserve the right in cases brought before the court for review, to consider questions not legitimately raised, if the objections are of such character as to nullify the proceedings and set aside the judgment on writ of error.

There was error in the judgment complained of, and a new trial is ordered.

In this opinion the other Judges concurred.

THE SECURITY COMPANY

v.

Charles M. HARDENBERG *et al.*

1. A devise to a married woman of one half of the residue of the estate of testatrix, and directing a transfer to devisee, of the whole amount of indebtedness of devisee's husband to the estate of testatrix, which may be due at the death of testatrix, to be received by devisee on account of the devise and as part thereof; should devisee die before her husband, the devise to go to such of devisee's children as shall be alive at the time of the death of testatrix, and to the lawful issue of such of devisee's children as may have died before testatrix, share and share alike; held, that the devisee, during the life of her husband, takes a life estate only.
2. The property being personal estate, devisee is not entitled to any portion of it except upon giving satisfactory bonds to an amount equal to the value of the property; and, in the meantime, it is the duty of the executor to keep the property prudently invested, collect the income, as it falls due, and pay it over to the devisee.

(Decided September, 1885.)

EQUITY. Construction of devise in will.

Complaint of the Security Company of Hartford, as executor of the last will and testament of Mary Collis Lee, came to the Superior Court, New Haven County, at its January Term, 1884, for the construction of her will. The parties appeared by counsel and were fully heard, and the court found all the allegations of the complaint proved and true.

The court, by and with the consent of the parties, reserved the cause for the advice of the Supreme Court of Errors as to what judgment should be rendered thereon upon the facts found.

Various questions arose relative to the construction, validity and legal effect of certain provisions contained in the thirteenth clause of said will, stated in the opinion, and in respect to the duties of the executor thereunder, among which are the following:

1. Whether the estate therein given to Mary Lee Hardenberg is an estate in fee.

2. Whether there is an implied trust created by said thirteenth clause and, if so, the nature of said trust.

3. Whether the said Mary Lee Hardenberg is now entitled to the immediate possession of the estate so given to her.

4. If she is not entitled to the possession of the whole of the estate so given to her, then, whether she is not entitled to the immediate possession of so much thereof as is represented by the indebtedness of her husband, Charles M. Hardenberg.

5. Whether, if she is entitled to the immediate possession of all or any part of the one half of said remainder so given to her, it is or is not the duty of the executor, in view of her pecuniary condition, to transfer and deliver the same to her, without requiring of her a bond with sufficient surety for the redelivery of such property to the executor in the event of her death before her husband; and if such bond is required, the amount thereof.

6. Whether, if the executor is bound to retain, for want of bonds to redeliver said estate, or otherwise, possession of so much of the one half of said remainder as is represented by the indebtedness of said Charles M. Hardenberg, it is or is not the duty of the executor to take measures to enforce the immediate collection of accrued and accruing interest on said indebtedness.

Mr. L. B. Morris, for Charles M. Hardenberg and Mary Lee Hardenberg:

Prima facie, the first taker is the principal object of the testator's bounty, and in doubtful cases the construction leans in favor of making the gift to him as effectual as possible. *Rewalt v. Ulrich*, 23 Pa. St., 388.

Does it not appear to have been the manifest intention of testatrix to exclude Charles M. Hardenberg from having any interest in her estate, and not her intention to limit the gift to Mary Lee Hardenberg? If this is a fair interpretation of the intention of the testatrix, then the limitation over or condition attached to the gift is void, as said Mary Lee Hardenberg has the power to dispose of the property. *McKenzie's App.*, 41 Conn., 607.

In the case of *Landon v. Moore*, 45 Conn., 422, a gift was to a daughter, free from the interference or control of the daughter's husband; at her death to go immediately to her children if she have any; her husband, if he survives her, not to have any use of the same, but that it be for her children. It was held that the estate given was a fee, not a life estate.

In the case of *Bassett's Est.*, L. R., 14 Eq., 54, a similar provision was held a gift of the residue in fee. To the same effect see, 1 Jarm. Wills, Rand. & Talc. ed., 648.

Words that create a vested or an absolute estate will not, on a doubtful implication from other words, be construed contingent or defeasible. *Rewalt v. Ulrich*, 23 Pa. St., 388; also, to same effect, *Biddle's Est.*, 28 Pa. St., 59.

Limitations of the mere use of personal property with reversions and remainders over, although allowed, are certainly not to be favored; it is with reluctance that they have been sanctioned by our courts, and they will lean against the creation of them, unless by expressions that are clear and definite. *Brewster v. McCall*, 15 Conn., 291.

Carpenter, J., delivered the opinion of the court:

The question in this case depends upon the construction of the following paragraph in the will of Mary Collis Lee: "I give, devise and bequeath unto Mary Lee Hardenberg, wife of Charles M. Hardenberg, of the City of Minneapolis, State of Minnesota, the one half part of the residue of my estate, be the same real, personal or mixed; and if Charles M. Hardenberg, her husband, is indebted to me in any sum whatever at the time of my decease, I hereby direct that my executor herein-after named, shall transfer the whole of any such indebtedness to Mary Lee Hardenberg, to be by her received on account of the one half part of the residue of my estate hereinbefore devised to her. And should Mary Lee Hardenberg die before her husband, the said Charles M. Hardenberg, then I give, devise and bequeath the aforesaid one half of the residue as herein devised to said Mary Lee Hardenberg, upon her death, to such of her children as shall be alive at the time of my decease, share and share alike, and if any child or children of Mary Lee Hardenberg shall have died at the time of my decease, leaving lawful issue, then I give, devise and bequeath to such lawful issue, the share or shares which such deceased child or children would have taken if living at the time of my death."

The property is personal estate. Mr. and Mrs. Hardenberg are residing in the State of Minnesota, and have several minor children. Mrs. Hardenberg is a person of insufficient pecuniary means to answer to the executor or to the persons in remainder for the one half of said residue bequeathed to her, in case she should die before her said husband.

The first question is: what estate does Mrs. Hardenberg take? The counsel for the defendants claim that it is an absolute fee. That involves the necessity of claiming that the provision for her children, in the event of her dying before her husband, is void. It is hardly necessary to say that a construction requiring us to hold that any portion of the will is inoperative is to be avoided, and that such a construction should be adopted as will give effect to all parts of the will, so far as they are consistent with the rules of law. The contingent provision for the children is a reasonable and proper one, so far as we can see, and we are not aware that it contravenes any legal principle. We cannot, therefore, hold that it is void, but must hold that Mrs. Hardenberg did not take an absolute estate. We think that it was clearly the intention of the testatrix to give her an estate which should be absolute ultimately in case she should survive her husband; and in case her husband survives her, the intention seems to be equally clear that she should have but a life estate and that, at her death, the property should go to her children. In that event, the children would take, not as her heirs, but as purchasers under the will.

It is suggested that the ruling intention of the testatrix was to give the property to the sole and separate use of Mrs. Hardenberg, so that her husband could not control it, and in such a manner that he could not, in any event, have any interest in it. That may have been the motive which induced her, in a certain con-

tingency, to give the property to the children; but that motive cannot affect the construction of the plain language of the will. It is still true that she gave the children an interest in the property. Her intention to do so is of more importance than the motive which prompted it. As both the intention and motive are legal, it is the duty of the court to give effect to the intention.

The respective interests of Mrs. Hardenberg and her children must be considered relatively as they together constitute but one estate. If Mrs. Hardenberg takes a defeasible fee, then the children take a contingent remainder, depending upon an event which may never happen. If she takes a life estate, the fee being contingent, then the children take a vested remainder, defeasible upon the happening of the contingency.

Whichever view is taken, the children have or may have an interest which should be protected. The power of a court of equity to protect it is not of statutory origin. In 1865, Session Laws, 74, an Act was passed authorizing the court of probate, in all cases, upon request of the life tenant, to order the executor to deliver the property to him upon his giving bond that it shall be forthcoming for the remainder man at the termination of the life estate. R. S., 871.

The authority thus conferred upon the court of probate is independent of and in no way interferes with the general chancery powers of a court of equity. Such powers were exercised in cases where there was danger that the remainder might be lost prior to the passage of the Act; *Hudson v. Wadsworth*, 8 Conn., 348; *Langworthy v. Chadwick*, 18 Conn., 42; and has been exercised since *Clarke v. Terry*, 34 Conn., 176.

Nor is the remainder without the pale of equitable protection by means of its contingent character. In *Hudson v. Wadsworth*, *supra*, real estate held in fee tail was sold by order of the Legislature. When the tenant in tail became of age, he claimed the possession and control of the funds. His claim was denied, unless he should give bonds that the funds should be forthcoming in case he should die without issue. In *Clarke v. Terry*, *supra*, the interest protected was a contingent one.

But if any question can possibly arise in this regard, it may be effectively put to rest by regarding Mrs. Hardenberg's interest as a life estate, with a vested, but defeasible, remainder in the children. Indeed, that seems to us the better view, because at present she has but a life estate, and by the express terms of the will she cannot have a fee unless she survives her husband. Until then, her rights in and power over the property are simply those of a life tenant. This construction gives effect to all the provisions of the will and effectually protects all interests created by it.

Counsel for Mrs. Hardenberg, in support of the claim that she takes a fee, cite *Landon v. Morse*, 45 Conn., 422. But that case is distinguishable from this. In that, two things were reasonably certain: 1, that the testator intended to give his daughter a fee simple; 2, that he intended to exclude her husband from any marital rights in the property devised. The language of the will clearly expressed both inten-

tions. The doubt arose from the fact that the testator, out of abundant caution, in order to make clear his intention, added: "At her death to go immediately to her children if she have children at that time." This language was satisfied and effect given to the whole will by holding that the devise took a fee to her sole and separate use, and that the language quoted did not reduce it to a life estate. In this case the intent to make a contingent provision for the children cannot be ignored. It is express, and in case the event happens, it is as clear as the intent in favor of the mother.

It is further contended that the gift to the children depends upon the further contingency that Mrs. Hardenberg should die during the lifetime of the testatrix. The argument in support of this claim is drawn from the fact that the gift over is not to the children generally, but is limited to those living at the decease of the testatrix, and the issue of those who had then deceased. We do not think that the implication from this circumstance is sufficient to justify us in construing the will as containing such a condition. The will itself makes the gift to depend, in express terms, upon the death of Mrs. Hardenberg while her husband is yet living, without further qualification as to time. We may or may not be able to discover a motive for excluding after-born children, but we think it reasonably certain that if she had intended that the gift over should take effect only in case Mrs. Hardenberg should die during his life time, she would have said so in less ambiguous terms. It is, at least, an obscure and awkward way of expressing such an intention. On the other hand, this fact is important in another view: it shows satisfactorily, if not conclusively, that the testatrix intended that the children should take as legatees and not as heirs of their mother.

A large portion of the property distributed to Mrs. Hardenberg consists of indebtedness due from her husband to the estate. In respect to such indebtedness, one clause of the paragraph we have quoted directs the executor to transfer it to Mrs. Hardenberg to be received by her on account of the one half part devised to her. The defendants contend that no bond should be required based on that portion of the estate represented by said indebtedness. This claim assumes that such was the intention of the testatrix. The principal, if not the sole evidence of such an intention, consists of the fact that the executor was directed to transfer such indebtedness. We hardly think that is sufficient. The fair meaning of the will is that she should receive the notes, which were evidence of such indebtedness, towards her portion of the estate; and the direction that the executor transfer the same is fully complied with by his indorsing the notes when they are legally delivered to her. That seems to have been the practical construction put upon it by the judge of probate, for the notes were in fact included in the distribution. No other reason is shown why these notes should not stand upon the same footing as the other property.

The complaint asks the court to instruct the executor whether it is his duty to collect the interest as it becomes due, on Mr. Hardenberg's notes. This matter is involved and practically disposed of in the point just considered. We

are unable to see why it is not the duty of the executor to collect and pay over the interest on these notes, as well as on other securities.

The Superior Court is advised that Mrs. Hardenberg, during the life of her husband, takes a life estate only; that she is not entitled to the property or any portion of it, except upon giving satisfactory bonds to an amount equal to the value of the property; and that, in the meantime, it is the duty of the executor to keep the property prudently invested, and to collect the income as it falls due and pay it over to Mrs. Hardenberg.

Levi G. NORTHROP

Abram J. KNOWLES, *Appt.*

1. **General reputation cannot be admitted in evidence to prove a negative;** hence when the **fact of marriage was proved** by the production in evidence of the **original certificate** of marriage issued by the magistrate who performed the ceremony, **evidence of general reputation is not admissible** that the parties were not married.
2. **A certificate of marriage** issued by a magistrate, is in the nature of an **original document**, and is admissible in evidence **to prove the facts** therein stated without other authentication.

(Decided September, 1885.)

A PPEAL from Litchfield County, First Judicial Department. *Affirmed.*

Suit for the recovery of the possession of land claimed under a will.

The case is stated by the court.

Messrs. Taylor & Taylor, for appellant as to evidence of marriage and legitimacy cited: *Blackburn v. Crawford*, 8 Wall., 175 (70 U. S., XVIII., Law. ed., 186); *Gra. & Wat.*, N. T., 251-260, 1542-1545; *Waller v. Graves*, 20 Conn., 311.

Messrs. L. D. Brewster and J. H. McMahon, for appellee:

The following cases hold that in no case is concubinage or non-marriage provable by reputation. *Carrie v. Cumming*, 26 Ga., 696; *Henderson v. Cargill*, 31 Miss., 367; *Bartlett v. Musliner*, 28 Hun, 235.

In the note (3) to § 107, Vol. 1, 18th ed. of Greenl. Ev., where this doctrine and the first two cases are quoted, there is added: "But see *Hargrave v. Hargrave*, 2 Carr. & K., 701, and *Jewell v. Jewell*, 1 How. (42 U. S.), 319."

Hargrave v. Hargrave, raised no question of reputation, but decided simply that declarations of a parent tending to bastardize her issue were admissible. *Jewell v. Jewell* decided no question of reputation in the appellate court.

The following cases hold that evidence of concubinage, or non-marriage by reputation, is not admissible where no attempt is made to establish the marriage by reputation. *Hill v. Hill*, 32 Pa. St., 511; *Jones v. Jones*, 45 Mar., 145, 158; *Jones v. Jones*, 48 Mar., 391; *Poultney v. Fairhaven*, Brayt., 185.

The reasonableness of the rejection of the evidence in question more clearly appears from

a consideration of the effect given to evidence of reputation in support of marriage. Bish., 1 Mar. & D., 6th ed., § 540, says: "It may not be plain what weight is to be given to the single fact that the parties are reputed married, because in ordinary cases this fact is seldom or never found practically alone."

Greenleaf seems to doubt its admissibility in and of itself and unconnected with other facts. 1 Greenl. Ev., §107.

In the Connecticut cases holding reputation of marriage receivable in support of the marriage in civil cases, *Hammick v. Bronson*, 5 Day, 290; *Budington v. Munson*, 33 Conn., 481, cohabitation and conduct went with the reputation and the latter, as it were, characterized the former.

Wharton, 1 Ev., § 84, says: "Proof of mere reputation, unsupported by that of cohabitation is, by itself, insufficient to establish marriage."

For a standard definition of "habit and repute" and their inseparability, we refer to *Campbell v. Campbell*, L. R., 1 H. L. Sc. App., 182. To the same point are *Badger v. Badger*, 88 N. Y., 547; *Hynes v. McDermott*, 91 N. Y., 451; *Chamberlain v. Chamberlain*, 71 N. Y., 423-7; *In Re Taylor*, 9 Paige, 614; *Strode v. Magowan*, 2 Bush (Ky.), 621.

The certificate of the marriage was properly admitted. Swift, Ev., 5.

Loomis, J., delivered the opinion of the court:

The record shows that, upon the trial of this case, the plaintiff claimed title to the land in question under the will of Friend G. Northrop, which was the subject of construction by this court in *Turrill v. Northrop*, 51 Conn., 33.

The plaintiff's title depended on the question whether he was the legitimate son of Gad G. Northrop and his wife, whose maiden name was Cordelia Dennis. The plaintiff in chief offered direct proof of the marriage of Gad Northrop and Cordelia Dennis, including the testimony of Cordelia and what purported to be the certificate of the magistrate performing the marriage ceremony, and at no stage of the trial did he offer any evidence of reputation to prove the marriage.

But the defendant on his part to disprove the marriage and to show that the plaintiff was illegitimate, offered the testimony of Harriet Curtis and others, that, after the alleged marriage, the said Gad and Cordelia were reputed in the neighborhood and locality where they resided to be unmarried and that they were reputed to be not husband and wife, but to be living in a state of illicit intercourse.

The first question for review is whether this evidence of reputation was properly excluded by the court upon the plaintiff's objection.

We have no doubt it was. The plaintiff's case on this point rested solely upon direct evidence of a formal ceremonial solemnization of marriage between his parents at a specified time and place; and it is too obvious to require discussion, that such evidence could not in the least be affected by any amount of evidence that they were reputed to have been unmarried. The strongest objections ever made against hearsay evidence would apply to such a case as this, for, if the defendant's position is correct, a mar-

riage solemnized according to all the forms of law might, in effect, be nullified by the mere speech of people.

The reasoning in behalf of the defendant is based upon the fallacy that, because general reputation of parties as husband and wife, in connection with other circumstances, is admissible to prove marriage, therefore general reputation must also be admissible to prove there was no marriage; but there is a vast difference between reputation as primary proof of an existing fact or relation, and reputation as applied to prove a mere negative. Reputation, in connection with other things, is admissible to prove marriage because, among other reasons, it attends and indicates the reality as a shadow does a substance, but a non-existing thing casts no shadow. But it may be suggested that in this case the evidence was offered to prove not simply a negative, but an adulterous relation. This, again, overlooks another fundamental reason why reputation and cohabitation furnish presumptive evidence of marriage, which is, that the law presumes against vice and immorality and in favor of marriage. The contention of the defendant would revolutionize this wholesome principle and obliterate all distinction between vice and virtue, concubinage and marriage, as furnishing the basis for presumption.

But it may be asked: has reputation no office as tending to disprove marriage? Not where an actual ceremonial marriage is relied upon, as in this case; but where marriage is attempted to be established by reputation, we think the defendant might be allowed to weaken the evidence, by showing that the reputation was not general, but was divided; but even in such case, the authorities restrain the negative evidence within narrow limits.

In *Badger v. Badger*, 88 N. Y., 547, the action was for the admeasurement of dower, and the plaintiff's right depended on the fact of marriage with the deceased. The plaintiff's evidence showed long continued cohabitation, characterized by reputation, and conduct to show that it was matrimonial. But it seemed that the deceased lived two lives. The cohabitation was under an assumed name. At the same time the deceased, among his own friends and relatives, known by his true name, occupied rooms and lived as a bachelor. It was held error in the court below to permit evidence to show that the deceased was reputed a bachelor among his friends and relatives, as it did not explain or show the character of the cohabitation, and this suggests another principle which is also decisive of the question under discussion.

Reputation of adulterous relations is not admissible as primary proof, but only as subsidiary or in aid of and incidental to substantive proof, where it may explain or account for the conduct of parties towards each other. This proposition is established by the following authorities: *Marble v. Marble*, 36 Mich., 386; *Clement v. Kimball*, 98 Mass., 536; Whart. Ev., § 225.

The next question is presented by the finding as follows: "Said Cordelia was introduced by the plaintiff as a witness and testified that she was married to said Gad on the 9th day of March, 1850," giving the place and name of

the officiating magistrate. The plaintiff then offered in evidence the certificate of marriage, accompanying the offer with the question put to the witness, to examine it and state whether it was the certificate which the messenger brought back, who was sent to the magistrate for it the day after the marriage. The defendant objected to the certificate on the ground that it should have been authenticated in the proper way, but under no other objection, and it was received by the court.

In this jurisdiction, from the earliest times, the practice has been to receive as evidence the marriage certificate itself, just as it was issued to the party, signed by the magistrate or other officer performing the ceremony, but without other authentication. In *Swift's Evidence*, p. 5, it is said to be common law in Connecticut. It is too late now to call it in question, if we were so disposed, but we think the rule has worked well and that to change it would cause much trouble and inconvenience. The practice is, we apprehend, founded upon a distinction between a certificate of this character and ordinary copies from the records of magistrates. In the latter case, the document offered in evidence is a mere copy from a record preserved by the magistrate, which copy would, of course, require authentication in the usual form. In the former the certificate is, itself, of the nature of an original document, like the certificate of registrars, that a person has been admitted as a voter, or of an appointing power that a person has been appointed to an officer. There may be, back of these certificates, and usually is, a record preserved by the officials issuing the certificate, but it has been the practice to receive such certificates without authentication beyond proof of their genuineness, as original documents.

The ruling of the court excluding the evidence as to the character and reputation of Cordelia for chastity, was so obviously correct that it needs no further vindication.

There was no error in the judgment complained of.

In this opinion the other Judges concurred.

Henry H. ZEIGLER, *Appt.*,

v.

DANBURY & NORWALK, R. R. CO.

1. Where a complaint alleges that plaintiff was an employe of the S. R. Co. and, as such, was riding on a train of that company over defendant's track, as he had a right to do as

an employe of the S. Co., and while so riding, was injured, etc., and the finding shows that plaintiff was employed by the S. Co., that he was on a train run by that company over a route composed of its own line and that of defendant; that while on defendant's line, the train was subject to its rules, and the hands thereon were directly under the orders of defendant's officers, as if employed by them and liable to discharge by defendant's officers for misconduct, etc.; the variance as to plaintiff's position and his reason for being on the train and on defendant's road, is technical and, the defendant not having been misled in relation thereto, the variance is not fatal.

2. An employe of the S. Co., on one of its trains running over defendant's track under a contract between the two companies under which the S. Co. furnished to defendant an engine, engineer, fireman, conductor and brakeman to run the train, under the supervision and regulation of defendant at an agreed price per month, sustains no contract relation with defendant and does not assume any risk from the negligence of its employes. An employe of the S. Co., under such circumstances, is not a fellow-servant of an employe of defendant.

3. Hence, defendant company is liable to an employe of the S. Co., for injuries received by a collision of the train served by the S. Co. and running over defendant's track, with one of defendant's own trains, caused by the negligence of defendant's conductor in charge of the latter train.

(Decided September 5, 1885.)

APPEAL from Superior Court. *Reversed.*

Action for damages for injuries received by a collision on defendant's road.

The court below made the following findings of facts:

The main line of the defendant's railroad extends from Danbury to South Norwalk. It has a branch track from Bethel to Hawleyville. The Shepaug railroad extends from Hawleyville to Litchfield. During the winter of 1882-3 the defendant had a train called the "Litchfield freight," which, by the time tables then in force, started from Danbury every morning at 7:30 A. M., reached Bethel at 7:40 A. M., left Bethel at 7:45 A. M., and reached

NOTE.—A company cannot devest itself of responsibility for the torts of persons operating its road, by transferring its corporate powers to other parties, or by leasing its road to them, in the absence of special statute authority and exemption. It cannot by its own act absolve itself from its obligations, without the consent of the Legislature. The lessees may however also be responsible for the injury. *Pierce on Am. R. R. Law*, 244.

The company owning the railroad is liable for the acts and omissions of its lessees who run the road. *Id.*, 26 Vt., 721.

A railroad company whose road is operated by a lessee in the name of the lessor, is liable to third persons for the lessee's negligence, unless absolved therefrom by legislative authority. *Blake v. Ferris*,

CONN.

N. E. R., V. I.

5 N. Y., 48; *Abbott v. Johnstown R. R. Co.*, 80 N. Y., 27; S. C., 38 Am. Rep., 572.

By statute, in Maine a company was authorized to lease its road, but was made liable for the lessee's negligence. *Mahoney v. Atlantic R. R. Co.*, 68 Me., 68.

In New Hampshire, it has been held in an action against the defendant, as owner of the road, for an injury to the plaintiff, sustained thereon while used by the Northern R. R. Co. under a contract with the defendant, the court held that the defendant was not liable, and that the claim of the plaintiff, if any, was upon the Northern R. R. Co. with which he contracted. In delivering the opinion of the court *Mr. Justice Bell* says: By using the railroad of another corporation as part of their track, whether by contract or mere possession,

Hawleyville at 8:10 A. M. At Hawleyville this train was incorporated with a train on the Shepaug road and continued on to Litchfield. In the afternoon this train returned from Litchfield to Hawleyville and from there, by way of Bethel, to Danbury. The defendant, during the same winter had another train called the "night freight," which regularly reached Bethel from South Norwalk at 1:30 A. M., and arrived at Danbury at 1:45 A. M.

For several years prior to this time an agreement had existed between the Shepaug Company and defendant, and which was then in force, by virtue of which the Shepaug Company furnished to the defendant an engine, engineer, fireman, conductor and brakeman to run the "Litchfield freight" train from Danbury to Hawleyville and back each day, for an agreed price, payable monthly. The train while on the defendant's road was a train of the defendant, run by its time tables and according to its orders. Between Hawleyville and Litchfield it was a train of the Shepaug Company, run by its time tables and according to its order. The same engine drew it and the same men had it in charge all the way from Danbury to Litchfield and back. Each company had exclusive control over the train while on its own road; and neither company had any control whatever over it while it was on the road of the other. The plaintiff engaged to the Shepaug Company as a brakeman some time in the latter part of the summer of 1882, and was by that company assigned to duty as one of the brakemen to assist in running the "Litchfield freight" of the defendant. The plaintiff assented to such assignment and had been continuously so employed up to the time he received the injury of which he complains. He received his wages from the Shepaug Company.

On the morning of February 20, 1883, this "Litchfield freight" train started from Danbury at its regular time. There were no cars that morning from Danbury to Bethel, and the brakemen, including the plaintiff, were riding on the tender to the engine. When about three fourths of a mile out of Danbury, the train came into collision with the "night freight" then approaching Danbury almost six hours behind its regular time. This collision was occasioned solely by reason of the negligence of the conductor in charge of the "night freight" train.

The plaintiff was terribly burned, one of his hip bones was fractured, and he received other severe and, in all probability, permanent injuries.

The contract between the Shepaug Company and the defendant was such that the men furnished by that company to the defendant, while on any part of the road of the latter, were directly under the orders of the defendant's officers; "the same as if employed and paid by them," and were accountable to the defendant's officers for the proper performance of their duties; and so fully was this so, that the defendant's officers had the right to discharge any of them for neglect or any improper conduct while on that road.

Upon these facts the court rendered judgment for the defendant. The plaintiff appealed.

Messrs. Henry B. Graves & Walter S. Judd, for plaintiff:

A conductor and brakeman are not fellow-servants, because the conductor is the immediate representative of the master, and his acts are imputable to the master. *Cleveland R. R. Co. v. Keary*, 3 Ohio St., 201.

To the same point, we cite a recent decision of the U. S. Supreme Court, *Am. L. Reg.*, Feb. No., 1885, *Chicago M. & St. P. R. Co. v. Ross*, 94-109. [See, 112 U. S., XXVIII, Law. ed.]

The conductor of a railway train who commands its movements, directs when it shall start, at what stations it shall stop, and at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and for injuries resulting from his negligent acts, the company is responsible. *Wilson v. Willimantic L. Co.*, 50 Conn., 438; *Chicago, M. & St. P. R. Co. v. Ross* (*supra*).

A common laborer is not a fellow-servant with the engineer, inasmuch as the plaintiff was under the control and subject to the direction of the engineer. The plaintiff was not a co-servant with the engineer, and was, therefore, entitled to recover. *Murray v. R. R. Co.*, 1 McMullan, 385; *Louisville R. R. Co. v. Collins*, 2 Duvall, 114.

In Ohio, it is well settled, that where one servant is placed by his employer in a position of subordination to, and subject to the orders and control of others, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the su-

they (the Northern Railroad Company) would ordinarily make it their own for many purposes, and would assume toward those whom they have agreed to receive as passengers all the duties resulting from that relation as to the road, and there would be no privity between such passengers and the proprietors of the road so used. *Murch v. Concord R. R. Co.*, 29 N. H., 35.

In Massachusetts it has been held that the owners of a railroad cannot lease their road to a corporation created by another State, and thereby discharge themselves from the duties and liabilities they have incurred as a consideration for the charter granted to them. But that case is clearly distinguishable, since that lease was executed without the sanction of legislative authority, and one party alone undertook to change the contract. *Langley v. Boston & Me. R. R. Co.*, 10 Gray, 103.

The owners of the road upon which the cars were running by permission, are liable for an accident resulting in injury or death of person. *Railroad Co. v. Barron*, 5 Wall. 104 (72 U. S.); *Chicago & R. I. R. Co. v. Whipple*, 22 Ill., 105; *Ohio & M. R. Co. v. Dunbar*, 20 Id., 823; *Chicago, etc., R. R. Co. v. McCarthy*, 20 Ill., 385; *Nelson v. Vermont, etc., R. R. Co.*, 26 Vt., 717; *McElroy v. Nashua, etc., R. R. Co.*, 4 Cush., 400.

The lessee corporation becomes the owner *pro hac vice* of the road leased, and is liable for damages accruing by fire or steam from a locomotive run by them upon the track of the leased road. *Pierce v. Concord R. R. Co.*, 51 N. H., 538.

"The remedy of the plaintiff, if any he have against either corporation, is against the Railway Company with which he contracted. For such injuries, that company is liable in the same manner as the defendants would have been, if they had been in the use, occupation and control of the road themselves." 1 Redf. Railw., 4th ed. 610; *Sprague v. Smith*, 20 Vt., 421.

When an injury is the result of a neglect to perform a common duty resting on two or more persons, the injured party may have his election to sue all parties owing the common duty or each separately. *Peoria v. Simpson*, 110 Ill., 294.

Where one railroad company, under a mutual agreement with another, is permitted to run its trains upon the track of the other, the servants employed by the respective companies are not co-servants and an action may, therefore, be sustained by the servants of either company to recover for injuries caused by the negligence of the servants of the other. *Sawyer v. Rutland, etc., R. Co.*, 27 Vt., 370;

perior servant, the master is liable. *Berea Stone Co. v. Kraft*, 31 Ohio St., 292; *R. R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland, C. & C. R. R. Co. v. Keary*, 3 Ohio, 201; *M. R., etc., R. R. Co. v. Barber*, 5 Ohio St., 541; *Pittsburgh, Ft. Wayne R. Co. v. Derinney*, 17 Ohio St., 197; *Lake Shore & M. S. R. Co. v. Lavalley*, 36 Ohio St., 221.

Messrs. John H. Perry & Winthrop H. Perry, for defendant:

The complaint describes the train upon which the plaintiff was riding as a "Shepaug train," alleges that as such, it has the right of way upon defendant's track, and that the Shepaug R. R. Co. had the exclusive right to so run it there at the time. The proof is that it was a track of defendant's over which the Shepaug Co. had no rights whatever.

These allegations, relating as they do to the place where the plaintiff was when injured, to his office, and reason for being in that situation, and to the method of his injury, are material, and not being proved, the judgment was right. *Shepard v. N. H. & N. Co.*, 45 Conn., 54.

A declaration for injuries to a brakeman while uncoupling cars, stated that he tripped in a hole between the rails. It appeared that the hole was between the rails of a side track, not of the main track. Held a fatal variance. *Batterson v. C. & G. T. R. Co.*, 49 Mich., 184.

In *Burke v. N. & W. R. R. Co.*, 34 Conn., 474, it became a question whether the plaintiff, who was hired by one O'Neill, a contractor, to shovel coal upon the defendant's cars, was a servant of the defendant. The following statement of the law by the court below is approved by the court of errors: had the company the control of him? Could it discharge him without breaking its special contract with O'Neill? If it could, or O'Neill was its agent in employing him, then he was in its employ and the plaintiff cannot recover.

In *Corbin v. American Mills*, 27 Conn., 274, the court says that "The existence of actual present control and supervision on the part of the employer," is a circumstance "of much weight," in determining whether one person is a servant of another, and that one person is a servant of another when "he is acting at the time for, and in the place of" that other, in accordance with and representing the other's will, and not his own. *Ill. R. R. Co. v. Cox*, 21 Ill., 20; *Wood v. Cobb*,

18 Allen, 58; *Kimball v. Cushman*, 103 Mass., 194; *Johnson v. Boston*, 118 Mass., 114; *Rourke v. Colliery Co.*, L. R., 1 Com. Pl. Div., 556; or *S. C.*, 18 Eng. Rep., Moaks' Notes, 191; *Murray v. Currie*, L. R., 6 Com. Pl., 24; *Vary v. B. C. R. & M. R. Co.*, 42 Iowa, 246; *C. B. & Q. R. R. Co. v. Clark*, 2 Bradw., 596.

The true test of fellow service is community in that which is the test of service, which is, subjection to control and direction by the same general master in the same common object; but unless they are subjected to the same general control, the fact that they are engaged in the same common pursuit does not render them co-servants. It is subjection to the same general control, coupled with an engagement in the same common pursuit, that affords the test. *Wood, Mast. & Serv.*, § 435, 585.

Is a conductor upon one train a fellow-servant with a brakeman upon another train of the same company, colliding with it through his negligence? The authorities seem to us to conclusively answer this in the affirmative. *Hutchinson v. Y. N. & B. R. Co.*, Welsby, Hurl & Gordon, 5 Exch., 843; *Louisville R. R. Co. v. Robinson*, 4 Bush., 507; *Pittsburgh R. Co. v. Derinney*, 17 Ohio St., 197; *Waaalan v. Mud River R. R. Co.*, 8 Ohio St., 249; *Boldt v. N. Y. C. R. R. Co.*, 18 N. Y., 432; *Huyes v. West. R. R. Corp.*, 3 Cush., 270; *Bull v. Mobile R. Co.*, 67 Ala., 206; *Wright v. R. R. Co.*, 25 N. Y., 562.

If the *Ross Case* had been tried in the Minnesota State Court, instead of in the United States Circuit Court for that District, the decision would have been different. *Brown v. Winona R. R. Co.*, 27 Minn., 162.

The consideration of the recent case of *Dar-rigan v. N. Y. & N. E. R. R. Co.*, must have satisfied this court that the decisions in England, New York, Massachusetts, Indiana, Wisconsin, Michigan, and in fact all the principal States, except Ohio, are opposed to the doctrine of the case in question.

Whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of railway, risk of injury from the carelessness of those managing the traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule of *Morgan v. Vale of Neath R. Co.*, 5 Best & S., 570 and 580.

N. & C. R. Co. v. Carroll, 6 Helsk., 347; *Smith v. N. Y. C. & H. R. R. Co.*, 19 N. Y., 127; *Catawissa R. Co. v. Armstrong*, 49 Pa. St., 193; *Carroll v. Minn. Valley R. Co.*, 13 Minn., 30; *Warburton v. G. W. R. Co.*, 2 Exch., 1866-7, 29.

The doctrine that an action will not lie by a servant against his principal for an injury sustained through the default of a fellow servant, applies to those cases only where the injuries complained of occur without fault of the principal, either in the act which caused the injury or the employment of the servant who caused it. Thus, an *employé* of a railroad company is not bound to know whether the road has been properly and safely constructed; that it has been, is the implied undertaking of the company with its servants, and they enter its service in that faith and that it will be kept in safe repair. *Chic. & N. W. R. Co. v. Swett*, 45 Ill., 197; *Porter v. Han. & St. J. R. Co.*, 60 Mo., 100. In all cases of this character, the important inquiry must be whether the negligence complained of may, in any manner, be attributed to the employer. *Keith v. New Haven & N. R. R. Co.*, 1 New Eng. Rep., 226.

No duty can be delegated, so as to exonerate the master from responsibility to a servant who has been injured by its non-performance. *Mann v.*

Pros., etc., D. & H. C. Co., 91 N. Y., 500; *Booth v. B. & A. R. R. Co.*, 73 N. Y., 40.

A superintendent stands in the place of the master and for his neglect or omission of duty the master is liable. *Corcoran v. Holbrook*, 59 N. Y., 517.

It is not essential that the master should directly control his servant in the particular matter. The fact that the details of the business are left exclusively to the servant will not alter the relation. The master will be liable for the manner in which the details are discharged. *Ploekens v. Diecker*, 21 Ohio St., 212.

The test of the master's responsibility for the act of his servant is not whether such action was performed according to the instructions of the master to the servant, but whether it was done in the prosecution of the business which the servant was employed by the master to perform. *Cosgrove v. Ogden*, 49 N. Y., 255.

Where the general management and control of an enterprise is entrusted to another, the master is liable for any injury to an *employé* resulting therefrom. *Pantzar v. T. F. I. M. Co.*, 99 N. Y., 368.

When the position of a servant is such that he is the agent of the master in respect to some matter which the master himself is bound to perform, as

Superiority in grade or rank does not change the relation, unless the superior servant is charged with the duties of the master to the servant, so that he may fairly be said to stand in the place of the master in reference to the particular duty, from a breach of which injury results, which is, in all doubtful cases, a question for the jury. *Wood, Mast. & Serv.*, 846.

If there is a natural or necessary connection between the different classes of service, such as necessarily brings the servants into contact with each other in the prosecution of their work, they are co-servants, however dissimilar their occupations may be. *Id.*, 851, 883, and cases cited.

While the binding force of the general rule was recognized in *Burke v. R. R. Co.* 34 Conn., 479, and *Wilson v. Willimantic L. Co.* 50 Conn., 457, its limitations and applications seem to have been nowhere else even discussed in our reports.

Carpenter, J., delivered the opinion of the court:

This is an action for damages for injuries received by a collision of two trains on the defendant's road. The case comes up on the plaintiff's appeal from a judgment in favor of the defendant.

The main question discussed is, whether the plaintiff was an *employé* of the defendant. The defense, however, raises a question of variance, which we will first consider.

The complaint alleges that the "Plaintiff was an *employé* of the Shepaug Railroad Company of said State and was a brakeman in his business for said Shepaug Railroad and, as such *employé*, was riding on a train of said Shepaug Railroad Company between Danbury and Bethel in said County of Fairfield, over and on the track of the railroad of the defendant, as he lawfully had a right to do under said Shepaug Railroad Company as its *employé* and servant, and that while so lawfully riding he was injured," etc.

The finding shows that the plaintiff was hired and paid by the Shepaug Railroad Company; that he was on a train run by that company between Litchfield and Danbury, a part of the way over its own road, and a part of the way over the defendant's road; that while it was on the defendant's road, the train was subject to its rules and regulations; that the train hands "Were directly under the orders of the defendant's officers, the same as if employed by them, and were accountable to the defendant's officers

for the proper performance of their duties; and so fully was this so, that the defendant's officers had the right to discharge any of them for neglect or any improper conduct while on that road."

This, it is claimed, is a fatal variance, as it misstates the plaintiff's position and his reason for being on the train and on the defendant's road. We think this is altogether too technical. It is tripping the plaintiff up and turning him out of court on a legal technicality. It required him to know the legal effect of a contract between his employer and the defendant, a contract of which he knew little or nothing. Whatever may be the legal effect of that contract in other respects, we think he might properly describe himself as in the employ of the Shepaug Railroad Company, and as being on a train run by it. The time, place, circumstances and manner of the accident are the same. The variance relates to the legal relations which the plaintiff, and the train on which he was, sustained to the two railroad companies. So long as the defendant was not deceived or misled as to any matter of fact, the plaintiff was not required to state those legal relations with technical accuracy.

In the next place it is claimed that there is a variance in respect to the method of the injury. The complaint alleges a collision, by reason whereof he was thrown out and from the train, and was scalded and burned and otherwise injured. The finding is that, by the collision, he "was terribly burned, one of his hip bones was fractured, and he received other severe and, in all probability, permanent injuries." We discover no variance here. The substance of the allegation is that the plaintiff was injured by the collision, and the proof seems to have fully sustained it.

In respect to the relation of the plaintiff to the defendant, two views may be taken: 1, that he was an *employé* of the defendant; and, 2, that he was an *employé* of the Shepaug Company, and as to the defendant, a third person or stranger. We will consider the case in both aspects.

If he was an *employé* of the defendant, and the accident was caused by the negligence of a fellow-servant, without fault in the defendant, then the rule which prevails in this State would exonerate the defendant from liability. But is it entirely clear from this finding that the defendant was without fault? The "night freight" was a train running from Norwalk to Danbury.

in the preparation of materials, construction of machinery, or the employment of servants in the common service, he is not a fellow-servant with those into whose hands the mere manual execution of the business is intrusted, but rather occupies the place of the master himself, and stands in the same position as the master would have done had he taken charge of the conduct of the work in person, instead of confiding its management into the hands of an agent. For the negligence of his servant or agent in such case, the master is responsible in the same manner as if the act was his own. *Brabbits v. R. R. Co.*, 38 Wm., 289; *Gormly v. Iron Works*, 61 Mo., 432; *Berea Stone Co. v. Kraft*, 31 Ohio St., 287; *S. C.*, 27 Am. Rep., 510; *Cum. & P. R. Co. v. State*, 44 Md., 263; *Devanny v. Iron Works*, 4 Mo. App., 236; *Mullan v. Phila. & S. M. S. Co.*, 78 Pa. St., 75; *Snow v. Housatonic R. Co.*, 8 Allen, 447; *Fuller v. Jewett*, 80 N. Y., 46; *S. C.*, 30 Am. Rep., 575; *T. W. & W. R. Co. v. Ingraham*, 77 Ill., 309; *Dobbin v. R. R. Co.*, 61 N. C., 446; *S. C.*, 31 Am. Rep., 512.

A middleman is bound to exercise the same de-

gree of care in the selection and retention of co-servants as the master is, and the master is bound by lapses in this respect. *Walker v. Bolling*, 22 Ala., 494; *Lansing v. N. Y. C. R. R. Co.*, 49 N. Y., 521; *Wright v. Same*, 28 Barb., 80; *Wood's Mast. & Serv.*, 880.

A master is liable for the middleman's negligence, if he yields entire control to him in regard to the instrumentalities of the business; *Mullan v. Philadelphia & S. M. S. Co.*, 78 Pa. St., 25; and in the repair of the same he is responsible when he has notice of the defects and entire control over that branch of the business; *Ford v. Fitchburg R. R. Co.*, 110 Mass., 240; and for any abuse of the middleman of authority committed to him. *Grizzle v. Frost*, 3 F. & F., 622; *Siegel v. Schantz*, 2 Thomp. & C., 833; *R. R. Co. v. Fort*, 17 Wall., 554 (84 U. S., 221, Law. ed., 739); or, in exposing a servant under his control to dangers not incident to or contemplated in the contract of service. *Waller v. S. C. R. Co.*, 2 H. & C., 102; *Washburn v. R. R. Co.*, 3 Head, 663; *Murphy v. Smith*, 19 C. B. (N. S.), 362; *Mann v. Oriental Print Works*, 11 R. L., 187.

It was nearly six hours behind time. The collision occurred on that part of the defendant's road which was between Danbury and Bethel, the only part of the road over which both colliding trains ran. The conductor of the "night freight" left Bethel on a single track road at a time which would make a collision with the "Litchfield freight" inevitable, provided the latter train left Danbury on time. The finding is that the collision was occasioned solely by the negligence of the conductor in charge of the night freight train. This finding is ambiguous. It may mean, and probably does, that there was no negligence on the part of the plaintiff, or those in charge of the other train. If that is the extent of its meaning, then there is no finding as to the negligence of the defendant, an all important fact in the case. For if the defendant was negligent in failing to employ a suitable conductor on the night freight, or in failing to have in operation a reasonably safe system for controlling and directing irregular trains, it is clearly liable to one of its employees. "It is those risks alone which cannot be obviated by the adoption of a reasonable measure of precaution by the master, that the servant assumes." *Pantzar v. Tilly Foster Min. Co.*, 1 Eastern R., 198, N. Y. Ct. of Appeals, June 9, 1885. And this is so even in Massachusetts, where the rule is adhered to more rigidly, perhaps, than elsewhere. *Magee v. Boston Cortage Co.*, 1 Eastern R., 126, decided in June, 1885.

Is it not entirely consistent with this finding that the defendant was in fault? Yea, more; does it not appear affirmatively, not expressly, but as a necessary conclusion from the facts stated, that it was so? Let us carefully examine the finding with a view to an answer to this question.

A freight train was due at Danbury at 1:45 A. M. At 7:30 A. M. it was on a single track road between Bethel and Danbury, approaching Danbury; and the Litchfield freight left Danbury on its regular time, 7:30 A. M., going in the opposite direction, so that the trains must come together. Was the conductor of the Litchfield train notified to hold his train at Danbury until the arrival of the night freight? Evidently not. Is a system which requires no notice under such circumstances a reasonable one? Was the conductor permitted to run his train, not on time, at his own pleasure, without reference to other trains and without directions from some intelligent and authoritative source? Was there no system by which trains behind time and irregular trains, were regulated and controlled by a train dispatcher or some superintending officer? If so, is such management consistent with the exercise of reasonable care and prudence? Was there a regular train dispatcher whose orders were disregarded by the conductor? If so, was the Company free from fault in having such a conductor in its employ? These questions are pertinent and important. In respect to all these matters, the record is silent. The facts stated, clearly indicate a want of due care in the defendant, and a jury would be warranted in so finding. More than that; they establish a *prima facie* case. They require explanation, and it is incumbent on the defendant to explain them, as all the facts are peculiar-

ly within its knowledge. It failed to do so, and such failure is significant.

The only answer that we can conceive of, is to construe the finding as negating any negligence in the Company. If the Judge had intended so to find, it is a little surprising that he did not say so, instead of leaving the finding ambiguous. Besides, there is a strong suspicion that the case was not tried upon any such theory, and that such a construction will be very unjust to the plaintiff. If these matters were not investigated, justice clearly requires that a new trial should be had, in order that they may be, unless the plaintiff is entitled to a judgment on the other ground. However, as what we have said on this part of the case is merely suggestive, and as we do not intend to decide the case on this point, we shall practically give the defendant the benefit of that construction, so far as our present purpose is concerned, and pass to a consideration of the question: whose servant was the plaintiff?

He was employed and paid by the Shepaug Railroad Company. A considerable portion of each day he was on that company's road and exclusively in its employ. While there he was responsible solely to its officers, the defendant having no control over him whatever. There was an arrangement between the two companies, "by virtue of which the Shepaug Company furnished to the defendant an engine, engineer, firemen, conductor and brakemen, to run the Litchfield freight train from Danbury to Hawleyville and back each day for an agreed price payable monthly;" so that the engine and train hands were those of the Shepaug Railroad Company furnished to the defendant; that is, to do its work in its stead, and for which was paid a fixed price monthly, not to the men, but to the Shepaug Company.

The contract is not before us, but from what appears, it did not relate to any particular engine and trainmen, but simply to an engine and trainmen, so that the Shepaug Company was at liberty to change engines and men at its pleasure, and presumptively did so during the many years that the arrangement continued. It follows that the Shepaug Company did not lose the entire control of the men while on the defendant's road, but had a general supervision over them, subject of course to the rules and regulations of the defendant and to such special orders as its officers might give, and might discharge them for any cause it might deem sufficient, although the defendant might consider it otherwise.

On the other hand the plaintiff sustained no contract relation whatever with the defendant. For that reason, there is no room for any presumption that he stipulated with the defendant to assume any risk arising from the negligence of its employees. No such stipulation can be presumed from the contract between the defendant and the Shepaug Company, because the plaintiff was not a party to that contract, did not know its terms, and the contracting parties had no power to make such a stipulation for him. For similar reasons, no such presumption can arise from the control which the defendant reserved to itself over the train while on its road. That, evidently, was intended to avoid the inconvenience and peril that would

result from having different trains on its road operated by different rules. It was reasonable that the defendant should retain the absolute control over all trains on its road; its own safety required it. To that end, the power to discharge the trainmen on the Litchfield train for neglect or improper conduct, was essential. But this power must be construed with reference to the subject-matter and the end which the contracting parties manifestly had in view. If the defendant could discharge them so far as to prohibit their services on its road, it would accomplish all it desired to and all that the parties contemplated, and, hence, all that it had a right to require. To interpret this arrangement as giving the power to discharge them absolutely from the employ of the Shepaug Company, would be going far beyond the obvious scope and purpose of the contract.

The defendant's authority, therefore, over the plaintiff was a limited one. The contract may be fulfilled and its object accomplished without regarding the plaintiff as the defendant's servant. The plaintiff cannot be so regarded without involving this consequence, which is well nigh an absurdity: that the plaintiff's employer changed every time he passed from one road to the other, which was usually twice each day. It is by far the better view to consider the Shepaug Company as doing certain work for the defendant, but doing it by means of its own instrumentalities and servants and not by means of the instrumentalities and servants of the defendant.

The defense of common employment has little of reason or principle to support it, and the tendency in nearly all jurisdictions is to limit rather than enlarge its range. It must be conceded that it cannot rest on reasons drawn from considerations of justice or of public policy. So far as the rule is to be retained, it must have its foundation in the contract theory. A writer

in the American Law Register for July, 1885, after a review of the law and noticing the drift of modern decisions, says: "If the law is to remain unchanged, let it be upon the ground that the servant assumes the risks incident to his employment, a conclusion which, though it may sometimes bear hard, is reasonable enough. Never was it more important than it is now, when the tendency in every department of thought is to pass authority by and search into the causes of things, that the law should commend itself to the plain sense of men in its reasonings as well as its rules."

No consideration of public policy will sustain this defense, because the public are not at all interested in the question, as they are in questions concerning inn-keepers and common carriers. They are only interested to have the law justly and fairly administered. No considerations of justice will sustain it, because the plaintiff had no relation whatever to the negligent conductor. It was not his duty to observe his conduct; he had no opportunity to do so and no opportunity to guard against the consequences of his negligence. We have shown that the defense can have no foundation in any contract to which the plaintiff was a party or which can justly affect him. If, therefore, the plaintiff may in any sense be regarded as in the service of the defendant, he is clearly without the reason of the rule and, therefore, not within the rule itself. But he cannot in any proper sense be regarded as the servant of the defendant. The Superior Court erred in holding that he was and that the defendant was exempt from liability.

The judgment is reversed and a new trial ordered.

In this opinion the other Judges concurred; except **Granger** and **Sanford, JJ.**, who dissented.

CASES

DETERMINED IN THE SUPREME COURT OF VERMONT,

FROM SEPTEMBER 1, 1885.

CHIEF JUSTICE,

HON. HOMER E. ROYCE.

ASSISTANT JUDGES,

HON. JONATHAN ROSS,
HON. WHERLOCK G. VEAZEY,
HON. JOHN W. ROWELL,

HON. H. HENRY POWERS,
HON. RUSSELL S. TAFT,
HON. WILLIAM H. WALKER.

EDWIN F. PALMER, Esq., Reporter.

In Re SNELL.

1. An Act,¹ authorizing a village to "suppress and restrain * * * all descriptions of gaming," repeals by implication an earlier statute empowering the selectmen to permit or forbid the use of billiard tables. The grant of power to restrain gaming, confers the right to license billiard playing.
2. The Act of 1884, No. 112,² authorizing the Governor to appoint special prosecutors of criminal offenses, is not in conflict with that Article of the Constitution which requires that, "State Attorneys shall be elected," etc.
3. The fourth section of the Act, is not passed upon. (*Bennington v. Smith*, 29 Vt., 254, distinguished.)

(Decided November 21, 1885.)

HABEAS CORPUS. *Relator discharged.*

The petition was brought before Veazey, J., and was continued and heard at the General Term, 1885. The petitioner set forth, that he was imprisoned in the county jail by virtue of a *mittimus* issued by a justice of the peace; and that he had been complained against by a special prosecutor.

The original complaint and *mittimus* were also set out, by which it appeared that the relat-

or was the owner of billiard tables in a saloon, situate in the Village of Middlebury; that the selectmen of the Town of Middlebury had forbidden him to use the said billiard tables, and had lodged a certificate of the notice in the town clerk's office, etc., in accordance with the statute; that the relator used the said billiard tables thirty-two days after he had been so forbidden by the selectmen; that the relator was brought before a justice of the peace, and was ordered by him to find sufficient sureties in the sum of \$400 for his appearance before the county court; that, having neglected to furnish the sureties, he was committed to jail for his appearance at the said court.

Messrs. Stewart & Wilds, and Eldridge & Slade, for the relator:

The Act of 1884 violates that article of the Constitution which requires that "State's attorneys shall be elected by the freemen." It is an attempt to usurp the powers and duties of the state's attorneys. The legislature cannot provide for the choice of officers a different mode from that prescribed by the Constitution. *Cool. Const. Lim.*, 78; *People v. Raymond*, 37 N. Y., 428; *Devoy v. New York*, 39 Barb., 169; *S. C.*, 22 How. Pr., 226; *People v. Blake*, 49 Barb., 9; *People v. Albertson*, 55 N. Y., 50; 117 Mass., 603; 40 Wis., 124.

Nor can it confer the characteristic duties of an officer upon another. *Warner v. People*, 2 Denio, 272; *Sprague v. Brown*, 40 Wis., 612; *State v. Branst*, 26 Wis., 418; *S. C.*, 7 Am. Rep., 84; *People v. Flannagan*, 66 N. Y., 237; *Cooley. Const. Lim.*, 216; *Jones v. Robbins*, 8 Gray, 338.

The 9th section of the charter suspends the power given by the general law to the selectmen over the village. *Ward v. State*, 17 Ohio St., 32.

Power to restrain, implies power to license. *Smith v. Madison*, 7 Ind., 86; *St. Louis v. Smith*, 2 Mo., 118; 1 Dill. Mun. Corp., 365; 50 Ill., 28; *Emporia v. Volmer*, 12 Kan., 632.

The power to regulate cannot exist in two independent bodies. *Daw v. Metropolitan Board*, 104 E. C. L., 162; *State v. Clarke*, 54 Mo., 17;

S. C., 14 Am. Rep., 471; 1 Dill. Mun. Corp., § 88; *ex Parte McNair*, 13 Neb., 195.

Mr. Edward Dana, for the State:

Under the Bill of Rights, art. 5, the Legislature can pass laws regulating the internal police. *Lincoln v. Smith*, 27 Vt., 337; *Cooley*, Const. Lim., § 706; *State v. Peterson*, 41 Vt., 504.

The Legislature has made provision for town grand jurors, as informing and prosecuting officers and has the right to make provision for other similar officers. *State v. Douglas*, 26 Wis., 428; *People v. Morrell*, 21 Wend., 568.

The authority of grand jurors as informing officers has never been questioned. The Legislature may add to their duties or establish other officers to perform part of them. *Wales v. Belcher*, 3 Pick., 508; 8 Gray, 1; 117 Mass., 604; *Hyde v. State*, 52 Miss., 673; 52 Ala., 79; 15 Iowa, 553.

While the Constitution provides for the election of State's attorneys, their duties have always been defined by the Legislature. The State's attorney may be excluded entirely from the prosecution of offenses. *In Re Barker*, 56 Vt., 26.

Taft, J., delivered the opinion of the court:

1. The law of this State authorizes the selectmen of any town to permit the use of billiard tables, under regulations prescribed by them, R. L., § 4070; or they may forbid the use of them, § 4068.

This law being in force, the Village of Middlebury was chartered and given the power to pass by-laws to suppress and restrain all descriptions of gaming, which clearly includes the game of billiards. The word restrain, when used as it is in the village charter, has been held to confer the power to license. *Smith v. Madison*, 7 Ind., 86; *Emoryia v. Volner*, 12 Kan., 622; *State v. Clarke*, 54 Mo., 17. It is not synonymous with suppress, but contemplates the continued existence of the business, placing it within bounds; in effect licensing it.

The powers conferred upon the selectmen and the village corporation are substantially the same; and if the claim of the prosecutor is the correct one, then each has the power to license or suppress gaming in the village limits.

It can hardly be supposed that the Legislature intended such a result. The provision in the charter derogates from and is inconsistent with the general law; and the Legislature must have intended by it to repeal the latter, as to the territory embraced in the village limits.

The case of *Daw v. Metropolitan Board*, 104 E. C. L., 162, is similar to the one at bar. The question was, which of two public boards had power to number the houses in certain streets. The court say: "Where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the Legislature co-exist, the earlier must necessarily be repealed by the later statute. The purpose of numbering houses is to distinguish them from each other; and, if the two boards had each the power to alter the numbers, that purpose would be frustrated."

In this case, if the general law was not repealed by the charter, the selectmen could suppress, and the village license, or the village suppress, and the selectmen license, by contemporaneous action.

Such a state of affairs could never have been contemplated by the Legislature. The Acts are repugnant, and the former is superseded by the latter.

In *Bennington v. Smith*, 29 Vt., 254, the selectmen of the petitioning town laid out a highway in the Village of Bennington, whose charter invested the trustees of the village with the same power and authority over highways within the village limits that the selectmen by general law had over the town. It was held that the power of the selectmen over the subject was not taken away by the village charter; but it was put upon the ground that there was no provision for compelling the village, by indictment, to keep its highways in repair, or for maintaining an action against it for losses sustained by reason of defects therein, or for laying highways continuously, part of which lay within the limits of the village and part without. Such cogent reasons for a like holding do not exist in the present case; and by the general rules for the construction of statutes, above referred to, we must hold that the authority of the selectmen over the billiard tables was taken away.

2. This prosecution was commenced by a special prosecutor, appointed under Act No. 112 passed at the session of 1884; and the relator claims that the Act is in conflict with that article of the Constitution which requires that "State's attorneys shall be elected by the free-men of their respective counties." We think the Legislature has power to provide for the commencement of prosecutions by other officers than State's attorneys, as they have done since the early days of the Government; and require their election by the people, as in the case of town grand jurors; or appointment by the Governor, as under the Act in question. Vacancies in most, if not all, elective offices are now filled by appointment; in some cases by the Governor, in other cases by the judges or selectmen.

As to the propriety of the Act in question we have nothing to do. We simply decide that the Legislature has power to provide for the commencement of prosecutions by informing officers not elected by the people. The question of the constitutionality of the fourth section of the Act, giving power to the special prosecutor to control the trial and disposition in the higher courts of the cases begun by him, is not before us.

The selectmen having no authority in the matter, their action was unauthorized; the relator was illegally imprisoned, and it is ordered that he be discharged.

OTTAQUECHEE SAVINGS BANK

Benjamin L. HOLT *et al.*

1. A mortgage to secure an agreement to support another during life, is assignable; and the condition may be performed by an assignee, unless the support is required by the mortgagee to be furnished personally.
2. If assigned, the amount agreed upon in good faith between the assignee and the mortgagor to be paid for the

support, is the sum to be paid by a subsequent mortgagee on redemption, and not what a master found was the actual cost of supporting, although the agreement was made after the second mortgage was given, the subsequent mortgagee taking its mortgage with knowledge that there was a controversy over what was to be paid on the first mortgage.

3. Notice to the president of a bank is notice to the bank. The record of a mortgage in the town clerk's office is constructive notice.
4. A defendant should be allowed his costs upon a bill to redeem.

(Decided November 21, 1885.)

IN CHANCERY to foreclose a mortgage and redeem. *Affirmed.*

Heard on petition, answer of Nathan L. Holt, and master's report, December Term, 1884, Windsor County, Powers, Chancellor. Taken as confessed by Benj. L. and Truman R. Holt.

The court decreed *pro forma* and without hearing, that the petitioner pay to Nathan L. Holt, the sum found due him on notes of Benj. L. Holt by the master, \$1,487.09; and that the petitioner have foreclosure against Benj. L. and Truman R. Holt.

On the 26th day of March, 1867, Benj. L. Holt mortgaged his farm to his father, Nathan Holt, conditioned: "Provided, nevertheless, that if the said Benjamin L. Holt shall furnish suitable food, drink and medicine, clothing, etc., * * * necessary for the support and comfort of the said Nathan Holt and my sister, Louisa, according to their degree, etc., * * * during the remainder of their natural lives, etc., * * * and perform all and singular the several covenants herein contained, then this deed to become null and void, otherwise to be and remain in full force."

The master found said Nathan was about 80 years old; that said Louisa was subject to fits and incapable of taking care of herself; that the consideration paid for the support was \$2,000; that the mortgage was duly recorded in the town clerk's office the same day that it was executed, March 26, 1867; that Benjamin L. supported his said father and sister until a different arrangement was made for their support between Benjamin and Nathan L. Holt, a brother of said Benjamin, in 1871, at the request and approval of their said father; that prior to June 28, 1871, said Nathan had made known to Nathan L. his dissatisfaction with the support furnished himself and Louisa; that on the said 28th day, the said Nathan L. and his son, Herman Holt, went to said Benjamin's house, and proposed that the father and sister should live with said Nathan L.; that Benjamin, being willing to support them, did not at first assent to this; that the said Herman told him if he did not, that the mortgage would be foreclosed, etc.; that he further told Benj. that he wished to go and live with his son Nathan L.; that at this time finally an agreement was made between Benj. L. and Nathan L., with the approval of their father, that he and Louisa were to live with Nathan L. and be supported by him, according to the conditions of the mortgage, and that Benj. L. was

to pay him "what was right for it." At this time the said Benj. L. signed a writing by which he agreed that the said Nathan might transfer the said mortgage to said Nathan L. Holt, in consideration of his promise to support.

On the 5th day of July following, Benj. L. had an interview with his father, the result of which was, that he told Benj. that he might inform Nathan L. that he had concluded not to go away from Benjamin's. On the same day Benj. L. reported what his father had said, and notified Nathan L. that he declined to go on with the contract. Immediately said Herman, with the approval of his father, Nathan L., went to Benjamin's house, and in his absence, took away the said Nathan and Louisa; but the master found that he was satisfied that they were willing to go.

On the 6th day of July, 1871, the said Nathan assigned the mortgage in due form to Nathan L., and the assignment on the same day was properly recorded. Benj. L. was not present, but sometime afterwards he knew of it and went on and negotiated with Nathan L. as to the support of their father and said Louisa, with the understanding that he was to have the benefit of the mortgage. They failed to agree as to the price, and chose arbitrators to decide. One of the arbitrators was N. T. Churchill, who was President of the said Ottaquechee Savings Bank from 1870 to 1876. Both Nathan L. and Benj. L. notified said Churchill of the subject-matter of the difference between them, which they had agreed to submit to him. On November 2, 1872, said Benj. L. Holt executed to the orator a mortgage on the farm covered by the first mentioned mortgage. The bank mortgage was conditioned for the payment of \$2,000.

The business as to this loan and taking the mortgage was done principally with said Churchill, who was notified by said Benj. of the first mortgage. The other officers did not know of it. The arbitrators were not called out; and on March 14, 1873, Nathan L. and Benj. met and agreed on the sum to be paid for the support of their father and sister, namely, \$1,750. Two notes of \$550 and \$1,200 were given at this time, dated back to July 1, 1871, and payable respectively, April 1, 1875, and April 1, 1878. A writing was attached to each note and signed by Benj. L. Holt, stating that the notes were given "in full for the support of Nathan Holt and Louisa Holt, and when both are paid the mortgage securing said support is to be immediately discharged." A memorandum of the notes and writings was indorsed on the back of the mortgage and recorded in the town clerk's office, on March 18, 1873.

The master also found that the father and sister lived several years, and were supported by said Nathan L. according to the terms of the mortgage; that it "was reasonably worth" \$2.75 per week each to support them, amounting to \$1,537.87; that payments had been made by Benj. L. and the balance due Nathan L. on the notes was \$1,487.09.

Messrs. French & South, for the orator:

Nathan L. Holt cannot set up the mortgage as an incumbrance. The condition was personal, to be performed by the mortgagor, Benj. L. The assignment was of no validity. 1 Jones, Mort., § 888; *Flanders v. Lamphear*, 9 N. H., 201; *Rhodes v. Parker*, 10 N. H., 83; *Bethlehem*

v. *Annis*, 40 N. H., 84; *Eastman v. Batchelder*, 36 N. H., 141; *Bryant v. Erskine*, 55 Me., 158.

Benj. being willing to support, there was no breach of the condition. *Jones*, Mort., § 891; *Jenkins v. Stetson*, 9 Allen, 129; *Thayer v. Richards*, 19 Pick., 398. See, 10 Mich., 455.

In any event, the mortgage can be a security for only what it was reasonably worth to support them. *Jones*, Mort. § 861; 7 Johns. Ch., 15; *Gardner v. Emerson*, 40 Ill., 296. See, 10 Me., 292; 57 Me., 322.

Mr. Herman Holt, for the defendant:

The mortgagor was bound to furnish support at any reasonable place the mortgagee might select. 1 *Jones*, Mort., § 388; *Lanfair v. Lanfair*, 18 Pick., 299; 2 Washb. Real Prop., 71; *Wilder v. Whittemore*, 15 Mass., 262; *Pettee v. Case*, 2 Allen, 548; *Austin v. Austin*, 9 Vt., 420; 1 Hill, Mort., 8; *Wright v. Wright*, 49 Mich., 624.

Giving the two notes did not affect the mortgage. *Seymour v. Darrow*, 31 Vt., 122; *Rice v. Clark*, 10 Met., 500.

The assignee could perform the condition in the mortgage. 2 Story, Eq., § 1018; 1 Hill, Mort., 501; 4 Kent, Com., 142; *Morrill v. Morrill*, 53 Vt., 74; 1 *Jones*, Mort., 808; 2 Washb. R. P., 66; *Joslyn v. Parlin*, 54 Vt., 670.

A mortgage to secure an unliquidated debt is valid. *Stoughton v. Pasco*, 5 Conn., 442. The debt need not be fully stated. 7 Cranch (11 U. S.), 36; *P. Savings Bank v. First Nat. Bank*, 53 Vt., 82; *Hurd v. Robinson*, 11 Ohio St., 232. The bank had notice.

Taft, J., delivered the opinion of the court:

Petition to foreclose a mortgage as to Benjamin L. and Truman R. Holt, and to redeem another mortgage as to Nathan L. Holt.

The petitioner contends that the condition of the mortgage given by Benjamin L. Holt to secure the support of Nathan Holt was personal, and could only have been performed by Benjamin personally. This mortgage was assigned by Nathan Holt to the defendant, Nathan L. Holt, and the latter agreed with Benjamin to perform the conditions thereof, and has fully done so. It is too late for Benjamin to say that such agreement and assignment were void. Under the circumstances, as shown by the master's report, our courts hold that the performance of the condition of a mortgage given for the support of a person may be performed by an assignee, unless such support is required, by

the terms of the mortgage, to be furnished by one personally. *Joslyn v. Parlin*, 54 Vt., 670.

In this case it would be unjust, after Nathan L. has performed the condition of the mortgage which had been assigned to him by the mortgagee with the consent of Benjamin, to say that Nathan L. shall not have the benefit of it. The transfer was valid.

The mortgage sought to be redeemed was properly recorded. The petitioner had constructive notice of it, and took its own mortgage in subordination to it. The President of the petitioning bank had actual notice of it, and notice to the President was notice to the Bank. *Porter v. Bank*, 19 Vt., 410; see, *Hart v. Bank*, 33 Vt., 252.

The mortgage was conditioned for the support of Nathan and Louisa Holt; and after Nathan L. agreed with Benjamin that he, Nathan L. would support them, and Benjamin had agreed to pay him for so doing, Nathan L. and Benjamin agreed upon the sum which should be so paid, and the latter executed his two notes for the same. Nathan and Louisa are both dead; and the master reports the amount that it cost Nathan L. to support them and comply with the other conditions of the deed; and the petitioner insists that, if compelled to redeem, it should pay this sum instead of the amount agreed upon and expressed in the two notes. I am inclined to think this view is correct; but my brethren think otherwise, and hold that, as the Bank was affected with notice to its president, and he had notice of the controversy between Benjamin and Nathan L., that they were then attempting to settle upon the amount which Benjamin should pay Nathan L., attempting to make the amount a fixed one, and agreeing upon a mode of settlement by arbitration, that it should be bound by the settlement, if fairly and honestly made, although made after the Bank had taken its mortgage.

There is no claim of fraud in the settlement; it is clear that it was a reasonable one; and the court holds that the amount to be paid by the petitioner is the sum due upon the two notes as stated in the report.

There is nothing in this case to vary the general rule as to costs, which is, that upon a bill to redeem, the defendant is entitled to costs.

The decree is affirmed and cause remanded; the defendant Nathan L. to recover costs.

SUPREME COURT OF MAINE.

William H. VIRGIE,

v.

Sarah A. STETSON.

1. A levy upon real estate is not invalidated because it embraces other land than that belonging to the debtor.
2. The real estate of a married woman, derived by her either directly or indirectly from her husband, may be attached and taken on execution, by levy for her debts. The provision of the Revised Statutes, 1871, ch. 61, § 1, prohibiting her from conveying such real estate without the joinder of her husband, relates only to her voluntary conveyance.

(Lincoln—Decided November 21, 1885.)

ON exceptions. Overruled.

Action for the recovery of real property levied upon under execution.

The case is stated in the opinion.

Messrs. A. P. Gould and J. E. Moore, for plaintiff.

Mr. W. Gilbert, for defendant:

It is in evidence, that the demanded premises were conveyed to the wife by the husband during coverture. Therefore the statute enabling married women to convey, denies to the wife power to convey the premises without the joinder of the husband. Rev. Stat., 1883, ch. 61, § 1.

The known and well understood intention of the Legislature and of the several Legislatures which originated and which have several times re-enacted and embodied it in the municipal law, was to enable the husband, out of debt, to secure to the wife her home without hazard to himself. We look therefore for the intention of the Legislature as the rule of interpretation. Sedg. Const. L., 198.

By and through all the Acts of the Legislature the provision was firmly established, that real estate donated to the wife by the husband, shall not be conveyed by her without the joinder or assent of the husband. The doctrine of plaintiff overthrows the legislative will, and unhouses the confiding husband whenever discord arises between him and his wife.—Counsel cited at length Blackstone's Rules of Construction, 1 Bl. Com., also cited in point, 1 Kent, Com., 9th ed., 517, 518, and cases cited; 10 Coke, 101 b.; also Sedg. Const. L., ch. 6, 2d ed., 198, 201, 221, 225, note 309, 310, 314; also note on page 312, citing *Charles v. Lamberson*, 1 Clarke (Ia.), 435; also, *Mayor of N. Y. v. Lord*, 17 Wend., 235, and 18 *Id.*, 186.

The provision of § 4, of ch. 61, that a married woman's property "may be attached and taken on execution," must be construed in consistency with the 1st section; since we are not to suppose the Legislature enacted a protection to husband's rights in § 1, and abrogated it in § 4.

The levy included land, to which the debtor had no title; and counsel cited Rev. Stat., ch. 76, § 3, which requires that the land levied on shall be distinctly "identified" by "metes and bounds" and ch. 76, § 25, which gives the right to redeem.

To hold such a levy good, is unjust and oppressive and contrary to the terms of the statute.—Plaintiff's counsel cited the following cases

as decisive against defendant on this point; *Greene v. Hatch*, 12 Mass., 198; *Ware v. Pike*, 12 Me., 808; *Grover v. Howard*, 31 Me., 546; *Rice v. Cook*, 75 Me., 45.—These cases do not reach the question.

Danforth, J., delivered the opinion of the court:

This is a real action in which the plaintiff claims title by virtue of a levy upon an execution against the defendant. The defense is the insufficiency of the levy, the objections to which are embodied in the several requests for instructions which were refused.

The first is general in its terms and is not relied upon.

The second is founded upon the fact that land not belonging to the debtor is included in the levy and appraisal, thereby increasing the amount to be allowed on the execution and to be paid for redemption. But it diminishes the debt in the same proportion. The effect is the same as if the debtor's land was appraised too high, an error of which she could hardly be expected to complain. It is not, however, a process for redemption. If it were so and the error found injurious to the debtor, doubtless a remedy could be found. This same question was before the court in Massachusetts in *Atkins v. Bean*, 14 Mass., 404, and the levy sustained. That case was cited with approval in *Grover v. Howard*, 31 Me., 549, and in *Rice v. Cook*, 75 Me., 46, the doctrine is recognized as well established settled law.

The third objection is, that, as the title to a portion of the premises in question was derived by the defendant from her husband during coverture, such portion was not liable to be taken by levy in satisfaction of her debts.

It is claimed on behalf of the plaintiff, that the case shows no evidence upon which such an objection can rest, while on the other hand a motion is made in behalf of the defendant, alleging that at the trial such evidence was introduced, but omitted in making up the case and asking for a new trial, that the omission may be supplied. We have no occasion to consider this motion; for, whatever the omission, that which is reported is plenary to establish the fact that the defendant's title came from her husband during coverture. The deed under which she claims is in the case and is the only evidence of her title. This is something more than the mere declaration of the grantor that at that time the grantee was his wife; it is the act of both parties, the grantor in giving and the grantee in receiving, recognizing the relationship of husband and wife as an existing fact and qualifying the title accordingly. Certainly the deed, in the absence of any contradictory evidence, taken in connection with other corroborative testimony in the case and especially with the fact that the ruling does not appear to have been founded upon any want of evidence in this respect, is sufficient proof of the coverture at its date.

Thus the question is directly presented, whether real estate conveyed by the husband to the wife can be attached and levied upon by a creditor to pay her debts. This depends upon the construction to be given to R. S., 1871, ch. 61, § 1, under which this levy was made. The statute provides that a married woman may not only acquire property in her own right, but

"may manage, sell, convey and devise the same by will, without the joinder or assent of her husband; but real estate directly or indirectly conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed *by her* without the joinder of her husband in such conveyance."

In this prohibition did the Legislature refer to such conveyances as were voluntary on the part of the wife, the result of the contract to which she should be a party, receiving their force and effect from her consent alone, or was it intended to go still further and exempt such real estate from attachment and levy in satisfaction of her debts? If we look at the language alone, we can have no hesitation in giving it the narrower limitation. Such at least is the ordinary use of the term conveyance; and besides we find the conveyance prohibited, one to be made "by her" which can only be one in which she is the moving cause, one of the contracting parties; while a transfer by extent of an execution is, on the part of the debtor, an involuntary, unwilling one.

It is, however, contended in the very able and elaborate argument in behalf of the defendant, that, in order to carry out the intention of the Legislature, a broader meaning should be given to the word conveyance, a meaning which shall include a transfer by levy as well as by deed. In the argument certain rules for the interpretation of statutes are clearly stated and fully sustained by the authorities cited. These rules we recognize as sound and binding so far as they render aid in ascertaining the meaning of the Legislature in the language used, which is the great and perhaps the only object to be sought.

The subject-matter of the statute is the regulation of the rights and disabilities of a married woman in regard to her own property. Prior to 1856 her well established disabilities at common law had been abrogated and she was left to her own discretion as to its disposition including the right to convey. In that year a statute was passed as said in *Cull v. Perkins*, 65 Me., 444, to meet a custom which had arisen where, "in numerous instances the title of real estate of married men in embarrassed circumstances was transferred to their respective wives and thence to third persons, thereby clogging the proof of fraudulent conveyances by this other remove from the original fraudulent grantor." This Statute of 1856, ch. 250, leaving the power of the wife over her own property in its full force in all other respects, limits it only in the power of sale of that real estate which was derived directly or indirectly from the husband or his relatives. If the protection of the husband's creditors as above stated is not the true purpose of this limitation, it would be difficult to say what is. It cannot be that it was to preserve any rights which the husband might have, for after an absolute conveyance he has none. In the deed such rights as he desired might be reserved to him without the aid of the law. If none is so reserved, the law gives the wife the entire control over it in every respect, except the power of sale, and even if it be a homestead he can occupy only by her consent; and if the wife becomes "recusant," the sanctity of the home is gone with or without the sale. Hence the broader construction gives the hus-

band no better protection than the narrower. We are not prepared to admit that under the latter interpretation the wife could receive the price under an agreement with a purchaser; submit to a judgment for the amount, for the purpose of having the execution levied upon the land. Such a levy would be a conveyance under a contract resting upon the consent of the wife, as much a conveyance "by her" as though accomplished by deed.

But the section of the statute now under consideration does not purport to act upon or regulate the rights of the creditors of the wife. If it affects the creditors at all, it is only those of the husband and for their protection. Other sections of the same chapter, and other chapters, regulate the rights of the creditors. The wife is made competent to contract debts. She may in all cases be sued alone and her property is made attachable the same as that of any other debtor, subject to the same exemptions and none other. The law carefully enumerates all that is exempt either by statute or common law. This enumeration by a well known principle of construction, excludes all others. The land in question is not among the exemptions, but is by clear and unquestioned law made attachable. But it is said that the general law of attachment must be so construed as not to interfere with this prohibition. It is true that two inconsistent laws cannot stand together. One or the other must give way and it may be a difficult question to decide which. But we are not to make them inconsistent except by necessity. No such necessity exists here. Giving the exception or prohibitory clause the full force required by its language and the purpose to be accomplished by the Legislature, there is no inconsistency. If we give it the broader construction, there is an inconsistency which no possible construction which can be given the attachment law can reconcile.

It may seem somewhat of an anomaly that land which cannot be sold by the debtor, which she cannot voluntarily turn out in payment of her debt, may yet be taken in execution by the creditor, and yet it was so under the common law disability of the wife. *Moore v. Richardson*, 37 Me., 438. In this case the wife is under the disability of the common law only as to the conveyance of the land.

Exceptions and motion overruled.

Peters, Ch. J., Walton, Libbey, Emery and Foster, JJ., concurred.

Adoniram J. BIRD

Mary M. BIRD, *Admrr.*

SAME *v.* SAME *et al.*

An action cannot be maintained by a surviving partner against the insolvent estate of a deceased partner, for a debt due from such estate to the partnership, though the partnership be insolvent, unless the action is pending at the time of the representation of insolvency by the administrator. The only remedy is before the commissioners of insolvency.

(Knox—Decided November 16, 1885.)

THE first case is *assumpsit*, for \$4,502.02, being the balance and interest shown by the firm books of an insolvent firm to be due from the estate of a deceased partner, which is also insolvent. *Dismissed*.

The second case is a proceeding in equity, for the recovery of the same debt. *Nonsuited*.

The facts appear in the opinion.

Mr. C. E. Littlefield, for plaintiff.

Mr. True P. Pierce, for defendant.

Danforth, J., delivered the opinion of the court:

By the statement of facts agreed upon in these cases, it appears that previous to May 10, 1882, there was a partnership in business consisting of the plaintiff, Hanson G. Bird and David N. Bird. On that date, Hanson G. Bird died, and the defendant was duly appointed and qualified as his administratrix. Subsequently, the plaintiff gave bond as surviving partner and was duly qualified to settle the partnership affairs. It further appears that said firm is largely insolvent and that the plaintiff has, in paying its debts, exhausted all its assets, except the claim now in question, besides paying from his own funds a sum much larger than this claim. The estate of Hanson G. Bird has been rendered and is insolvent, and commissioners appointed and qualified.

The claim in suit is for a private indebtedness of the defendant's intestate to the firm, as found upon its books at his decease.

The defense is that the plaintiff should have proved his claim before the commissioners of insolvency and shared in the distribution of the estate, as other creditors, under the provisions of R. S., c. 66, § 1.

That the claim in suit is a part of the assets of the firm upon which the creditors, as well as the individual members of the firm who have paid more than their share of its liabilities or received less than their share of its effects, have a lien, may be conceded. As such, it belongs to the partnership, and it becomes the duty of the plaintiff, as surviving partner, to turn it into money for the settlement of the partnership affairs.

If the firm were solvent, a portion of this claim would have belonged to the intestate, liable to his private debts, and the plaintiff and administratrix would have held it as tenants in common. But as the firm is insolvent, the joint creditors having a preference, the whole of this claim becomes a fund for their payment and thereby belongs exclusively to the plaintiff and necessarily a debt against the estate. As such debt, the plaintiff seeks to recover it in these actions and, but for the representation of insolvency, the action at law might have been maintained. Such debts it is the duty of the administratrix to pay; but she must pay them in the way pointed out by the law. She had the right to interpose insolvency as she has done, and having interposed it, by the express terms of the statute she is exempt from actions for any debt except in a few specified instances, and these suits, both of which are for the same cause of action, come within none of the exceptions named. In fact, it is not claimed that they do nor that they were pending at the time the representation of insolvency was made and prosecuted to ascertain the amount due as evidence to be given the commissioners, or that the amount ascertained may be added to the report of the commissioners; but they are prosecuted independent of the commission, not only for judgment but for execution, not only to ascertain the amount due but that the whole amount shall be paid. This is done not under or in pursuance of any provision of the statute but in spite of it, relying "upon the equitable lien for re-imbursement upon common-law principles applicable to partnerships independent of any statute." While there is such a lien at common law where the statute does not apply, when it does, the common law, if in conflict, must yield. But in this case there is no conflict. Strictly speaking, the firm has something more than a lien upon the claim in suit; it has the ownership of it. But whether lien or ownership, it does not change the nature of the thing, or increase or diminish its value. In either view, it is a debt against the intestate created by contract and is worth what can be collected upon it by the proper legal process. In law or equity no reason is apparent why one contract creditor in such a case should have any preference over another.

If we consider this an action to indemnify the plaintiff for the excess above his share, paid by him for partnership debts, the result must be the same, except, perhaps, in that case the action should have been in the name of the plaintiff as an individual, under his specific contract of indemnity with the intestate, and not as surviving partner. The case shows an express contract between the plaintiff and intestate, by which the latter was to re-imburse the former one half of such excess. Thus this liability rests upon the personal contract of the intestate and must stand upon the same ground as other indebtedness arising from personal contracts.

Thus, in any view we can take of this case, the liability to be enforced is one against the intestate as an individual, growing out of the fact that he was a member of the firm, but, nevertheless, depending upon his personal contract.

The plaintiff relies with much confidence upon *Wilby v. Phinney*, 15 Mass., 124, to sustain his action. It is true that that case is substantially like the present one, and that the statute relating to the settlement of insolvent estates then in force in Massachusetts, was the same as ours, in all respects material to the question at issue. How that case came into the court, whether by appeal or consent, or was commenced before the representation of insolvency, does not appear; but it was presented to the law court upon a report of referees which, in effect, is the same as upon a statement of facts as in this case. The questions there presented were whether the action could be sustained at all, as it depended upon the settlement of partnership affairs, and if so, for what amount, as the loss which the plaintiff would finally sustain by means of the partnership was uncertain, the referees having fixed it, up to the time of making the report. The court decided that the action could be maintained and fixed the amount to be recovered as reported by the referees. But what

is important in its bearing upon this case, is that the amount was subject to revision by subsequent proceedings, and one of those proceedings was the amount which might be paid upon a distribution of the deceased partner's estate. In alluding to the amount, the court says: "It is true, that we cannot now say that he will eventually be entitled to retain the whole dividend, which may be decreed to be paid him in the distribution of Harrison's estate; for that may be so considerable as to pay more than Harrison's just proportion of the debts of the firm." Again, on page 125, the court says: "The plaintiff may hereafter be compelled to pay the outstanding debts, which have been represented as of considerable amount; and after the distribution of Harrison's estate, he can have no relief." Thus it appears that under the decision of the court, the amount to be recovered was not necessarily the amount to be paid by the administrator, as this would depend upon the decree of distribution of the estate. In other words, no execution was to issue upon the judgment, but it was to be added to the commissioners' report for its distributive share of the estate, and this was the only remedy which the plaintiff could have. It is, therefore, apparent that the case cited is not only not in conflict with the conclusion to which we have come, but is an authority for it.

In *Johnson v. Ames*, 6 Pick., 330, an action very similar to the one at bar, it was held that insolvency of the estate of the deceased partner, decreed before the commencement of the suit, was a bar to its maintenance, no notice of appeal having been given, although there was a surplus of assets after the distribution among creditors who had proved their claims. It was then suggested that there might be a remedy in equity applicable to the surplus only. As in this case, no surplus appears.

Johnson v. Ames must be considered an authority for the conclusion in the case at bar that the plaintiff's remedy is before the commissioners of insolvency.

In the equity suit the entry must be: *Bill dismissed without costs.*

In the suit at bar law: *Plaintiff nonsuit.*

Peters, Ch. J., Walton, Libbey, Emery and Foster, JJ., concurred.

Charles B. VARNEY *et al.*

v.

Albert R. CONERY.

If a debtor gives his creditor a note, indorsed by a third person, for a less sum than the debt, but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction.

(Cumberland.—Decided November 24, 1885.)

ASSUMPSIT on account annexed, for \$65.50. The defense was that the claim had been settled; and the defendant and his father testified, in substance, that the plaintiffs' traveling salesman called upon him, defendant, to pay the plaintiffs' bill for merchandise, amounting 12

to about \$265, and on being informed by the defendant that he could not pay his debts in full, after some talk the salesman agreed to discharge the claim if the defendant would give him two notes of \$100 each, indorsed by the defendant's father, which was done. The plaintiffs and the salesman denied this, and claimed that the notes were given and received on account. The verdict was for the defendant and the plaintiffs moved to set it aside as against law and evidence.

Mr. E. S. Ridlon, for plaintiffs.

Mr. H. A. Tripp, for defendant.

No exceptions being taken to the charge before the jury retired, it is to be assumed that the law was correctly given. *Eaton v. Telegraph Co.*, 68 Me., 69.

Where defendant gave notes to plaintiffs' agent in accord and satisfaction of his debt to plaintiffs, upon an agreement of compromise with plaintiffs' agent, which notes were not returned to defendant, the latter is justified in assuming that all was just as the agent said it should be. *Qui facit per alium facit per se*: Story, Agen. 8th ed., § 442.

As to the authority to compromise a debt, see, R. S., ch. 82, § 45.

Virgin, -J., delivered the opinion of the court:

If a debtor gives and the creditor receives in full satisfaction of the debt, a note indorsed by a third person for a less sum than the amount of the debt, it is a good accord and satisfaction to bar a subsequent suit by the creditor to recover the balance of the debt. *Boyd v. Hitchcock*, 20 Johns., 76; *Dolsen v. Arnold*, 10 How. Pr., 529; *Brooks v. White*, 2 Met., 283; *S. C.*, 37 Am. Dec. and note, 98; and a subsequent promise to pay the balance is not binding; *Phelps v. Dennett*, 57 Maine, 491; so that even if the case does not come within the provisions of R. S., ch. 82, § 45, the verdict is not for that reason against law.

Under proper instructions, the jury found that the plaintiffs' runner, through whom all the dealings between the parties had been negotiated, had the authority of the plaintiffs to compromise the claim; and we think the runner's own testimony is a sufficient warrant for such finding.

That the notes were given and accepted in full satisfaction of the whole debt, the testimony of the defendant and of his father who indorsed them, is express, although denied by the plaintiffs' agent.

Motion overruled.

Peters, Ch. J., Walton, Libbey, Foster and Haskell, JJ., concurred.

STATE OF MAINE

v.

MAINE CENTRAL R. R. CO.

1. To sustain an action, either civil or criminal against a railroad company for injury or death of a person occa-

NOTE.—See, *State v. Chicago R. I. & Pac. R. R. Co. (Mo.)* 1 West. Rep., 400 and note.

sioned by a collision with its train at a crossing, it must be affirmatively proven, either directly or indirectly, that the collision was occasioned by the negligence of the railroad company, and that no want of due care on the part of the traveler contributed thereto.

2. It is negligence for one seeing or hearing an approaching train, running at ordinary speed, to attempt to cross the track in front of the train.

(Kennebec—Decided December 1, 1885.)

INDICTMENT against the defendant Corporation brought under § 68 of chapter 51 of the Revised Statutes to recover the forfeiture therein specified, for the death of Henry McBenner, alleged to have been caused by the negligence of defendant Corporation while deceased was attempting to drive over a street crossing.

Mr. W. T. Haines, for the State.

Messrs. Leslie C. Cornish and G. C. Vose, for defendant:

This class of cases, though criminal in form, is civil in substance. *State v. Grand Trunk R. Co.*, 58 Me., 176; *State v. E. & N. A. R. Co.*, 67 Me., 479.

And this motion, though not addressed to the law court in a proceeding strictly criminal, is properly addressed to and entertained by it in such a case as this. *State v. Maine Cent. R. Co.*, 76 Me., 357.

The fact that the train was moving at a rate slightly above that prescribed by the statute, is not negligence *per se*. It may be evidence of negligence, but is not in itself conclusive. *Hanton v. S. B. H. R. R. Co.*, 129 Mass., 310.

It seems that the municipal officers of Lowell never deemed it necessary for public protection to have either gates or a flagman at the crossing, for there is no evidence that they have ever made the application for the same, specified in Rev. Stat. ch. 51, § 34, 35.

But the presence or absence of a flagman and gates is entirely immaterial under the facts in this case: because, as will be seen hereafter, the deceased was aware of the approach of the train, heard it, saw it and spoke about it; therefore, a gate or a flagman could not have aided him; as our court said in *Brown v. E. & N. A. R. Co.*, 58 Me., 384.

The defendants were not required by statute to have a flag or flagman stationed at the draw to give notice. If they had done so, neither the flag nor the flagman could have given him greater information or clearer warning than his own vision gave him. It was in the daytime, and notice was unnecessary when all was known without notice. See, *State v. M. C. R. Co.*, 76 Me., 357, 366.

The deceased was guilty of such contributory negligence as to prevent the maintenance of this suit. The burden is upon the prosecution to prove affirmatively, freedom from contributory negligence on the part of Mr. Benner; in other words, that he himself was in the exercise of due care and diligence at the time of the accident. *Allyn v. B. & A. R. R. Co.*, 105 Mass., 77; *Hinckley v. C. C. R. R. Co.*, 120 Mass., 257; *Gleason v. Bremen*, 50 Me., 222; *State v. Grand Trunk R. Co.*, 58 Me., 176; *State v. Maine Cent. R. R. Co.*, 76 Me., 358.

The care which persons are required to exercise at railroad crossings to avoid danger, is such as prudent persons, conscious of the danger to which they may be exposed, usually exercise. And this requires the vigilant use of the ear in listening, and of the eye in looking for approaching trains. *Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y., 330.

No one can be said to be in the exercise of due care, who places himself upon a railroad track without the assurance from actual observation that there is no approaching train. *Gwynor v. Old Colony & N. R. Co.*, 100 Mass., 208; And, see, *Butterfield v. Western R. R. Corp.*, 10 Allen, 532; *Allyn v. B. & A. R. R. Co.*, 105 Mass., 77.

If a person omitted to use his senses of sight and hearing and walked thoughtlessly upon the track, he was guilty of culpable negligence, and so far contributed to his injuries as to deprive him of any right to complain of others. *R. R. Co. v. Houston*, 95 U. S., 697 (XXIV. Law. ed., 542).

It is negligence to attempt to cross the track of a railroad without looking to see if the cars are approaching. If the traveler does not look, and his omission contributes to his injury, he is guilty of such negligence as will bar his recovery, notwithstanding the negligence of those in charge, in omitting to sound the whistle or ring the bell. *Grove v. Maine Cent. R. R. Co.*, 67 Me., 100.

The peculiar risks of the crossing imposed upon the decedent the duty of special caution also; and as he knew that a regular train was due at the crossing at about that time, he was under the highest possible obligation to observe such precautions as would be needful to avoid a collision. *Haas v. G. R. & I. R. R. Co.*, 47 Mich., 401, citing *L. S. & M. S. R. R. Co. v. Miller*, 25 Mich., 274; *Pa. R. R. Co. v. Beale*, 78 Pa. St., 504.

The law imposes upon the traveler the exercise of the most rigid prudence and care under such circumstances. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. *R. R. Co. v. Houston*, 95 U. S., 697, 702 (XXIV. Law. ed., 542, 544), affirmed in *Schofield v. C. M. & St. P. R. Co.*, 114 U. S., 615 (XXIX. Law. ed.).

It is negligence to attempt crossing the track of a railroad, without looking to see if the cars are approaching. But it is greater negligence for one seeing the cars approaching at ordinary speed to make the attempt. *Grove v. Maine Cent. R. R. Co.*, 67 Me., 100, 104.

One in the full possession of his faculties, who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but is, in fact, struck by it, is *prima facie* guilty of negligence, and in the absence of a satisfactory excuse, his negligence must be regarded as established. *State v. Maine Cent. R. R. Co.*, 76 Me., 357, 365; See, *Md. Cent. R. R. Co. v. Neubeur*, 31 Alb. L. J. 497, and cases cited.

If he took this risk and miscalculated, he must bear the consequences of his imprudence. *Chicago & A. R. R. Co. v. Jacobs*, 63 Ill., 178, 180.

The truth plainly was, that he gave no heed to the railroad before him, until he came very

near it, and then chose to try the experiment of endeavoring to cross it in front of the engine, for that purpose applying the whip to his horses. He miscalculated and was struck. *Wilds v. H. R. R. Co.*, 29 N. Y., 815.

If he did not observe the train before reaching the track, it was by reason of his negligence; if he did observe it, his proceeding on without stopping was an act of gross carelessness. We can see no ground upon which the verdict can stand. *Connelly v. R. R. Co.*, 88 N. Y., 346.

The jury, in determining whether plaintiff exercised such care as ought to have been reasonably expected from one in his situation, might take into consideration whether or not, even if he looked up the track and saw the engine which struck him, it was at such a distance that, with its usual and lawful rate of speed at that place, he might reasonably have supposed that he could cross without harm. *Kelley v. Hannibal & St. Jo. R. Co.*, 75 Mo., 138.

If the locomotive is so near him that he deems it necessary to enter into such a calculation of chances, it is then conclusive that an attempt to cross its path is recklessness. He has no more right to presume that the servants in charge of the locomotive will obey the requirements of the law, than they have that he will obey the instinct of self-preservation, and not thrust himself into danger unnecessarily. See, *Daniel v. Metropolitan R. Co.*, L. R., 3 C. B., 591.

The alternative is as conclusive in this case as in *R. R. Co. v. Houston*, *supra*; *Spencer v. Utica*, etc., *R. R. Co.*, 5 Barb., 337; *Salter v. Utica & B. R. R. Co.*, 75 N. Y., 273; *Cent. R. R. Co. v. Feller*, 84 Pa. St., 226; *State v. Maine Cent. R. R. Co.*, 76 Me., 357.

Granting, for the sake of argument, that the train was running at a greater rate of speed than six miles an hour, that fact of itself is not a sufficient foundation for the verdict. If the relation of cause and effect is wanting, the verdict cannot stand. *State v. Maine Cent. R. R. Co.*, *supra*.

The fact that the train was run at an unauthorized rate of speed, would in no way relieve him of the consequences of his own negligence, and afford him a right of action against the defendant. *Daniel v. Metropolitan R. Co.*, *supra*; *S. C.*, 37 L. J. C. P., 280.

Mr. Justice Foster delivered the opinion of the court:

The indictment in this case is against the Maine Central Railroad Company for negligently causing the death of one Henry McBenner, on the 17th day of June, 1884, at Greenville Street crossing in the City of Hallowell.

About four o'clock in the afternoon of that day, the deceased was passing up Greenville Street seated upon the body of a four wheel empty dump-cart, hauled by one horse, and in attempting to cross the railroad was struck by the regular afternoon passenger train and instantly killed. A trial has been had, a verdict of guilty returned by the jury against the Railroad, and the case now comes before this court on motion to set aside the verdict as against evidence. From a careful examination of the case, we have no doubt that the verdict is wrong and

cannot be sustained by the evidence, and must, therefore, be set aside.

The principles of law pertaining to actions of this nature have been so recently discussed and laid down in *State v. Maine Cent. R. R. Co.*, 76 Me., 357, and *Lean v. Same*, 77 Me., 85, that it is hardly necessary to recur to them at this time. It is now the established law, not only of this court, but of the highest courts in this country, that in order to entitle a recovery in this class of actions, whether in form civil or criminal, it must be affirmatively shown that the defendants were guilty of negligence, that their negligence was the cause of the accident, and that the injured party was in the exercise of due care and diligence at the time of the injury; or, at least, that the want of such care on his part in no way contributed to procure it. It is not enough to show that the defendants were negligent. That may be true; and at the same time the injured party may have been negligent, and by such negligence on his part may have contributed to produce the injury complained of. In such case, the law affords no redress. It is incumbent on the prosecuting party to go further and, directly or indirectly, by affirmative proof satisfy the jury that no want of due care on the part of the injured party, who seeks to recover compensation, helped to produce the accident.

Applying these rules of law to the case under consideration, and from an examination of the evidence before us, we do not find the mere want of proof on the part of the prosecution to establish due care, but, on the contrary, the evidence overwhelmingly preponderates in affirmatively establishing contributory negligence, amounting to even sheer recklessness, on the part of the deceased.

This is not a case where evidence is wanting as to the circumstances attending the accident or the manner in which it happened. It is conclusively shown that the deceased was entirely familiar with the crossing and its surroundings, and had been for six months prior to the accident. Living in the immediate vicinity, he had been accustomed to cross and recross the railroad at that point several times each day, and at the time of the accident and for three days prior thereto, he was engaged in hauling dirt from a bank about seventy-five rods west of this crossing to a place about the same distance east of it, and passing over it quite frequently.

At the time of the accident the deceased was riding upon an empty dump-cart fastened to the axle of the hind wheels, the front of which came up to within about three and one half feet of the forward axle, so that there was a considerable space between himself and the horse he was driving. The evidence is conclusive and uncontradicted that the whistle was sounded at the regular whistling post, about one hundred rods below the Greenville Street crossing, and that the bell was rung continuously from that point to the crossing where the accident occurred, and beyond. There were at least three witnesses to the accident, aside from those upon the moving train. Collins, one of the witnesses, who was present and within a few feet of the deceased at the time of the accident and who had walked up from Water Street by the side of the team, testifies that Benner had been talking with him all the way up towards the crossing,

and when about half way up the hill, McBenner said: "There comes the train," and Collins asked if that was the Augusta train, and he said it was; that he was part of the time leaning over partly looking towards him; and that when he said the train was coming, he looked the other way and commenced to pull on the reins of his horse; and when the alarm signals from the engine were given, Collins then being a little in advance of the horse, which was within about four feet of the track, threw up his hands, and McBenner stopped two or three seconds, and then commenced saving on the reins and said: "I guess I can make it," and drove directly on to the track in front of the advancing train.

The witnesses for the State who saw these parties at the time of the accident strongly corroborate the testimony of Collins, as to the position of the deceased, the situation of the team and the distance it was from the track at the time the danger signals were given. Blake, one of the witnesses for the State who was near by at the time, says that when he first saw McBenner he was sitting in a stooping position, facing towards the north, apparently talking with the man walking by his side, and when the alarm whistles were given, he looked round to the south towards the engine, and then turned back and hallowed: "Get up," to his horse and began to fish on the reins; he was going very slowly, if he was going at all; he was not trotting the horse any way.

The evidence overwhelmingly preponderates in favor of the fact that the deceased was aware of the approach of that train before he drove upon the crossing. It was in broad daylight. The horse was one which might, with propriety, be termed gentle, not afraid of the cars, and going only at a walk. And it is appropriate to say here, as was said by Mr. Justice Walton in *State v. Maine Cent. R. R. Co.*, *supra*: "One in the full possession of his faculties, who undertakes to cross a railroad track at the very moment a train of cars is passing or when a train is so near that he is not only liable to be, but is in fact, struck by it, is *prima facie* guilty of negligence; and in the absence of a satisfactory excuse, his negligence must be regarded as established." The evidence offered fails to furnish any satisfactory excuse for the act of the deceased in this case.

It is claimed by the prosecution that there were embankments and other obstacles to the view of approaching trains, and that it was the duty of the Railroad Company, on account of this, to exercise greater caution in approaching this crossing. Assuming that such obstacles existed, it may be true; but at the same time, such a state of facts, with the knowledge of them, such as the deceased must have had, would impose on him a corresponding duty of special caution also.

The established doctrine, by the great weight of authority and by numerous decisions is, that it is negligence to attempt to cross the track of a railroad without looking and listening to ascertain if a train is approaching, and that ordinary sense, prudence and discretion require this of a traveler, so far as he has an opportunity so to do. If the experiment is made without such precaution, the party acts at his peril, and in the event of an injury received by collision with a passing train, where such pre-

caution is wanting, the traveler must be held to have so far contributed to the catastrophe as to preclude any recovery by him against the company. This precaution is not only reasonable and proper on the part of the traveler for his own safety, but it is equally necessary for the safety of the multitude of passengers upon railroad trains, liable to be killed by collision with obstacles, even of an animate nature, upon the track. As remarked by Paxson, J., in *Phila. W. & B. R. R. Co. v. Stinger*, 78 Pa. St., 219: "The right of a man to risk his own life and that of his horse may be conceded; but not the right, by an act of negligence, if not of recklessness, to place in peril the lives of hundreds of others who may happen to be traveling in a train of cars." Public welfare, as well as private danger to the individual, requires the enforcement of this rule, and, consequently, courts have been strict and rigid in adhering to it. But if it is negligence to attempt to cross the track of a railroad without calling into use the senses of seeing and hearing, it is still greater negligence for one seeing and hearing a train approaching at ordinary speed, to make such attempt. It is recklessness.

In *Chicago, etc., R. R. Co. v. Houston*, 95 U. S., 697 [XXIV. Law. ed., 542], the court hold that if a person using his senses sees the train coming, and yet undertakes to cross the track instead of waiting for the train to pass, and is thereby injured, the consequences of such mistake and temerity cannot be cast upon the company; that no railroad company can be held for a failure of experiments of that kind; and if one chooses, in such a position, to take risks, he must bear the consequences of failure.

Numerous cases might be cited, sustaining like views, but we do not deem it necessary. From the evidence before us, we can arrive at no other conclusion than that, if the deceased did not observe the train before reaching the crossing, it was by reason of his negligence; and if he did observe it, then his proceeding on and attempting to cross in front of the approaching train was an act of gross carelessness, and in either event, the verdict cannot be sustained.

And if, as claimed by the prosecution, the train at the time was running at a higher rate of speed than six miles an hour, in violation of the statute, it may be conceded that such running would be evidence of negligence on the part of the Railroad Company, and might subject it to the penalty prescribed by statute. Nevertheless, the plaintiff's case would still fail of being made out, unless it appeared that the injury was occasioned by such unauthorized speed of the train, without any direct contributory negligence on the part of the deceased himself. The relation of cause and effect would be wanting. And upon this branch of the case the evidence is absolutely insufficient upon which to found a verdict.

By agreement of counsel filed with the case, the decision of this court was to make a final disposition of it; therefore the entry must be:

Motion sustained and verdict set aside. Judgment for defendant.

Peters, Ch. J., Walton, Danforth, Libbey and Emery, JJ., concurred.

Celia C. STINSON

v.
Joseph L. FERNALD.

1. **Part owners of a vessel must join in an action to recover the earnings; and in case of the bankruptcy of one of the part owners, the assignee must be joined with the solvent owners.**
2. **There are exceptions to this general rule, as where one part owner has already received his share of the common earnings; after that, the other owner or owners, may sue for his share.**

(Knox—Decided December 9, 1885.)

ASSUMPSIT by the half owner of a vessel, to recover his share of the earnings from the master, not an owner. Objection to the maintenance of the suit, on the ground that the other half owner should be joined, both owners having been parties to the contract which related to the use of the vessel.

The case is stated in the opinion.

Mr. J. H. Montgomery, for plaintiff:

In contracts *ex contractu*, co-tenants may join or sever, according to the terms of the contract sued upon. *Kimball v. Sumner*, 62 Me., 305.

The surrounding circumstances and the situation of the parties and the nature of the consideration may be looked at, in order to see who may bring suit. *Chit. Cont.*, 124.

Indebitatus assumpsit by one joint owner of a ship, for his share of the freight, was joint or several, at the plaintiff's election. *Stanley v. Ayles*, 3 Keble, 444.

Mr. Parsons, in his work on Shipping and Admiralty, Vol. 1, 117, commenting on the opinion says: "It seems, however, well settled, that where the contract is joint, either by agreement or implication, as where the joint owners are general partners or *quasi* partners in the particular adventure, they must sue together."

The probabilities are, that a settlement had been made with the assignee of the bankrupt owner, and in that case this action will hold. *Baker v. Jewell*, 6 Mass., 480.

If justice is done between parties, by permitting several actions, the defendant has no cause of complaint. In the case at bar, the plaintiff can only lose this action, for the Statute of Limitation bars further action. *Kimball v. Sumner*, 62 Me., 311.

Where joint property is sold by a sheriff, one part owner may have separate action for surplus in sheriff's hands. *Hopkins v. Foreyth*, 14 Pa. St., 34.

Where joint property is sold, a part owner may have separate action against the purchaser, for his share of the price. *Lyman v. Boston & Me. R. R. Co.*, 58 N. H., 884.

Mr. E. C. Littlefield, for defendant.

Peters, Ch. J., delivered the opinion of the court:

The plaintiff sues the master of a vessel for one half of her use for a certain time. The vessel was let as a whole, the plaintiff owning but one half of her. The defense set up is nonjoinder; the defendant contending, under the general issue, that all the owners should be joined as plaintiffs.

Such is the general rule; and the rule governs, unless there be some excuse for disregarding it. Tenants in common of personal property have a single claim, and not separate claims, for the use of the common property. One tenant in common, of course, can lease his own interest separately by some special agreement. And a severance may be created, by the debtor's making a settlement with one owner, for his share or interest in the common earnings; after which the other owner may sue for his share separately. The case in hand does not come within the permitted exceptions. *Moody v. Sewall*, 14 Me., 295; *White v. Curtis*, 85 Me., 584.

It is contended that the other owner could not be joined as a plaintiff in the present case, because he had been declared a bankrupt. This does not operate as a severance. The assignee should have been joined. All competent parties must unite, whoever they may be. The bankrupt law provides that the assignee shall have the like remedy to recover all debts, as the debtor would have had if there had been no decree of bankruptcy. R. S., U. S., §§ 5046, 5047. Such has been the practice in this country and in England. *Add. Cont.*, § 477; *Dacey*, Parties, 160; *Thomason v. Frere*, 10 East, 418; *Kelly v. Smith*, 1 Blatchf., 290; *Murray v. Murray*, 5 Johns. Ch., 60; *Willink v. Renwick*, 23 Wend., 63; *Fuller v. Benjamin*, 23 Me., 255.

To this it is replied that there had been no assignee appointed for the owner who was in bankruptcy. The case is indefinite in this particular. But if it be so, it calls for no qualification of the rule. Some party representing the ownership should be joined. Either the owner or his assignee should be. The name of the bankrupt could be used, until an assignee got into court, and the defendant could not object to the proceeding. *Mayhew v. Pentecost*, 129 Mass., 332; *Reed v. Paul*, 131 Mass., 129; *Ramsey v. Fellows*, 58 N. H., 607.

The plaintiff should be allowed, upon payment of costs, to amend the writ by inserting an additional plaintiff, if he desires to; otherwise, to be nonsuit. R. S., ch. 83, § 11.

Walton, Danforth, Libbey, Emery and Foster, JJ., concurred.

STATE OF MAINE

v.
George A. LYNDE.

1. **Where a witness has examined a public record and swears that he has made a true copy, such copy may be admitted to show the contents of the record.**

(Knox—Decided December 9, 1885.)

ON EXCEPTIONS. *Overruled.*

Indictment for keeping a liquor nuisance. A witness at the trial testified that he had examined the records in the office of Collector of Internal Revenue and had made a true copy of a certain portion. That copy was then admitted, against the defendant's objection, to show that the defendant had taken out a license as a retail liquor dealer.

Mr. True P. Pierce, County Attorney, for State.

Messrs. D. N. Mortland and J. E. Hanley, for defendant.

Peters, Ch. J., delivered the opinion of the court:

The original record of payments for licenses, kept in the office of the Collector of Internal Revenue, would have been proper evidence. And a copy of the same, certified by the collector himself, would have been. A copy of the record, authenticated merely by a clerk in the collector's office, an unofficial person, standing without other proof, would be neither sufficient nor admissible. But it was in this case supported by the testimony of the clerk as a witness, who swears that he personally examined the record and made a true copy. The copy sustained by his oath, was admissible, if the mode of proof styled "sworn copies," or "examined copies," is allowable by the practice in this State. *State v. Gorham*, 65 Me., 270.

Examined copies are, in England, resorted to as the most usual mode of proving records. *Whart. Ev.*, § 94. The mode is explained and commended in *Best's work on Evidence*, § 486. It seems to have prevailed in many of the States, including Pennsylvania and New York. It was at an early date adopted in some of the federal circuit courts. *U. S. v. Johns*, 4 Dall. 4 [U. S.], 412. It is not an unknown mode of proof in New England. It is spoken of as a well settled doctrine in New Hampshire. *Whitehouse v. Bickford*, 29 N. H., 471. In *Spaulding v. Vincent*, 24 Vt., 501, it is said: "The more usual method" (of proving a discharge in a foreign court of bankruptcy) "is a sworn copy." *Mr. Greenleaf says*, 1 Ev., § 485, "Where the proof is by copy, an examined copy, duly made and sworn to by any competent witness, is always admissible." In *Atwood v. Winterport*, 60 Me., 250, the rule is casually approved, *Appleton, Ch. J.*, there saying, whilst speaking of the mode of proving an army record: "A sworn copy is admissible, or a copy certified by the proper certifying officer."

Why not admissible? The evidence is as satisfactory, certainly, as a certified copy. In the latter case we depend upon the honor and integrity of an official, and in the former upon the oath of a competent witness. In either case, an error or a fraud is easily detectable. Probably, the reason why such a mode of proof has not been much known, if known at all in our practice is, that it is cheaper and handier to produce copies, and if a witness comes instead, it is more satisfactory to have the officer who controls the records bring them into court. In some jurisdictions, certified copies are not admitted in all cases, but only from special necessity. We think the evidence was properly admitted.

Receptions overruled.

Walton, Danforth, Libbey, Emery and Foster, JJ., concurred.

Andrew N. STOWE

vs.
Betsey MERRILL.

1. A bond given by the grantee, three years after the delivery of an absolute deed, conditioned to reconvey to the grantor, cannot be considered a defeasance, so as to constitute the deed a mortgage under the Statutes of Maine. R. S., ch. 90, § 1.
2. A note payable "in one — after date" may be identified as one payable in one year to correspond with one described in the mortgage given to secure it.
3. It is not necessary for the mortgagee to sign the mortgage, in order to make an agreement in relation to the time of redemption, inserted in the mortgage, binding upon him; and it is not necessary to insert such agreement in the notice of foreclosure of such a mortgage.
4. A notice of foreclosure, published in three successive issues of a weekly newspaper and recorded the next day after the last publication, is sufficient under the Statutes of Maine. R. S., ch. 90, § 5.
5. The judgment in an action of dower is not binding on one who was not a party or privy.

(Oxford—Decided December 7, 1885.)

WRIT OF ENTRY. *Judgment for plaintiff.*
The case is sufficiently stated in the opinion.
Mr. R. A. Frye, for plaintiff.
Mr. S. F. Gibson, for defendant.

Virgin, J., delivered the opinion of the court:

Writ of entry. Both parties claim title from Joseph L. Merrill; the plaintiff, as assignee of an alleged foreclosed mortgage of the defendant premises given by J. W. Merrill, son of Joseph L., who derived his title through several *mesne* conveyances from his father; and the defendant, formerly the wife and now the widow of Joseph L. Merrill, by virtue of an alleged assignment of dower set out to her on a writ of seisin issued October 16, 1883, on a judgment for dower recovered on default against her son at the preceding September Term.

1. Willis' bond to his grantor, Joseph L. Merrill, executed more than three years after the delivery of Merrill's absolute deed to him, cannot be considered an instrument of defeasance and thereby render the conveyance a mortgage, the bond not having been "executed at the same time with the deed or as a part of the same transaction." R. S., ch. 90, § 1. And the fact that the defendant took a similar bond from Philbrook to herself more than a year after Willis conveyed to him, shows that she always also understood it, and were it otherwise, the bond never having been recorded, it would not have operated as a defeasance as against the subsequent grantees, Philbrook or Twitchell. R. S. (1871), ch. 73, § 9.

2. While the mortgage, under which the plaintiff claims, describes the note secured there,

by as one payable in "one year," and the note produced has a blank space therein after the words "in one" and before the words "after date," the identity is established by the recital in the case that the "execution and delivery of the deed of assignment, also the note secured and unpaid are admitted." Moreover, if no such admission had been made, the note itself, with the attending circumstances, satisfies us, in the absence of any counter testimony, that the word "year" was intended by the parties to fill the blank. *Nichols v. Frothingham*, 45 Me., 220, and cases cited in the opinion of the court.

8. It is contended that the agreement limiting the time of redemption to one year, as authorized by Stat., 1876, ch. 118, now R. S., ch. 90, § 6, although it was "inserted in the mortgage" as the statute requires, it was not signed by the mortgagee, which the statute does not require. But both parties are not required to sign a deed of this character, in order that its stipulations shall be binding on them; being a deed poll, on acceptance by the grantee it became the mutual act of both parties thereto and therefore binding on them. *Newell v. Hill*, 2 Met., 181.

4. Neither does the statute require such agreement to be incorporated in the notice of foreclosure. The notice of foreclosure contains everything required by R. S., ch. 90, § 5, viz: the claim by mortgage of premises so intelligibly described as to inform the party entitled to redeem, with reasonable certainty what premises are intended (*Chase v. McLellan*, 49 Me., 375); mention of the date of the mortgage; and an allegation of a breach of its condition together with a claim of foreclosure by reason thereof.

5. The law does not require publication of the notice twenty-one days before record. "It was published in three consecutive weekly issues of the newspaper. The record in the registry of deeds must be 'within thirty days after such last publication.' Therefore it may be within one day after." *Wilson v. Page*, 76 Me., 281.

6. It is contended that the transactions between J. L. Merrill and Willis constituted a mortgage; that the conveyance of November 27, 1868, from Willis to Philbrook, operated as an assignment of that mortgage which was paid and thereby discharged April 5, 1871. The only evidence urged in support of such contention is the nominal receipt of that date from Philbrook to Merrill. But, as already seen, the deed and bond did not constitute a mortgage; and the giving of another bond in 1868 shows the parties understood the former was no instrument of defeasance. Moreover, as late as Dec. 14, 1872, J. W. Merrill, son of J. L. Merrill and of this defendant, took a bond of the premises from Philbrook and Twitchell and Willis' successors in title, whereby they obligated themselves to convey it to him on payment of \$650 at the various times therein specified; which he would not be likely to do, if the parties understood the title was one of mortgage and that discharged.

We are of opinion, therefore, that the plaintiff has proved a regular chain of title from Willis, to whom this defendant released her right of dower which she now sets up in defense; which title became absolute in one year

after the first publication of his notice of foreclosure. To be sure the defendant recovered judgment for dower against her son, who once held the title, four years after he had conveyed it to the plaintiff's assignor; but assuming, without deciding, that the commissioners selected to set out the dower were legally sworn by the deputy sheriff who held the writ of seisin, that judgment cannot bind this plaintiff who was neither party nor privy thereto; and hence there must be.

Judgment for the plaintiff.

Peters, Ch. J., Walton, Libbey and Haskell, JJ., concurred.

Henry K. WHITE *et al.*

O. M. KILGORE and Trustee; Hussey and Conant, Claimants.

1. An oral assignment of a chose in action is valid when made for a valuable consideration and perfected by a delivery. The delivery may be symbolical or constructive and evidenced by a less significant act, when the claim assigned is not capable of a manual delivery, like an execution, note or bond.
2. Such an assignment of an account may be made for collateral security, and it will be so regarded when that appears to have been the intention of the parties.
3. Three men agreed that the first should pay the second a certain sum due from the first to the third, the third being then indebted to the second and receiving at the time a further credit from the second. Held, that this was a valid oral assignment of the account, due from the first to the third, from the third to the second.

(Somerset—Decided December 9, 1886.)

ON EXCEPTIONS. Sustained.
Equity. Assignment of choses in action. The case is stated in the opinion.

Messrs. Walton & Walton, with Messrs. Danforth & Gould for plaintiffs:

Flanders' verbal agreement to pay Kilgore's debt was within the Statute of Frauds. *Hilton v. Dinamore*, 21 Me., 410; *Roue v. Whittier*, Id., 545; *Stewart v. Campbell*, 58 Me., 439; *Furbish v. Goodnow*, 98 Mass., 296; *Whitney v. Munroe*, 19 Me., 42; *Langdon v. Richardson*, 58 Iowa, 610; *Bugbee v. Kendricksen*, 130 Mass., 487.

Mr. C. A. Harrington, for claimants:
A judgment may be assigned by parol or by writing. *Ford v. Stuart*, 19 Johns., 342.

A bounty due from a town, may be assigned by parol. *Sprague v. Frankfort*, 60 Me., 253.

Other cases bearing more or less strongly on same point. *Simpson v. Bibber*, 59 Me., 196; *Curtis v. Norris*, 8 Pick., 280; *Jones v. Witter*, 18 Mass., 304; *Dunn v. Snell*, 15 Mass., 485; *Crocker v. Whitney*, 10 Mass., 316; *Voe v. Handy*, 2 Me., 322; *Ticomb v. Thomas*, 5 Me., 285; *Nat. Exchange Bank v. McLoon*, 78 Me., 498.

Peters, Ch. J., delivered the opinion of the court:

It is a sufficient statement of the facts of the

case to say, that the trustee, Flanders, owed the defendant, Kilgore, on account, and the defendant owed the claimants, Hussey & Conant, on account; that there was a verbal agreement between the parties that Flanders should pay to Hussey & Conant what he owed Kilgore towards the satisfaction of their debt against Kilgore; that Flanders promised to send a check to Hussey & Conant, but was trustee in this suit before the check was sent.

Which party has the better claim upon the fund in the trustee's hands? The claimants contend that the defendant assigned his account against the trustee to them; that the transaction amounted to an equitable assignment, made orally. The plaintiff contends otherwise.

The ground taken by the plaintiff is, that there was not an assignment for two reasons: 1, that there was no consideration; 2, that there was no delivery of the debt or thing assigned.

The doctrine of equitable assignments of choses in action was, at an early date, adopted by the law; and it has been an expanding, growing doctrine. The general rule of courts has been that, to establish a mere oral, or written or unwritten agreement, assignment of a chose in action, both a consideration and a delivery must be proved, not only as against creditors and subsequent purchasers, but as between the parties themselves. If it be asked why there should be more particularity of the requirement of delivery in equitable than in legal sales, the answer is, that from the nature of things, there is nothing else to indicate that it is an executed rather than an executory contract; nothing to clearly mark the intention of the parties. There would be too much uncertainty and misunderstanding in such equitable contracts, unless the rule respecting consideration and delivery be adhered to. Equity, in its liberality, invented the doctrine and, at the same time, in its caution, provided certain requirements to be observed in its application. While equity dispenses with some forms, it insists upon others.

The element of valuable consideration has been quite rigidly adhered to. Our own cases have uniformly required it. "The presence of a valuable consideration becomes the essential and necessary element of an equitable assignment." *Tallman v. Hoey*, 89 N. Y., 537.

A delivery is just as essential an element as the presence of a valuable consideration.

It is said by Redfield, J., in *Whittle v. Skinner*, 23 Vt., 531: "We know of no case where an agreement to assign a chose in action, without even a symbolical delivery, has been held valid, between the parties even." While, however, delivery or its equivalent is necessary in those cases of "imperfect transfer," rather insignificant acts have been in many instances allowed to answer the requirement. Various circumstances and situations of parties have been construed as tantamount to delivery. And especially is this so in respect to verbal assignments of debts which are not evidenced by any writing and therefore, not susceptible of manual or visible delivery.

In *Robbins v. Bacon*, 3 Me., 346, Mellen, Ch. J., said: "A bond or note may be assigned upon valuable consideration by mere delivery to the assignee for his use. In those cases, the bond or note is evidence of the debt due. When the debt is due on book merely, as a man can-

not deliver over to an assignee of such debt his general book of accounts, a copy of the account taken from the book, with an order on the debtor, may well be considered as a delivery." In subsequent cases, not as much was required.

In *Porter v. Bullard*, 26 Me., 448, it was a sufficient delivery, that a copy of an account was handed over, and it was there held that a receipt from the assignee to the assignor, admitting a transfer to himself, was sufficient evidence of a delivery. In *Garnsey v. Gardner*, 49 Me., 167, the court held that the assignment of a debt might be made by parol, and might be inferred from the conduct and acts of the parties. In *Sprague v. Frankfort*, 60 Me., 263, it appeared that a person volunteered for the war, as a substitute for an enrolled man, for the sum of \$600, verbally agreeing that any future bounties payable to him should belong to the person whose place he took; and this was held to be a parol assignment. In that case there was nothing to deliver and might never be. The assignment was a part of the original agreement, and a part of the consideration therefor. The parties acted under it. *Simpson v. Bidder*, 59 Me., 196, is a still more radical case perhaps. But in that case there was more than merely spoken words to constitute an assignment; there were circumstances. The assignee had an equitable lien for his repairs.

There should undoubtedly be something more than words to constitute sale and delivery; there must be some act. "Any order, writing or act, which makes an appropriation of a fund," amounts to an equitable assignment of that fund. Story, Eq. Jur., § 1047. A constructive delivery may be evidenced by conduct indicating that the assignor relinquishes and the assignee assumes control of the chose in action. *Brewer v. Franklin Mills*, 42 N. H., 292; *Williams v. Ingersoll*, 89 N. Y., 508.

In accordance with this view of the law, we think that the claimants are entitled to a portion of the fund. There was a consideration for the assignment. The claimants let a portion of their goods go upon the strength of the assignment. The agreement to buy the debt was a consideration for its sale. The acts of the three parties, one selling, another buying and the third agreeing to account to the buyer, done contemporaneously, amounted to at least a constructive delivery. It was enough to "satisfy the reason and policy of the law."

The assignees cannot hold all the funds. Only \$24.44 was due them when the writ was served, while the debt assigned was \$60.53. The transaction has evidently resolved itself into a matter of security.

Says Story, J., in *Flagg v. Mann*, 2 Sumner, 486: "If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." The fund should be divided as before indicated. Any other view would cast a fraudulent shadow over the original assignment. Such an assignment could as properly be for collateral security as to be absolute. *Taft v. Bowker*, 132 Mass., 277.

Exceptions sustained. Claimants to have \$24.44 only of the fund.

Walton, Danforth, Libbey, Emery and Foster, JJ., concurred.

Inhabitants of MONMOUTH

v.
Elias PLIMPTON *et al.*Wilbert WOODBURY *et al.*,v.
SAME.

In a warranty deed by the owner of the land, the grantor said: "I, * * *, do hereby give, grant, bargain, sell and convey unto the said E. Plimpton and sons, their heirs and assigns forever, the right of having, building and maintaining, and repairing and keeping in repair a dam across Purgatory Stream, on premises conveyed to me by C. F. Dunn, at, on or near where the dam now is, with the right to so much of said premises as may be necessary, on which to build and maintain said dam, with its wings." Held, that the deed conveyed the fee in the land on which the dam was built and maintained.

(Kennebec—Decided December 7, 1885.)

ON report. Judgment for complainants.
Complaints for flowage.

The facts in the two actions are the same, and are stated in the opinion.

Messrs. Potter & Lancaster, for complainants in first action:

The words of the deed conveyed a fee in the land on which the dam stands, and, consequently, complaint for flowage will lie. The following words have been held to convey a fee: "use of," "entire income of," "all the improvements, income and benefit of," "all the profits of," "privileges of," "including all the privilege of." *Reed v. Reed*, 9 Mass., 872; *Andrews v. Boyd*, 5 Me., 199; *Butterfield v. Huskins*, 33 Me., 395; *Gleason v. Fayerweather*, 4 Gray, 348; *Farrar v. Cooper*, 34 Me., 394; *Dillingham v. Roberts*, 75 Me., 469.

There is nothing in the ownership or occupancy of the land on which this dam stands, analogous to an easement. An easement is "a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose, not inconsistent with a general property in the owner." *Bouv. L. Dic.*; 2 Washb. Real Prop., 25.

The construction contended for preserves the proper and long established distinctions between estates in fee and easements, and is clearly warranted by the decisions of this court. *Farrar v. Cooper*, *supra*; *Dillingham v. Roberts*, *supra*.

Mr. A. M. Spear, for complainants in second action.

Messrs. Clay & Clay, for defendants.

Foster, J., delivered the opinion of the court:

This is a complaint for flowage. It is a statutory proceeding. To be entitled to maintain it, the complainant must show that the conditions of the statute have been complied with. The only condition concerning which there is any controversy, and the only question involved in this case is, whether the dam which causes the flowing is erected and maintained on land of the defendants.

It is admitted that defendants own a mill, mill privilege and dam, on the stream some ways below the one in question, which is a reservoir dam, built and maintained by the defendants, for the purpose of supplying water to their mills below. That such a dam is protected by the provisions of the statute, if erected and maintained on land of the defendants, there can be no question. *Nelson v. Butterfield*, 21 Me., 231; *Dingley v. Gardiner*, 78 Me., 66.

"Any man may on his own land, erect and maintain a water mill and dams to raise water for working it, upon and across any stream, not navigable." R. S., ch. 92, § 1.

Whatever rights the defendants have, in relation to this reservoir dam, were derived by warranty deed from one John G. Robie, who was the owner of the land where the dam is situated. In that deed he says: "I, * * * do hereby give, grant, bargain, sell and convey, unto the said E. Plimpton and sons, their heirs and assigns forever, the right of having, building and maintaining, and repairing and keeping in repair, a dam across Purgatory Stream on premises conveyed to me by C. F. Dunn at, on or near where the dam now is, with the right to so much of said premises as may be necessary, on which to build and maintain said dam with its wings." The same deed conveys to the defendants certain easements over the land of the grantor, such as the right to pass to and from said dam from the road, the right to flow to a certain height and to remove obstructions from the stream, etc. The *habendum* in said deed is in these words: "To have and to hold the aforegranted and bargained premises and rights with all the privileges and appurtenances thereto belonging, to them the said E. Plimpton and sons, their heirs and assigns, to their use and behoof forever;" and following which are the usual covenants of warranty.

The question is, whether, by this deed, the defendants obtained a fee to so much of the land as is covered by this dam. We think they did.

Prof. Washburn, Vol. 2, 622, speaking of forms of conveyance by private grant, says that it is not necessary "That the deed should, in terms, convey the land or thing intended to be granted, if such grant is implied from what is described. Thus, a grant of the rents, issues and profits of a tract of land, is the grant of the land itself. If the grant be of the uses of, and dominion over land, it carries the land itself."

"Such designation and description, though usual, are not always essential. Land will often pass by other terms." *Sheets v. Selden*, 2 Wall. (69 U. S., XVII., Law. ed., 825), 187.

The same is true in regard to devises, where the following words have been held to convey an estate in the land, equivalent to a devise of the land itself, either in fee or for life, according to the limitation expressed in the devise: the income of land, *Reed v. Reed*, 9 Mass., 374; *Andrews v. Boyd*, 5 Me., 202; the income and interest of land, *Blanchard v. Brooks*, 12 Pick., 68; *Fay v. Fay*, 1 Cush., 101; rents and profits, *South v. Allcine*, 1 Salk., 228; improvement, use and benefit, *Gleason v. Fayerweather*, 4 Gray, 351; all my right and benefit, *Newkirk v. Newkirk*, 2 Caines, 351.

In *Farrar v. Cooper*, 34 Me., 397, the court held that a deed of "an undivided moiety forever, of the privilege of a mill yard" conveyed a

fee in the mill yard. And in the same deed, a moiety of a double saw-mill was conveyed, "with the privilege of forever having and keeping a saw-mill on the same plat of ground whereon the same conveyed moiety now stands;" and these words were held to convey a fee; "for," as Shepley, *C. J.*, remarked, "a conveyance of the 'use of the land forever,' is equivalent to a conveyance of the land." This case is cited and approved in *Dillingham v. Roberts*, 75 Me., 471, where a deed conveying a parcel of land bounded on one side by the shore of the sea at high water mark, contained the following words, "including all the privilege of the shore to low water mark;" and the court held that the fee in the land between high and low water mark passed to the grantee.

In *Caldwell v. Fulton*, 81 Pa. St., 475, the grantor conveyed the full right, title and privilege of digging and taking away stone coal, to any extent the grantee might think proper to do or cause to be done, under any of the land owned and occupied by the grantor; and the court there held, that such an interest in the mines under the grantor's lands passed, as to distinguish it from a right of easement in the land.

Examining the language of the deed before us, we find that the grantor not only says that he does "give, grant, bargain and sell and convey unto the grantors, their heirs and assigns forever, the right of having, building and maintaining and repairing and keeping in repair, a dam" on certain premises, but he also in the same clause conveys "the right to so much of said premises as may be necessary, on which to build and maintain said dam with its wings." If there is any doubt as to the meaning of the language used, it must be taken most strongly against the grantor and in favor of the grantees. He conveys the "right" to a definite parcel of land. The extent of that parcel is that which "may be necessary on which to build and maintain said dam, with its wings."

Webster defines "right" to be "just claim; legal title; ownership." Had the grantor conveyed all his right, title and interest in the parcel thus described to the grantees, their heirs and assigns forever, the fee would undoubtedly have passed. Here he conveys his right, which, in this connection, is equivalent to title.

"It can hardly be doubted," says Livingston, *J.*, in *Neukerk v. Neukerk*, 2 Cal., 351, "that a devise of a man's right in land will pass all his estate and interest therein and, of course, a fee, if he himself have one. Right is equivalent to all right; and if all his right be devised, what is there left for others?"

Here the right is to so much of the premises as may be necessary, on which to build and maintain a dam, with its wings; and this right is not repugnant to, but rather expressive of, the right previously named: that of having, building and maintaining and repairing and keeping in repair a dam upon that particular spot. It is something more than the mere right to do an act or a series of acts upon this parcel of land, and herein lies the distinction between the grant of a fee and an easement therein. The conveyance was of the entire beneficial occupation of such parcel, strongly indicative of a fee, and not for uses which might be only intermittent and occasional; uses sometimes denominated "non-continuous."

ME.

And when we apply the rule of construction, that in determining the meaning of the parties, recourse may be had to the whole instrument, our conclusions are sustained by the language of the *habendum* where the "aforegranted and bargained premises and rights" are named. The parties evidently, from a fair construction of the language used, recognized the distinction between the title or estate in fee which was granted, and the easements subsequently named in the deed, such as the right to flow, to pass and repass, and to enter and remove obstructions, etc.

Furthermore, whatever estate was conveyed was one of inheritance. The deed is one of warranty, with covenants warranting and defending the premises to the defendants, their heirs and assigns forever.

It is claimed, however, that the estate was not one in fee simple, but a qualified or determinable fee, and that it will continue no longer than the land may be occupied and used for a dam. Granting the construction thus claimed by the learned counsel for the defendants; nevertheless such an estate would pass, subject to a reverter, and would continue until the qualification or limitation annexed to it is at an end. It would constitute an estate both descendible and assignable. *Moulton v. Trafton*, 64 Me., 222. And consequently, whether the estate granted be one in fee simple, or a base, qualified or determinable fee, is not important here, inasmuch as in either case the defendants would be possessed of a title sufficient for the maintenance of this action.

Judgment for complainants. Commissioners to be appointed at Nisi Prius.

Peters, Ch. J., Walton, Danforth, Libbey and Emery, JJ. concurred.

Edmund F. WEBB, Admr.,

v.
Edmund A. FULLER *et al.*

For some years before the death of a mother, her two sons managed her property, consisting of bonds, stock and money; they changed its form and converted it to their own use, and after her death refused to account therefor with the administrator. Held, that equity was a proper remedy for the administrator.

(Waldo—Decided December 8, 1885.)

DEMURRER to bill in equity, for discovery. *Overruled.*

The case is stated in the opinion of the court. **Mr. Appleton Webb**, for complainant:

Such bills are expressly authorized by Rev. Stat., ch. 77, § 18 (Act of 1881, ch. 68, § 8). A case of equitable jurisdiction is also authorized by ch. 77, § 6, item 10 (Act of 1874, ch. 175).

A bill of discovery, in its true sense, is one filed for the sole purpose of compelling the defendant to answer interrogatories and disclose and produce papers and documents and asking no relief in the suit. 1 Pom. Eq. Jur., § 91.

It does not follow, because a court of law

will give relief, that this court loses the concurrent jurisdiction it has always had, and until the law is clear on the subject, the court will entertain the jurisdiction. 1 Pom. Eq. Jur., § 176; *Rathbone v. Warren*, 10 Johns., 587; *King v. Baldwin*, 17 Johns., 384. To the same effect are *Bromley v. Holland*, 7 Ves. Jr., 19; *East India Co. v. Boddam*, 9 Ves. Jr., 464.

If one party claims the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner so that he cannot equitably return the property, which really belongs to another, equity carries out the theory of a double ownership, equitable and legal, by impressing the constitutive trusts upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity to be the beneficial owner. 1 Pomeroy, Eq. Jur., 115, 157; 1 Perry, Tr., § 166; *Ryan v. Dox*, 34 N. Y., 307. A case in point is *Ashton v. Thompson*, Minn. Supreme Court, April 9, 1884, Alb. L. J., Aug. 16, 1884, 187.

To the same effect is *Huguenin v. Basely*, 14 Ves. Jr. 273. The bill charges and the demurrer admits mental weakness and loss of memory and conveyances under undue influence. Equity takes jurisdiction in such cases. 2 Pomeroy, Eq. Jur., § 947.

In *Sprague v. Rodas*, 4 R. I., 301, the court says a demurrer to a bill in equity cannot be allowed unless the court is notified that no discovery or proof, called for by the bill or founded upon its obligation, can make the court set forth in it a proper subject of equitable cognizance.

In *Dike v. Greene*, 4 R. I., 285, the court says: "Upon demurrer to a bill in equity, for want of equity, although every influence of law favorable to the party demurring may be drawn from the facts stated in the bill, no inference of facts can be drawn from them, unfavorable to the right of the plaintiff to relief."

Mr. Wm. H. Fogler, for defendant.

Peters, Ch. J., delivered the opinion of the court:

Roundly stated, the complainant's grievance is that the defendants, sons of the deceased intestate, were intrusted, for some years in her lifetime, with a complete possession and control of her property, consisting of bonds, stocks and money; that they managed the property as they pleased, and in the end converted the same to their own use; that the mother was weak and infirm, and that by means of her infirmities the sons fraudulently obtained her signature to releases and assignments and pretended settlements; and the complainant asks for discovery and relief.

The defendants demur to so much of the bill as calls for an account of any money, stocks or other property, or any interest and dividends thereon, or for restoration of any property or its proceeds. Being without a brief from the defendants' side of the case, we can only infer that the objection to this part of the bill is, that a legal remedy would be sufficient. No doubt, an action at law would lie; but we believe that the equitable will be a more expeditious and adequate remedy.

It is to be admitted that the equitable remedy

cannot be appealed to in all cases where the relation of principal and agency exists, or where accounts should be rendered; in some cases it may be. Any general rule of distinction between the classes of cases falling on different sides of the line would be difficult to ascertain. Mr. Pomeroy discusses the origin of the equitable jurisdiction in suits for an accounting (3 Eq. Jur., § 1421 and notes), and says that the jurisdiction is extended to cases where there are circumstances of great complication or difficulties in the way of adequate relief at law, even if the accounts are all on one side; and especially if any sort of a fiduciary relation exists between the parties. In a note to the section cited, it is said: "But where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction." To this numerous cases are cited. That equity should not hesitate to give a helping hand in the circumstances of the case before us, we have no doubt.

Demurrer overruled.

Danforth, Virgin, Emery, Foster and Haskell, JJ., concurred.

William R. BURRILL

v.
W. T. DAGGETT.

1. Where a bond is given, conditioned that the obligor will **not engage in a particular business** at a time and place named, the **question as to whether the penal sum will be regarded as liquidated damages for a breach, is determined by the intention of the parties.**
2. In such a case, if the **intention is not expressed, it is ascertained by an examination of the whole instrument, its subject-matter, the ease or difficulty in measuring the actual damages, and a comparison of the penal sum with the probable damages from a breach.**

(Somerset—Decided December 1, 1885.)

ON report on agreed statement of facts.

Debt on bond. *Remanded.*

On April 24, 1882, date of bond in suit, and sometime prior thereto, defendant was the owner and proprietor of a barber shop in the Town of Fairfield, and was himself a barber and worked at his trade in his own shop. On the day of the date of said bond in suit, defendant sold to plaintiff his shop, tools, fixtures, furniture, stock and good will of trade in said shop, for the sum of \$800, and as part of, and in consideration of said purchase, gave plaintiff the bond in suit. On or about January 1, 1884, the defendant bought out a barber shop in an adjoining building in Fairfield, and since said purchase had continued and still continues the barbering business in said shop and works himself at the barber's trade in his shop. The shop which defendant purchased as afore-

said is an old one and had been used for a barber shop for a long time before the said bond was given, was one of the principal barber shops in the place at that time, and has been ever since. There have been and are still three barber shops in the Village of Fairfield.

The case was submitted on the following agreement: if upon the foregoing statement of facts, the court is of the opinion that the action can be maintained and the sum of \$500 should be considered liquidated damages, judgment to be rendered for plaintiff for that amount. If the action can be maintained, but the \$500 is not to be considered as liquidated damages, then the case to be sent back for trial on the damages. If the action cannot be maintained, judgment to be for defendant.

Messrs. Potter & Lancaster, for plaintiff: The bond is valid and will support an action. An agreement in restraint of trade is not void "unless it manifestly contravene public policy and be injurious to the interests of the State." 2 Chit. Cont., 982, and cases cited.

An agreement which operates merely in partial restraint of trade, is good, if it be not unreasonable and there be a consideration to support it. If it be limited in time or place and is reasonable, it is valid. 2 Chit. Cont., 984; *Whitney v. Slayton*, 40 Me., 229; *Warren v. Jones*, 51 Me., 148; *Cuswell v. Johnson*, 58 Me., 164; *Holbrook v. Tobey*, 66 Me., 410, and cases cited; *Pierce v. Woodward*, 6 Pick., 206; *Perkins v. Lyman*, 9 Mass., 522; *Pierce v. Fuller*, 8 Mass., 228.

The sum of \$500 should be considered liquidated damages. *Holbrook v. Tobey*, 66 Me., 412, 413, 414; *Pierce v. Fuller*, 8 Mass., 228, and case cited p. 228.

Messrs. Brown & Carver, for defendant.

Foster, J., delivered the opinion of the court:

On the day of the date of the bond in suit the defendant sold to the plaintiff his barber shop, tools, fixtures, furniture, stock and good will of trade in said shop, for the sum of \$300. As a part of the consideration of the purchase he gave the plaintiff the bond in suit in the penal sum of \$500, conditioned, among other things, never to open and keep a barber shop in the Town of Fairfield. Nearly two years after the sale and the giving of this bond, the defendant bought out a barber shop in an adjoining building, and since that time has continued the business of barbering, working at the barber's trade in said shop.

The only questions in controversy are whether there has been a breach of this bond, and if there has been, whether the same sum mentioned is to be regarded as a penalty, or as liquidated damages.

The plaintiff contends that there has been a breach of the bond, and that he is entitled to recover the above named sum of \$500 as liquidated damages. The defendant denies that there has been any such breach, and claims that his purchase of another barber shop, which was in operation at the time, and his continuation of the barbering business therein, working himself at his trade, is not opening and keeping a barber shop, and therefore not within the engagement.

We are not inclined to adopt the defendant's

view of this question. Although there may not have been more than two other shops of the kind in the village, as the case shows, at the time the defendant sold to the plaintiff, it may well be inferred that it was the understanding of the parties, from the language of the bond, viewed in the light of the attendant circumstances as disclosed in the case, that the defendant was not again to engage in the business by keeping a barber shop. He sold to the plaintiff not only his shop, tools, etc., but also his good will in the business. It was against the competition of the defendant that the plaintiff intended to provide; and whether the defendant bought out and kept another barber shop, or opened and kept one independently of any in operation at the time, still continuing the business and working at his trade, it would be a violation of the condition of the bond.

The remaining question then is: whether the \$500 shall be regarded as liquidated damages, or only security for the damages actually sustained. And whether the sum named in instruments of this nature is to be regarded as penalty, or liquidated damages, is not always free from difficulty. It must rest however, upon the construction to be given to the language used, and there are certain principles that may be resorted to in most cases to aid in determining this question. The bond is in the usual form, and the general rule and preference of the law, in such cases is, that the penal sum therein named is to be regarded as a penalty and not as liquidated damages. *Smith v. Wedgwood*, 74 Me., 459; *Cushing v. Drew*, 97 Mass., 446; *Henry v. Davis*, 123 Mass., 348.

Yet courts endeavor to learn the real intent of the parties to the contract and, if that can be ascertained, will be governed by it. "It is always a question of construction, on which, as in other cases where the meaning of the parties in a contract provable by a written instrument arises, the court may take some aid to themselves from circumstances extraneous to the writing. In order to determine upon the words used, there may be an inquiry into the subject-matter of the contract, the situation of the parties, the usages to which they may be understood to refer, as well as other facts and circumstances of their contract." *Perkins v. Lyman*, 11 Mass., 81. This is not done for the purpose of modifying or controlling the language used, but the more clearly to interpret the true meaning of the language, aided by the circumstances that gave birth to it. To determine whether the sum named is intended as a penalty or as liquidated damages, the court in Pennsylvania, in *Streeper v. Williams*, 12 Wright, 454, say that it is necessary to look at the whole instrument, its subject-matter, the ease or difficulty in measuring the breach in damages, and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach.

In accordance with these principles, our own court, in the case of *Holbrook v. Tobey*, 66 Me., 414, has adhered to the same doctrine. *Mr. Justice Walton*, after stating that if a party binds himself in a certain sum not to carry on any particular kind of business, within a certain territory or within a certain time, the sum mentioned will, in general, be regarded as liqui-

dated damages, says: "Of course, if the sum named should be out of all proportion to any possible damage which the plaintiff could sustain, the court would hold otherwise, upon the very reasonable presumption that the parties never could have intended that the sum named should be regarded as liquidated damages."

In the case at bar there is no express agreement in the bond that the sum named shall be regarded as liquidated damages. Nor are we able to find anything in the language of the bond, the subject-matter of the contract or the nature of the case, that would justify a conclusion that this sum was intended by the parties to be the stipulated and ascertained damages in case of a breach. We may properly consider the fact that the parties were negotiating in reference to a business of not very great magnitude, and that the whole consideration paid for the subject-matter of the purchase was much less than the sum named in the bond. And when we further take into consideration the situation of the parties, as well as the proportion that this sum bears to the probable consequences of a breach, we can arrive at no other conclusion than that it was the intention of the parties that the sum named should be considered only as security for whatever damages might be sustained upon breach of the bond.

The case of *Caswell v. Johnson*, 58 Me., 165, is very similar to this, and the language of the two instruments so nearly identical that no extended reference to it is necessary, and in that case the court arrived at the same conclusion as in this.

In accordance with the stipulation in the report the entry may be:

Case sent back for trial on the damages.

Peters, Ch. J., Walton, Danforth, Libbey and Emery, JJ., concurred.

INHABITANTS OF CAMDEN

v.

CAMDEN VILLAGE Corporation.

Where a **village corporation** has authority to raise money to defray the expense of a night watch, fire department, etc., and to erect a building for a public hall, and **does erect such a building**, containing, besides the hall, rooms for assessor's office, police court, lock-up, etc., the **building and lot is not subject to taxation** by the town in which it is situated, **although portions** of it when not in use for the purposes of the corporation **are let for hire**, the money received therefrom being used for corporation purposes.

(Knox — Decided December 1, 1885.)

ON report. *Nonsuit.*

The case is stated in the opinion.

Mr. A. P. Gould, for plaintiffs.

Mr. T. R. Simonton, for defendant.

Foster, J., delivered the opinion of the court:

The defendant Corporation, by special authority from the Legislature, together with other powers and privileges particularly enumerated in the Act of incorporation, was authorized to build a village hall at a cost of not more than \$8,000. Thereafter, a lot was purchased and a building erected thereon by the defendant, known as "Megantacook Hall." This building is sixty feet long, fifty feet wide, and two stories high. The upper portion is finished into a hall, with galleries, platforms and two small anterooms. The lower story contains a hall somewhat smaller than the one above, a lock-up, assessors' room, cook and furnace room. The upper hall is used for the annual and other meetings of the Corporation; the lower one for a police court room; and when not in use by the corporation, both halls are let, as occasion requires, for lectures and other public entertainments, with an income of from \$300 to \$500 a year, which is appropriated in defraying the annual expenses of the Corporation.

The plaintiff Town in which the defendant Corporation is situated, claiming that the property is subject to taxation under the general statutes, like other real estate, has assessed a tax thereon, and this action is brought to recover the same.

The plaintiff's claim is that this Corporation is limited in its extent of territory, is partly private and partly public, in which the inhabitants of much the largest portion of the Town have no pecuniary interest, and that this building, being adapted to and used in part for other than corporate purposes, is owned by the defendant in its social or commercial capacity and for pecuniary profit and is, therefore, neither expressly nor impliedly exempt from taxation.

As against this proposition, the defense set up is that the Corporation is of a public nature, and that the property upon which this tax is sought to be imposed is held by the defendant, for public uses, necessarily incident to the objects of the Corporation, and as such exempt from taxation.

For a correct determination of this question it becomes necessary to consider the nature and character of such corporations, the objects they are intended to accomplish, and their connection with the government of the State. It is laid down by the authorities that such corporations are public, and while they "Are allowed to assume to themselves some of the duties of the State in a partial or detailed form, but having neither property nor power for personal aggrandizement, they can be considered in no other light than as auxiliaries of the Government." *U. S. v. R. R. Co.*, 17 Wall. [84 U. S., XXI., Law. ed., 601], 328. Being intended as agencies in the administration of civil government, they are regarded as public, and partaking of the nature of municipal corporations in their incidents. Being purely creatures of legislative enactments, they owe their creation to the particular statute which gives them their existence; this statute, together with the general provisions of law applicable to them, confers upon them the powers they possess, and, like other municipal corporations, imposes upon them certain public duties which they owe to the State in the administration of the local government. Likewise towns are public corpora-

tions, created for similar public purposes in the due administration of the government of the State. As incident to their existence and the objects of their creation they are allowed to purchase or build town houses, schoolhouses, poorhouses and police stations, these being the "recognized functions of government," and as such exempted by implication from the general provisions of the statute in relation to taxation, as property appropriated to public uses. *Worcester v. West. R. R. Corp.*, 4 Met., 567; *Wayland v. County Comrs.*, 4 Gray, 501; *Worcester County v. Worcester*, 116 Mass., 198; *Portland v. Water Co.*, 67 Me., 187; *Boston & Me. R. R. v. Cambridge*, 8 Cush., 289.

This doctrine is thus laid down by a learned writer and jurist, Dill. Mun. Corp., § 614: "The general statutes of the State upon the subject of taxing property undoubtedly refer to private property, and not to that owned by the State; and, in view of the public nature of municipalities, and the purposes for which they are established, heretofore explained, the author is of opinion that such enactments do not, by implication, extend to any property owned by them; certainly to none owned by them for public uses."

In accordance with these views, the Court of Appeals in Kentucky, in the case of *Louisville v. Commonwealth*, 1 Duvall (Ky.), 294, held that whatever property was used and held by the City for carrying on its municipal government, or was necessary or useful for that purpose, was not taxable by the State, and this would include public buildings, prisons, and property dedicated to charity.

The courts of other States furnish ample authority in support of exempting, by implication, from taxation, property of the character above named.

People v. Doe, 36 Cal., 222, was a case where a writ of assistance was asked by the plaintiff to put him in possession of land which he claimed to have acquired by tax title, being a portion of the city cemetery in the City of Sacramento. The court denied the writ as to that, on the ground that the land was public property and therefore not taxable. Sanderson, J., said: "The Constitution and laws upon the subject of taxing property are, therefore, to be understood as referring to private property and persons and not including public property and the State, or any subordinate part of the State Government, such as counties, towns and municipal corporations."

Speaking of the south park commissioners as a corporation, and of the park property, Breese, C. J., in *People v. Saloman*, 51 Ill., 52, says: "But holding it, they hold it as a public corporation for public purposes; and was it ever heard, that the property, real or personal, of a public municipal corporation, was subject to taxation?"

And Pennsylvania maintains the same doctrine. "No exemption law is needed for any public property, held as such." *Directors of Poor v. School Directors*, 42 Pa. St., 25.

To entitle it to exemption, however, it must be public in its nature. There is a distinction between property held and owned for profit by a municipal corporation like a private individual, charged with no public trust or use, which is private in its nature, and that which it holds

in general or special trust for purposes germane to the objects of the corporation. In the former case it is the legitimate subject of taxation, and no reason exists why it should be exempt from the general rule; while in the latter case, such property, forming a part of the means and instrumentalities of the corporation called into use in the administration of government, is held to be exempt from taxation, upon principles as well as upon authority. Taxation is a sovereign right, essential to the existence of government, and as a rule, attaching upon all property within the jurisdiction of the State. But in our system of government, both state and national, there are limitations as well as exceptions to the rule. The Federal Government cannot tax the public means and instrumentalities of the State, nor the State the public means and instrumentalities of the National Government, so as to interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. *Nat. Bank v. Commonwealth*, 9 Wall., 362 [76 U. S., XIX., Law. ed., 708]; *Thomson v. Union Pac. R. R., Co.*, Id., 591 [799]; *Burroughs, Tax.*, 505.

There is no express constitutional prohibition upon the State against taxing the means and instrumentalities of the General Government, but it is held to be prohibited by necessary implication. *Collector v. Day*, 11 Wall. (78 U. S., XX., Law. ed., 125), 123. Court houses, jails, town houses, schoolhouses, poorhouses and other buildings appropriated to public uses, owned by municipal corporations, and incident to such corporations, are but the means and instrumentalities used for municipal and governmental purposes and are, therefore, exempt from general taxation, not by express statutory prohibition, but, as we have seen, by necessary implication. Hence, it has been held, upon principles quite analogous, that public property is by implication exempted from lien statutes, as much as from general tax laws, and for the same reasons. *Poster v. Fowler*, 60 Pa. St., 27; *Frank v. Freeholders*, 89 N. J. L., 347; *Board v. Neidenberger*, 78 Ill., 58; *Bouton v. McDonough Co.*, 84 Ill., 884; *Loring v. Small*, 50 Iowa, 271.

The consequences of either process might result in a sale of the property for the purposes of enforcing the claim, thereby destroying its public character. In *Frank v. Freeholders*, *supra*, the court say that, "When the buildings are those of a municipal corporation, a fundamental rule of public policy compels the courts to arrest the proceedings before the buildings are touched." It is said that "The power to tax involves the power to destroy, and the power to destroy might defeat and render useless the power to create." 1 Kent, Com., 426.

Consequently, if the implied exemption exists as between the State and the public buildings or property of the town or city created by its own Legislature, *a fortiori* the town cannot tax the public means and instrumentalities of a village corporation, an auxiliary of the State, deriving its existence from the same legislative source.

The charter of the defendant Corporation, when examined, will be found to contain many of those incidents of a public character usually pertaining to other municipal corporations; among which, this corporation is authorized and vested with power to raise money to defray the

expenses of a night watch, a police force, a fire department and all other necessary measures for the better security of life and property and for the promotion of good order and quiet within its limits. Thus, the powers with which it is invested and the objects for which it was created, are similar, in many respects, to those which belong to towns, cities and other municipal corporations. In addition to the powers and privileges above enumerated, bestowed upon this Corporation, express authority is given by the sovereign power of the State to erect this hall. And from a careful examination of the facts in the case, and in view of the public nature of this Corporation and the purposes for which it was created, we are led to no other conclusion than that this building, authorized by legislative sanction, is owned by the Corporation for public uses, rather than in its "social or commercial capacity." The letting of those parts of the building which are not in actual use by the Corporation, are incidental and subsidiary to the objects for which it was created, and do not take away its character as a public building, nor render it liable to taxation by the Town, as it would be were this a private corporation, and its building erected for private purposes. Many city and town halls in this State are so constructed that when not in use for strictly municipal purposes, they may be let for any proper use. Such fitting up and letting for hire are the incidents and not the primary objects of such public buildings.

The authorities to which our attention has been called by the learned counsel for the plaintiffs, upon examination will be found to apply to property owned not by public municipal corporations and appropriated to public uses, but by private corporations or associations, and where express statutory exemption was claimed. In such cases of express exemption, statutes are to be construed with strictness, and the exemption should be denied, unless so clearly granted as to be free from doubt. *Dill., Mun. Corp., § 616.*

In accordance with the stipulation in the report of the case, the entry must be:

Plaintiffs nonsuit.

Peters, Ch. J., Walton, Danforth, Libbey and Emery, JJ., concurred.

W. H. RICHMOND

^{v.}
Loring FOSS.

The seller of manufactured lumber, including shingles, sold and delivered without an official survey, cannot recover the price, such sales being prohibited by statutory penalties.

(Kennebec—Decided December 12 1885.)

ON EXCEPTIONS. Sustained.

This is an action of *assumpsit* on an account annexed for \$48.45, balance claimed to be due for boards, planks, timber, joist and shingles, used in the erection of a building.

Mr. L. T. Carlton, for the plaintiff.

Messrs. Potter & Lancaster, for the defendant:

Cite Rev. Stat. of Maine, ch. 41, secs. 15, 17, 21; *Durgin v. Dyer*, 68 Me., 143, and cases cited; *Smith v. Campbell*, 68 Me., 268; *James v. Josselyn*, 65 Me., 188.

Peters, Ch. J., delivered the opinion of the court:

Can a seller recover the price of boards and shingles, sold and delivered without a survey by some proper officer?

This point is determined against the plaintiff by the case of *Durgin v. Dyer*, 68 Me., 143. After a critical examination of the statutes and the cases, we can see no other possible construction. There have been cases which have made or attempted to make a distinction which would save a seller from loss. *Abbott v. Goodwin*, 37 Me., 208; *Rogers v. Humphrey*, 39 Me., 382. These cases stood in their day on the outermost verge of the law on which they were decided. In the first one, it was held that, where there was a delivery by the seller under a contract solicited by the purchaser, there was not such an "offering for a sale" as required the lumber to be surveyed. In the other, it was decided, not upon very conclusive reasoning, that a sale and delivery of a quantity of boards sufficient to make a certain number of sugar box shooks, was legal and binding, although no survey was ever made. In the case at bar, the plaintiff's counsel contends that the reported evidence made a part of the case, shows that the plaintiff did not offer to sell, but that the defendant solicited the purchase. The distinction, based upon the statutes of today, cannot prevail. Section 21, c. 41, R. S., provides that "no person shall deliver on sale" any boards or other lumber there mentioned, and provides severe penalties for disobedience. Can we say that a person does not deliver on sale, because the sale is preceded by a contract for the sale? Or, that there is a difference between a delivery on sale and a delivery on contract, if the price is to be measured by the thousands? There can be no doubt that lumber could be sold in bulk or lump, so much payable for the whole, and no survey be necessary. There would be no need of the statutory protection in such case. But when any lumber is sold, the price for which is to depend upon the number of thousands, which is to be ascertained by the survey or inspection of some person, the surveyor must be an official surveyor or the sale is void. On account of the opportunities for fraud, possessed by the seller, the law refuses to trust any method but its own for the ascertainment of the quantities or qualities of lumber. Experts must be employed. Perhaps it would be expedient for the Legislature to permit parties to a sale, to waive an official survey. Such is not its present policy. A more puzzling question is, whether shingles may be excepted from the rule applying to other lumber. The attempt by the revisers of the statutes, to retain the effect of the statutes passed at different periods upon the same subject-matter, creates obscurity, if not inconsistency in the provisions relating to the sale of shingles. Still, we think, in the present instance, that the same rule must apply to shingles as to other lumber. The reason for the rule would seem to be as forcible in the one case as in the other. By § 17, c. 41, R. S., if shingles are offered for sale before they are sur-

vayed and branded, "unless the parties otherwise agree," the property becomes wholly forfeited to the town. By § 21, same chapter, there is a penalty of \$2 per thousand for delivery of shingles on sale without inspection and survey, and there is no immunity from penalty because of any agreement of the parties. To give a consistency to both sections, the construction must be that, if there be any agreement, the penalty of the total forfeiture is not incurred; but the penalty of \$2 per thousand is incurred, whether there be an agreement or not. The revisers of the statutes would have done a service towards preventing misunderstanding and litigation, had they freed the total enactment, relating to this subject, of its ill constructed passages.

Exceptions sustained.

Walton, Danforth, Libbey, Emery and Foster, JJ., concurred.

Davis W. COOLIDGE

v.

Charles W. GODDARD.

The holder of stock in a recently organized corporation, which had issued four hundred and ten shares, of the par value of \$100 a share, sold five shares at par, representing to the purchaser that all the stockholders had paid for their shares at par, while in fact they had paid only one third the par value. Held, that the statement was a misrepresentation of a material fact, and that the purchaser would have the right to infer from it that the assets of the company were \$41,000 instead of only one third of that amount.

(Cumberland—Decided December 2, 1885.)

ON MOTION AND EXCEPTIONS. Sustained.

Assumpsit for value of shares of stock of a corporation. Verdict for plaintiff for full amount claimed; motion for new trial denied, and exceptions to the ruling.

The case is stated in the opinion.

Mr. George E. Bird, for plaintiff:

The statements of the plaintiff, construed in the most favorable light for defendant, were mere statements of value, statements of prices paid by plaintiff or by others, mere "dealer's talk." Such representations afford no ground for an action of deceit, nor do they constitute a defense to an action for the price. *Long v. Woodman*, 58 Me., 52; *Martin v. Jordan*, 60 Me., 582; *Holbrook v. Connor*, Id., 580; *Bishop v. Small*, 63 Me., 12; *Bowen v. Davis*, 76 Me., 225, and cases cited; see, also, *Ellis v. Andrews*, 56 N. Y., 85; *Brown v. Castles*, 11 Cush., 350.

At the trial in the Superior Court, the defendant relied upon the following cases: *Litchfield v. Hutchinson*, 117 Mass., 195; *Savage v. Stevens*, 126 Mass., 208; *Teague v. Irwin*, 127 Mass., 217; *Bannister v. Alderman*, 111 Mass., 263; *Fisher v. Mellen*, 103 Mass., 506; *Fogg v. Pew*, 10 Gray, 409; *Hubbell v. Meigs*, 50 N. Y., 490.

MR.

Messrs. Symonds & Libby, for defendant:

Where it was alleged that a party in negotiation with another had expressed his ignorance concerning the value of certain stock offered him by the owner, and declined to take it for that very reason, whereupon he was told that it was valuable and was induced to buy it, the allegation of ignorance of the value of the stock was material and must be proved by the party making it, else the statement of the owner of the stock would not be an actionable misrepresentation. *Lawton v. Kittredge*, 30 N. H., 500; *Bigelow, Fraud*, 20.

False representations as to elements of fact going to make up value, certainly should afford ground for an action of deceit, or of defense to an action upon the contract of purchase or of subscription. *Bigelow, Fraud*, 31.

When a person has been induced to take shares in a joint stock company by misrepresentation, either by the directors or by their officer, as to the effect of taking the shares and as to the solvency and position of the company, the contract is voidable at the option of the holder of the shares. *Id.*, 24.

A director of a corporation who knowingly issues or sanctions the issue of a prospectus, containing false and fraudulent representations of the condition of the company, which are likely to deceive the public, is personally liable therefor. *Id.*, 60.

Where the parties do not stand upon equal footing, the objection to a plea or claim of false representations, that the party to whom they were made was negligent in not making inquiry or examination, will not be allowed. *Id.*, 79; see, *Fogg v. Pew*, 10 Gray, 409; *Manning v. Albee*, 11 Allen, 522.

In *Bradley v. Poole*, 98 Mass., 179, an action against a director of a mining company for false representation made by him in effecting a sale of the stock of the company, it is said, "The representations proved and relied upon were: 'they are going right to work upon it. It is all right.'" It was properly left to the jury to interpret these statements.

If a person states, as of his own knowledge, material facts, which are susceptible of knowledge, to one who relies and acts upon them as true, it is no defense, if the representations are false, to an action for deceit, that the person making them believed them to be true, although the declaration alleges that the representations were false and that the defendant made them knowing that they were false. *Litchfield v. Hutchinson*, 117 Mass., 195.

In *Teague v. Irwin*, 127 Mass., 218, it is said: "In the opinion of the court, the statements that the company was liable to lay its track and provide rolling stock and pay all bills contracted, and that the stock was not for sale, as made by the president of the corporation to one who was about to purchase, were statements which the jury would be warranted in finding were representations of fact of which he professed to have knowledge, and not the expression of an opinion or an estimate. The representations here made, if found by the jury to be representations of facts, were of facts calculated to deceive the plaintiff as to the value of the stock. *Sharp v. Ponce*, 74 Me., 470; *Campbell v. Fleming*, 1 Adol. & El., 40.

So, if after a corporation is formed, the man-

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agers make false reports, declare fictitious dividends, or resort to any fraudulent devices whatever, whereby they induce individuals to take stock in the corporation, they are liable to the parties thus defrauded, in an action for the deceit. *Cooley, Torts*, 494, 495; see, *Cargill v. Bower*, L. R., 10 Ch. Div., 502; *Benj. Sales*, 4th Am. ed., 521, 523; *Bedford v. Bagshaw*, 4 Hurl. & N., 538; *Eaglesfield v. Londonderry*, L. R., 4 Ch. Div., 693.

If directors of a corporation fraudulently unite in an attempt to deceive the public and, by false statements of facts, to give credit and currency to its stock, it is but simple justice that they shall answer to those who have been deluded into giving confidence to them. *Morgan v. Skiddy*, 62 N. Y., 326.

The misrepresentations made by this president, managing director and chief proprietor of the company, as admitted in his own deposition, are totally different in their character from "loose, exaggerated, vague and indefinite recommendations, which a vendor is likely to make of property." Such language by the president of a moneyed corporation is something more than "dealer's talk." *Bishop v. Small*, 63 Me., 13.

Peters, Ch. J., delivered the opinion of the court:

In February, 1882, an electric light company was formed in Portland, with 2,000 shares, of a par value of \$100 each share, making \$200,000 of capital stock. The plaintiff was the president of the company, its principal manager, and the owner of a majority of its stock. In June, 1882, he contracted to sell to the defendant five shares for \$500. At that time there had been taken or purchased from the company 410 shares and the money therefor paid into its treasury, 1,590 remaining unsold, and the company had voted to sell no more. When the plaintiff made the sale to the defendant, he represented that he was selling to him at the same price which all others had paid who were interested in the stock.

Paid to whom? It must have been to the company, the seller of the stock. The clear and irresistible implication of this positive assertion was that the company had \$41,000 in its hands. The defendant was, undoubtedly induced to believe that the company had a working capital of one hundred times as many dol-

lars as it had issued shares. The statement amounted to a representation to that effect. But the company had only about one third of that amount of working capital, or of money. The defendant, instead of getting stock which represented about one eightieth of the working assets of the company, got stock which represented only one two hundred and fortieth of such assets.

Was not this an assertion of an important fact? Suppose that nothing had been paid in, but that the stock, as is sometimes the case in these speculations, had been given by the company to the holders. In such case, what would the defendant have got for his money? Suppose the plaintiff had said to defendant, "I will sell you five shares for \$500, but all others received their shares at the rate of one third as much." Would the defendant have purchased? The plaintiff voluntarily and artfully represented the working assets of the company to be \$41,000; they were only about \$14,000. To be sure, it may be said that the defendant was not told how many shares had been issued. The answer to that is, that he undoubtedly supposed, if he did not know, and would have a right to suppose that some substantial amount of capital had been paid in. It is urged in extenuation by the plaintiff that the defendant offered himself as a purchaser. The affirmation complained of is none the truer on that account. Undoubtedly the case is near the line which marks the distinction between actionable and non-actionable representations. However near to it, the facts place the plaintiff upon the wrong side. It is often a narrow line which separates right from wrong.

We feel well assured that the requested instruction, or its equivalent, should have been given. The learned Judge evidently had not at the moment in mind the distinction between what the plaintiff had paid, and what the company had actually received, for the stock. In any view, there was at least a question for the jury. We think that the exceptions and the motion should be sustained. *Sharp v. Ponce*, 74 Me., 470.

Motion and exceptions sustained.

Walton, Virgin, Libbey, Foster and Haskell, JJ., concurred.

SUPREME COURT OF CONNECTICUT.

Theophilus BROWN

v.

Orrin S. EGGLESTON *et al.*, Admr., *Appls.*

1. Under the statute (Session Laws, 1882, p. 146), **only claims against an executor or administrator for debts contracted by him in his representative capacity for services, etc., rendered the estate in his hands, can be adjudged against and paid out of the estate. Hence, expenses incurred in litigating a will, at request of and on the promise of a person as administrator, where the will was not approved and before administration granted, are personal claims against the administrator.**
2. It is **not the intention of the above ruling to prevent the court of probate from allowing administrators, in their administration account, any just and reasonable expenses, incurred in behalf of the estate before administration.**
3. A conservator can **not be made personally liable for debts incurred by his ward before his appointment.** Such claims should be prosecuted against the ward if living, and after his death, against his estate.
4. A conservator is, however, **liable personally, for debts contracted by him on behalf of his ward after his appointment and while the ward and his estate are subject to the control and management of the conservator, and the estate of the ward is not liable therefor.**
5. The **presumption is that a conservator performed his duty and paid for proper services performed on behalf of the ward at his request, and charged the same in his account.**

(Decided September 5, 1885.)

APPEAL from the Court of Common Pleas for New London County. *Reversed.*

On October 28, 1878, Asa L. Gallup, of Ledyard, was appointed by the probate court for the District of Stonington, conservator of the person and estate of Sabrina Main, and duly accepted said trust and qualified as such conservator. Sabrina Main died September 8, 1881, and defendants were appointed administrators of her estate on October 25, 1881, by the probate court for the District of Ledyard, and duly qualified. At the time of granting letters of administration, the probate court made an order limiting the term of six months therefrom for creditors of the estate to present claims, of which due notice was given. Gallup was then an inhabitant and resident of the State, but did not present any claim; the plaintiff, however, did present his claim.

Items in plaintiff's bill of particulars dated August 15 and 27, and September 1, 1877, for \$6, \$6 and \$28.70, respectively, were services rendered and expenses, including court and attorney fees, incurred in the appointment of one Noyes, conservator of Sabrina Main, previous to the appointment of Gallup. Items dated

October 10 and 24, 1878, for \$6, and October 28, 1878, for \$27.06, were services rendered and expenses, including court and attorney fees, incurred in the appointment of Gallup as conservator. The rest of the items in plaintiff's bill of particulars to September, 1881, were services rendered and moneys paid for the benefit of Sabrina Main or her estate, by plaintiff at request of Gallup, conservator.

Items of debit dated September 19 and 27, and October 18, 19 and 25, 1881, for \$3 each, and October 26, 1881, for \$82, were services rendered and expenses incurred by plaintiff, at request of defendant Crandall, at the Ledyard probate court, in the hearing with regard to the probate of two instruments, each purporting to be the last will of Sabrina Main, and for which services and expenses it was agreed by Crandall administratrix, a reasonable sum should be paid. The Stonington probate court, on September 27, 1881, allowed the account of the conservator, showing a balance of \$84.56 due the conservator from the estate of Sabrina Main, and on October 26, 1881, the plaintiff, by direction of the Judge of said probate court, paid such balance to the conservator.

After the death of Sabrina Main, and before the appointment of defendants as administrators, plaintiff collected \$105 due her estate for rent under a lease made by her conservator during her lifetime, which was applied in part payment of plaintiff's account.

The Court of Common Pleas allowed the above items, with some diminution as to amounts, and rendered judgment for plaintiff for \$38.62 and costs; from which judgment defendants appealed.

Mr. A. B. Crafts, for defendants:

Gallup was appointed conservator over Sabrina Main, October 28, 1878, which position he held until her death. Every item of the plaintiff's counsel, except those incurred in the two attempts to appoint a conservator, were subsequent to the appointment of the conservator. All the other items of debit up to September, 1881, were rendered, as appears by the finding, at the request of the conservator, and for those he, and not she or her estate, was personally liable, as is substantiated by the following authorities: *Wallis v. Bardwell*, 126 Mass., 866; *Thacher v. Dinamore*, 5 Mass., 800; *Taylor v. Mygatt*, 26 Conn., 189; *Burke v. Terry*, 28 Conn., 415; *Forster v. Fuller*, 6 Mass., 58; *Campbell v. Crandall*, 2 Root, 371; *Jones v. Brewer*, 1 Pick., 817.

The court of probate which appointed the conservator is the only court having jurisdiction, even after the death of the ward, to allow the services and expenses of the conservator. *Nettleton's App.*, 28 Conn., 272, 273.

The expenses and services incurred in the appointment of a general guardian are not proper charges. *Cloves v. Van Antwerp*, 4 Barb., 416.

A successor is "a person who has been appointed or elected to some office after another person." Bouv. Law Dic. "One who takes the place which another has left, and sustains the like part or character." Webster's Dic.

Whatever judgment is rendered on such a complaint as this, is, as appears by the record, a charge against the estate. The expenses of successful litigation to establish a will were not

allowed the executors in *Leavenworth v. Marshall*, 19 Conn., 417.

The defendants are entitled to recover the sum of \$105, which was due the estate of Sabrina Main, and collected by the plaintiff after her death. Gen. Stat., 1875, Title 18, ch. 4, part 1, § 9, p. 848; *Sanford v. Hayes*, 19 Conn., 591.

Carpenter, J., delivered the opinion of the court:

On one point in this case we are constrained to say that the court below erred. The action is against the administrators of an estate, the complaint consisting of two counts: one for a debt incurred by the intestate during her lifetime, and one for a debt accruing after her decease. She died September 8, 1881. After her death, two instruments, each purporting to be her last will and testament, were presented to the court of probate. Both were contested and neither was approved as her last will. In the litigation concerning the proposed wills, certain expenses were incurred by the plaintiff at the request of one of the defendants, and she, as administratrix, agreed that a reasonable sum should be paid therefor. The expenses thus incurred were allowed by the court below to the amount of \$38 and interest. The sum thus allowed, improperly as we think, amounts to more than the balance found due to the plaintiff; hence it cannot be remitted, but the whole judgment must be reversed.

This court held in *Taylor v. Mygatt*, 26 Conn., 184, that an administrator has no power to make the estate a debtor, even for expenses legitimately incurred in the settlement of the estate, but that such expenses are claims against the administrator personally. See, also, *Chambers v. Robbins*, 28 Conn., 544.

To some extent this is now changed by statute. Sess. L., 1882, p. 146. It is there provided that "In all cases in which any person shall have a legal claim against any executor, administrator, guardian or trustee, growing out of moneys paid or services rendered for the estate in the hands of such executor, administrator, guardian or trustee, and which should justly be paid out of such estate, an action at law may be brought by such claimant against such executor, etc. * * * and if such claim shall be found to be a just one, and one which ought to be equitably paid out of such estate, judgment may be rendered in favor of such claimant, to be paid wholly out of the estate."

Obviously this statute is not broad enough to cover this case. The claim must be against an executor or administrator and must be a debt contracted by him in his representative capacity, and not be a debt contracted by some other party before his appointment; and by the express terms of the statute it must be for moneys paid or services rendered for the estate in the hands of the executor, etc. If the title to the estate or any portion of it was in dispute, and expenses were incurred by the administrators in defending it, it might be truthfully said that such expenses were incurred for the estate; and they might well be recovered of the estate under this statute. But no one would presume to claim that expenses incurred in attacking the estate or its title should be paid

from it. It does not appear whether the expenses allowed were incurred in endeavoring to establish the proposed wills or in resisting them. If the former, as they may have been, then they were incurred in a wrongful attempt to divert the estate from its legal course, and they should not have been allowed. If the latter, then they were incurred voluntarily by parties interested in defeating the proposed wills, and before administration granted. Although such action may have been in the interest of the estate, yet the persons so acting had no power to bind the estate, because they were not legally authorized to represent it. The agreement of A. J. Crandall, one of the defendants, that the expenses should be paid out of the estate, cannot bind the estate because she had no power to make such an agreement; certainly not if the alleged agreement was made before her appointment. If made afterwards, even then the estate is not liable, unless it appears that the money paid or services rendered were for the estate and "ought to be equitably paid out of the estate;" and there is no such finding in the case. But the expenses were evidently incurred before administration was granted.

The statute only contemplates expenses incurred by executors or administrators legally appointed and authorized to act as such, and cannot be made to apply to expenses previously incurred by interested parties. This is manifest from the further provisions of the statute, that the creditor may, at his election, pursue his legal remedy against the executor or administrator personally. Of course nothing in this opinion is intended to prevent the court of probate from allowing to the administrators in their administration account any just and reasonable expenses incurred in behalf of the estate before administration. Upon the facts as they now appear, we think the plaintiff must seek his remedy in that direction, or against the administratrix personally.

The first three items of the plaintiff's account accrued in the proceedings to appoint conservators. The court found that they were reasonable charges for services rendered and moneys paid out. No objection is made that the services rendered and moneys paid were not for the benefit of the ward, and while she was without a conservator; but the objection is that the charges should have been made against the conservator personally.

The charges being proper, it was doubtless the duty of the conservator to pay them from funds in his hands and charge the money so paid in his account; but that duty devolved on him as conservator and did not make him a debtor in his private capacity. When the right to charge matured there was no conservator. Of course the charge could only be made against Mrs. Main. The relation of debtor and creditor between her and the plaintiff was thus fixed, and that relation was not disturbed or changed by the appointment of a conservator. Hence, if a suit was necessary, she was the proper party during her lifetime to make defendant, and after her death her administrator. A conservator cannot be made personally liable for existing debts. There may be some liability if he neglects or refuses to pay or provide for them, but that liability does not go to

the extent of making him personally a debtor to the creditor. We discover no error in allowing these items.

A portion of the account allowed by the court below accrued while the intestate and her estate were subject to the control and management of a conservator. The defendants insisted that these items, if proper charges at all, could not be charged to the ward but should have been charged to the conservator. The court ruled otherwise, and that ruling is assigned as a reason of appeal. An executor or administrator, as we have seen, had no power to bind the estate he represents by contract, except as such power may be implied from the Statute of 1882, above referred to. But that statute was not in force when the services were rendered for which those charges were made. Moreover, the statute was not intended to affect the personal liability of an executor or administrator; its principal object seems to have been to give the creditor a right to collect his debt from the estate as a cumulative remedy. So that if the word guardian in the statute may be interpreted as including conservators, as perhaps it may, still, the statute will not affect the question now before us.

It has been repeatedly decided in Massachusetts that a guardian has no power to bind the ward or his estate by his contract. *Thacher v. Dinwiddie*, 5 Mass., 299; *Forster v. Fuller*, 6 Mass., 58; *Wallis v. Bardwell*, 126 Mass., 366. Administrators and guardians in this respect are closely analogous to conservators.

The powers and duties of a conservator are defined in a general way by statute. He "shall have the charge of the person and estate of such incapable person." "The conservator shall manage all the estate of his ward, and apply the net income thereof and, if necessary, any part of the personal estate, to support him and his family and to pay his debts, and may sue for and collect all debts due to him." The statute neither expressly nor impliedly authorizes the conservator to make contracts in the name of the ward, and the ward is legally incapable of making a contract. A conservator, unlike an overseer, acts independently of his ward, and in all his transactions he alone is the responsible party. He is not, however, bound to contract debts and pay them from his own estate. The law places in his hands ample means for supplying himself with funds to meet all his obligations. If he suffers loss personally, it must be through his own neglect. Sabrina Main being in fact and in law incapable of making a contract when the services were rendered, it is difficult to conceive how she or her estate can be held liable *ex contractu*.

Again; the services performed by the plaintiff, if proper, should have been performed by the conservator. The finding shows that they were in fact performed at his request. Regularly he should have paid for them and charged the amount paid in his account. Upon the presumption that he did his duty, we must presume that he did so and that the amount paid was included in the balance found due him. As the record stands, these items seem to have been erroneously allowed.

The fifth reason of appeal is that the court should not have allowed the sum of \$34.50 paid by the plaintiff to the conservator, October

26, 1881. That sum was paid by direction of the Judge of the Probate Court. There is no finding that the administrators, who were appointed the day before, requested the payment. The objection is that the claim was not presented to the administrators as a claim against the estate by Mr. Gallup, and that there was no assignment by him to the plaintiff, although the plaintiff duly presented the claim.

We do not understand that the Judge of Probate had any power to direct as to the disposition of the funds in the plaintiff's hands. It was a mere personal direction and not a judicial order. Even if the probate court had ordered it, the order would have been invalid, because it was a matter not within its jurisdiction. So far as we can see, the only way to relieve the transaction from being a gratuitous payment is to regard it as a purchase by the plaintiff. In that event, he could only recover as an assignee and upon a complaint adapted to the facts. There is, therefore, a technical difficulty in allowing this item as a basis of recovery; but there was no difficulty in allowing it as a set-off to the demand against the plaintiff, if it appeared that Mr. Gallup was justly entitled to it, and that the estate was benefited to that amount. We think that the court might properly treat it as an equitable accounting for so much money. That it was allowed as a set-off only, is apparent from the fact that the judgment was for a less sum than the amount erroneously allowed.

The judgment is reversed and a new trial ordered.

In this opinion the other Judges concurred.

John CROGAN and Wife

v.

Louis SCHIELE.

1. In an action for damages resulting from negligence, where a **demurrer to the complaint** has been **sustained**, the effect of the demurrer is to **admit**, for the purposes of the hearing in damages, the truth of every material and well pleaded fact in the complaint; such admission is conclusive as to the **right of action** and the **right to nominal damages**, and is *prima facie* as to **substantial damages**; but the defendant has the right to prove the non-existence of the alleged fact as bearing upon substantial damages, and the burden of proof in that regard is upon him, and if he fails, such fact is regarded as established in all its effects upon and relation to actual damages.
2. The question whether an open excavation was so located as to make the use of a highway **dangerous** is one of **fact**, not of law.
3. The **duty and liability of a person maintaining an open excavation** on his premises near a highway, depend upon the **dangerous condition**, in reference to the public use of the highway, in which the excavation was left by him, **rather than upon its exact location and distance from the highway.**

4. Where defendant maintained an extension of a public sidewalk, connecting the sidewalk of a city street with the front of his building and of the same material and on the same grade as the sidewalk, with no apparent division between the public sidewalk and such continuation thereof, except as the line might be denoted at each end of defendant's premises by division fences extending to the sidewalk; and where, adjoining the entrance to defendant's building and on defendant's premises, there was an open area, and plaintiff, being unfamiliar with the premises and trying, on a lawful errand, to find the entrance of defendant's building, in the dark, passed upon the extension of the sidewalk and, without negligence on her part, fell into the area; she was not a trespasser in going upon defendant's extension of the public sidewalk, but had a right to the use of the whole apparent public way.
5. That the plaintiff passed beyond the technical line of the street without knowledge on her part, is not the determining fact in relation to whether she was in the exercise of a traveler's right. A traveler's right is not confined to passing along the street. He may use the public way for all ordinary acts incident to ordinary travel, among which is the right of approach and entry of an adjoining building for a lawful purpose; for all these purposes the highway is to be regarded as it apparently exists, as against one who has actually enlarged the width of the highway.
6. If a person is induced or allured upon another's premises, the owner or occupier of such premises owes a duty to such person, whether a traveler or not, to see that his premises are in a reasonably safe condition; and it is not necessary to claim that a highway existed, either actual or implied; but if the owner of the premises has dedicated to the public a right of passage, or has so constructed his sidewalk as to induce people to believe that the public right of way exists, so that such public right should be held to exist as to a person acting on the belief, this condition is material on the question of allurement or inducement. If there is an apparent public way, a person, although not strictly a traveler, has a right to proceed upon the assumption that guards against dangers are provided, co-extensive with the apparent purpose and use of the way.
7. Defendant, by extending the sidewalk on his premises, as described, indicated that that part of his land was intended to be used by visitors or passengers, and that it was adopted and prepared for such use; and the law imposes a duty upon him, as an occupier of land, co-extensive with the use to which he subjects his premises; and in such a case, a person, whether a visitor or traveler, injured by a concealed source of mis-

chief, is entitled to substantial damages.

(New Haven—Decided October 23, 1885.)

ACTION for damages for injuries sustained by the plaintiff, Mrs. Crogan, in falling into an open area on defendant's premises. Action sustained.

The case is stated in the opinion.

Messrs. Doolittle & Bennett, for plaintiffs:

A person who makes an excavation on his own land so near the highway as to render the use of the way dangerous, is liable in damages to one who, in the lawful use of the way, and in the exercise of due care, falls into such excavation and is injured. *Buesching v. St. L. Gas Co.*, 73 Mo., 219; and cases cited; *Temp. Hall Assn. v. Giles*, 83 N. J. L., 260; *Beck v. Carter*, 68 N. Y., 283; *Coupland v. Hardingham*, 3 Camp., 898; *Jarvis v. Dean*, 3 Bing., 447; *Barnes v. Ward*, 2 Car. & K., 661; *Beardsley v. Hartford*, 60 Conn., 539; *Norwich v. Breed*, 30 Conn., 535.

The defendant's liability does not depend upon the distance of the pit from the street, but upon the dangerous condition in which the excavation was left. *Norwich v. Breed*, 30 Conn., 543; *Beck v. Carter*, 68 N. Y., 293; *B. & O. R. R. Co. v. Boteler*, 88 Md., 568, and cases cited.

The danger was that persons approaching his premises upon innocent errands might be led unconsciously from the sidewalk into the area. *Munson v. Derby*, 37 Conn., 311.

Entry upon another's close or into his house, at usual and reasonable hours and in a customary manner, for any of the common purposes of life, cannot be regarded as a trespass. 2 Wat., Tres., § 782; *Lakin v. Ames*, 10 Cush., 198.

Moreover, by leaving the strip of land so open to the public for fifteen years, the owner at least licensed the public to use it. Otherwise it is a mere trap to catch trespassers. *Cleveland v. Cleveland*, 12 Wend., 172.

The gross negligence of the defendant is here the cause of action; and he alone is responsible for the entire consequences of it, unless there has been fault on the plaintiff's part. *Birge v. Gardiner*, 19 Conn., 512.

In *Young v. Harvey*, 16 Ind., 814, the defendant dug a well near the street line, upon an uninclosed lot owned by him, and left it uncovered. Horses were permitted by law to run at large. A horse belonging to the plaintiff fell into the well and was killed. In holding the defendant liable, the court says that, whether the action "can be or not" maintained, "depends upon the degree of probability there was that such an accident might happen from thus leaving the partially dug well." *Hydraulic Co. v. Orr*, 83 Pa. St., 832; *Beck v. Carter* (supra); *R. R. Co. v. Stout*, 17 Wall., 657 (83 U. S., XXI., Law. ed., 745).

But in addition, the defendant, by his arrangement of the sidewalk and entrance, "held out an allurement whereby the plaintiff was induced to come upon the place in question." *Corby v. Hill*, 4 Com. B. (N. S.), 556.

The plaintiff in the above case was a visitor making use of a private way. *Sweeney v. R. R.*

Co., 10 Allen 868; *Larue v. Hotel Co.*, 116 Mass., 67; *Leahey v. Godfrey*, Rep., (May 6, 1885), 563.

In *Stratton v. Staples*, 59 Me., 94, the plaintiff was upon the defendant's premises to ask a question. *Low v. G. T. R. Co.*, 72 Me., 313; *Bennett v. R. R. Co.*, 102 U. S., 577 (XXVI., Law. ed., 285).

Messrs. John W. Alling and Harry W. Asher, for defendant:

The pith of the complaint is a violation of some obligation, which was owed to plaintiff as a traveler upon a public highway. The allegations of the complaint being untrue in this particular, no more than nominal damages could have been recovered. *Shepard v. N. H. & N. Co.*, 45 Conn., 54; *Sykes v. Pavlet*, 43 Vt., 446.

Upon the adjudged cases, the law is with the defendant. *Howland v. Vincent*, 10 Met., 371.

In *Hardcastle v. South York. R. Co.*, 4 Hurl. & N., 67, the defendants made a reservoir, near to but not adjoining a public highway, and omitted to enclose it from the way. The plaintiff's intestate, by accident, strayed from the way in the night and, falling into the reservoir, was drowned. There the defendants had a right to make the reservoir. The deceased was bound to know the law, so that, in reference to his rights, the defendants were chargeable with no wrong or neglect.

Hounsell v. Smyth, 7 Com. B. (N. S.), 781, was a case of the same character, with this element in addition, that the plaintiff went off from the public road, and upon the defendant's land, intentionally and not by accident. See, *Norwich v. Breed*, 80 Conn., 548; *Beardsley v. Hartford*, 50 Conn., 530; *P. & R. R. Co. v. Hummell*, 44 Pa. St., 375-379; *Blyth v. Topham*, 1 Roll. Abr., 88; *Seymour v. Maddox*, 16 Adol. & El., N. S., 326; *Southcote v. Stanley*, 1 Hurl. & N., 247; *Gardner v. N. H. & N. Co.*, 51 Conn., 143; *Baker v. Byrne*, 58 Barb., 438; *Roulston v. Clark*, 8 E. D. Smith, 866; *Severy v. Nickerson*, 120 Mass., 306; *Gramlich v. Wurst*, 86 Pa. St., 74; *Gillis v. Pa. R. R. Co.*, 59 Pa. St., 143; *Witham v. Portland*, 72 Me., 589.

Before a man can be made liable for the consequences of a defect in the condition of his own private property, some obligation, express or implied, that such defect shall not exist, must be shown to have arisen between him and the party injured. The mere possession of property that is not safe for use, except by the owner, does not constitute actionable negligence. *Pierce v. Whitcomb*, 48 Vt., 127.

A party permitted to enter private premises, for his own convenience or advantage and at his own request, acquires no such right but goes at his own risk.

If the defendant is liable to redress this injury to the plaintiff, it is because he did him a wrong, in omitting to perform a duty that he owed the plaintiff. *Id.*, 129; *Kahl v. Love*, 37 N. J. L., 5.

This area was not a public nuisance, nor did Mrs. Crogan get injured as a highway traveler. *Hounsell v. Smyth*, 7 Com. B. (N. S.), 729, 742.

As matter of law, Mrs. Crogan's conduct was negligent, for she took all the risks of her ignorance and the darkness. *Bush v. Brainard*, 1 Cow., 78; *Fox v. Glastenbury*, 29 Conn., 206-209.

The cases of *Hydraulic Co. v. Orr*, 83 Pa. St., 382; *R. R. Co. v. Stout*, 17 Wall. 657 (83 U. S., XXI., Law. ed., 745); *Stratton v. Staples*, Conn.

59 Me., 94; *Larue v. Hotel Co.*, 116 Mass., 67, and *Low v. G. T. R. Co.*, 72 Me., 313, hold that it is a question of fact for the trial court to decide whether or not, in a given case, the defendant owed the duty of making his premises safe for the plaintiff.

Upon the facts of the case, the defendant owed no duty to her, to have said area protected by rail or guard. If this, as the above authorities indicate, is a conclusion of fact, it is an end of the discussion. *Kavanagh v. Phelps*, 36 Conn., 111.

No duty is imposed by law on the owner or occupant, to keep his premises in a suitable condition for those who come there solely for their own convenience and pleasure. *Sweeney v. R. R. Co.*, 10 Allen, 372.

It is sometimes difficult to determine whether the circumstances make a case of invitation, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. *Bennett v. R. R. Co.*, 102 U. S., 577 (XXVI., Law. ed., 285).

In *Stratton v. Staples* (*supra*), it is a mistake to say that the business was merely to ask a question, although the same court, in 72 Me., 94, seems to have made the same mistake.

Cases of *Nicholson v. R. Co.*, 41 N. Y., 580, 582, 542, and *Rinks v. S. Y. R. Co.*, 3 Best & S., 244, contain a very full discussion of the cases and principles involved.

Stoddard, J., delivered the opinion of the court:

A demurrer to the complaint was filed in this case; that demurrer was overruled, and, in accordance with our practice, the damages were assessed by the court.

In this jurisdiction, the effect of a demurrer to the complaint in cases of this character, is to admit, for the purposes of the hearing in damages, the truth of every material and well pleaded statement of fact in the complaint. Such admission is conclusive, so far as the right of action and the consequent right to nominal damages is concerned, and is *prima facie* as related in substantial damages. The defendant has the legal right to prove the non-existence of the alleged fact as bearing upon substantial damages. The burden of proof in this particular is upon the defendant, and if he fails to prove the non-existence of the alleged fact, such fact is regarded as established, in all its effects upon and relation to actual damages.

The recent case of *Crane v. East. Trans. Line*, 48 Conn., 363, and again before this court, 50 Conn., 842, settles the practice in this State.

In the first paragraph of the complaint it is alleged that the defendant kept, maintained and permitted to remain on his premises, substantially adjoining the public highway and so near the public footway of said highway as to make the use of the same unsafe and dangerous, a deep area or pit, without rail, cover or guard of any kind.

It was not pretended in the argument that the area was not dangerous in itself, and its dangerous character is apparent from the finding. But it is said that the defendant owed no duty to this plaintiff not to maintain this dangerous pit. It is upon this theory alone that the judgment of the court below was pronounced, and by this

theory that judgment must be tested and the case disposed of here.

There is no finding of fact in this case to disprove the allegation of the complaint, that this dangerous area or pit was "so near the public footway of said highway as to make the use of the same unsafe and dangerous." Therefore, under the rule before stated, that alleged fact must be taken to be established. The case does state certain facts from which, argumentatively or inferentially, the court might be led to find, either that the pit was or was not so located, in reference to the public way and travel thereon, as to make the use of the highway unsafe or dangerous. But the court below made no finding of fact upon this point, thus leaving the legal inference arising from the demurrer to have its full effect upon this allegation in establishing its undeniable truth. This is necessarily so, unless it can be said that the court, as matter of law, notwithstanding the admission involved in the demurrer, ought to say that the pit was not so located as to make the use of the highway dangerous. This position has not been taken, and we do not think it can be maintained. That question is peculiarly one of fact, depending upon all the surrounding and characterizing facts and upon the whole evidence in the cause. The location of the excavation, its proximity to the public way, the character of the use of that public way in numbers and the manner of its use, the probabilities that travelers would or would not be endangered there, and the like general considerations, are to be weighed by the trial court in every case, and in addition to these general considerations attaching to all cases, the particular and peculiar surroundings of each special case render the question peculiarly one of fact and not of law, as a general rule. We think it is plain in this case that the question here involved is a question of fact and, so, beyond our jurisdiction to determine. While, therefore, no discussion of the fact will be made, it is, perhaps, proper to say that to a majority of the court it appears that the evidential facts found and stated by the trial court, establish the fact as alleged in the complaint in this particular.

Under such circumstances, no authority can be found warranting the treatment of such a question as a question of law to effect a result adverse to this conclusion. This condition of facts, we feel impelled to say, created and imposed a duty upon the defendant to persons lawfully using the highway.

There is some diversity of opinion as to the test of duty and consequent liability, in cases of this kind. It is said that in England and Massachusetts, the test of liability is whether the excavation be substantially adjoining the public way, so that a traveler, by a false or misstep, might be endangered, and the cases of *Howland v. Vincent*, 10 Met., 871; *Hardcastle v. R. R. Co.*, 4 Hurl. & N., 67; *Hounsell v. Smyth*, 7 Com. B. (N. S.), 729, are cited to this point.

Without stopping to inquire whether this is a correct statement of the rule in England, a different and much more satisfactory test and rule prevails in this State. The Massachusetts case, cited above, certainly adopts that theory; but we do not think it is authoritative. The case is discredited as authority by our own

court, in *Norwich v. Breed*, 30 Conn., 547.

Our court plainly implies that the ruling was wrong. It is denied in express terms in *Beck v. Carter*, 6 Hun, 604, and see same case in Court of Appeals, 68 N. Y., 284.

It is adversely criticised in Bigelow on Torts, 686, 689, and is pronounced in Shearman & Redfield on Negligence, § 505, "a decision which it is difficult to justify."

A late Massachusetts case seems to ignore the rule as applied in *Howland v. Vincent*, and approximates the test to that of our court in *Norwich v. Breed*; *Mistlo v. O'Grady*, 132 Mass., 139.

This last cited case substitutes for the test stated in *Howland v. Vincent*, this language, that the defendant "had no reason to suppose that any person would attempt to go where the danger was; and that the plaintiff was not misled by any act or word of the defendant;" a statement of the rule which plainly imposes a duty on this defendant.

The rule laid down in *Norwich v. Breed*, was stated after an examination of the Massachusetts case and English cases cited above, was declared upon full consideration, and places the liability upon true grounds, and has been cited in other jurisdictions with approval. An extract or two from that case will suffice: "We think that in making the defendant's liability to depend upon the dangerous condition in which the excavation was left by the defendant, rather than upon its distance from the street, the Judge adopted the true criterion. It is the dangerous character rather than the exact location of the excavation that determines the duty and consequent liability of the defendant in this respect." "Whether the excavation could, with a due regard to the rights of passers on the street, be left unguarded, or could not, depended upon the question whether, being unguarded, it endangered the travel or not; if it did not, no matter how near it was to the line of way; if it did, no matter how far it was removed."

It is plain that there was a duty upon the defendant in reference to the public use of that public way. The next inquiry is whether that duty attached to the defendant in reference to this plaintiff. The defendant claimed and the court ruled that the plaintiff was a trespasser upon the defendant's property, and was not in the exercise of any rights as a traveler upon the highway.

The material facts bearing upon this part of the case are, that a building used by the defendant as a corset manufactory stood on the defendant's premises, extending along the entire street line of eighty-eight feet, and set back ten feet from the line of the public way. The entrance to this building was in front, and consisted of an inclosed wooden porch with a door in the front. The door of the porch was five feet and from six to nine inches from the street line. The area was located alongside the building and adjoins the porch and is ten feet and nine inches long, two feet and nine inches wide, and five feet and four inches deep. A brick paved public sidewalk was laid along the front of the factory, and three or four years ago the open space between the sidewalk and the building was paved with brick on the same grade as that of the brick sidewalk, thus forming an unbroken

and continuous brick sidewalk covering the entire space between the roadway of the street and the defendant's building. There was nothing to mark the exact line of separation between the sidewalk and the defendant's lot.

Thus the defendant was maintaining an extension and continuance of the public sidewalk along the entire front of his building up to the line of his building, in the midst of a large city, where the familiar condition of affairs is that the public pavements extend to the line of building. This extension of the public sidewalk was of the same material and constructed in the same manner as the public sidewalk. It was on the same grade, nothing to indicate the place where the public walk ended, and apparently, to the eye, causing the public walk to extend to the factory.

On the night in question, the plaintiff was told that her child was in the defendant's factory. She lived in Collis Street, and only a few feet from Franklin. Collis Street is a street leading into Franklin Street nearly opposite the south end of the factory. On the evening of the 17th of November, about 8 o'clock, going for her child, "she went along the Collis Street sidewalk to the corner of Franklin Street, and then she took a direct line towards and to the wooden porch of the factory, crossing Franklin Street diagonally. In trying to find the door she fell into the area. She was unfamiliar with the premises and did not know of the existence of the area and is found not to have been negligent in fact in not avoiding the area."

The front fence lines of the property owners at either end of the defendant's shop indicated, in a general way, the line of the public way. And now it is said that the plaintiff was a trespasser in thus going upon this part of the brick pavement placed upon the defendant's property.

We think the defendant's point is not well taken. The entire space up to the factory was apparently a public sidewalk; it does not appear that she knew anything to the contrary. She had a right to use the whole of the apparent public way to reach the defendant's shop. Her errand there was lawful. She had a right to go there, and it will not answer for the defendant to say to the plaintiff: "True it is that by my act there was an apparent, visible, manifest public walk extended to my shop, but you, a stranger, must be held to know where the divisional line is, although I have so built and maintained the sidewalk that you are naturally misled thereby."

There is no principle of law or justice which will warrant a court in holding a person to be a trespasser who uses as a public way an apparent public sidewalk, kept so by the act of the defendant, simply because he steps over the technical legal boundary line. By the construction of the walk, the plaintiff, as one of the public, was told in a most emphatic way that the sidewalk extended to its full apparent width. The occurrence was in the night season; the plaintiff was not familiar with the premises; it is not found that she knew or could have seen the fence lines at either end of the defendant's property. The defendant's acts would indicate, even if a person knew where the technical line of the street was, that the defendant had thrown open to the public and made part of the public domain that part of his property covered by this extended sidewalk; and much more so as to a

person who did not know where the line was.

The streets of our cities, especially in the mercantile and manufacturing districts, are full of instances where the buildings are set on the street line, or at varying distances therefrom, with similar continued and extended pavements. To impose upon persons lawfully using our sidewalks the duty of ascertaining at their peril where the technical divisional line lies, before venturing to use the sidewalk as it openly and visibly exists, is, in our judgment, not warranted by any authority; and to permit owners and occupiers of such property to construct and maintain unguarded pits and areas in those parts of their premises that are not distinguishable from the public way will fatally jeopardize public travel.

In *Corby v. Hill*, 4 Com. Bench (N. S.), 562, Cockburn, Ch. J., said: "The proprietors of the soil held out an allurements whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. * * * Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent to them to place thereon any obstruction calculated to render the road unsafe."

In *Beck v. Carter*, 6 Hun, 607, it is said: "Even if the road had been proved to have been laid out two rods wide, and a few feet belonging to the plaintiff lay between the road and the fence, as it has always been left in common with the road, and thereby apparently devoted to the public use, any person would be justified in using it in that way. The fair inference to be drawn from its situation thus acquiesced in by the owner is, that it has been abandoned to the public." "If a house or store is built a few feet from the margin of the street or highway, and no fence is erected along or near the margin, persons are at liberty to assume that the building is on the margin of the street, and that they may lawfully travel over the whole space thus apparently set apart for public use by the owners of the land." "To authorize an owner of land adjoining a highway to require travelers lawfully passing along it to keep within the limits of it, as laid out or dedicated, he must indicate in some proper way where the boundaries are; and when that is done, he is relieved from liability for injuries sustained outside such limits. To hold a traveler, a stranger to the locality, bound to keep within the limits of a lane or alley, in the night as well as in the day, and that the owner of the adjoining land may dig pits in his land five or six or seven feet from one of the margins of the street, and if the traveler falls into them and is injured, he is without remedy against the owner of the land on which such pit is dug, is so monstrous, so unjust, and so unreasonable, that it needs but to be stated to be repudiated."

But the case at bar is far stronger than the New York case, touching which this language is held. Here, the owner and occupier of property had so constructed and built the extension of the sidewalk as to induce and allure people to use it as and to suppose it to be a

part of the public way. As to persons lawfully using it, he thus constituted it an inseparable part and parcel of the public way. Persons using it within the scope of the purpose so plainly indicated by the owner, are not trespassers and are protected by the law from dangerous excavations, pits and traps.

In the Court of Appeals, *Beck v. Carter*, it is thus treated: "It was not the case of a bare permission by the owner to cross his land adjoining a public street. The land had, by use long continued, been made, for the time being, a public place and part of the highway." "The boundary of the alley was not defined, and persons crossing the lot in the usual way were not trespassers." 68 N. Y., 298.

The case in hand presents not only the public use spoken of by the Court of Appeals, but superadded to that, as a characteristic thing, the personal, active acts of the defendant, in so constructing and using his property as to make it a part of the highway.

"There may possibly be," says the court, in *Binks v. R. Co.*, 8 Best & Smith, 253, "cases where the owner of land adjoining a way may, by his acts, induce the public to go near to an excavation in his land so as to get into danger; in which case it would be the same thing whether the way were a highway or not."

It is stated as a fact in the first count of the complaint, that the plaintiff was passing along said public footway of said highway, etc., and fell in, etc. The demurrer, as before suggested, in the first instance admits this, and this fact stands, except as modified by the other facts found.

The bare fact that she passed without knowledge on her part (for this want of knowledge, if material, is admitted, because not disproven) beyond the technical line of the street, is by no means the determining fact in relation to the question whether she was in the exercise of a traveler's right. A traveler's right is not confined to simply passing along the street. He may use the public way for any of the whole range of ordinary acts incident to ordinary travel, not the least of which is the right of approach and entry to an adjoining building for a lawful purpose. And for all these purposes the highway is to be regarded as it apparently exists, as against a defendant who has actually enlarged the width of the highway.

So far, this case has been treated upon the theory and facts set forth in the first count of the plaintiff's complaint. That count confessedly proceeds upon the assumption that the plaintiff was in the exercise of a traveler's rights upon a public highway. The plaintiff, fearing that she might be met with the objection that the plaintiff had passed beyond the theoretical line of demarcation, and, therefore, was not technically a traveler, by amendment inserted a second count, in which the physical facts surrounding the area are stated, precisely as they are proved and hereinbefore recited; and in addition thereto particularly alleged that the plaintiff "was passing along said public way, and from the said public way passed over and upon the said brick pavement of the defendant."

It is now claimed that the second count is identical with the first, notwithstanding the first count alleges that she was a traveler, and

the second count states every fact which is relied upon by the defendant to establish his vital proposition that she was not a traveler. The second count also is framed in strict accord with the letter and spirit of the Practice Act; it "contains a statement of the facts constituting the cause of action;" and if those statements are substantially established, the right of recovery follows; and this is the result without reference to the plaintiff's status as a traveler; for the substance of that count is that she, the plaintiff, was induced by the acts of the defendant to pass from the public way to and upon the defendant's premises.

We understand the law to be that if a person is induced or allured upon another's premises, that the owner or occupier of such premises owes a duty to such person to see that his premises are in a reasonably safe condition, and that this duty attaches to the defendant in reference to the personality of the allured individual. Upon these facts, the right of action is complete, even if the plaintiff was not a traveler; it is, therefore, immaterial to inquire whether the plaintiff called herself a traveler. Even if she had said in the complaint, in express terms, that she considered herself a traveler and entitled to protection in that character, the court should be of opinion that she was not, at the time of the injury, technically a traveler; but that she was, upon the facts alleged and proved, entitled to protection as an individual, there can be on that ground no objection to a recovery. The plaintiff was not bound to state in the complaint the legal theory of her case, nor is the legal theory in any case material, except, possibly, where the form of action is material to the rights of the parties. The Court of Appeals in *Hemiquay v. Poucher*, 98 N. Y., 287, states the rule in this language: "The party was under no obligation to state in his pleading the theory of the law upon which his claim is based."

And we also think that this second count is properly framed to obviate the objection that the plaintiff was not a traveler. The first count alleges that she was a traveler, and we think the second count is not a meaningless repetition of the first count. That it accomplishes its evident design, is clear and forces us to examine the case as presenting the question, assuming the plaintiff not to have been a traveler, whether the plaintiff was or was not induced or allured to enter upon the defendant's property. In this view of the case, as we have already stated, the character of traveler is not essential to the plaintiff's right of recovery.

If the plaintiff was induced by the defendant to come, or was allured upon the defendant's land, it is not necessary for the plaintiff to claim that a highway existed, either actual or imputed, as against this defendant. But, if the defendant had dedicated to the public a right of passage or had so constructed his sidewalk as to induce people to believe that the public right of way existed, and, therefore, as to a person so supposing and acting thereon, that public right should be held to exist, this condition would have a very material bearing upon the question of allurement or inducement. For, if there was an apparent public way, a person, though not strictly a traveler, has a right to proceed upon the as-

sumption that guards against dangers are provided, co-extensive with the apparent purpose and use of the way.

Reverting now to our original proposition, that the effect of the demurrer to this complaint is to admit the truth of every material, well pleaded fact as stated, except so far as such statement of fact may be modified or controlled by the facts found upon the hearing, we find, by reference to the second paragraph of the second count, a statement of fact that the defendant "kept and maintained on his own land, between the public footway or pavement on said Franklin Street and said pit or area, a brick pavement or footway, in all respects like the public pavement or footway, separated in no manner therefrom, and invited, licensed and permitted the public to make use of the same in the same manner and to the same extent that they made use of the public way; from which it was in no manner to be distinguished by the eye."

This statement of fact certainly is not denied by any direct statement in the finding; but, on the other hand, it is in substance and effect confirmed and established by the finding; for it is found that the public sidewalk had been widened and continued up to the defendant's building, and so kept and maintained by him, and that there was nothing to mark the exact line of separation; that the sidewalk on the defendant's premises was paved with brick in the same manner as the public footway, and was on the same grade, is also found; thus the finding in substance accords with the allegation in this particular.

But it is said that the front fence lines of the adjoining owners would indicate to the ordinary traveler the general line and course of the sidewalk. Assuming this and assuming, also, that such indications would exist in the night season when those front fence lines might not be seen or, if seen, would probably not be effective, yet that fact does not help the defendant as to the controlling fact that he had so built, kept and maintained his sidewalk as to induce people to go beyond the line of the adjoining front fences. Besides, the accident happened in the night season, and there is no fact in the case to lead to the belief that the plaintiff was cognizant of the line of those front fences, or knew of their existence even.

In the leading case of *Sweeney v. R. R. Co.*, 10 Allen. 373, Bigelow, *Ch. J.*, giving the opinion says: "The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurements, or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or

passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: a mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on or pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use; and for a breach of this obligation he is liable in damages to a person injured thereby."

The plaintiff alleges that it was by reason of the existence of the pavement on the defendant's land, constructed as it was, that she passed beyond the limits of the highway?" Instead of contradicting this allegation, the facts found support and confirm it. How could it be more certainly indicated that this part of the defendant's land was "intended to be used by visitors or passengers," and that it was "adapted and prepared for such use," than by extending and continuing a public sidewalk over it; he built and maintained this walk so that every person whose interest or inclination inclined so to do, would naturally enter upon it supposing that it was intended for public use and, therefore, properly guarded. See, *Mellen v. Morrill*, 126 Mass., 546; also, 132 Id., 189, 141.

"The question is: did a reasonable regard for the safety of those to whom the use to which the defendants had devoted their wharf might be expected to bring there, require something in the way of safeguard at this gangway?" *Low v. R. Co.*, 72 Me., 819.

In *Hydraulic Co. v. Orr*, 83 Pa. St., 335, that court by Agnew, *Ch. J.*, upheld a verdict for damages at the suit of a trespasser, upon the theory that the occupier of premises has reason to apprehend danger owing to the peculiar situation of his property, and its openness to accident, and on page 336: "That this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society."

The turn-table case in *R. R. Co. v. Stout*, 17 Wall., 659 [XXI., Law. ed., 745], and *Birge v. Gardiner*, 19 Conn. 512, proceed upon the same general theory. See, also, *Haughey v. Hart*, 62 Iowa, 98; *Young v. Harvey*, 16 Ind., 814.

Shearman & Redfield on Negligence, page 599, says: "Of course, it is culpable negligence to leave a pit or other excavation in such an unguarded state as to cause injury to a person having a right to be upon the land, and using that right with ordinary care."

Tested by this statement of the law, the plaintiff's right must be conceded. Under any view of this case, she was lawfully on the land and in the exercise of ordinary care.

So, in Addison on Torts, it is said, page 163, 8d ed.: "But if a person, being upon the premises of another on lawful business, without any fault or negligence of his own, falls through a hole on such premises, the occupier will be responsible." Again, on page 164: "Every occupier of a house who makes or permits the continuance or use of a pathway to the house, may fairly be deemed to hold out

an invitation to all persons, who have any reasonable ground for coming to the house, to pass along his pathway."

Wharton on Negligence, § 824, *a*, lays down this proposition: at the same time it must be kept in mind that he is bound to keep his premises in such order that visitors, whom he invites, when acting prudently, will not be injured; and if dangerous places exist by which they, exercising such prudence, might be hurt, his duty is to give notice of the danger. * * * And if he is aware that persons are in the habit of passing over his grounds, trespassers though they may be, he is liable, if he leaves in their way dangerous excavations or instruments by which they are injured.

"By making the path as an approach to his house he thereby has given implied permission to all persons having occasion to do so, to go over it to his house, and he cannot shield himself from liability, upon the ground that they had no business there. He is treated by maintaining the path to hold out an invitation to all persons to use it who have reasonable grounds to do so, and he is bound, at his peril, to keep it in safe condition." Wood on Nuisances, § 187.

In *Vanderbeck v. Hendry*, 34 N. J. L., 471, it is said: "It has been substantially held that although a way may not have been dedicated to the public or otherwise legally established for the use of the public, yet if the owner of premises over which it passes has exhibited an intention that it shall be used by the public, either as a means of access to his property, or over it, and, by the manifestation of that intention, has induced or allured the public to its use, that those using it within the scope of the purpose manifested are entitled to be protected from dangers to the way, by reason of obstructions or interferences created during its existence, and resulting from the want of ordinary care on the part of the owner or those acting within his authority."

Authorities to the same point, in great numbers, firmly establish a principle of law that imposes a duty upon an occupier of land. The extent of that duty is co-extensive with the use to which he subjects his premises.

Under some circumstances, trespassers are protected; in others, trespassers are at their own risk, while visitors are entitled to a reasonably safe passage; and in others still, the public have rights that the occupier cannot safely ignore.

Trespasser, the plaintiff was not; and whether she be regarded as a visitor by invitation going upon private property, or one of the public in the enjoyment of public right by using an apparent public way as a means of access to the defendant's building, and being injured by "a concealed source of mischief," she was entitled to recover substantial damages.

There is error in the judgment of the Superior Court.

In this opinion the other Judges concurred.

William B. FARNAM *et al.*, Exrs.,

v.

George B. FARNAM *et al.*

A will devised the residue of the estate to testator's wife and children, as trust-

ees, to pay certain annuities to the wife and each child of testator, for their respective lives, the excess of income to accumulate for ten years after the death of the testator; and at the expiration of that time, two thirds of the annual income to be divided among children and the legal representatives of deceased children, the remaining one third to accumulate. The will further provided that "at the decease of the last survivor of my said children, if my wife shall not then be living, but if living, then upon her death, this trust shall cease, and I give, devise and bequeath all the estate which shall then be held in trust under this will, to my grandchildren who shall then be living, to be equally divided among them *per capita* and not *per stirpes*, and to their heirs forever;" and among the children, *per stirpes*, and widows of such grandchildren as shall have died at the expiration of the trust. Held:

1. The grandchildren take a vested interest in the remainder of the trust property, and take as a class, opening to let in after-born grandchildren; and, in case of the death of any one grandchild, before distribution, without children and leaving no widow, his title devests. Consequently, no part of the estate is intestate by reason of the statute against perpetuities.
2. The annuity to children is payable to the family of a deceased child during the continuance of the trust.
3. The gift of two thirds of the net income after the first ten years, is cumulative.
4. By "legal representatives," is meant those who would take under the Statute of Distribution.

(Decided November 13, 1885.)

FROM the Superior Court, New Haven County. Suit for the construction of a will.

The case is stated in the opinion.

Mr. L. H. Bristol, for plaintiffs.

Mr. C. R. Ingersoll, for certain respondents:

The limitation of an estate to be within the rule against perpetuities, and, therefore, valid, must be such that by no possibility can its vesting be postponed beyond the statutory limit. "But to be valid, it must be so made that the estate, or whatever is devised or bequeathed, not only may, but must necessarily vest within the prescribed period. And whenever there is a limitation over which cannot take effect by reason of its being too remote, the will is to be construed as if no such provision or clause were contained in it." *Fosdick v. Fosdick*, 6 Allen, 43; *Rand v. Butler*, 48 Conn., 299.

In *Rand v. Butler*, there was a trust during the life of Thomas Bradley, and upon his death the trustees were to deliver the estate to the heirs at law of the testator. This court held that if the testator intended, by this designation of his heirs at law, those heirs at law of the testator who might be living at Thomas Bradley's death, the devise was void.

In *Alfred v. Marks*, 49 Conn., 478, the testator gave Lew L. Marks a life interest in the property in question, but provided that in case he should die without children, the property should go to "the heirs of my son Willis M. Marks." The gift over was held to contravene the statute.

In the still more recent case of *Wheeler v. Fellows*, June Term, 1884, not reported, it was said: "Our statute is imperative that the estate must be given to parties in being when the will was made, or the immediate issue of parties then in being. If by possibility the estate might be carried, by the terms of the will, to parties not then in being and who are not the immediate issue of parties then in being, the will, in this regard, is void."

In *Austin v. Bristol*, 40 Conn., 120, the bequest was: "Upon the decease of my said wife (to whom was given a life interest) I give all of my said estate to such of my children as may be living at the time of her decease," and it was conceded that there was no vesting of the estate in the children until the decease of the wife. *Denny v. Kettell*, 135 Mass., 188; *Smith v. Edwards*, 88 N. Y., 104.

This is made clear in the late English cases; *Bentinck v. Duke of Portland*, L. R., 7 Ch. Div., 693, and *Pearks v. Moseley*, L. R., 5 App. Cas., 714, in both of which cases the limitation over was analogous to that in the will in question, and the claim we have just indicated was made and disregarded.

In *Bentinck v. Duke of Portland*, a class gift is thus defined: "A class gift is where the total and ultimate amount of the shares to be taken by any one donee cannot be ascertained until all the persons who are to take, and the ultimate proportions in which they take, are finally ascertained."

Here, it is manifest, the ultimate amount of no one donee's share can be finally ascertained until it is known who are to take, and that cannot be known until the time for the distribution. *Sears v. Russell*, 8 Gray, 100.

For this reason it is, that the rule is now well settled in the law of perpetuities, that the vice of remoteness affects a class as a whole, if it may affect an unascertained number of its members. 1 Jarm. Wills, 5th Am. ed., 580; *Hall v. Hall*, 123 Mass., 120.

This subject has received recent, 1880, and very thorough consideration in the House of Lords. *Pearks v. Moseley* (supra).

The limitation over of the trust estate being void, the trust created for the support of the gift over must fail. *Irving v. De Kay*, 9 Paige, 521; *Smith v. Edwards*, 88 N. Y., 104.

In the present case, the trust for the accumulation has no other object than to save the property for an unlawful purpose, for persons not the testator's heirs at the time of his decease, and without the capacity to take, under the statute, and is, therefore, invalid. *Thorndike v. Loring*, 15 Gray, 391.

But if the trust of the will is so divisible that the trust relating to the accumulation can be separated from the trust relating to the annual payments to the children, then, clearly, upon the failure of the trust for the accumulation, a resulting trust, in that respect, would arise for the heirs at law. *Sears v. Hardy*, 120 Mass., 524.

"A gift to descendants receives a construction answering to the obvious sense of the term, namely: as comprising issue of every degree." 2 Jarm. Wills, 5th Am. ed., 692.

The objection that the words "issue" and "descendant" are, therefore, substantially synonymous, is hypercritical. For the expression "issue or descendant" is natural, and not uncommonly used by accomplished lawyers; as for example, by *Vice-Chancellor McCoun*, in *Mowatt v. Carow*, 7 Paige, 382, and by Mr. Sherman, in *Allyn v. Mather*, 9 Conn., 120.

We are aware of no authority that either in a direct gift by will, or in a declaration of trust to the descendants of a person named, such bequest or declaration of trust would be construed to include, as a *descriptio personarum*, the heirs general of such person, including ancestors and collaterals. Here it seems clear that it was intended, according to the natural meaning of the terms, to limit the ultimate disposition to his own issue. *Baker v. Baker*, 8 Gray, 101. And see, *Van Beuren v. Dash*, 30 N. Y., 393, where the legal meaning of the word descendant is exhaustively considered.

Prima facie, the words, legal representatives, mean executors and administrators. And this meaning will only give way to a different intention of the testator, to be gathered from the whole will. 2 Redf. Wills, ch. 1, § 5.

The Statute of Distribution governs, in all cases where there is no will; and where there is one and the testator's intention is in doubt, the statute is a safe guide. *Lyon v. Acker*, 33 Conn., 225.

Messrs. J. W. Alling and S. C. Loomis, for other respondents.

Carpenter, J., delivered the opinion of the court:

The testator's will contains the following: "Fourth. All the rest and residue of my estate of every kind and wherever situated, I give, devise and bequeath to my wife, Ann Sophia Farnam, and my children, George Bronson Farnam, William Whitmore Farnam, Charles Henry Farnam, Sarah Sheffield Farnam, wife of Eli Whitney, Jr., and Henry Walcott Farnam, and to the survivors and survivor of them as joint tenants in fee simple, but in trust for the uses and purposes following, to wit: 1st. Out of the net income and profits thereof to pay to my said wife, Ann Sophia Farnam, during her life, the sum of \$25,000, annually, in quarterly payments, beginning on the first day of the month next succeeding that of my decease. This bequest and that contained in the second article of this will is in lieu of her right of dower in my estate. 2d. The said trustees are, out of said net annual income, to pay to each of my children during their lives respectively, the sum of \$5,000 annually, in quarterly payments, beginning on the first day of the month next succeeding that of my decease. 3d. The said trustees are, out of said net annual income, to pay each of my grandchildren as and when he or she shall arrive at the age of twenty-one years, the sum of \$5,000. 4th. During the ten years next succeeding my decease, the said trustees shall allow the said net annual income to accumulate, subject always to the payment of said annuities to my said wife, and to my said children, and also to

any payments to grandchildren, as aforesaid, and invest the same as part of said trust estate; and said trustees, after the expiration of said ten years, shall pay two thirds of the net annual income of said estate annually to my children then surviving, in equal proportions, and if any of my said children shall have then deceased, his or her legal representatives shall be entitled to the share of said annual income that he or she would have been entitled to if living; and said trustees shall allow the remaining one third of said net annual income to accumulate, and invest the same as part of said trust estate.

Fifth. At the decease of the last survivor of my said children, if my said wife shall not then be living, but, if living, then upon her death, this trust shall cease; and I give, devise and bequeath all the estate which shall then be held in trust under this will to my grandchildren who shall then be living, to be equally divided among them *per capita* and not *per stirpes*; and to their heirs forever; but if any grandchild of mine shall have died leaving a child or children surviving at the expiration of said trust, such child or children shall take the share that his, her or their parent would have been entitled to if living; and if any grandchild of mine shall have died leaving a widow surviving at the expiration of said trust, but leaving no child or children then surviving, such widow shall take one third of the share her husband would have been entitled to if living."

In the construction of this will several questions have arisen. It is claimed by the children of the testator that the fourth and fifth articles are inoperative or substantially so, for the reason that they are in violation of the statute against perpetuities.

This claim, if sustained, requires us to hold: 1, that no estate vests in the grandchildren until the death of the widow and all the children; and 2, that it will then vest in a class composed of grandchildren then living and the children and widows of deceased grandchildren.

The main question is, whether the estate in the grandchildren is a vested or contingent remainder. We use the terms "vested remainder," and "contingent remainder" as they have been frequently used in this State, as applicable alike to real and personal property. We do not deem it necessary in this case to make any distinction between the two kinds of property.

When, by the terms of this will does the estate vest in the grandchildren? at the death of the testator or at the death of the last survivor of his wife and children?

We think it vested, in point of right, on the death of the testator.

That courts will incline in doubtful cases to construe a devise or legacy as vested, rather than contingent, is a familiar and well settled rule. In some instances, courts seem to have gone so far as to say that they will, if possible, construe it as vested. It is enough for our present purpose to say that we ought to give this will that construction, if its language will fairly admit of it.

The bequest is not in terms contingent, nor is it so by necessary implication. That it may be so construed may be conceded. That it will bear a different construction and that that is the better one, we shall attempt to show.

It will be noticed that the testator, as to the great bulk of his property, separates the legal from the equitable title; and that separation is to continue until the death of his widow and children. The naked legal title is vested in trustees; the equitable title to the principal and a large part of the income is vested in no one until the termination of the trust, unless it vests in the grandchildren. The testator has made no other disposition of it. The law will not favor a construction which suspends the title or holds it in abeyance.

That the testator intended that the grandchildren should ultimately have the property, cannot be doubted. That he has not expressly postponed the vesting, is equally clear. The doubt arises from the use of the word "then," referring to the time when the trust shall cease, in the fifth article—"I give, devise and bequeath all the estate which shall then be held in trust under this will, to my grandchildren who shall then be living."

It is contended on the one hand that the word, as first used, is used to indicate the time when the estate is to vest in point of right; on the other hand it is insisted that it merely indicates the time when it is to vest in possession. It is agreed that it points out the time when the legal and equitable titles merge, and when the estate is to be distributed; and we think it must be conceded that the connection in which it is used does not necessarily require us to say that it is used for the further purpose of indicating the time when the estate vests in point of right. But if it is left in doubt, the rule referred to makes it a vested estate.

The word, as used in the last clause, does not refer to the estate nor to the time of its vesting, but is used to designate the persons who are to take, and will be further noticed when we consider that branch of the case.

Another rule is, that if the limitation over depends upon an event which is sure to happen, and the persons who are to take can be ascertained during the continuance of the particular estate, the interest is vested. But if it depends upon an event which may or may not happen, or if it is uncertain whether any person will ever be in existence who can take, the estate is contingent. Mr. Redfield states the rule thus: "From a careful examination of the subject, it will be found, we think, that the question of vesting, or remaining contingent, depends upon whether the condition of the intervening estate determining, or the estate ever taking effect, is one that must happen sometime, and so as to give effect at some period to the second estate, or may never happen. If the former, then the second estate in remainder will always be regarded as vested." *Redf. Wills*, pt. 2, 594.

Again "A conditional bequest is where its taking effect depends upon the happening of some uncertain event." *Id.*, 661, citing 2 Wms. Exrs., 1132; 1 *Rop. Leg.*, 605.

The rule thus unqualifiedly stated makes this a vested remainder. The event on which the remainder is to take effect, the death of all the trustees, is sure to happen. Assuming that the grandchildren, as a class, and they only, take the remainder, a question we shall hereafter consider, there is no difficulty in ascertaining at any time who are to take. The remainder is certain to vest at some time, and a certain defi-

nite class is designated to take. Under these circumstances the law presumes that the testator intended that the remainder should vest presently. There is a present right of future enjoyment whenever the possession becomes vacant; and that right, coupled with the fact that the time for the enjoyment must come, clearly shows a vested interest.

Mr. Jarman's 14th rule is as follows: "That the rule of construction cannot be strained to bring a devise within the rules of law; but it seems that where the will admits of two constructions, that is to be preferred which will render it valid."

If this remainder is vested, the statute against perpetuities will not defeat it; otherwise it may. To defeat this will, we are obliged to interpret two of its provisions, concerning which the most that can be said is, that they are doubtful and susceptible of a different interpretation, so as to make it invalid. In other words, we are required to give the benefit of all doubts to those attacking the will, and that for the purpose of destroying it, which is contrary to the rule.

The words "I give, devise and bequeath" import a present interest, unless other provisions in the will clearly manifest a different intention. "Where the will imports a present interest in the devise, it is to be construed so that any condition in the same shall be held subsequent and not precedent." Redf. Wills, pt. 2, 685.

"The leading inquiry upon which the question of vesting or not vesting turns is, whether the gift is immediate and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person or the like." *Everitt v. Everitt*, 20 N. Y., 39.

It cannot be denied that the testator has used language importing an immediate gift, in point of right, and we fail to discover in other parts of the will sufficient indications of a contrary intent.

Another rule, of less weight, perhaps, but still worthy of notice, is, that where the only gift is in a direction to pay at a future time, and the will does not otherwise indicate a present gift, the remainder will generally be regarded as contingent. But where the terms of a bequest import a gift and also a direction to pay at a subsequent time, the legacy vests at the death of the testator and not at the time of payment. *Traser v. Schell*, 20 N. Y., 89; *Manice v. Manice*, 43 N. Y., 308.

Here are words importing a present gift, and also a direction to distribute at a future time.

Two cases in the State of New York will serve to illustrate and define this rule. In the case of *Warner v. Durant*, 76 N. Y., 133, the will gave to the executor in trust certain money with directions to pay to B. annually the interest on \$15,000 at 7 per cent and at the expiration of five years to pay over to B. the principal sum of \$15,000. B. died before the time fixed for the payment of the principal. The question was, whether the legacy vested in B. during his life.

The court say: "It is a general principle that where the gift is absolute, and the time of payment only postponed, time not being of the substance of the gift but relating only to the payment, does not suspend the gift, but merely defers the payment." This principle will not

act in this case to vest the legacy, for the gift was not, in the outset to the legatee; and another rule is to be noticed. It is this: where there is no gift, but by a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives. Here the gift was at first to executors to hold in trust for five years; and at the expiration of that period to pay over to the legatee. But this rule does not act in this case, for there has been a distinction grafted upon it. It is this: where the gift is to be severed *instantly* from the general estate, for the benefit of the legatee, and in the meantime the interest thereof is to be paid to him, that is indicative of the intent of the testator that the legatee shall, at all events, have the principal, and is to wait only for the payment until the day fixed. And on that ground it was held that the principal sum of \$15,000 was severed from the general estate and vested in the legatee, at the death of the testator.

In *Smith v. Edwards*, 88 N. Y., 92, there were no words in the will importing a present gift, but the legacy depended entirely upon a direction to the executor to pay over to the legatee a legacy at a future time. It was held that the legacy was contingent and did not vest until the time of payment. The court say: "Where the only gift is in the direction to pay or distribute at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift; 1 Jarman on Wills, 762."

* * * If that rule is arbitrary and inflexible it ends any further argument; for in the present case, there was no immediate gift, made in distinct terms, separate and apart from the direction to divide and distribute. But while we have recognized the rule it has been with very important qualifications and exceptions, which properly limit its force as a standard of construction. In *Manice v. Manice*, 43 N. Y., 309, it was said that where the terms of a bequest import a gift, and also a direction to pay at a subsequent time, the legacy vests and will not lapse by the death of the legatee before the time of payment has expired. And in *Warner v. Durant*, 76 N. Y., 136, the general rule is declared to have an exception grafted upon it, that where the gift is to be severed *instantly* from the general estate for the benefit of the legatee, and in the meantime the interest is to be paid to him, that is indicative of the intent of the testator that the legatee shall, at all events, have the principal and is to wait only for the payment until the day fixed. The doctrine of these cases confines the rule within the limitation of its precise terms. It applies only where, beyond the direction for future distribution, there are no words and no provisions which import a present or vested gift, or indicate such an intent. It does not control, where the language of the will, while not expressly saying 'I give and bequeath,' does yet plainly import a present gift intended to vest immediately, without reference to the clause of distribution."

Smith v. Edwards was quoted approvingly by this court in *Wheeler v. Fellows*, 52 Conn., 238; and it is an authority which supports that decision as well as this; for an examination of the whole will in *Wheeler v. Fellows* reveals this fact: that the gift over, which was held to be

void, was found only in the direction to pay or divide at a future time. The question whether other provisions of the will indicated a present gift, and the question whether the remainder was vested or contingent, were not made and were not considered by the court. It was assumed by the counsel and the court that the remainder was contingent.

But we do not propose to decide this question wholly or principally upon legal and artificial rules. Those rules should never control the intention of the testator; they should only be used as aids in discovering that intention. In this, as in other cases, we should rely mainly on the language of the will itself. In doing so, we must consider the terms of the whole will, having due regard to the condition and circumstances of the testator.

The will is drawn with great care and technical accuracy. Taking the whole will together, we think it is reasonably certain that he intended that his estate should vest, in right, at once, in his grandchildren.

His general scheme is clear. In the first place, he made ample provision for the widow; in the second place, he made reasonable provision for his children; and, in the third place, he gave most of his property ultimately to his grandchildren. Secondary and incidental intentions may also be noticed. As to the great bulk of his property he intended to pass by his children, that they should not have the absolute ownership of it. He also intended to keep it together and accumulate as long as the rules of law would allow. Perhaps he was ambitious to live in his estate long after his death, and that the estate, when finally distributed, should be a very large one. Whether these purposes were wise or otherwise, is not for us to say.

His disposition of his property seems to be an impartial one. But, principally and prominently, it appears that his grandchildren were the preferred objects of his bounty. His intention that they should ultimately receive by far the larger portion of his property, is unmistakable. That is one of the leading features of the will. Now, as a vested interest is better than a contingent one, it will not be presumed that he intended the latter, especially as no one is benefited by it; and if he did so intend, it threatens the practical destruction of the will. Every presumption is in favor of a vested interest; not only so, but the inference to be drawn from the manifest intentions of the will, points strongly to that conclusion.

Let us now examine the will more in detail:

In the third article he gives, upon the death of his wife, to each of his surviving children, five pictures, and his silver-ware and plate, and prescribes the method of distribution. His language is: "Upon the death of my said wife, I give and bequeath to each of my then surviving children," etc. Of course, no question of perpetuity can arise in respect to these bequests; but the question whether the children took a vested or contingent interest is a pertinent one. That they took a vested interest will hardly be doubted. The use of the pictures and silver-ware, is given to the widow during life. The title to the remainder, meanwhile, is in no one unless it is in the children. It is no part of the trust estate, because it is to be distributed, in all human probability, long before the trust will

terminate. As the title must vest in some one, and as the children are ultimately to have it, the law vests it at once in them.

The condition here implied is clearly a condition subsequent. Surviving the widow is not the condition on which the estate vests, but death during her lifetime, is the condition on which it divests.

Now, the language of the devises and bequests in the fifth article, is similar to and substantially identical with the language in the third article, and must receive the same construction. If one gives a contingent estate, the other does; if one gives a vested interest, both do.

The fact that the net income, subject to the annuities, for ten years, and one third of it afterwards, is ultimately given to those who take the remainder, is some evidence that the testator intended a present interest, in analogy to the principle of those cases which hold that payment of the income to the remainder man during the prior estate, indicates an intention to vest the remainder.

But, aside from all collateral and indirect considerations, the language of the fifth article, when properly interpreted, gives a vested interest. "At the decease of the last survivor of my said children, if my said wife shall not then be living, but if living, then upon her death, this trust shall cease; and I give, devise and bequeath, all the estate which shall then be held in trust under this will, to my grandchildren who shall then be living," etc.

The grammatical as well as the legal import of the words, "I give, devise and bequeath," etc., gives a vested interest. The death of the last survivor of the trustees, refers not to the time of vesting but to the time for the trust to cease. The words are not to be carried over so as to qualify the words of the gift. They are not repeated in connection with the gift, nor even referred to by the use of the adverb, then, as they might have been, "I then give, devise," etc.; but all reference to them is omitted; the sentence is complete and conveys, to the professional mind, a distinct and unequivocal legal meaning, a present gift. Time is in no sense attached to its substance.

Later in the sentence the word *then* is used—"all the estate which shall then be held in trust." But it is there used for the purpose, not of indicating the time when the estate is to vest, but for the purpose of pointing out the subject of the gift. The amount of the trust property is constantly increasing, and the nature and kinds of property are liable to frequent changes. The design was to give now, the property which may then exist.

Such changes and accumulations do not affect the *corpus* so as to prevent the remainder from vesting. They are frequently, we may say generally, incident to trust estates, but they do not affect the title of the remainder.

The word *then* is again used in this connection; "to my grandchildren who shall then be living." It is here used to point out the persons who are to take, and not to indicate the time when the estate is to vest. But it is said that the persons who are to take are the grandchildren then living, and that until that time arrives there is necessarily an uncertainty as to the legatees; and that this uncertainty makes the gift contingent. There would be more

force in this reasoning if the testator's intent is to be inferred from this sentence alone. But the testator was careful to explain his meaning, for he adds: "But if any grandchild of mine shall have died leaving a child or children surviving at the expiration of said trust, such child or children shall take the share that his, her or their parent would have been entitled to if living." And then follows a provision in favor of the widow, if a grandchild died leaving a widow and no children.

Taking the whole article together, it is apparent that the testator intended that an interest should vest in each grandchild, and that the distribution should be on that theory.

But, it is insisted that, if the interest vested, it would descend by the Statute of Distribution to the widows and children, so that there was no occasion for the testator to provide for it; and that the fact that he did so is an indication that the estate does not vest. There is little force in this argument; for it frequently happens that property is disposed of in wills according to the statute. Besides, in this case, the statute is not precisely followed; for, if there are children, the widow is excluded; and if there is a widow and no children, she takes one third instead of one half, as she would by statute. By "my grandchildren then living," the testator evidently had in mind after-born grandchildren. His reasoning was this: I desire to give this property to my grandchildren; but if I say so and say no more, it may be claimed that only those now living will take. But I do not mean that, and so for the purpose of including after-born grandchildren I will give it to those then living. He then discovers that the children of deceased grandchildren are excluded and makes separate provision for them. Thus it seems quite clear to us that the estate vested in the grandchildren as a class, opening to take in those subsequently born. Each grandchild then living, and each grandchild subsequently born, as he came into being, took an interest in the estate and a right to share in its distribution. That right and that interest can only be defeated by his decease during the continuance of the trust, leaving no widow and no children, and that is clearly a condition subsequent.

We cannot assent to the views urged by the counsel for the children, that there is but one class to take under the final distribution, and that that class is composed of grandchildren then living and children and widows of deceased grandchildren. Assuming all the provisions of the will to be operative, the grandchildren take equal shares *per capita*; all the children of a deceased grandchild, no matter how many, take but one share *per stirpes*; while each widow is entitled only to the fraction of a share. We are unable to comprehend how all these legatees, of different grades, and taking as they do, in different proportions, can be regarded as a single class. They are such only in one sense; they constitute all the beneficiaries. But that is not what is meant by a class gift. Ordinarily, a class is where several persons answering the same description sustain the same relation to the legacy. In this case the whole property is given to the grandchildren. One word describes them all. Each takes an equal share in the property; each takes originally and not by way of substitution or derivatively; and

each takes absolutely. On the contrary, the children of a deceased grandchild are to take contingently; they take derivatively and not primarily; they represent a deceased grandchild and together take but one share; they do not answer the same description; and their relations to the legacy are entirely different. So also with the widows, with this further suggestion that they take severally and not collectively.

It seems to us that the first and primary class consists of grandchildren only. If all should live until the expiration of the trust, as is possible, they will take the whole estate, and great grandchildren and widows will be excluded. Clearly, then, all cannot be embraced in one class. Contingently, great grandchildren may take, but as they take *per stirpes*, they cannot take as one class. There must be as many classes as there are deceased grandchildren leaving children. Each class takes, not directly from the original property but from a severed portion thereof. Each class, therefore, is distinct from and independent of the others. The widows cannot be regarded as a class at all, as each takes independently of the others. They, too, do not take from the general legacy the whole trust property, but each shares in a portion of it after it has been severed from the common fund. The share of each grandchild is distinct from the others, and becomes the subject of another division. Each widow is only interested in one share; she is a stranger to the others. And so the widows and great grandchildren are to share, not in the original distribution, but in a sub-distribution.

It would seem to follow, from these considerations, that each class of great grandchildren must stand by itself; and that the gift to it may or may not be void under the statute against perpetuities, a question we refrain from deciding. Inasmuch as that question has not been fully discussed, we think best to leave it to be determined hereafter. We apprehend, however, that it is not a question of very great practical importance, because the interest being vested in the grandchildren, their children and widows will take under the Statute of Distribution, and that may be quite as well for all concerned. We also deem it inexpedient to consider whether this will, or any part of it, is inoperative under the Statute of New York. That is a question which must ultimately be determined by the courts of that State. Another question is, whether in case of the death of a child of the testator, at any time within the period of ten years, the annuity of \$5,000 given to such child would be payable to that child's legal representatives or heirs for the remainder of the ten years, and if so, to what representatives?

The language of the second clause of the fourth article, construed by itself, would seem to require a negative answer; but taking it in connection with the other parts of the will, we think the answer should be in the affirmative.

A leading feature of this will is equality, or impartiality. The testator's scheme studiously provides for equality among the children and also among the grandchildren. If a child dies leaving children, that equality will be seriously impaired unless the annuity is continued to his heirs. The children of a deceased child are expressly put in the place of their parent in respect to two thirds of the net income after the

expiration of the ten years. It would be strange if he intended that they should be upon a different footing for the time that might elapse between the death of a child and the expiration of the ten years in respect to the annuity.

Again; the testator in providing for the accumulation of the net income has taken pains to say that all the annuities shall first be paid from it. That is some indication that he intended that all the annuities should be paid for the whole period of ten years.

These annuities are manifestly given for present maintenance. We cannot presume that the testator would have deliberately cut off the family of a child from all participation in the estate, upon the child's death. He has not done so expressly and we are not disposed to do so by implication.

We think it may fairly be inferred from the general tenor of the will, considering all its provisions in the light of the attending circumstances, that the testator intended that the annuity should be continued to the heirs of a deceased child; and it seems to follow logically, that it should be paid as long as the trust continues.

The gift of two thirds of the net income to each child is in addition to the annuity. The legacies are distinct, differing in character and amount, and both are given without qualification. Had it been intended that the latter should be substituted for the former the testator would have said so. Instead of that, he has expressly provided that the former, the annuity, shall be for life, and we fail to discover any indication of an intention that it shall cease at the end of ten years. Two different legacies will be presumed to be cumulative in the absence of any direction to the contrary.

The term "legal representatives" in the fourth clause of the fourth article is not to be taken in a technical sense. It was obviously the intention of the testator to provide for the

family of the deceased child. That intention will be best effectuated by construing the words as meaning the heirs and widows, they being the ones to take under the Statute of Distribution. Both parties substantially agree in that construction, and the will seems to justify it.

In respect to the last three points considered, the will leaving each of them somewhat in doubt, we have endeavored to follow, as nearly as may be, the Statute of Distribution, believing that the will will bear that interpretation, as well or better than any other, and that it will make the will more harmonious and consistent as a whole.

The Superior Court is advised as follows:

1. That the grandchildren take a vested interest in the remainder of the trust property; and that they take as a class, opening to let in after-born grandchildren, and in case of the death of any one, before distribution, without children and leaving no widow, his title devests. Consequently, no part of the estate is intestate by reason of the statute against perpetuities.

2. We deem it unnecessary now to determine whether great grandchildren and the widows of grandchildren, in any given case, can take under the will.

3. We also deem it inexpedient to consider whether any part of the will is rendered inoperative by the laws of New York.

4. The annuity to children is payable to the family of a deceased child during the continuance of the trust.

5. The gift of two thirds of the net income after the first ten years, is cumulative.

6. By legal representatives, is meant those who would take under the Statute of Distribution.

In this opinion **Granger and Stoddard, JJ.**, concurred. **Park, Ch. J.**, and **Loomis, J.**, dissented.

SUPREME COURT OF NEW HAMPSHIRE.

John W. WHEELER

v.
TRADERS' INSURANCE CO.

1. In an action upon a policy of insurance on a "Woolen mill and contents" parol evidence is admissible to show what the contents were.
2. An insurance company which issues to a manufacturer of woolen goods a policy upon his woolen mill and contents, knowing that naphtha is necessarily used in the business, waives a printed condition of the policy that it shall be void if the assured uses naphtha, and is estopped, after a loss, from setting up its use to defeat a recovery on the policy.

(Rockingham—Decided July 31, 1885.)

ASSUMPT on a policy of insurance. *Judge-ment for plaintiff.*

The policy contained a stipulation in the printed condition, that if the insured "Kept or used benzine" the policy should be void. The property insured was a woolen mill. On the main floor at one end of a room 85x58 ft. was a quantity of wool in bags, and a pile of card waste and partly prepared wool about 50 ft. from the wool. The plaintiff rolled a barrel of benzine into the mill, and drew benzine from the barrel into a watering pot, and sprinkled the wool with it to kill moths, repeating the operation several times; while so engaged, fire suddenly appeared in the room, which destroyed the mill. The jury, in answer to written questions submitted to them by the court, made several special findings of fact, upon the return of which both parties moved for judgment. Those findings, as well as the exceptions taken by the defendant at the trial, are stated in the opinion.

Messrs. Marston & Eastman, Frink & Batchelder, for the plaintiff.

Mr. Samuel C. Eastman, for defendant: When a custom is shown, it is as much a part of the contract in reference to which it relates as a statute, because it is a part of the law pertaining to those matters, and unless specially excepted against in the contract, will control its interpretation. *Wood, Ins., 331.*

Custom is the thing to be learned, and usage is the evidence of the custom. 1 Pars. Cont. 56.

The same rule of construction which applies to all other instruments applies equally to this

instrument of a policy of insurance. *Robertson v. French, 4 East, 185.*

Cases involving the issue upon increased risks, have not often been before the courts. *Stokes v. Cox, 1 Hurl. & N., 540.*

In the earlier case of *Blackett v. Royal Exchange Assur. Co., 2 Tyr., 266*, the policy was on a vessel free from average under 8 per cent.

In *Hall v. Janson, 4 Ellis & B., 509*, it was held that usage may be relied on, to show the sense in which an expression found in a written contract is used in a particular trade. The usage attempted to be shown was, that in insurance on freight the insurers are not bound to pay general average. *Miller v. Tetherington, 7 Hurl. & N., 954*, is to the same effect.

The plaintiff had a steam-engine for hoisting, and subsequently used it for cutting feed for his horses. It was held that this was no new trade, and as the jury found no increase of risk, that the plaintiff could recover in spite of a clause making the policy void, if there was an increase of risk. *Bazendale v. Harvey, 4 Hurl. & N., 444*, cites *Stokes v. Cox, supra*.

McEwan v. Guthridge, 13 Moore P. C. C., 804, was a case where the policy was to be void, if more than fifty-six lbs. of gunpowder was kept. The premises were used for general trade. The condition was held to be reasonable, and not discharged by the description of the stock in trade.

Mason v. Hartford Ins. Co., 29 Upp. Can., 585, is a similar case. The court says, that even assuming the custom to keep gunpowder in stock, it cannot control the express words of the contract.

Where the insurance was upon a stock of goods, and the premium was for a certain class, but to cover goods usually kept in such stores, it has been held that goods of the more hazardous class were covered, if generally kept. Among these cases is *Moore v. Protection Ins. Co., 29 Me., 97*, though in *Richards v. Protection Ins. Co., 30 Me., 273*, it was held that the keeping of goods classed as more hazardous avoided the policy, when the insurance was on stock not hazardous. The same reasoning is followed in *Leggett v. Aetna Ins. Co., 10 Rich. L. R. (S. C.), 206*; *Haley v. Dorchester Ins. Co., 12 Gray, 545*; *Whitmarsh v. Conway Ins. Co., 16 Gray, 859*; *Phenix Ins. Co. v. Taylor, 5 Minn., 492*; *Niagara Ins. Co. v. DeGraff, 12 Mich., 124*.

The policy does not seek to avoid the presence of the article, but only that its presence should be paid for.

There is another class of cases, of which

NOTE.—A policy on a distillery forbade the assured to "keep or have," on the premises "petroleum, naphtha, benzine, benzole, gasoline, varnish," etc., or to keep, have or use camphene, spirit gas, or any burning fluid or chemical oils, etc.; held, not to prohibit the temporary taking of benzine on the premises for the cleaning of machinery and the use of the same therefor. *Mears v. Humboldt Ins. Co., 92 Pa. St., 15*, and cases cited.

Such provision did not forbid the use of naphtha upon the premises, for the use of illumination; also held, if, during the insurance, the premises should be used for any trade or business, or for storing, using or vending the extra hazardous articles, printed on the back of the policy, so long as they shall be so appropriated, applied or used, the policy shall cease to be of force and effect; but, under such provision "burning fluid" did not necessarily mean any fluid that would burn, when "burning fluid" was classed as specially hazardous; and that the policy revived when such use ceased. *Putnam v. Comm. Ins. Co., U. S. C. C., North. Dist. N. Y., Nov., 1880.*

Kerosene is not an "inflammable fluid" within a prohibition against the use of a light of "camphene spirit gas or burning fluid, phosgene or any other 'inflammable fluid.'" *Wood v. N.W. Ins. Co., 46 N. Y., 421*; *Bennett v. North. British, etc., Ins. Co., 81 N. Y., 273.*

It is inflammability which is warranted against

Harper v. Albany Ins. Co., 17 N. Y., 194, is a leading case although there are earlier decisions to much the same effect. This case holds that the insurance of a trade, allows all the processes of the trade. Part of these cases are where a different trade is made subject to a higher rate. There, as in *Lounsbury v. Protection Ins. Co.*, 8 Conn., 459, it is held that the labor of the artisan about the business insured, is not carrying on the objectionable trade. *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall (N. Y. Super. Ct.) 589, is to the same effect.

The cases following *Harper v. Ins. Co.*, are *Bryant v. Poughkeepsie Mut. Ins. Co.*, 17 N. Y., 200; *Harper v. N. Y. City Ins. Co.*, 22 N. Y., 441; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St., 485; *Archer v. Merchants' Ins. Co.*, 43 Mo., 484; *Sims v. State Ins. Co.*, 47 Mo., 54; *Washington Ins. Co. v. Merchants' Ins. Co.*, 5 Ohio St., 450; *Hall v. Ins. Co. of N. A.*, 58 N. Y., 292.

In *James v. Lycoming Ins. Co.*, 4 Cliff., 272, the decision is placed upon different grounds, though there, also, the question is one of compensation.

The cause of the fire is immaterial. In most cases, the evidence of the cause perishes with the property. In the few remaining cases, demonstration is impossible. *Merriam v. Middlesex Ins. Co.*, 21 Pick., 162; *Wood v. Hartford Ins. Co.*, 13 Conn., 533; *Jennings v. Chenango Ins. Co.*, 2 Denio, 75; *Clark v. Mfg. Ins. Co.*, 2 Wood. & M., 472; *Gates v. Madison Ins. Co.*, 2 N. Y., 48; *Mead v. North Western Ins. Co.*, 7 N. Y., 530; *Westfall v. Hudson River Ins. Co.*, 12 N. Y., 289.

In *Harper v. N. Y. City Ins. Co.*, 22 N. Y., 441, it is held: "In this case, I think the perils of keeping and using camphene were insured against, so far as the keeping or use of it was permitted at all, and the clause which exempts the insurer from liability, should be understood as applying to the presence of the article under other conditions."

Thus, where it was written in a policy, "Privilege for \$4,500 other insurance," and the printed clauses prohibited other insurance unless indorsed on the policy, it was held that the written controlled the printed, to the extent of \$4,500, but that beyond that sum the stipulation remained in full force. *Benedict v. Ocean Ins. Co.*, 31 N. Y., 397.

So, where the keeping of saltpeter was prohibited, and a stock of drugs was insured, it is said, the saltpeter, which was in the stock as a drug, kept and sold as a drug, was insured; it

was forbidden to keep it for any other purpose. *Collins v. Farmville Ins. Co.*, 79 N. C., 279.

There was absolutely no evidence that the usage was brought home to the defendant. It cannot either be said that the usage was so well known that the defendant must be charged with knowledge of it. Actual not constructive knowledge is what is meant when the insurer sets up a usage. The rule should be the same when the insured seeks to modify the contract. Where the insurer undertook to show by usage that an agent of the insured, who effected the insurance, was also the agent to receive notice of cancellation, the usage was wholly rejected in one case, *Grace v. Am. Central Ins. Co.*, 17 Reporter 1, and disallowed, unless uniform and known to both parties, in *Adams v. Manufacture & Builders' Ins. Co.*, 12 Ins. Law J., 787.

There was no evidence from which the jury was justified in finding that the picker-house was a separate building. Whether it was so or not is immaterial, under the unreported decision in *Baldwin v. Hartford Fire Ins. Co.*, Coos Co.

Bingham, J., delivered the opinion of the court:

The motion for a non-suit for want of sufficient evidence to warrant a finding of the facts claimed by the plaintiff was properly overruled. Evidence was introduced on each point, from several witnesses, tending to show the facts as claimed by him, and it cannot be said as a matter of law that the plaintiff was not entitled to have the evidence submitted to the jury. *Paine v. R. Co.*, 58 N. H., 611.

The motion for a non-suit, because the facts appearing in the plaintiff's opening and proof did not make a ground of recovery, and the motion for a verdict raise essentially the same questions. These facts were, in substance, that the action was *assumpsit* on a fire insurance policy, which was made by writing in a printed blank, that the defendant insured the plaintiff's woolen mill and contents in Salem, New Hampshire, against loss by fire for one year. In the printed part of the policy was a stipulation that if the assured should keep or use naphtha without permission in the policy it should be void, and the insurance cease. The plaintiff within the year used naphtha for killing moths and after its use, through a fire not occasioned by it, the mill and its contents were burned. The plaintiff was a woolen manufacturer, doing business in the mill at the time of the insurance and loss, and the use of naphtha

and judicial notice will not be taken, in all cases, that kerosene is explosive. *Id.* See, *Mark v. Nat. F. Ins. Co.*, 24 Hun, 509; *Buchanan v. Exchange F. Ins. Co.*, 61 N. Y., 26. Whether alcohol is an explosive, is a question of fact depending on circumstances. *Willis v. Germania Ins. Co.*, 79 N. C., 235.

A policy which prohibited the use of these articles, but permitted the use of refined coal oil, kerosene, or other carbon oils for lights, if drawn and filled by daylight, was not violated by the use of lard oil and candles when filling the lamps at night. *Carlin v. West. Assur. Co. of Canada*, 57 Md., 515.

Where petroleum was prohibited and the insured kept a barrel of petroleum in the engine house ad-

joining, and the fire originated in the main building, it was held, that it was not on the premises and that he had a right to use it for lubricating purposes. *Carlin v. West. Assur. Co. of Canada*, 57 Md., 515.

Fire occasioned by a single use of the prohibited article is sufficient to avoid the policy, the condition not being restricted to a habitual use. *Matson v. Farm Build. Ins. Co.*, 73 N. Y., 810.

Where the insurance clause was written, the exempting clause printed, and the insured kept for sale the articles prohibited, the policy was held void. *Lancaster F. Ins. Co. v. Lenheim*, 89 Pa. St., 497.

in the manufacture of woolen goods was necessary and customary, and the defendant knew of the usage. Its use for killing moths was necessary in manufacturing his goods and protecting his mill, and such use was customary among woolen manufacturers.

It is claimed that parol evidence was not admissible to show what constituted the contents of the mill. It does not appear that this objection was specifically taken at the trial, except as it may be included in the one that there was no sufficient evidence to warrant the finding of the facts claimed. The question, however, has been considered without reference to the form of the exception. It has no reference to the prohibitory clause of the policy, but relates entirely to the admissibility of the parol evidence.

The contents of the mill were insured, but if no resort to parol evidence can be had to ascertain what they were, this part of the insurance may be void for uncertainty. "Woolen mill and contents," is a general description which refers to extrinsic objects and circumstances that make it necessary to resort to parol evidence to prove the existence of the facts by which alone the property insured can be ascertained and identified. Such evidence is competent to enable an application of the policy to its subject matter. *Gerrish v. Towne*, 3 Gray, 82, 88; *Woods v. Swain*, 4 Gray, 322; 1 Greenl. Ev., §§ 286, 287, 288; *Webster v. Atkinson*, 4 N. H., 21, 24; *Bell v. Woodward*, 46 N. H., 315, 335; *Steinbach v. Ins. Company*, 54 N. Y., 90; *Barnum v. Fire Ins. Co.*, 97 N. Y., 188, 192.

The evidence being properly admitted, it could be used for all legitimate purposes in the case, and the plaintiff claims that its effect is not to be limited to a mere enumeration or identification of the property insured, but is also to be used, to aid in the construction of the policy, in determining what comes within its true meaning, as understood and intended by the parties to it. It appears by parol, that the plaintiff was a woolen manufacturer, and at the date of the policy insuring the mill and contents for one year, he was operating the mill in manufacturing a stock of wool into woolen goods, with no intention that the same would not continue during the year. The jury has found that the use of naphtha in the manufacture of woolen goods was necessary and customary and that the defendant knew of the custom; that its use for killing moths by the plaintiff, was necessary in his business and was customary among manufacturers of woolen goods.

The fair construction of this branch of the policy is that the unmanufactured material, both before and during the process of manufacture, with the necessary articles customary in the process, and the cloths when manufactured, with such articles as were necessarily and customarily used in the preservation of the material and manufactured goods, were included in the description as they might exist at any time in the year, when a loss might occur. In fact, it might well be said to be an insurance of the woolen mill and contents to be used in manufacturing woolen goods in the customary manner for one year. This was the apparent intention of the parties. The plaintiff had a woolen mill which he was operating, that he was intending to operate for the next year and desired

to get it and his stock insured. The defendant was an Insurance Company, soliciting patronage for the profit to be derived from the premiums. Now what was the understanding and intention of the parties in the description of the property in the policy? We think it was as above stated. In construing written instruments, the intention of the parties is sought, and to ascertain that intention, regard may be had to the nature of the instrument itself, the situation of the parties executing it, and the purpose they had in view. *Corwin v. Hood*, 58 N. H., 401; *Houghton v. Pattie*, Id., 326; *Bradley v. Steam Packet Co.*, 13 Pet. (38 U. S.), 89, 98; *Swain v. Saltmarsh*, 54 N. H., 9, 16.

There is no material difference of principle in the rules of interpretation between wills and contracts, except what naturally arises from the different circumstances of the parties. The object in both cases is to discover the intention, and the court may in either case put itself in the place of the parties and see how the terms of the instrument affect its subject matter. 1 Greenl. Ev., § 287. The interpretation of a will is the ascertainment of the testator's intention. *Brown v. Bartlett*, 58 N. H., 511; *Kimball v. Lancaster*, 60 N. H., 264.

The written description in the policy was sufficient to insure the contents of the mill including the necessary articles customarily used in manufacturing and preserving the stock, when interpreted in the light of the circumstances surrounding its execution. But it is said that in the printed part of the policy the use of naphtha is expressly prohibited, and that the policy is to cease and become void in case of its use, without written permission in the policy. This claim makes it necessary to examine the policy further and find the meaning and intention of the parties as expressed in both the written and printed parts of it, as to the use of naphtha. It is admitted that the plaintiff has been guilty of no fraud or bad faith, and it is not to be presumed that the defendant was, but on the contrary, it may be assumed that both parties acted in good faith to perfect an honest, practical insurance of the property, as it existed and was operated. The loss was not occasioned by the use of naphtha, but from other causes, so that this branch of the defense is purely technical; an attempt to avoid an honest loss for a claimed violation of the policy that has done the defendant no harm. The jury has found that at the time of the insurance and loss, the use of naphtha in woolen mills, for the manufacture of such goods as the plaintiff was making, was necessary and usual, and that the defendants knew of this usage. This being true, under the present claim of the defendant, the policy was substantially worthless to the plaintiff, he paid the premium for nothing and the defendant received it for nothing. The defendant understood it was the plaintiff's purpose to continue his business of manufacturing, and knew if he did, he must necessarily use naphtha and as necessarily avoid the policy. This shows, if the present claim is the correct one, that the defendant was not acting in good faith at the time it insured the plaintiff, for it is fair to assume that he supposed he paid the premium for a valuable and not a worthless insurance. It was not unlike a grant with a reservation of all that was granted. It was a policy with a

condition that would necessarily avoid it the moment the assured received it, unless he ceased the business of manufacturing in the mill. When the insurer names the premium for which he will insure property employed in any trade or business, it is presumed that he has in mind the nature of the undertaking and the usual methods of doing the business, and if he does not know it, it is his duty to inform himself, and he takes the risk on the understanding that what is usual or necessary will be done. *Polly v. Assur. Company*, 1 Burr., 841, 848; *Noble v. Kennoway*, 2 Doug., 510, 512; *Steinbach v. Insurance Company*, 54 N. Y., 90, 95; *Harper v. Insurance Company*, 17 N. Y., 194, 197, 198.

In this case the defendant's knowledge that the use of naphtha was a necessity in the plaintiff's business, does not depend upon presumption, but is found as a fact by the jury. The blank policy in which the insurance was written contained many conditions upon which it was to become void, among them was the one in question. These were for the benefit of the defendant, placed there by it before the negotiation commenced for the insurance, and no special consideration appears to have been given them, further than the filling of the blank with language which placed an insurance on property entirely inconsistent with the printed prohibition, and which, if the prohibition was intended by the parties to remain in force, rendered the policy worthless. The written special description of the particular subject matter, wherever inconsistent with special clauses, must control. *May, Ins.*, § 239. It has been decided in this State that if an insurer has knowledge, at the time of the insurance, of the true state of the assured's title, it is a waiver of the condition in the policy making an inaccurate statement of the title an avoidance of the policy. *Thompson v. Williams*, 58 N. H., 248; *Pierce v. Ins. Co.*, 50 N. H., 297, 300, 302; *Marshall v. Ins. Co.*, 27 N. H., 157, 168; *Currier v. Ins. Company*, 53 N. H., 589; *Ins. Co. v. Goodall*, 29 N. H., 182, 184, 196.

Campbell v. Ins. Company, 37 N. H., 85, was *assumpsit* on a policy of insurance. The property insured was in a building, in another part of which a small steam boiler was used. The application did not state this, if it had, the rules of the company would have prohibited the policy. It appeared that the company had knowledge of the boiler and it was held to be estopped from taking advantage of the defect in the application. *Barnes v. Company*, 45 N. H., 21, 28; *Appleton v. Ins. Company*, 59 N. H., 541, 544.

The doctrine of waiver as asserted, to avoid the strict enforcement of conditions contained in contracts, is only another name for the doctrine of estoppel. *Appleton v. Ins. Company*, 59 N. H., 545, 546; *Hadley v. Ins. Co.*, 55 N. H., 110.

A. C. Ins. Company v. McCrea, 8 Lea, 513; 41 Am. Rep., 647, was an action on a fire insurance policy on a distillery, which provided that it should be void if the distillery should be run at night, and that "The use of general terms or anything less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restric-

tion herein." It was admitted that the distillery had always been run at night, and was so run before, at the time of and after the issuance of the policy, to the knowledge of the general agent of the company who delivered it, and it was held a waiver of the condition. This is a recent case in which many authorities are cited, classified and ably discussed, and it appeared in this case that at the time of the insurance the defendant knew the use to be not only necessary, but customary.

It seems to be well settled that the execution of a policy of insurance with full knowledge of existing facts which by its conditions render it void, is a waiver of those conditions, because otherwise it would be a fraud. *Van Schoick v. Ins. Co.*, 68 N. Y., 434; *Bennett v. Ins. Co.*, 81 N. Y., 278; *Woodruff v. Ins. Co.*, 83 N. Y., 133; *Ins. Co. v. Crane*, 16 Md., 269.

In this State, upon substantially the same principle, a policy conditioned to be void, if the facts material to the risk are not correctly stated in the application, is not rendered void by the omission or misstatement without fraud, of facts known to the insurer. In other words, the issue of the policy with knowledge of the facts, is a waiver of the condition.

The insurance of the plaintiff's property with a knowledge of the necessary use of naphtha, was so utterly inconsistent with the condition against its use, that an intention to waive the condition must be presumed. To permit the defendant, after a loss, to set up the condition which, by issuing the policy, it induced the plaintiff to believe was waived, would be permitting a fraud. There is no reason why the doctrine of estoppel should not be applied. *Horn v. Cole*, 51 N. H., 287; *Drew v. Kimball*, 43 N. H., 285. It may be said that this doctrine denies to insurance companies the right to impose the conditions on which they will assume risks. This is a mistake. It is founded upon the rules of fair dealing and sound morality, and is in harmony with a healthy public policy. It simply provides that companies, if they desire to impose conditions upon the assured, that are inconsistent with usages, incidents or nature of the risks and the companies' knowledge thereof, they must do so in clear and unmistakable terms, so that the assured shall not be misled or deceived, as to the character of the contract or the protection it affords, or bound by inferences from the putting together of blind, detached parts of the contract which he never in fact heard of, and rightfully supposed the contrary thereof to be true. *DeLancey v. Ins. Co.*, 52 N. H., 581, 587.

There are authorities to the contrary of this rule. *B. Fire Ins. Co. v. Kroegher*, 24 Am. Rep., note, 153, 154, but the great weight of authority sustains the view here taken. *Wood, Ins.*, 388. The following are some of the many authorities bearing on this branch of the case. *May, Ins.*, §§ 289, 240, 241; *Wood, Ins.*, pp. 839, 840; *Carliss v. Assur. Co.*, 57 Md., 515; 40 Am. Rep., 440, 445; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St., 485; *Michigan State Ins. Company v. Lewis*, 80 Mich., 41; *Moliere v. Ins. Co.*, 5 Rawle, 349; *Howard Ins. Company v. Bruner*, 23 Pa. St., 50; *Ayres v. Ins. Co.*, 21 Iowa, 185; *Reaper City Ins. Company v. Jones*, 62 Ill., 458; *Cum-berland Ins. Company v. Schell*, 29 Pa. St., 81; *Am. Law Review*, Vol. 15, 763; 3 Stark. Ev., 1021, 1038, 1037; *Geo. Home Ins. Company v.*

Kinnier's Admr., 28 Gratt., 88; *Rathbone v. Ins. Company*, 81 Conn., 198, 194; *Harper v. Ins. Company*, 17 N. Y., 194; *Bryant v. Ins. Company*, Id., 200; *Harper v. Ins. Company*, 22 Id., 441; *Hall v. Ins. Company*, 58 Id., 392; *Buchanan v. Ins. Company*, 61 Id., 26; *Moore v. Ins. Company*, 29 Me., 97, 101; *Lounsbury v. Ins. Company*, 8 Conn., 459; *Sims v. Ins. Company*, 47 Mo., 54; 4 Am. Rep., 811; *May v. Ins. Company*, 25 Wis., 291; *Elliot v. Ins. Company*, 13 Gray, 139; *Haley v. Ins. Company*, 12 Id., 545, 548, 551; *Pindar v. Ins. Company*, 36 N. Y., 648, 650; *Billings v. Ins. Company*, 20 Conn., 139; *Whitmarsh v. Ins. Company*, 16 Gray, 359; *Viele v. Ins. Company*, 26 Iowa, 9; *Archer v. Ins. Company*, 43 Md., 484; *Birmingham Ins. Company v. Kroegher*, 83 Pa. St., 64; 24 Am. Rep., 147, note, 150; *Collins v. Ins. Company*, 79 N. C., 279; 28 Am. Rep., 322; *Carrigan v. Ins. Company*, 53 Vt., 418, 425; *O'Neil v. Ins. Company*, 8 N. Y., 122, 126; *Steinbach v. Ins. Company*, 54 Id., 90.

The evidence received of the use of naphtha in woolen mills for other purposes than killing moths, was unobjectionable. Many of the cases on this subject show the admission of similar evidence.

The question of the regularity of the verdict was decided at this term in *Dearborn v. Newhall* [ante, 242], in which the doctrine of *Nims v. Bigelow*, 44 N. H., 876, is approved.

Judgment on the verdict for the plaintiff.

Doe, Ch. J., and *Smith, J.*, dissented. *Allen, J.*, did not sit; the others concurred.

Francis B. CRAWFORD *et al.*,

George PARSONS *et al.*

1. **Counts in covenant and tort may be joined in a declaration on a single cause of action.**
2. **The legal construction of a written contract is the ascertainment of the fact of the parties' intention from competent evidence.**
3. **In a grant of a right to draw water from a pond after the grantor's grist mill is supplied from the same pond, his right to continue to use the water power in the mill, for a purpose not necessary for the operation of the mill, is not implied.**
4. **In an action by a lessee of a mill against his lessor, for a diversion of water, depriving the plaintiff of the demised water power, damages for loss of profits being claimed in the declaration, and loss of profits being a damage the parties could have reasonably anticipated, proof of the profits of the business done at the mill is admissible on the question of damages.**

(Decided July 31, 1885.)

COVENANT, on a lease by which the defendants let to the plaintiffs a lot of land in Colebrook, to be used in the manufacture of potato starch, for twenty years from Feb. 9, x. H.

1874, at a yearly rental of \$125, "with the right to draw water from the grist mill pond sufficient to carry and operate a starch mill, said lessees to have the first use of the water after the grist mill is supplied from said pond * * * provided the said lessees shall not draw the water out of the pond more than six inches below the top of the dam where the waste water runs over * * * and the said lessors covenant with the said lessees that they may occupy said premises during said term peaceably, without lawful interruption from any person or persons whatsoever." The alleged breach is that the defendants deprived the plaintiffs of the use of the water to which they were entitled and neglected to furnish it. Plea, full performance. Verdict for the plaintiffs. After the trial had proceeded several days, the plaintiffs were allowed to amend the declaration by adding a count in case, subject to exception.

At the date of the lease, the defendants owned and operated the grist mill which was situated on the west side of a road. To furnish it with power, water was drawn, through an artificial canal, from a pond on the east side of the road to a smaller pond on the west side. The grist mill privilege was on the south side, and the starch mill privilege was at the westerly end of the small pond. The latter privilege was leased to one Merrill in 1854, and was used and occupied by him thereafter, up to and including the season of 1873. During the latter half of the term of Merrill's lease, the defendant C. E. Rolfe erected a carriage and sash and blind shop on the east side of the road, and constructed a flume and drew water from the main canal at a point between the two ponds. Both parties claimed, and put in evidence to prove, that the Rolfe flume was in the same condition at the trial as at the time of the waste and interruptions complained of by the plaintiffs; and the jury saw it twice. The following evidence was admitted, subject to the defendant's exception. The plaintiff Crawford, who was an expert, testified that with the water saved which the defendants allowed to waste, and without interruptions by Rolfe, the plaintiffs' work of manufacturing in 1875 and 1876 could have been done in about half the time it was done; and that there was a good stream of water running through the Rolfe flume on the morning of the day he testified. Hicks, an expert, who had worked for Merrill before the Rolfe mill was built, testified that Merrill's wheel was much larger than the plaintiffs', and took three times as much water, and that there was plenty of water before Rolfe built his mill. W. T. Rolfe, who was part owner of and operated the Rolfe mill at one time, testified that the plaintiffs' flume and Merrill's flume were on the same level, and that, while operating the Rolfe mill, in low water, he could draw the water away from either of the mills below. Gathercole, who had worked for Merrill before the Rolfe mill was built, testified that Merrill usually had water enough after the fall rains came the first few years. The plaintiffs claimed that during all the years they operated the starch mill, Rolfe used the water, more or less, to which they were entitled, whereby they suffered loss and damage. The defendants claimed that some years Rolfe did not use it at all, and that when he did, it was with the

plaintiffs' consent, or when it was running to waste over the dam, and, therefore, that he in no way wrongfully hindered or obstructed them in the prosecution of their business. The jury were instructed to decide which claim was true.

Among the acts complained of by the plaintiffs as negligent or wanton infraction of their right, was the use of a belt running from the elevator shaft in the grist mill to operate a pump by which water was forced from a spring under the mill to the house of the defendant Rolfe, and another, where it was used for domestic purposes. The pump had been used before the lease as it was afterwards. Its existence was known to the defendants, and was not known to the plaintiffs, when the lease was executed; and by reason of its location it was not open to ordinary observation. The defendants requested the court to instruct the jury that the words of the lease, "after the grist mill is supplied from said pond," are to be construed in reference to the state of things existing at the time the instrument was executed; that the right of the lessees was subject to a supply for the grist mill as it was then used; and that this fairly includes the trifling burden then attached to one of the grist mill wheels operating the force pump to supply Rolfe's house for domestic purposes. The instructions given on this point were that if, by the use of the grist mill power to drive the force pump, the plaintiffs were deprived of any water belonging to them which they wanted to use, there was a violation of the lease. The defendants excepted to the refusal to give the instruction requested in relation to the pump.

Messrs. Parsons & Johnson, Ray, Drew, Jordan and Carpenter, Ladd & Fletcher, for the defendants:

The trial was a mistrial and the verdict cannot stand.

The case finds that "After the trial had proceeded several days and while the plaintiffs were putting in their case, they were permitted to amend their writ subject to defendants' exception by adding a count in case."

This could not be done at common law. It is well settled that counts for torts and upon contracts cannot be joined. 1 Ch. Pl., 199; *Wilson v. Marsh*, 1 Johns., 508; *Stoyel v. Westcott*, 2 Day, 418; *Church v. Mumford*, 11 Johns., 479; 2 Wms. Saund., 117, c. note.

Counts in deceit and assumpsit cannot be joined. *Crooker v. Willard*, and note, 28 N. H., 184.

If a count in assumpsit be joined with one for deceit or for negligence and sounding in tort and a general verdict for the plaintiff, judgment will be arrested. *Peabody v. Kingsley*, 40 N. H., p. 416.

Debt may be joined with detinue and causes of action in case with trover, but with these exceptions counts in one species of action cannot be joined with counts in another. If causes of action are misjoined the defect will not be cured by the verdict where the defect appears on the pleadings. 36 N. H., 13; 22 N. H., 236; 1 Chitty, Pl., 198.

When the same plea may be pleaded and the same judgment given on all the counts of the declaration or whenever the counts are of the same nature and the same judgment is to

be given on them, although the pleas be different as in the case of debt upon bond and on simple contract, they may be joined. 1 Chitty, Pl., 200; 2 Saund., 117.

The obvious reason for this rule at common law is, that were different causes of action allowed to be joined, two final judgments of different kinds would have to be entered in the same action. Gould, Pl., 219.

"In general, where one count in a declaration is good and another substantially ill, if the jury upon a plea to the whole declaration, or upon a default, find a general verdict for the plaintiff, with entire damages, the defendant may cause the judgment to be arrested; for it is impossible for the court, judging as it must from the record alone, to discover on which count the damages were assessed or what proportion of them may have been assessed on one count or the other; and the jury as the law presumes are as likely to have assessed them on the bad count as on the good one." *Peabody v. Kingsley*, 40 N. H., at p. 418; Gould, Pl., 523; 1 Term R., 151, 508; 2 Saund., 171, b, note 1; 2 Mass., 53, 408; 9 Pick., 547.

Our broad and almost unlimited statute of amendments has never been, so far as we have been able to learn, applied in any case for the purpose of defeating justice, but on the other hand, has been so construed and so applied as to accomplish an equitable and just result, giving to the defendant his right to defend as fully, fairly and completely as he would have had such rights before the enactment of the statute.

Our court, since the enactment of the latest amendment to the statute, in construing the same has said in terms that "Amendments are not allowed when injustice will be done thereby." *Redding v. Dodge*, 59 N. H., p. 98.

The amendments allowed in *Whittaker v. Warren*, 60 N. H., p. 20, is no precedent for what is sought to be done here. There the court allowed the amendment to prevent injustice and if the amendment had not been allowed, the action would entirely have failed, and the amendment there was merely allowing the writ to be amended by adding a count for the common-law remedy to the count for the statute remedy for the same cause of action. Nor is the holding of the court in *Ruthford v. Whiteher*, 60 N. H., 110, authority for allowing the amendment in this case, for there both counts were for the same cause of action.

Actual injury and not anticipated injury, is the ground of legal recovery. *Daniels v. Newton*, 114 Mass., 539.

Plaintiffs are attempting to recover speculative damages. Remote, contingent or speculative damages, or such as might have been avoided by the lessee, if he had made the repairs himself and charged their cost to the lessor, were not allowable. *Fisher v. Goebel*, 40 Mo., 475; U. S. Dig., Vol. 28 (annual, XXII.), p. 381, § 60.

The true rule seems to us to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under conditions such that he is or might be entitled to require performance. In support of this proposition are cited: *Fraser v. Cushman*, 12 Mass., 277; *Pomroy v. Gold*, 2 Met., 500; *Haggood v. Shaw*, 105 Mass.,

276; *Carpenter v. Holcomb*, 105 Mass., 280. Such undoubtedly was the interpretation of the common law in all the earlier decisions. *Phillipps v. Evans*, 5 M. & W., 475; *Ripley v. McClure*, 4 Exch., 345; *Lovelock v. Franklyn*, 8 Q. B., 371.

Lord Chief Justice Cockburn concedes it to be true that "there can be no actual breach of a contract by reason of non-performance, so long as the time for performance has not arrived." L. R., 7 Ex., 14.

In *Nason v. Holt*, 114 Mass., 541, Wells, J., in delivering the opinion of the court, said: "But in order to charge one in damages for breach of contract, the other party must go further than merely to excuse his own non-performance. He must show a refusal or a neglect to perform, at a time and under conditions in which he was entitled to require performance."

The damages recoverable for failure to complete a contract to put up machinery do not include prospective gains, unless there should be shown outstanding contracts to be performed by the machinery to be furnished. *Frazier v. Smith*, 60 Ill., 145; *Washburn v. Hubbard*, 6 Laus. (N. Y.), 11; *French v. Ramago*, 2 Neb., 254; *Smith v. Smith*, 45 Vt., 433. See, also, U. S. Dig. (New Series), Vol. IV. (1873), 221, §§ 13 and 14.

In an action to recover damages for failure on the part of the defendant to comply with the conditions of a lease, the measure of damages is the difference between the rental value of the mill in the condition it was in and its value if it had been kept in the condition stipulated by the defendant. The additional profits plaintiff would have made in the business of the mill, if it had been put and kept in such condition, are too remote to constitute a basis of recovery. *Winne v. Kelly*, 34 Iowa, 339; *Rogers v. Bemis*, 69 Pa. St., 432; U. S. Dig. (N. S.), Vol. 4 (1873), p. 221, § 11.

The above authorities apply also to our position in regard to contingent damages.

Messrs. Aldrich and Remick, for the plaintiffs.

Doe, Ch. J. Counts in contract and tort may be joined in a declaration on a single cause of action. It does not appear that the counts were not on the same cause of action, or that the amendment was necessary, or had any effect upon the trial or the verdict.

The construction of the written contract is the ascertainment of the fact of the parties' intention from competent evidence. *Houghton v. Pattee*, 58 N. H., 326; *Moree v. Moree*, 58 N. H., 391.

The dam was not leased to the plaintiffs; and the lease does not prove an understanding that the dam was to be kept in repair by them, either for their own benefit or that of the defendants. On the contrary, the limitations of the water right granted to the plaintiffs, and the title, possession, control and use of the dam retained by the defendants show an understanding that the defendants were at least to exercise ordinary care in the work of so maintaining the dam as to give the plaintiffs the power demised to them. Whether the true construction is more favorable to the plaintiffs than that, the questions tried, the instructions given

N. H.

to the jury, and the verdict, render it unnecessary to inquire.

The defendants have not argued the questions raised by the evidence relating to the use of water at Rolfe's mill, and do not claim that Rolfe could continue to use the water at that mill as he had used it before the starch mill privilege was leased to the plaintiffs.

They put this part of their case on the ground that for his use, at his mill, of any water when it was not running to waste over the dam, he had the plaintiffs' consent.

I. The use of the force pump to transport water to the house for domestic purposes, not being necessary for the grist mill, the defendant's retention of the right of such use is not implied. *Smith v. Smith* (Grafton, June, 1882); *Adams v. Marshall*, 138 Mass., 228, 236.

II. The jury found the defendants' negligent or wanton waste and diversion of the water compelled the plaintiffs, acting with reasonable discretion, to discontinue the business for which the lease stipulated the leased premises to be used. The loss of profits being a damage alleged in the declaration, proof of the amount of such loss was competent. *Taylor v. Dustin*, 43 N. H., 493. The manufacture of starch being the business to which the lease restricted the plaintiffs, and profit being presumably the object of the business, the loss of profit could be reasonably anticipated by both parties as a damage likely to be caused by such a waste and diversion of the water as would extinguish the business. It seems to be admitted that the measure of damages was not less than the difference between the rental value of the premises with and their rental value without the waste and diversion; and the profit of the business was a large, if not the only, element of rental value. Remote and speculative damages were excluded by the instructions given on this point.

Judgment on the verdict.

Blodgett and Bingham, JJ., did not sit: the others concurred.

JENNE,

v.

HARRISVILLE.

Foreign unwritten law, including the prevailing construction of a foreign statute, may be proved by competent witnesses, and is a matter of fact determinable at the trial term.

(Cheshire — Decided July 31, 1885.)

CASE. The plaintiff is a citizen of Vermont, and questions were raised as to the law of that State.

Messrs. N. B. Bryant and Lane & Dole, for plaintiff.

Messrs. Batchelder & Faulkner, for defendants.

Doe, Ch. J., delivered the opinion of the court:

Foreign unwritten law, including the prevailing construction of a foreign statute, may

be proved by competent witnesses, and is a matter of fact determinable at the trial term. *Leach v. Pillsbury*, 15 N. H., 187; *Beach v. Workman*, 20 N. H., 879; *Watson v. Walker*, 28 N. H., 471; *Pickard v. Bailey*, 26 N. H., 152; *Holton v. Gleason*, 26 N. H., 501; *Emery v. Berry*, 28 N. H., 485; *Taylor v. Barrow*, 30 N. H., 100; *Ferguson v. Cufford*, 37 N. H., 87; *Kennard v. Kennard* [*ante*, 303, 308]; *Dyer v. Smith*, 12 Conn., 384; *Holman v. King*, 7 Met., 384; *Kline v. Baker*, 99 Mass., 253; 1 Greenl. Ev., §§ 486, 488; *Story*, Conf. L., §§ 637, 639.

Case discharged.

Carpenter, J., did not sit; the others concurred.

Caroline G. ROGERS

v.

ASHLAND SAVINGS BANK.

There may be a right of homestead in land on which there is no building, but which is occupied as a part of the place of his home by the owner living in a hired house.

(Grafton — Decided July 31, 1885.)

DECLARATION, upon Gen. Laws, c. 138, s. 20, of the grounds of the defendant's denial of a homestead right claimed by the plaintiff. Trial by the court.

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The plaintiff and her husband, who is the execution debtor, occupy a leased tenement. They own no real estate except the premises in question, upon which there is no building, and which are situated at some distance from their hired house. The court found the plaintiff entitled to a homestead if, under the law, she can be.

Mr. C. A. Jewell, for plaintiff.

Mr. J. L. Wilson, for defendant.

Doe, Ch. J., delivered the opinion of the court:

The question is of the legal possibility of a homestead right in the land under any circumstances consistent with those stated in the reserved case. The exemption may attach in cases in which the debtor "is owner of a homestead, or of any interest therein." G. L., ch. 138, § 1. If the plaintiff's husband owning and occupying the house and an adjoining garden, had sold the house and the land under it, but had continued to own and occupy the garden, and as a lessee had remained in the house, the garden might continue to be a part of the place of his home; and adjacency is not a requisite of the homestead right. The question whether the land was a part of the home place, is a question of fact that has been determined at the trial term. *Allen v. Chase*, 58 N. H., 419; *Cole v. Bank*, 59 N. H., 53, 321.

Judgment for the plaintiff.

Carpenter, J., did not sit; the others concurred.

SUPREME COURT OF MASSACHUSETTS.

James A. NORCROSS *et al.*

v.

William JAMES *et al.*

1. There are two classes of covenants: those which run with the estate in land only, and those which run with the land itself. A covenant wherein the covenantor binds himself, his heirs, executors and administrators, that he is lawfully seized in fee of the granted premises, that they are free of all incumbrances, and that he will not open or work, or allow others to open or work any quarry on his farm or premises, surrounding the land wanted, purports to create a pure negative restriction on the use of land, and makes it fall into the class of covenants running with the land, notwithstanding its place among the covenants for title. Whether such a covenant is or is not valid, not decided.
2. A covenant which purports to create a pure negative restriction on the use of one parcel, in all hands, for the benefit of whoever may hold the other, will no more be enforced in equity, than will the common law recognize as creating an easement, every grant purporting to limit the use of land. The principle of policy applied to affirmative, applies also to negative covenants. They must "touch and concern" or "extend to the support of the thing" and be "for the benefit of the estate." New or unusual incidents cannot be attached to lands, by way either of benefit or burden.

(Worcester——Decided October 23, 1885.)

BILL IN EQUITY, to restrain the breach of a covenant in a deed. *Dismissed.*

The case was reported to the full bench of the Supreme Court on an agreed statement.

The facts are sufficiently stated in the opinion.

Mr. James G. Dunning, for plaintiff:

The covenant as to quarrying contained in the deed of Luke Kibbe, Jr., to William N. Flynt, is a covenant running with the land to which it relates, viz.: all the land surrounding the plaintiffs' quarry lot; and as such, is binding on the heirs and assigns of the covenantor, in favor of the heirs and assigns of the covenantee. *Bronson v. Coffin*, 108 Mass., 175; *Hills v. Miller*, 3 Paige, 254; *Norman v. Wells*, 17 Wend., 147; *Platt v. Eggleston*, 20 Ohio St., 419; *Spencer's Case*; Smith's Lead. Cas.

Although a covenant, when regarded as a contract, is binding only as between the original parties; yet in order to give effect to their intention, it may be considered by equity as creating an incorporeal hereditament, in the nature of an easement, in the unconveyed estate, and rendering it appurtenant to the estate conveyed. *O'Neil v. Holbrook*, 121 Mass., 102; *Savage v. Mason*, 8 Cush., 500; *Morse v. Aldrich*, 19 Pick., 449; *Pick v. Johnson*, 104 Ill., 111; *Roche v. Ullman*, 104 Ill., 11.

An easement may consist, either in suffering something to be done or in abstaining from doing something, upon the servient tenement. 3 Kent, 6th ed., 419; Washb. Eas., 2d ed. 4, 5; Gale, Eas., 4th ed. 5.

There is a privity of estate through the medium of the easement created by the covenant; and also through the medium of the easement of the right of way. *Bronson v. Coffin* (*supra*); *Hills v. Miller* (*supra*).

So far as creating a privity of estate is concerned, it is immaterial whether the easement is already existing, or is created by the covenant. *Bronson v. Coffin* (*supra*).

Assuming that no easement was created by the covenant, there is still left the easement of the right of way which is sufficient of itself to constitute a privity of estate. *Bronson v. Coffin*, 118 Mass., 156.

The operation of the covenant being confined by its terms to a particular place, the covenant is not open to objection as being in total restraint of business, or as creating a monopoly, but only in partial restraint of business, for which an ample consideration was given. It was only a fair protection to the interests of the party in whose favor it was made. *Mitchell v. Reynolds*, 1 P. Wms., 181; *Gilman v. Dwight*, 18 Gray, 356; *Palmer v. Stebbins*, 3 Pick., 188; *Stearns v. Barrett*, 1 Pick., 448; *Pierce v. Woodward*, 6 Pick., 206.

Mr. Chas. L. Long, for defendants:

The covenant in the deed does not, of itself, create a privity of estate; it conveys no easement in the surrounding lands, but simply provides that a quarry shall not be opened or worked thereon. In this respect, the case does not differ from *Hurd v. Curtis*, 19 Pick., 463. The court held, however, that there was no privity of estate and, consequently, that the covenant did not run with the land. A similar doctrine, that the covenant does not create the privity, is recognized in the case of *Plymouth v. Carver*, 16 Pick., 188.

So a covenant, by one who has conveyed the privilege of drawing water from a pond, that the covenantor would erect a dam to a certain height, is a personal covenant; *Wheelock v. Thayer*, 16 Pick., 68, and the court there says that "To make a covenant run with the land, it is not sufficient that it is of and concerning land."

It is not, like the covenant in *Morse v. Aldrich*, 19 Pick., 449, which the court held was made in reference to the plaintiff's right and interest under a grant "and was manifestly intended to confirm it, and to secure the plaintiff in the enjoyment thereof."

An interest in the nature of an easement in the land which the covenant purports to bind, whether already existing, or created by the very deed which contains the covenant, constitutes a sufficient privity of estate to make the burden of the covenant to do certain acts upon that land for the support and protection of that interest, and the beneficial use and enjoyment of the land granted, runs with the land charged. *Bronson v. Coffin*, 108 Mass., 175.

A covenant in a deed that a parcel of land, described in a deed of other land, "shall forever remain common" created an easement in the parcel in favor of the covenantee. *O'Neil v. Holbrook*, 121 Mass., 102.

The decision is on the ground that the agreement created a right "denominated predial servitudes by the civil law, and by our law termed easements;" the right of the owner of the lands to which it is appurtenant to restrain the owner of the servient tenement from making any erection thereon which may injure the light or prospect of the dominant tenement or any part thereof. *Hills v. Miller*, 3 Paige, 254. This case does not differ from *O'Neil v. Holbrook*, *supra*.

The case arose on a demurrer, which was overruled on the ground of a privilege or easement created by the covenants. The case is similar to *Savage v. Mason*, 3 Cush., 500.

Norman v. Wells, 17 Wend., 136, arose on the covenants, by the lessor, in the case of a mahogany mill, that "he would not let or establish any other place or seat on the before mentioned stream of water, to be used for sawing mahogany," said stream being that on which the leased property was situated. It is to be noticed that the court refers to the above statute as being a transcript of 32 H., 8, ch. 34, which the court says was constructed in *Spencer's Case*, *Spencer v. Clark*, 5 Coke, 16, as applicable, only, to those covenants touching or concerning the land leased. In this case, Cowen, J., recognizes the conflict of cases and the difficulty of determining what was real and what collateral covenants.

It is evident, on examination of *Fitch v. Johnson* (cited by plaintiff), that it is not in point.

If, however, the existence of these easements creates such a privy of estate that the covenant attaches, it cannot, as it is dependent on them for its power, attach to and run with any land not burdened with the easement. *Bronson v. Coffin*, 118 Mass., 156.

Whatever the nature of the covenant may be, it is void as being in restraint of trade. It does not create a limited restraint, as would be the case were the stone used only to a limited extent, or in the town where the quarry is located. It deals with a stone of great value and of "peculiar excellence in color and quality, and, as such, well known in the market for stone throughout the United States," and its purpose is to prevent the quarrying of a stone "substantially the same in character and value as the stone in said quarry of plaintiffs." *Alger v. Thacher*, 19 Pick., 51; *Taylor v. Blanchard*, 13 Allen, 870.

When the restraint is no greater, having regard to the subject-matter of the contract, than is necessary for the protection of the purchaser, it is valid. This doctrine, however, relates to sales made. *Morse, etc. Co. v. Morse*, 103 Mass., 73.

Holmes, J., delivered the opinion of the court:

One Kibbe conveyed to one Flynt a valuable quarry of six acres bounded by other land of the grantor, with covenants as follows: "And I do, for myself, my heirs, executors and administrators, covenant with the said Flynt, his heirs and assigns, that I am lawfully seised in fee of the afore granted premises; that they are free of all incumbrances; that I will not open or work, or allow any person or persons to open or work, any quarry or quarries on my farm or premises in said Long Meadow." By mesne conveyances the plaintiffs have become possessed of the quarry conveyed to Flynt, and the defendants of the surrounding land referred

to in the covenant. The defendants are quarrying stone in their land like that quarried by the plaintiffs; and the plaintiffs bring their bill for an injunction.

The discussion of the question under what circumstances a land owner is entitled to rights created by way of covenant with a former owner of the land has been much confused since the time of Lord Coke, by neglecting a distinction, which he stated with perfect clearness, between those rights which run only with the estate in the land and those which are said to be attached to the land itself.

"So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privy, and commons, advowsons, and other hereditaments annexed to the possession of the land." *Chudleigh's Case*, 1 Rep., 122b; *S. C.*, Poph., 70, 71.

Rights, of the class represented by the ancient warranty and now by the usual covenants for title, are pure matters of contract, and from a very early date down to comparatively modern times lawyers have been perplexed with the question, how an assignee could sue upon a contract to which he was not a party. *West, Symb. I.*, § 35; *Wing. Max.*, 44, pl. 20, 55, pl. 10; *Co. Litt.*, 117a; *Sir Moyle Finch's Case*, 4 Inst., 85. But an heir could sue upon a warranty of his ancestor, because for that purpose he was "*eadem persona cum antecessore*." See, *Y. B.*, 20, 21, Ed. I., 232, Rolls' ed.; *Oates v. Frith*, Hob., 180; *Bain v. Cooper*, 1 Dowl. Pr. Cas., N. S., 11, 14. And the conception was gradually extended in a qualified way to assigns where they were mentioned in the deed; *Bract. fol. 17 b*; 67a, 880 b; 881; *Fleta.*, III., ch. 14, § 6; 1 *Britton*, Nich., 255, 256; *Y. B.*, 20, Ed. I., 232-234, Rolls ed.; *Fitz. Abr.*, *Covenant*, pl. 28; *Vin. Abr.*, *Voucher*, N, 59; *Y. B.*, 14 H. 4, 56; 20 H. 6, 34b; *Old Nat. Brev.*, *Covenant*, 67, B, C, in *Rastell's Law Tracts*, ed. 1534; *Dr. & Stud.*, I., ch. 8; *F. N. B.*, 145, 5; *Co. Litt.*, 894b; *Com. Dig.*, *Covenant*, B, 3; *Middlemore v. Goodale*, *Cro. Car.*, 503; *S. C.*, Id., 505; *W. Jones*, 406; *Philpot v. Hoare*, 2 Atk., 219. But in order that an assignee should be so far identified in law with the original covenantee, he must have the same estate, that is, the same status or inheritance, and thus the same *persona quoad* the contract. But as will be seen, the privy of estate which is thus required, is privy of estate with the original covenantee, not with the original covenantor; and this is the only privy of which there is anything said in the ancient books. See, further, *Y. B.*, 21, 22, Ed. I., 148, Rolls ed.; 14 Hen. 4, pl. 5. Of course we are not now speaking of cases of landlord and tenant, and it will be seen that the doctrine has no necessary connection with tenure. *F. N. B.*, 134 c. We may add that the burden of an ordinary warranty in fee did not fall upon assigns, although it might upon an heir as representing the person of his ancestor. *Y. B.*, 32, 33, Edw. I., 516, Rolls ed.

On the other hand, if the rights in question were of the class to which commons belonged, and of which easements are the most conspicuous type, these rights, whether created by prescription, grant or covenant, when once acquired were attached to the land, and went with it, irrespective of privy, into all hands,

even those of a disseisor. "So a disseisor, abator, intruder, or the lord by escheat, etc., shall have them as things annexed to the land." *Chudleigh's Case*, ubi supra. See, 1 Britton, Nichols' ed., 861; Keilway, 145, 146, pl. 15; F. N. B., 190, n.; *Sir H. Nevil's Case*, Plowd., 377, 381. In like manner, when, as was usual, although not invariable, the duty was regarded as falling upon land, the burden of the covenant or grant went with the servient land into all hands, and of course there was no need to mention assigns. See cases *supra et infra*. The phrase consecrated to cases where privity was not necessary was *transit terra cum onere*. Bract., fol. 382, a, b; Fleta, VI., ch. 23, § 17. See, Y. B., 20 Ed. I., 360, Rolls ed.; Keilway, 113, pl. 45. And it was said that "a covenant which runs and rests with the land lies for or against the assignee at common law, *quia transit terra cum onere*, although the assignee be not named in the covenant." *Hyde v. Dean of Windsor*, Cro. Eliz., 552; *Ibid.*, 457; S. C., 5 Co. Rep., 24a; Moore, 399.

It is not necessary to consider whether possession of the land alone would have been sufficient to maintain the action of covenant; it is enough for our present purposes that it carried the right of property. Neither is it necessary to consider the difficulties that have sometimes arisen in distinguishing rights of this latter class from pure matters of contract, by reason of their having embraced active duties as well as those purely passive and negative ones which are plainly interests carved out of a servient estate and matters of grant. The most conspicuous example is *Pakenham's Case*, Y. B., 42 Ed. III., 3 pl. 14, where the plaintiff recovered in covenant as terre tenant, although not heir, upon a covenant or prescriptive duty to sing in the chapel of his manor. *Spencer's Case*, 5 Co. Rep., 16a, 17b. Another which has been recognized in this Commonwealth is the *quasi* easement to have fences maintained. *Bronson v. Coffin*, 106 Mass., 175, 185; S. C., 118 Mass., 156. Repairs were dealt with on the same footing: they were likened to estovers and other rights of common. 5 Co. Rep., 24 a, b; *Hyde v. Dean of Windsor*, ubi supra. See, F. N. B., 127; *Spencer's Case*, ubi supra; *Eyre v. Strickland*, Cro. Jac., 240; *Brett v. Cumberland*, 1 Roll. R., 359, 360; and other examples might be given. See, Bract., 882, a, b; Fleta, vi. c. 28, § 17; Y. B., 20 Ed. I., 860; Keilway, 2 a, pl. 2; Y. B., 6 Hen. VII., 14b, pl. 2; Co. Litt., 884b, 885a; *Cockson v. Cock*, Cro. Jac., 125; *Bush v. Cole*, 12 Mod., 24; S. C., 1 Salk., 196; 1 Shower, 888; Carthew, 232; *Sale v. Kitchingham*, 10 Mod., 158. The cases are generally landlord and tenant cases, but that fact has nothing to do with the principles laid down.

When it is said, in this class of cases, that there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or *quasi* easement, or must be in aid of such a grant. *Bronson v. Coffin*, ubi supra, which is generally true, although, as has been shown, not invariably. *Pakenham's Case*, ubi supra, and although not quite reconcilable with all the old cases, except by somewhat hypothetical historical explanation. But the ex-

pression, privity of estate, in this sense is of modern use, and has been carried over from the cases of warranty where it was used with a wholly different meaning.

In the main, the line between the two classes of cases distinguished by Lord Coke is sufficiently clear; and it is enough to say that the present covenant falls into the second class, if either. Notwithstanding its place among the covenants for title, it purports to create a pure negative restriction on the use of land, and we will take it as intended to do so for the benefit of the land conveyed.

The restriction is in form within the equitable doctrine of notice. *Whitney v. Union R. Co.*, 11 Gray, 359; *Parker v. Nightingale*, 6 Allen, 841. See, *Tulk v. Moxhay*, 2 Phillips, 774; *Haywood v. Brunswick Building Soc.*, 8 Q. B. D., 408; *London & S. W. R. Co. v. Gomm*, 20 Ch. Div., 562; *Austerberry v. Oldham*, 29 Ch. Div., 750. But as the deed is recorded, it does not matter whether the plaintiffs' case is discussed on this footing or on that of easement.

The question remains, whether, even if we make the further assumption that the covenant was valid as a contract between the parties, it is of a kind which the law permits to be attached to land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement, every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants, applies also to negative ones. They must "touch and concern," or "extend to the support of the thing" conveyed, 5 Co. Rep., 16 a; *Ibid.*, 24 b. They must be "for the benefit of the estate." *Cockson v. Cock*, Cro. Jac., 125. Or, as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden. *Keppell v. Bailey*, 2 My. & K., 517, 535; *Ackroyd v. Smith*, 10 C. B., 164; *Hill v. Tupper*, 2 H. & C., 121.

The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiffs' quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked, what is the difference in principle between an easement to have land unbuilt upon, such as was recognized in *Brooks v. Reynolds*, 106 Mass., 81, and an easement to have a quarry left unopened, the answer is, that whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land.

Again; this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiffs contend, it creates an easement

of monopoly, an easement not to be competed with, and in that interest alone a right to prohibit one owner from exercising the usual incidents of property. It is true that a man could accomplish the same results by buying the whole land, and regulating production. But it does not follow, because you can do a thing in one way, that you can do it in all; and we think that if this covenant were regarded as one

which bound all subsequent owners of the land to keep its products out of commerce, there would be much greater difficulty in sustaining its validity than if it be treated as merely personal in its burden. Whether that is its true construction, as well as its only legal operation, and whether, so construed, it is or is not valid, are matters on which we express no opinion.

Bill dismissed.

NOTE.—A covenant runs with the land, when the liability for its performance or the right to enforce it passes to the assignee of the land itself. A covenant is said to run with the reversion, when the liability to perform it or the right to enforce it passes to the assignee of the reversion. *Dorsey v. St. Louis, etc., R. R. Co.*, 58 Ill., 67; *Spencer's Case*, 1 Smith Lead. Cas., pt. 1, 137; *Brewer v. Marshall*, 3 C. E. Green, 337.

All covenants which relate to land and are for its benefit run with it and may be enforced by each successive assignee into whose hands it may come by conveyance or assignment. *Sterling Hydraulic Co. v. Williams*, 66 Ill., 397; 1 Smith, Lead. Cas., Hare & Wall., Notes, pt. 1, 173.

Where a covenant is not of such a nature as the law permits to be attached to the estate as a covenant running with the land, it cannot be made such by agreement of parties. *Gibson v. Holden* (Ill.), 1 West. Rep., 677; *Masury v. Southworth*, 9 Ohio St., 340; *Glenn v. Canby*, 24 Md., 127; *Washb. Real Prop.*, 438.

In equity, a simple contract in regard to land, partly performed, will be treated as a covenant and run with the land. *Rome, W. & O. R. R. Co. v. Ontario S. R. R. Co.*, 16 Hun, 445.

A covenant in a deed of conveyance of part of a parcel of land by grantee not to build upon a strip designated, is binding upon the grantee and those claiming under him. A right in the nature of an easement is thus created for the benefit of the land retained by the grantor. *Phoenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr. (N. S.), 266; see, *Story v. N. Y. Elev. R. R. Co.*, 11 Abb. N. Cas. 236; reversing 3 *Id.*, 478.

The vested rights of an owner of property under a covenant against certain erections by his neighbor, cannot be waived or impaired by the acts of their common grantor. *DuBois v. Darling*, 44 Super. Ct. N. Y., 436; see, also, 23 Moak, Eng., 333, note.

A covenant of seisin is broken, if at all, as soon as the deed is delivered; *Nichols v. Nichols*, 5 Hun, 108; *Dusenbury v. Callaghan*, 8 *Id.*, 541; being then converted into a chose in action, it does not run, with the land nor pass by the conveyance of the grantee. *Dusenbury v. Callaghan*, 8 Hun, 541.

A covenant of seisin occurring in a deed where the seisin forms no part of the description of the lands granted, applies to the present seisin as well as to the title. *Thomas v. Perry*, Pet. (C. C.), 49.

A covenant for quiet enjoyment, affords no ground for construing a reservation as not intended to permit any disturbance of possession. *Ryckman v. Gillis*, 57 N. Y., 68.

A covenant for quiet enjoyment in a deed is broken, where the land, at the time of the execution of the deed, was in possession of a third person under paramount title; *Shattuck v. Lamb*, 65 N. Y., 490; but nothing short of a lawful eviction will constitute a breach. *Fellows v. Lyon*, 6 Week. Dig., 424; 82

see, *Wood v. Forncrook*, 8 Supm. Ct., N. Y. (T. & C.), 303.

There is a difference between mere covenants of quiet enjoyment and covenants to do specific acts, the object of which is to secure the possession of the covenantee. In the former, there is no breach until actual eviction. In the latter, the failure to do the act specified gives a right of action, although possession be not disturbed. *Hawkins v. Mosher*, 13 Hun, 563, and cases cited.

A covenant that the lands "are actually the property" of the grantor and that grantor "has a good right to convey and sell the same," runs with the land. *Hall v. Scott Co.*, 12 Rep., 101.

A covenant that land is free from all incumbrances, is not a covenant that runs with the land. *Fulfer v. Jillett*, 2 Fed. Rep., 30; 9 Bias., 286.

The owners of adjoining lands may, by mutual covenants, regulate the use and enjoyment of their respective properties, with a view to the permanent benefit and advancement of value of each. *Trustees Columbia Coll. v. Lynch*, 70 N. Y., 440; *Same v. Thatcher*, 10 Abb. N. Cas., 235.

A court of equity has jurisdiction to compel the observance of mutual covenants by adjoining owners; whether it be a covenant running with the land or a collateral covenant, or a covenant in gross, or whether an action of law will be on it. *Trustees Columbia Coll. v. Lynch*, *supra*.

A covenant between adjoining owners to build a party wall, creates an easement. *Gibson v. Holden* (Ill.), 1 West. Rep., 677; *Keteltas v. Penfold*, 4 E. D. Smith, 122. It is a covenant which runs with the estate. *Savage v. Mason*, 3 Cush., 504; *Maine v. Cumston*, 96 Mass., 817; *Standish v. Lawrence*, 111 Mass., 111; *Dorsey v. St. Louis, etc., R. R. Co.*, 58 Ill., 68; *Sterling Hydraulic Co. v. Williams*, 66 *Id.*, 397; *Rindger v. Baker*, 57 N. Y., 209.

The change of a dwelling into a French flat, is a violation of the covenant not to build a tenement house. *Muggrave v. Sherwood*, 53 How. Pr., 311.

The erection of a balcony in good faith which extends over the reserved space, is not a violation of a covenant not to build within a certain distance of the street line; 4 Rob., 647; but otherwise of a bay window, the foundation of which rests on the ground. *DuBois v. Darling*, 44 Super. Ct. (N. Y.), 436.

A covenant in a deed by a municipal corporation that lands in the neighborhood of premises conveyed shall never be appropriated to a private use, does not prevent their being used for an elevated railroad. *Spader v. N. Y. El. R. R. Co.*, 3 Abb. N. Cas., 467.

Where grantees of different lots at several times, covenanted not to build beyond a specified line, such covenant, being and continuing for the benefit of future purchasers, may be enforced against an earlier purchaser by a later purchaser. *Lattimer v. Livermore*, 72 N. Y., 174; modifying, 8 C., 6 Daly, 501.

SUPREME COURT OF CONNECTICUT.

Solomon COHEN

v.

William H. PEMBERTON, *Appt.*

1. Where a purchaser ordered articles of merchandise (hats, caps, etc.) in fractions of a dozen, by classes, according to styles, sizes and prices per dozen, he may refuse to retain, and return to the vendor, within a reasonable time, such articles of a class as differ materially (here, in size,) from the order, in their adaptation to the wants and uses of the purchaser.
2. It appearing that the statement of the prices per dozen was merely for convenience in accounting, and that the parties understood the order to mean the same as if each separate article was itemized and carried out at one twelfth of the price per dozen, the consideration was susceptible of division and apportionment, and no injustice is done the vendor in compelling him to deduct the proportionate price of a single article returned.
3. If the issuable fact in a matter exclusively within the province of the jury, is fairly submitted to them, it is not error for the court to omit all comment upon the bearing and weight of the evidence, unless the question is such that some particular fact or facts lying back of the main fact and claimed to have been proved, would control the result.
4. Where a statement on a bill sent with goods purchased, to the effect that claims must be made within a limited time mentioned, does not, under the circumstances of the case, enter into the contract, the purchaser is not thereby limited to the time mentioned, to make his objections to receiving the goods.

(New Haven—Decided September 5, 1885.)

APPEAL from a judgment in favor of plaintiff, in an action to recover the price of merchandise sold. *New trial ordered.*

The case is stated in the opinion.

Mr. E. P. Arvine, for defendant, appellant.

Mr. E. B. Gager, for plaintiff.

Loomis, J., delivered the opinion of the court:

The complaint seeks to recover the price of merchandise, consisting of hats, caps, collars and gloves, sold and delivered to the defendant pursuant to his written order, which is annexed to the finding as an exhibit. The order classified the goods wanted according to the kind and style, each class occupying a line by itself, on which was given the size and over it, the number desired of that size; at the left, the numbers were summed up in fractions of a dozen, and at the extreme right, the price of a dozen was given. Take, for example, the first

line in the order to be dated in November, which also, in part, involves the matter in dispute: "1 doz. hat high college $\frac{1}{2}$, 2 $\frac{2}{3}$, 1 $\frac{1}{4}$, 7, 7 $\frac{1}{4}$, 7 $\frac{1}{4}$, \$18.50."

The goods were sent in boxes, accompanied by the plaintiff's bill, which, on its face, showed a full compliance with the order. The bill had also a printed heading: "All claims must be made within three days after receipt of the goods."

The defendant kept the goods about a month before he had occasion to open the boxes, and then, for the first time, discovered that some of the caps were not of the size required by his order and not of the size indicated by the labels thereon, and such goods he returned to the plaintiff, who refused to receive them, on the ground that each dozen or fraction of a dozen was an entire contract which must be rescinded *in toto* or not at all, and also that the offer to return was not made within a reasonable time; and, therefore, he claimed to recover for all the goods originally delivered.

The court, as matter of law, in its charge to the jury, adopted the first mentioned claim of the plaintiff, and as the defendant conceded he did not return all of any one of his said classes, consisting of a dozen or fraction of a dozen, a verdict against him was inevitable.

In thus applying the law which the plaintiff invoked, as to the entirety of contracts, the court was doubtless influenced by such propositions as are laid down in *Clark v. Baker*, 5 Met., 459, and *Manfield v. Trigg*, 118 Mass., 350. It is not our present purpose to discuss the propositions referred to, nor to examine and apply the nice distinctions that obtain as to the divisibility of contracts.

In *Manfield v. Trigg*, *supra*, the court, while holding that a sale of a specific number of packages of an article at a given price per package, was an entire contract, also held that "The rejection and return of an article of a different kind or description, not answering to the terms of the contract, do not stand upon the ground of this decision, nor does the right to return them depend upon the existence of a warranty."

The defect claimed was not one of quality, but of size in respect to hats and caps. The suggestion is now made that as the extent of variation did not appear, it might have been trivial; but no such point was made in the court below. The court, in its ruling, assumed that the claimed variation was so substantial that, if it existed as to each article composing the class, the whole might have been returned. The finding shows that the defendant, on his part, distinctly claimed that the variation in size was such that the articles rejected were of no use to him. We shall, therefore, assume for the purposes of this discussion, that the variation was substantial and not trivial and immaterial. We can readily see that it might have been so material as to render the article returned a different thing from that specified in the order, so as to come within the rule last suggested. It must be borne in mind that the identity of a thing within the meaning of the rule, does not depend on its being of the same class or kind, but rather on its adaptation to the wants and uses of buyers.

The local merchant presumably has his regular customers who require hats and caps of definite sizes, and he makes his order on the wholesale dealer with reference to this and the probable demand. If one of the retailer's customers sends to him for a 7 $\frac{1}{2}$ hat and one is sent, so labeled, but which proves to be a 6 $\frac{1}{2}$ or even a 7, in size, it would at once be conceded that the customer could reject it as a very different thing from what he ordered. A difference which is so material, between the retailer and his customer, must also be important as between the wholesale and retail merchant.

In *Gardner v. Lane*, 12 Allen, 44, A undertook to pay B a debt by delivering to him 139 barrels of No. 1 mackerel. A delivered part No. 1 mackerel and 46 barrels of No. 3 mackerel. B actually received the mackerel, but did not open the barrels. C, a creditor of A, attached the No. 3 mackerel as A's property. B undertook to affirm the sale, claimed the property as his own and replevied it. On the trial, C claimed that no property in the No. 3 mackerel had passed to B, as the claimed delivery was a non-performance. B claimed that the difference between No. 3 and No. 1 was a difference in quality, and that the title did pass, subject to his right to rescind. The court held the difference between No. 1 and No. 3 mackerel to be a difference in kind, and that no title passed to B in the No. 3 mackerel, because his contract for sale was for articles of a different kind, and that he had never assented to receive the No. 3 mackerel, by reason of his want of knowledge, and so the attaching creditor held the goods.

In *McEntyre v. McEntyre*, 12 Ired., 299, and in *Waldo v. Halsey*, 8 Jones (N. C.), 107, the proposition is stated, as everywhere admitted to be law, that "If one not having seen them, orders goods of a certain description at a certain price, and the goods do not answer the description, he may return them or offer to return them, within a reasonable time." In the last mentioned case, the order was for bags of a certain size, and the only defect was that they were of less size.

If, then, we should concede that the order for each dozen or fraction of a dozen, was an entire contract, and that the hats or caps sent were materially different in size from those ordered, the plaintiff himself was in default as to his contract and could not recover anything except for the fact that partial performance had been accepted and full performance waived by the act of the defendant. It seems to us that the court should have charged the jury, in substance, according to the defendant's request referred to in his fifth assignment of error.

It is suggested that the application of the principle under consideration might work injustice to the plaintiff, by compelling him to deduct the proportionate price of a single article returned, when the contract estimated the price only by the dozen; but a more critical examination of the contract found in the defendant's order and the plaintiff's acceptance of it, as indicated in his bill rendered, will lead to a different construction. So far as the disputed items are concerned, there is no instance where an entire dozen is ordered, and the price for a dozen is always given, whether the fraction is large or small, but the plaintiff's bill carries out

the proportionate price. In two instances, only one article of the class is ordered and it is entered as $\frac{1}{2}$ of a dozen (we refer to the items: "colored beaver gloves" and "not beaver gloves"); and yet the price of the dozen is given, viz.: \$54; but in the plaintiff's bill, in addition to the price per dozen, the charge is carried out as \$4.50, being precisely $\frac{1}{2}$ of the price per dozen. We think there is enough appearing to justify the inference that the statement in dozens was merely for convenience in accounting, and that the parties understood the order to mean the same as if each separate article was itemized and carried out at a sum indicated by taking one twelfth of the price given for a dozen. We think, therefore, the consideration, by the true construction of the contract, was susceptible of division and apportionment.

Our reasoning has a bearing, also, on the question whether the contract was entire or divisible, which, as we have already indicated, we do not intend to decide.

The remaining question relative to a reasonable time for returning the goods rejected, has no importance, except with a view to another trial; for as, under the charge of the court and the conceded facts, the defendant could not return the goods at all, there was no occasion to consider the question of reasonable time for such return. The presumption is that the jury did not pass upon the question. But had it been before them, the charge as given would seem to be correct, viz.: "What is a reasonable time is a question for the jury and to be determined in view of all the evidence and circumstances attending each case; what would be reasonable time under one set of circumstances might not be in another. You will take into consideration the order given, when given, the time when goods were received, the nature of the goods, the season for selling them, the acts of the parties, and all the circumstances, and view the matter in a common sense and reasonable light."

In a matter within the exclusive province of the jury, if the issuable fact is fairly submitted to them, it is not error for the court to omit all comment upon the bearing and weight of the evidence, unless, indeed, the nature and position of the question is such that some particular fact or facts lying back of the main fact, and claimed to have been proved, would control the result.

It has been suggested that as the printed heading of the bill sent to the defendant required that "all claims must be made in three days," and none were in fact made for a month, the question of reasonable time must be decided adversely to the defendant. As no reference was made to this fact in the court below and no claim was predicated upon it, we are not required to comment upon it. With a view, however, to another trial, it may be well to say that, as the case is presented, these words formed no part of the contract between these parties, and the defendant was not thereby limited to the time mentioned to make his objections to receiving the goods.

The case of *Beam v. Tinkham*, 14 R. I., 197, fully supports this position.

There was error in the ruling complained of, and a new trial is ordered.

SUPREME COURT OF MAINE.

INHABITANTS OF RANGELEY
v.
INHABITANTS OF BOWDOIN.

SAME v. SAME.

Revised Statutes, ch. 24, § 3, provides that "Whenever a person having a pauper settlement in a town has lived, or shall live, for five successive years in an unincorporated place or places in this State, he and those who derive their settlement from him, lose their settlement in such town." Held, that the law applies to a person who thus resided in an unincorporated place before the enactment of the statute.

(Franklin—Decided December 14, 1885.)

ACTIONS for supplies furnished to paupers.
Non suit.

Mr. P. A. Sawyer, for plaintiffs:

Under the statement of facts as agreed upon, there seems to be but one question before the court, viz.: the construction of the Act of 1883, now incorporated into § 3, ch. 24 of the Rev. Stat. But for the provisions or existence of the latter paragraph of this section the liability of the defendants under the plaintiffs' claim would be absolute and unquestioned.

It is admitted that Andrew Campbell in 1837, had a settlement in Bowdoin, and that that settlement continued an existent liability of Bowdoin, and a vested right of recovery in any other town which might furnish supplies to him or his descendants. Suits may have been instituted and maintained in years past and up to the date of the passage of the law of 1883, and by force of § 36 of ch. 24, the Town of Bowdoin may have become estopped from denying the settlement of the paupers.

The Act of 1883 should not be construed as having a retroactive or retrospective effect, as such a construction would directly tend to "impair the obligation of contracts," as the action for recovery of pauper supplies is founded upon the implied promise of defendants to pay.

Meers. J. W. Spaulding and F. J. Baker, for defendants:

Rev. Stat., ch. 24, § 3, provides: "Whenever a person, having a pauper settlement in a town has lived, or shall live, for five years in any unincorporated place or places in this State, he and those who derive their settlement from him lose their settlement in such town." The expenses sought to be recovered were incurred after the passage of the Act. *Bridgewater v. Plymouth*, 97 Mass., 390.

In *Goshen v. Richmond*, 4 Allen, 460, the court says: "The purpose of Stat. 1845, ch. 222, was to alter the law of evidence on a single subject, by making inadmissible certain proofs which were before admissible."

Before the statute was passed, these defendants might have proved that the marriage of Jacob Redington, the father of the pauper for whose support this action is brought, was in-

valid, by reason of his insanity. *Middleborough v. Rochester*, 12 Mass., 363.

In *Monson v. Palmer*, 8 Allen, 556, the court after giving a construction to "An Act concerning illegitimate children, whose parents intermarry," Stat. 1858, ch. 253, says, "It is not sufficient objection that this construction may change the settlement of children already acquired. That consequence has not unfrequently happened, under the operation of causes over which towns have no control."

The Legislature has no power to disturb vested rights; but rules for the settlement of paupers have always been regarded by the courts as matters of mere positive or arbitrary regulation, in establishing which the Legislature is limited in its power only by its own perception of what is proper and expedient. *Leviston v. N. Yarmouth*, 5 Me., 66.

A legislative resolve, rendering valid a certain class of marriages, so far as it had a bearing upon questions of settlement under the pauper laws, for expenses incurred subsequent to its passage, was constitutional. *Leviston v. N. Yarmouth (supra)*.

Virgin, J., delivered the opinion of the court:

Actions for pauper supplies furnished to two families, viz.: to Cyrus A. Campbell and family, from June to August, 1883, and to Mrs. Ellis and children, from June, 1883, to August, 1884.

First action: C. A. Campbell was the son of Joseph Campbell, who derived his settlement from his father, Andrew Campbell.

Second action: Mrs. Ellis was once the wife of Joseph Campbell, who having deceased she subsequently married one Ellis, who having no settlement in this State she retained that of her former husband, if he had any.

Andrew Campbell had a settlement in the Town of Bowdoin in 1837, when he removed with his son Joseph, then only two years of age, to the unincorporated place of Letter C, where he continued to reside more than ten years, and had never acquired any new settlement when Joseph attained his majority.

In 1883, the Legislature enacted a statute which went into effect in April of the same year, therein providing: "Whenever a person having a pauper settlement in a town, has lived or shall live, for five successive years, in any unincorporated place, he and those who derive their settlement from him lose their settlement in such town." Stat. 1883, ch. 374, incorporated into R. S., ch. 24, § 3. And applying the concrete facts to this statute it appears that, Andrew Campbell having a pauper settlement in Bowdoin in 1837, has since lived more than five successive years in the unincorporated place of Letter C, and he and his son Joseph who derived his settlement from him lost their settlement in that town. The result is, these actions cannot be maintained if the statute is valid.

Of the validity of the statute there can be no doubt. The liability of towns to relieve and support paupers has none of the elements of a contract express or implied, *Augusta v. Chelsea*, 47 Me., 367, but rests solely in the positive and arbitrary provisions of statute, which the Legislature can change as well as originally enact. *Leviston v. N. Yarmouth*, 5 Me., 66; *Appleton v. Belfast*, 67 Me., 579, and cases there cited.

Although the residence in the unincorporated place, which was the operating cause of losing the settlement in Bowdoin, was before the statute became operative, still the cause of action, which consisted in furnishing the supplies, arose thereafter.

Plaintiffs nonsuit in both actions.

Peters, Ch. J., Walton, Libbey, Foster and Haskell, JJ., concurred.

Orrin McFADDEN, Judge of Probate

v.

J. H. H. HEWETT, Admr.

1. In a suit upon a guardian's bond, the declaration may be amended by adding the averment that the interest of the persons suing had been specifically ascertained by probate decree.
2. A declaration is not faulty, because it alleges that the action had been authorized by the judge of probate, when it is immaterial whether he assented to the action or not.
3. A guardian's bond is not changed from a statute to a common law bond, because it contains provisions not required in the statutory form, which are in accordance with law.

(Lincoln—Decided December 16, 1885.)

ON EXCEPTIONS. Overruled.

Action on guardian's bond.

The facts are stated in the opinion.

Mr. A. P. Gould, for plaintiff.

Messrs. Baker, Baker & Cornish, for defendant.

Peters, Ch. J., delivered the opinion of the court:

This action, on a guardian's bond, was designed to be brought under § 10, ch. 72, R. S. But it was not originally averred in the writ that the interest of the persons suing the bond had been specifically ascertained by a decree of the Judge of Probate, as required by that section. The plaintiffs were allowed to amend upon terms, by inserting the omitted words. The defendant contends that the amendment was not admissible; that it introduces a new cause of action and, in a sense, new parties. We think the amendment merely allows a missing link to be supplied in the facts alleged, and that the objection to it should not be sustained.

The plaintiffs, before amendment having too slender an averment, after amendment have too much. In the flurry of *nisi prius* the amendment was overloaded. It not only added the missing words, but further added an averment that the plaintiffs, in interest, had been expressly authorized by the Judge of Probate to commence the action, for their benefit and for the benefit of the estate. These superfluous words were borrowed from § 16 of the chapter referred to, and would be more appropriate to an action brought under conditions not applying to this case. But the words are harmless and may be rejected as surplusage. Under § 10 the action is instituted without the consent

of the Judge, and under § 16 with his consent. It must be harmless to allege the Judge's consent when it matters not whether he consents or not. "The estate" can be no other than the estate belonging to the heirs, and the action really inures to the benefit of the heirs and their estate, although instituted under § 10, and not § 16.

An additional defense is, that the bond declared upon is not a statute bond; that it contains provisions not required by law. The provision in the bond which seems to be the most of a departure from the statutory form, is the requirement that the guardian should put out and secure the proceeds of sale, of the real estate, on interest for the benefit of the minors. But this imposed no new obligation. We think the position taken by plaintiffs' counsel correctly answers this objection. While the statutory form of bond did not require such a thing, the law did require it. The bond was given when part 6 of § 10, ch. 112 R. S., of 1841, was in force. The later form of bond requires the principal to obey the law appertaining to the duties undertaken by him. The older form, and this bond was of a style formerly used, contained more specifications of such duties. The other obligations named in the bond were substantially what the law imposed. The opinion, in the case of *Cleaves v. Dockray*, 67 Me., 118, contains illustrations of harmless departures from the strict formalities of probate bonds, and the present case falls within the principle there illustrated. The law required certain duties of the guardian who gave the bond now in suit, and his bond required no more. No new or additional burden was put upon him.

Exceptions overruled.

Walton, Virgin, Libbey, Foster and Haskell, JJ., concurred.

Martha A. HATHORN

v.

David H. CORSON *et al.*,

1. A levy is not void because it takes two parcels of a farm lying side by side, at separate instead of joint appraisal.
2. A defendant must present all his defenses of the same grade at the same time. On pleading non-tenure and nothing else, in bar, he is supposed to have no other defense, and if that is adjudged bad on demurrer, he cannot plead anew without leave of court.

(Somerset—Decided December 8, 1885.)

ON EXCEPTIONS. Overruled.

The case is stated in the opinion.

Mr. D. D. Stewart, for plaintiff.

Messrs. Brown & Carver, for defendant.

Peters, Ch. J., delivered the opinion of the court:

The levy, under which the demandant claims, took at the same time as one act, two parcels of a farm, the parcels lying side by side, at separate appraisals. It is contended that this is an irregularity which renders the levy void.

The argument is, that the two parts would not be likely to be in the aggregate valued so much by the appraisers, as they would be as a whole. It is apparent that such a scheme of appraisal might be prejudicial to the debtor, but we see no remedy for it beyond the right to redeem.

By § 4, ch. 76, R. S., when several parcels of land are taken, they may be appraised separately or together. By the same section, the creditor may take parcels at different times and have different sets of appraisers. This creditor could have accomplished the same end by taking at different times. There was nothing to prevent his taking a portion of the farm in such form as he pleased, however irregular. Even if the land taken is grossly undervalued, there is no help for it but to redeem. We think it results from those privileges accorded to the creditor, that the objection in the present case cannot avail the defendants. The theory of the law is expressed in the case of *Bond v. Bond*, 2 Pick., 385, where it is said: "The object of the statute is not that the land should be taken in payment of the debt, but that the levy on it might coerce the debtor to pay the debt."

Greenleaf Corson, one of the defendants, pleaded non-tenure in bar, when the plea should have been in abatement. Upon demurrer to the plea because it was in bar, judgment was given in chief against the pleader. This was according to the precedents. The defendant had pleaded his chief defense, and that being lost to him upon a question of law, the natural deduction would be that he had no other. The law presumes that he would not have pleaded a single defense in bar, if other defenses were at the same time open to him. If a defendant had the right to plead anew as often as a prior plea of the same grade be disposed of, the litigation might be prolonged beyond endurance. Hence, the rule that all defenses upon the merits should be presented at the same time. The defendant had his day, and logically acknowledged that his only defense was a technical one, not very much favored, and in that he was worsted.

He claims that he should have been permitted to plead the general issue. It was, no doubt, a matter of discretion with the Judge whether he would relieve the pleader of his dilemma or not, by allowing a withdrawal or an amendment of the first plea. But it was so inconsistent for a defendant to plead no title in himself and, with the next stroke of the pen, to plead that he had title, the Judge thought it would not be in the furtherance of justice to allow the motion to replead. It is also clear from the facts of the case, inasmuch as the levy is held to be good, that this defendant, as well as the associate defendant, had no possible defense under the general issue.

Exceptions overruled.

Danforth, Virgin, Emery, Foster and Haskell, JJ., concurred.

Herbert BLAKE

F. H. PECK *et al.*

1. Where a justice of the peace and of the quorum is commissioned to act for all

the counties, he may sit as a magistrate in a poor debtor's disclosure in any county in the State.

2. Where a debtor who has cited the creditor to a disclosure upon his execution bond, refuses to disclose before the magistrate selected by the creditor, who is qualified to act, he forfeits his bond, although he procures an officer to select another magistrate and then makes a disclosure in which the creditor participates.

(Kennebec—Decided December 12, 1885.)

ON EXCEPTIONS. *Overruled.*

This was an action of debt on a poor debtor's bond. Writ dated October 25, 1884. The bond sued on was given by F. H. Peck as principal, and the other defendant and W. A. Ross as sureties, for the release of said Peck, dated April 23, 1884, who was then arrested in the County of York on an execution in favor of plaintiff against him.

Messrs. Potter & Lancaster, for plaintiff:

Cited Rev. Stat., §§ 33, 34, 42, ch. 113.

The creditor did not waive objection to the justices by not filing a written protest and by participating in the disclosures. *Guilford v. Delaney*, 57 Me., 589; *Hall v. Houghton*, 87 Me., 411.

Mr. Asa Low, for defendants.

Peters, Ch. J., delivered the opinion of the court:

This is an action on a poor debtor's bond. The disclosure was made in York County. The creditor chose W. P. Ayer, who resided in Androscoggin County, as a justice to hear the disclosure. Ayer, at the time, was commissioned as a magistrate to act within and for each county of the State. The debtor refused to disclose before Ayer, because he was not a resident of York County; and procured an officer to select a second justice. We think the debtor committed an error by which the bond became forfeited.

Revised Statutes, ch. 86, § 34, is this: "Justices of the peace and of the quorum shall exercise their powers and duties, and shall be commissioned to act, within and for every county." They are to exercise their powers and duties—not a part of them, all of them—unless restricted by some other statutory provision. The counsel for the defendants finds some instances where the service to be performed may be of a local character. This is not one of them. Should we decide that the magistrate could not act, it would be difficult to know what powers can be accorded to the office. It cannot be intended that the duties to be performed away from local residence are only ministerial. The statute is in its terms broader than that. Such work could perhaps be done away from the magistrate's home without the consent bestowed by the Act referred to. *Learned v. Riley*, 14 Allen, 109, and cases cited. In *Young v. Bride*, 25 N. H., 482, an instructive case upon this question, it was held that a justice of the peace throughout the State could hear and determine a civil action in any county in the State.

We are not at liberty to adopt the theory of the defense, that the want of jurisdiction in the magistrates was waived by the creditor's participation in the examination of the debtor. To do so, would require us to disregard quite a list of our own decisions where the point has been heretofore considered. It is said that the creditor should have protested the proceeding. His action was a protest. His attempt to protect his interests, in case of erroneous supposition on his part that the magistrates were without jurisdiction, would not confer jurisdiction. *Barnard v. Bryant*, 21 Me., 206; *Williams v. Burrill*, 28 Me., 144; *Ware v. Jackson*, 24 Me., 166.

It is claimed that the defendants are liable only for actual damages, though less than the debt. This point is foreclosed against them by late cases. *Hackett v. Lane*, 61 Me., 31; *Poor v. Knight*, 66 Me., 482.

Exceptions overruled.

Walton, Danforth, Libbey, Emery and Foster, JJ., concurred.

William B. PINKHAM

v.

Jefferson CROCKER.

1. A factor may sell his principal's goods upon credit if there be no usage nor instructions to the contrary.
2. If a factor makes sales to irresponsible parties through want of care and diligence, or is not attentive to his principal's interests after the sale, he is liable to the principal for any loss sustained because of such neglect.

(Penobscot — Decided December 8, 1885.)

ASSUMPSIT. *Defendant defaulted.*

The action was on an account annexed for 2,268½ pounds of wool at 27 cents, \$612.50; the writ also contained a count for money had and received.

Messrs. Charles P. Stetson and John F. Robinson, for plaintiff.

Mr. John Varney, for defendant.

Peters, Ch. J., delivered the opinion of the court:

The defendant as a factor, no instructions being imposed upon him, sold the plaintiff's wool at the plaintiff's risk, upon credit; the purchaser failing before the debt became due. The defendant exercised due care in taking the risk, if he was justified in so selling the goods.

Does the law authorize the factor to sell his principal's goods on credit? It was held in an early case in this State that a factor has such authority. *Greeley v. Bartlett*, 1 Me., 172. It was the doctrine of the Massachusetts courts, when our own State was a portion of that Commonwealth. *Goodenow v. Tyler*, 7 Mass., 86. It is the general doctrine. *Story, Ag.*, §§ 60, 110, and cases there cited.

We do not think it necessary for the defendant to show that it is an usage of trade to sell wool upon credit. Of course, if the sale was made in defiance of an usage which forbids a

sale on credit, the defense fails. But it is fair to presume that an usage exists which permits such a sale, unless the contrary be shown. We know that, as far as most descriptions of goods are concerned, it is not unusual to sell on credit. The factor often sells his own goods on credit, and it is to be presumed that he is clothed with as much discretion when he sells goods belonging to others. It is not unreasonable to suppose that the principal would have sold the goods on credit had the sale been made by him, without the aid of a factor. Should it be necessary, however, to appeal to the evidence for the defendant's justification, we should not hesitate to declare that, in our opinion, such an usage as the defendant invokes, is affirmatively proved.

The plaintiff contends that the defendant made himself personally liable for the goods, because he was guilty of negligence in not seasonably apprising the plaintiff of the circumstances of the sale, and in not using more diligence than he did use to collect the debt. The evidence does not support the contention. If a factor exposes his principal to risk of loss by any want of information which the principal is entitled to from him, or by any inattention to his principal's interests, he is responsible for all the natural consequences of the neglect. The law requires diligence and a lively interest on his part in his employer's affairs. But what better action could have been taken than was taken by the defendant after the purchaser failed? His own wool was covered by the same sale. He took the same percentage in settlement with the purchaser that all other creditors received. The plaintiff evidently intended, after the purchaser failed, to cast the loss upon the defendant, if he could, and he seems to have been unwilling to participate in the responsibility of settlement of the debt either by word or act. The cases cited upon the brief submitted for the plaintiff are not applicable to these facts. The case cited upon the brief for the defense, *Gorman v. Wheeler*, 10 Gray, 362, is in point.

The plaintiff is entitled to recover, under the money count, the amount which the defendant received from the purchaser on his account.

Defendant defaulted accordingly.

Danforth, Virgin, Emery, Foster and Haskell, JJ., concurred.

Sanford STEVENS and Robert W. GILMORE.

v.

Charles SHAW.

1. An assignee of a claim in suit in equity proceedings is not required to indorse the bill in equity, or the writ in which the bill may be inserted by R. S., ch. 83, §§ 128, 129.
2. It is irregular to present preliminary questions in equity to the law court until final hearing; but where postponement might unjustly defeat the end sought to be gained by the preliminary proceeding, the court will entertain the question.

(Penobscot—Decided December 8, 1885.)

ON EXCEPTIONS. Overruled.

Bill in Equity inserted in a writ dated March 13, 1882, praying for a decree to reform a certain mortgage of personal property, hay, dated April 19, 1877, given by Stevens to Shaw, and to enjoin Shaw from further prosecuting a certain replevin suit for a certain quantity of hay contended by Shaw to be embraced in the mortgage, in favor of Shaw against Gilmore, dated November 2, 1881, and now pending in this court.

At this term, Shaw made a motion in writing that "Nathaniel Dustin, assignee of Robert W. Gilmore, one of the plaintiffs, have his name and place of residence indorsed on the writ in this action."

The plaintiffs and Dustin were duly notified of this motion, and appeared by counsel and a hearing was had.

Shaw introduced the before mentioned documents, also the following document:

"Know all men by these presents, that I, Robert W. Gilmore, for a full and valuable consideration to me paid by Nathaniel Dustin, of Dexter, Penobscot County, Maine, do hereby bargain, sell and assign to said Dustin and his legal representatives, all the right, title and interest I have in and to that lot of hay that was raised on that farm in Dexter owned by Charles Shaw and lately occupied by Sanford Stevens in the summer of 1881, and purchased by me August 8, 1881, of said Stevens, and on November 1, 1881, replevied by said Charles Shaw, which suit is now pending, all my right to a return of said hay so replevied and to damages for the taking or keeping the same, and all my rights arising in any way from said purchase and said replevin and in any suit therewith, is hereby, for the above consideration, bargained, sold and assigned to said Dustin. He is to have the same rights in defending said replevin suit or enforcing judgment therein, and in prosecuting any suit in my name for the assertion of my rights in regard to said hay, and in regard to reforming or canceling any claim given by said Stevens to Shaw upon said hay, that I could have or assert in regard to the same."

The court refused to grant the motion, to which ruling Shaw excepts.

Mr. H. B. Pierce, for plaintiff.

Mr. Josiah Crosby, for defendant.

Peters, Ch. J., delivered the opinion of the court:

We regard the ruling as correct. We do not see that the statutory provision, which requires an assignee to indorse his name on a writ or process, was intended for bills in equity. R. S., ch. 82, §§ 128, 129. There would be an incongruity in it. The statute requires judgment for costs to go against the assignee and the assignor jointly, if the other side prevails. But whether costs shall be awarded or not in a case in equity, is for the court to determine, as a matter in its discretion. An assignee can be included as a party in a bill in equity, when he could not be in an action at law. There is a plausibility in the defendant's position; still, we think the motion should be denied.

A question arises whether a bill of excep-

tions can be heard in this court, before a case in equity comes up for a final hearing. Generally, it would be an irregular proceeding. But the peculiar character of the present question hardly admits of postponement. If any benefit is to be derived from it, by the moving party, we think it would not be an infraction of the rules usually regulating equity proceedings, to give these exceptions a privileged position on the docket. It is authorized by the example furnished in the case of *Spaulding v. Farwell*, 62 Me., 319.

Exceptions overruled.

Danforth, Virgin, Emery, Foster and Haskell, JJ., concurred.

SANDY RIVER RAILROAD CO.

v.
Phillip H. STUBBS.

1. The purchase of land by the director of a railroad company, over which he expects the way may be located, is not necessarily to be considered to have been made in trust for the company, at its option; although a director of such a company is, in equity, its trustee.
2. A railroad company was unable to make satisfactory arrangements with a land owner for a right of way for its track and for land for its buildings, when one of the directors, without any suggestion from his associates, purchased the land with his own means and immediately reported his doings to his associates, who at once repudiated the transaction on behalf of the company. The track and buildings of the company were afterward located and constructed upon a portion of this land, and committees, appointed at different times for the purpose, had agreed with the purchaser as to the amount of land needed and the compensation therefor; but the land damages were not adjusted, because he would only convey the use for railroad purposes and not the fee. After the lapse of more than three and one half years from the time the land was taken, the company for the first time claimed that he purchased and held the whole land in trust for the company and brought a bill in equity to compel a conveyance of all the land to the company upon payment of the price paid therefor, with interest and expenses. Held, that the bill could not be maintained.

(Franklin—Decided December 14, 1885.)

APPEAL from a decree refusing to enforce an alleged trust, and to compel the conveyance of title to land alleged to be held in trust. *Affirmed.*

The case is stated in the opinion.

Mr. S. Clifford Belcher, for plaintiff.

Mr. J. P. Swasey, for defendant.

Virgin, J., delivered the opinion of the court:

The complainant brings up this case by ap-

peal from the decree of the Presiding Justice who heard it on bill, answer and proof.

Its claim briefly stated is: that the defendant, as one of its directors and for its benefit, purchased certain land in the Village of Strong, but took the conveyance to himself; that the Company soon afterward located its track, erected its station house, water tank and woodshed upon a portion of it; that the defendant holds the title to the whole land thus purchased in trust for the complainant; wherefore, it prays that on payment to him of the consideration, interest and expenses, he be decreed to convey to the Company.

The defendant denies that he acted as director or *in hac re* and claims that the Company, being unable to obtain from the owner a right of way across the land upon the terms it proposed, he thereupon, without its direction, suggestion or knowledge, purchased on his own personal responsibility, from the owner, much more land than was necessary for the Company's use, to the end that it might have so much of it as was necessary for railroad purposes, for a reasonable consideration or for such a proportion of the whole consideration as the portion of the land needed and taken by the Company should bear to the whole land.

Several of the allegations in the bill are not proved in the sense in which they are set out, and some of them, especially in paragraphs four and nine, are disproved. And without unprofitably extending this opinion by analysis of the testimony, it is sufficient to say that the material facts, established by a fair preponderance of it, are these: the Company was organized in April, 1879. Prior to the following August, it obtained by parol gift a right of way twenty feet in width, not including any land for its buildings, and located its track across land of one Porter, in the Village of Strong. Some of its citizens and the two directors, including the defendant, resident therein, expressed some dissatisfaction thereto, preferring a route farther east and nearer to the business center of the village. Wherefore, at the latter date mentioned, five of the seven directors, together with Porter, assembled at the defendant's office to consider the proposed change of location which, if made would also cross the land of Porter. A majority of the directors not residing in Strong, being at least indifferent to the change, strenuously contended that it ought not to be made, unless Porter would give this right of way, land damages for railroad buildings being inevitable on either route. But, after a whole afternoon's importunate urging, he absolutely refused to accede, and the projected change was, therefore, substantially abandoned. Thereupon, the defendant took Porter out upon the land, pointed out the probable proposed route and there made renewed but fruitless efforts to persuade him to give the right of way. Then the defendant proposed to personally purchase his entire field, which proposition Porter peremptorily declined to entertain. As the last resort, the defendant staked out some two and one half acres of it, comprising much more land than they anticipated the Company might need for all its purposes, but across which the new track might probably go; and after considerable bantering, Porter agreed to take \$500 therefor, provided the defendant would erect and main-

tain a fence against the remainder of the lot; and the defendant closed the trade. Whereupon they returned to the office, where the defendant made a detailed report of his negotiations with Porter, adding in substance that, having purchased the land, he could accommodate the Company with a right of way, and with as much land as was necessary if they wished to locate there. But the directors expressly repudiated all participation in the defendant's purchase, alleging, among other reasons, that land there was not worth any such price, and declaring that he must understand that it was his own personal trade, to which he readily and expressly assented; whereupon, they separated.

A few days thereafter, the defendant paid Porter the \$500, received his deed containing the fencing clause and caused it to be recorded and subsequently built the fence. There was no other consideration for the land thus conveyed.

In September, the location was changed. In November and December the station house and water tank were erected, followed by the running of the trains and the erection of the woodshed.

Subsequently the parties had several conferences in relation to settling the damages for the land taken for the track and buildings. Still later two committees were chosen for the same purpose. They staked out so much of the land as was deemed necessary for railroad purposes, agreed upon the price, but failed to conclude a final adjustment, because the defendant declined to convey the fee instead of the use of the land so long as it should be used for railroad purposes. Thus the matter stood, until February, 1888, when the defendant, for the first time during the three and one half years of his ownership of the land, received notice that the Company claimed he held the whole land in trust simply. He had held the office of director and clerk of the Company from the time of its organization to November, 1888, attended its meetings, and never before received any intimation of such a claim.

Without questioning the rule so clearly recognized in this court, *E. & N. A. R. Co. v. Poor*, 59 Me., 277, as well as in many others, that his directorship constituted the defendant, in law, an agent, and in equity a *quasi* trustee, at least, and thereby established his fiduciary character; fully appreciating the foundation of the important doctrine by which equity requires that the confidence imposed in a trustee shall not be abused for his personal interests, keeping constantly in mind the jealousy with which courts scan the dealings of a trustee with respect to matters involved in the trust, holding with other courts, the *cestui quo trust's* right of avoidance does not necessarily depend upon the fraud, or *bona fides* of the trustee, *Duncomb v. N. Y. H. & N. R. R. Co.*, 84 N. Y., 199; and still we are of opinion that none of the cases or the principles announced therein invoked by the complainant, nor any of the numerous others upon the subject which we have carefully examined, would warrant us in granting the prayer of the complainant.

The defendant zealously worked for the interests of his principal by seeking to change the location so as thereby to accommodate the business interests of the community in which

one of its intermediate stations was to be located. This result had failed to be brought about by the other directors. As a last resort, he personally purchased what was then considered two or three times more land than he deemed the needs of the road required for public use, not as a speculation, from which he might derive secret profits (Thomp. Liab. Off. Corp., 360, § 8, and cases in *notes*), but to facilitate the desired object. He did not deal with the Company's funds, but paid his own without any assurance or intimation that the Company would ever take any of the land. He did not deal with the Company's property. He did nothing which he concealed from its knowledge, but frankly and promptly disclosed the whole transaction and put his deed upon the public registry, and his acts were repudiated. He did not act in the premises in anywise inconsistent with the interests of his *cestui que trust*, nor acquire for himself any interest adverse to his Company in any sense contemplated by the rules of equity governing trustees and *cestuis que trust*. *McClanahan v. Henderson*, 12 Am. Dec., 412; *Van Epps v. Van Epps*, 9 Paige, 238, 241.

There was no opportunity for a breach of trust, the defendant standing alone against the other six directors, who had a full knowledge of all the facts, with full control of the question of change of location. If they concluded to make the change the Company could only "take and hold the land for public use." R. S., ch. 54, § 14. It had no right to insist upon having the fee. If the parties could not agree upon the land damages, the statute furnished a tribunal to adjust that question. R. S., 1871, ch. 51, § 6. If they could not agree as to the "necessity or extent of the land taken," their remedy was plain and adequate. R. S., 1871, ch. 51, § 18.

But the alleged necessity for the whole land was evidently an afterthought on the part of the complainant. Its whole conduct down to February, 1883, points in that direction; the staking out of the land appropriated, leaving a portion as not needed, the agreed price, based upon a fair proportion of the whole consideration paid by the defendant, the three reports of outstanding liabilities for land damages including the defendant's claim, and the long (more than three and one half years) acquiescence of the Company, all afford ample proof that the Company then took a new departure.

Decree affirmed. Bill dismissed with costs.

Peters, C. Jh., Walton, Libbey, Foster and Haskell, JJ., concurred.

Thomas M. OLIVER

v.

William H. LOOK.

A petition under the statute of Maine, R. S., ch. 104, §§ 47, 48, praying that the respondent be summoned into court to show cause why he should not bring an action to try an asserted title to real estate, should contain such a descrip-

tion of the real estate as will give notice to the respondent to what land the petition referred.

(Franklin—Decided December 9, 1885.)

ON EXCEPTIONS. Overruled.

The case is stated in the opinion.

Mr. S. Clifford Belcher, for plaintiff.

Mr. H. L. Whitcomb, for defendant.

Foster, J., delivered the opinion of the court:

The petition in this case is sufficiently formal for the purposes of the statute upon which it is based. It alleges the petitioner's possession and an estate in fee of certain real estate, together with an averment of his information and belief that the defendant makes a claim adverse to said estate by way of mortgage upon the same, and praying that he be summoned to show cause why he should not bring an action to try his alleged title.

The only objection raised, about which there can be any question, is in relation to the sufficiency of the description of the real estate set out in the petition. It is claimed that this is not so definitely described as to give the defendant proper notice of the land in question. This objection cannot prevail. The answer which the defendant filed to the petition discloses no such objection as that now raised, but states that the defendant has an interest "in the premises described in the petition." It would seem, therefore, that the description therein contained was sufficiently definite to give notice to the defendant to what land the petition referred.

We see no reason for saying that, in this proceeding, which is preliminary in its nature to any action that may be brought by the party claiming title adverse to the petitioner, the premises are not sufficiently described. The descriptions of lands in a demand for dower may be sufficient, and yet not as definite as would be required in a writ for its recovery. All that is required in such demand, says *Wilde, J.*, in *Atwood v. Atwood*, 22 Pick., 286, "is that the description of the land should be such as to give notice to the tenant to what land the demand refers." A more stringent rule, however, has been applied with reference to the certainty of the description required in a writ of entry, dower or partition. Such description forms the basis of a formal and final judgment which is to fix or transfer the title or possession adversely. In those actions, the description of the land must be so certain that seisin may be delivered by the sheriff without reference to any description outside the writ.

But in the case at bar we think the defendant, from the description given, might well understand to what land the petitioner referred. The premises are described. Not only is reference by deed and record given, but the number and range of the lots as well, together with certain fractional parts thereof. Such description may be considered sufficient for the proceedings instituted by the petitioner. *Sillouway v. Hale*, 8 Allen, 62.

Exceptions overruled.

Peters, Ch. J., Danforth, Virgin. Libbey and Emery, JJ., concurred.

Andrew M. MORGAN *et al.*, *Appls.*,

Nathaniel T. BOOTHBY.

An appeal does not lie from the decree of the Court of Insolvency granting a discharge to an insolvent who has made a composition with his creditors; even although one ground of appeal be that the Judge refused to require the insolvent to undergo an examination concerning his property at the request of creditors who were dissatisfied with the settlement.

(York—Decided December 21, 1885.)

INSOLVENCY proceedings. *Appeal dismissed.*

Nathaniel T. Boothby, insolvent, effected a compromise with his creditors, filed in the Court of Insolvency an agreement signed by a majority of his creditors and by creditors holding three fourths of all his indebtedness, in the form required by statute, and satisfied the court that the percentage named had been paid or deposited.

Appellants then filed a petition for an examination of the debtor, which the court refused to grant. The court then granted the debtor his discharge.

The plaintiffs appealed from the refusal of the court to order an examination and also from the order of discharge.

The case appears in the opinion.

Messrs. N. & H. B. Cleaves, for appellants.

Mr. H. Fairfield, for appellee:

No appeal can be taken in a case like this, R. S., ch. 70, § 12, p. 578, because not provided for specially or generally; nor does appeal lie from a decision of a judge "in granting a discharge" under R. S., ch. 70, § 44, p. 584.

As in probate appeals, so in appeals from the Court of Insolvency, the appellant is restricted to such points as are specified in the reasons of appeal, and those reasons should be set forth specifically. *In Re Hawkes*, 70 Me., 218.

Appellants say—"Examination should have been ordered." Not so. Composition papers had been filed. The percentage named had been paid to the requisite proportion of the creditors in number and amount. The court had been satisfied of this. Nothing remained to be done but to grant the discharge. "If the judge is satisfied that such agreement is signed, etc., he shall give such debtor, etc., a full discharge." R. S., ch. 70, § 62.

"Insolvency proceedings stand in abeyance, so to speak, while the negotiations for composition are going on, and they revive or die, according to the failure or success of these negotiations of the debtor with his creditor. *In Re Shafer*, 17 Nat. Bankruptcy Reg., 120; *In Re Alanson & Tift*, 18 Id., 177; *In Re Weber Furniture Co.*, 13 Id., 529.

As to the unconstitutionality of the composition clause: if the fact that the question cannot be raised under these proceedings, is not sufficient answer, *Kingley v. Cousins*, 47 Me., 95, is.

Peters, Ch. J., delivered the opinion of the court:

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It is here claimed that an appeal lies from the allowance of a discharge of an insolvent who made a composition settlement with creditors. The case of *In Re Hoyt*, 76 Me., 894, is an authority directly opposed to such claim. The appellant contends that an appeal should be open to him in the present case, because he was denied the privilege of having the insolvent personally examined concerning his property. But that refusal by the Judge gave no cause for an appeal. It was designed that a single creditor should not be enabled to block or delay such a settlement. The idea of the law is, rapid proceedings and speedy settlement. Delays have a tendency to lessen the amount of an insolvent estate. There are a great many matters in insolvency proceedings which must be finally settled by the Judge. He could see no expediency in an examination of the debtor after the composition agreement was entered into; and we see none.

Appeal dismissed.

Walton, Virgin, Libbey, Foster and Haskell, JJ., concurred.

STATE

v.

William A. GERRISH.

1. An indictment for concealing stolen goods is not bad because the property is collectively instead of separately valued.
2. Exceptions to a refusal to grant a motion in arrest of judgment, cannot be sustained, on the ground that there was a want of proof of a material allegation in the indictment.
3. At the trial of an indictment for larceny or receiving stolen goods, it must affirmatively appear that the goods had some value; this may be inferentially shown, as by an inspection of the goods by the jury or from a description of them by witnesses.

(York—Decided December 16, 1885.)

ON defendant's exceptions. *Overruled.*
Indictment for concealing stolen goods.

The case is stated in the opinion.

Messrs. Copeland & Edgerly, for defendant:

The indictment must state the value of the articles stolen. *Commonwealth v. Smith*, 1 Mass., 245.

Every material allegation in an indictment must be proved as alleged, and it was incumbent on the State to show that the goods alleged to have been stolen were of value. *Hope v. Commonwealth*, 9 Met., 138; *Locke v. State*, 33 N. H., 106.

There was no testimony in the case to show that there was more than one pair of shoes taken, and there was no evidence that there were any boots belonging to Dalton. As the defendant may have been convicted without being found guilty of concealing anything which the grand jury and the traverse jury concurred in finding to be of any value, the verdict should

be set aside. *Commonwealth v. Lavery*, 101 Mass., 209; *O'Connell v. Commonwealth*, 7 Met., 460; *Hope v. Commonwealth*, 9 Met., 134.

Mr. Frank M. Higgins, County Attorney, for the State:

The offense of receiving stolen property is a substantive crime in itself, and not merely accessory to the principal offense of larceny. *Commonwealth v. Barry*, 116 Mass., 1; *State v. Bicker*, 29 Me., 84; 1 Whart. C. L., 8th ed., § 983; 1 Bish. Cr. Proc., 3d ed., § 981.

The statute of this State makes no mention of value; it requires that it shall be property. Under this statement value need not be averred; or if averred, it need not be proved. 2 Bish. Cr. Proc., 3d ed., § 718.

"Whether, where value was not of the essence of the indictment, it was ever necessary to aver it, is doubted by Hawkins 'for any other purpose than to aggravate the fine,' or penalty. Roscoe, Cr. Ev., 8th ed., § 126.

"If the punishment depends on the value, it must be stated, otherwise it need not be; the same rule applying here (receiving stolen property), as in larceny." 2 Bish. Cr. Proc., 3d ed., § 935; 8 Redf. Greenl. Ev., § 153.

It is required, when the kind or extent of the punishment depends on the value of the stolen articles, but otherwise when it does not. 2 Bish. Cr. Proc., 3d ed., § 713.

It is unnecessary to prove the value laid in the indictment, unless the precise sum forms the essence of the offense, or is stated as a matter of description. Whart. Cr. Ev., 8th ed., § 126; *Commonwealth v. Morrill*, 8 Cush., 574; *Commonwealth v. McKenney*, 9 Gray, 114; *Commonwealth v. Lawless*, 103 Mass., 431; *State v. Buck*, 46 Me., 531.

Value may be inferred from the general testimony without precise proof. Whart. Cr. Ev., 8th ed., § 126; *Remsen v. People*, 57 Barb., 324; *Commonwealth v. Logan*, 3 Brewst. (Pa.), 341.

But where value is not essential to the punishment it need not be proved, though needlessly it is alleged. 2 Bish. Cr. Proc., § 751, 3d ed.

The inspection of these articles by the jury for the purpose of ascertaining that they were of some value was competent; and if by such inspection they were satisfied that the articles were of value, they were authorized so to find. *Commonwealth v. Burke*, 12 Allen, 182.

On the trial of an indictment for larceny of a horse, the jury are warranted in finding that he is of some value, upon evidence that he was a dark sorrel horse, weighing about nine hundred pounds, had a long tail and was driven a long distance. *Commonwealth v. McKenney*, *supra*.

The jury were correctly instructed, that if they were satisfied by all the evidence and by inspection of the goods alleged to be stolen, that they were of any value, the allegation of value in the indictment was sustained. Proof of the alleged value was not necessary. It was sufficient for conviction, that the property alleged to be stolen should be shown to be of some value, at least to the owner, if to no one else; things of no value not being the subject of larceny. *Commonwealth v. Riggs*, 14 Gray, 378; *Commonwealth v. Lawless*, *supra*.

It is enough that the article stolen was of

some value, and that fact being essential to constitute a larceny, the general verdict of guilty must necessarily include the finding of value to the property alleged to be received. *Commonwealth v. McKenney*, 9 Gray, 118.

In *Hope v. Commonwealth*, 9 Met., 134, an indictment for larceny in two counts, the verdict was that defendant was guilty of stealing one of the articles among a number of others, charged in the second count.

Where an indictment alleges a larceny in various articles, and adds only to the collective value of the whole, such allegation is not sufficient, where the defendant is not found guilty of the larceny as to the whole. Id., 137.

In *O'Connell v. Commonwealth*, 7 Met., 460, it was a question as to the plea of guilty, as to fifty dollars' worth of stolen property alleged to have been received by defendant.

In *Commonwealth v. Lavery*, 101 Mass., 209, a rule is laid down that is not consistent with the opinion of the courts of this State as laid down in *State v. Hood*, 51 Me., 363; 1 Whart. Cr. L., § 952.

In *Locke v. State*, 32 N. H., 106, it was decided that (in larceny) where the sentence depends upon the value of the property, the jury should be directed to find the value of the property stolen.

Peters, Ch. J., delivered the opinion of the court:

The indictment charges the concealing of stolen goods, described in this manner: "One box containing about twenty pounds of tobacco, one chest of tea, thirty pairs of shoes and ten pairs of boots, all of great value, to wit: of the value of \$75."

Several matters are presented under the motion in arrest, which we cannot consider, because they arise outside of the indictment. The only point, presented under the motion, that may be seen upon the indictment itself, is that the goods are collectively instead of separately valued. But this does not render the indictment void. It may have made it difficult to maintain. The point relied on by the defense is, that, inasmuch as all the alleged goods were not stolen and concealed, the entire value of the property may have attached to the goods which were not stolen, the others being valueless. But the indictment itself discloses no such weakness. The presumption arising from a general and unqualified verdict is, that all the goods were stolen and secreted. The verdict saves the indictment, rendering the whole record good. *State v. Hood*, 51 Me., 363; *Commonwealth v. Lavery*, 101 Mass., 207; 2 Bish. Cr. Proc., 3d ed., § 714.

The counsel for the respondent asserts that, as a matter of fact, all the creditor's articles were not stolen, and produces a copy of the evidence for our examination, that we may see that they were not. But that is a matter of proof and not of pleading. To meet any defect of proof, the remedy would have been to request rulings appropriate to the facts, if not given without request. Or, a motion to set the verdict aside as being against the proof would have reached the alleged difficulty. The point is presented to us only upon exceptions to a refusal to sustain a motion in arrest.

In the bill of exceptions, a point is made upon

the ruling of the Judge in another question. It is inferable from the exceptions there is no evidence introduced to show what the goods or any of them were worth, or whether worth anything or not. That is, no witness testified specifically upon the question of value. The Judge was requested to tell the jury that the prosecution must prove that the articles named in the indictment were of value, and that the fact should be proved by evidence and was not to be merely inferred. The jury were instructed that the fact of value must be proved by evidence, but that they might infer from all of the evidence in the case whether the articles were of some value or not. This was correct.

It was not required that the fact of value should be established by any separate proof. The jury may infer it from an inspection of the articles or from having heard them described by witnesses. The jury need not necessarily be informed of what they can see for themselves. Many things speak their own value. *Res ipsa loquitur*. Suppose the stolen goods had been government gold pieces; would it have occurred to anyone that a witness should be called to swear that they were valuable? 2 Bish. Cr. Proc., § 751, and cases; *Commonwealth v. Burke*, 12 Allen, 182; *Commonwealth v. McKenney*, 9 Gray, 114; *Commonwealth v. Lawless*, 103 Mass., 431.

Exceptions overruled.

Walton, Virgin, Libbey, Foster and Haskell, JJ., concurred.

Thomas H. WELLMAN

v.

John DICKEY.

1. A deed bounded the premises by the center of a road; and following the description appeared these words: "Excepting the roads laid out over said lands." Held, that the deed conveyed the fee within the limits of the way, subject to the easement of the public in the way.
2. Highway surveyors cannot dig for materials suited for the making or repairing of ways, upon land outside the limits of the way, unless it is uninclosed and uncultivated.
3. The owner of land upon a public way may lawfully plant ornamental or shade trees within the limits of the way, if the public use is not thereby obstructed or endangered; and highway surveyors who destroy such trees without reason or necessity are trespassers.

(Waldo—Decided December 19, 1885.)

ON defendant's exceptions. *Overruled.*

Action for trespass on real property.

The facts are stated in the opinion.

Messrs. Knowlton & Knowlton, for defendant:

The second requested instruction should have been given because the plaintiff, in his writ, claims damage for cutting down and removing the trees. He does not claim damages for an

injury to his crops, but for an injury done to the land; to the estate, and nothing more. *Little v. Palister*, 3 (Greenl.), Me., 6; *Starr v. Jackson*, 11 Mass., 519.

In *Cyr v. Dufour*, 68 Me., 492, the court said to the jury substantially, "If the defendant was inside the location, he was not guilty." Exceptions were taken and the lower court overruled the exceptions.

The grantor in plaintiff's deed did not convey the land where the road was laid out twenty years before the date of the deed. The general boundaries are given, conveying the whole tract "except" a part of said premises; that excepted part was not conveyed. The plaintiff has no title to the excepted land. *Inhab. Winthrop v. Fairbanks*, 41 Me., 307; *Bussey v. Grant*, 20 Me., 281.

Exceptions in a deed are always a part of the thing granted. *Winthrop v. Fairbanks*; 41 Me., 307; *State v. Wilson*, 42 Me., 9; *Brown v. Allen*, 43 Me., 590.

Mr. William H. Fogler, for plaintiff.

Haskell, J., delivered the opinion of the court:

Trespass *quare clausum* for the cutting down of twenty ornamental trees. The defendant attempts to justify, by the lawful performance of duty as highway surveyor.

The plaintiff, in 1859, entered into possession of a lot of land, lying "southwardly" of a highway, under an agreement to purchase, and hitherto has held possession thereof, and received a deed of the same, October 14, 1863. He planted and nurtured a row of shade trees across his land along the highway. The jury found that some of the trees stood without the limits of the highway, and assessed damages.

The words of grant in the plaintiff's deed conveyed the land to the center of the highway; but following the description, it contained the words, "excepting the roads laid out over said land." To the instruction, that the deed conveyed the *locus* to the center of the road, the defendant has exception.

Such construction should be given to a deed, that each part, phrase and word, may have force and effect, that the intention of the parties, if by law it may, shall prevail; and exceptions from the grant must be construed, in cases of doubt, most strongly against the grantor. *Worthington v. Hytler*, 4 Mass., 196; *Wyman v. Farrar*, 35 Me., 64.

The intention of the parties to this deed undoubtedly was, that the plaintiff should take the title to the center of the way, but that the easement of the public, incident to the uses of a public way, should be excepted from the grant; otherwise the *locus* would naturally have been bounded by the line of the road. Moreover, the exception in terms is of something laid out over the land, not the land itself. This construction has been repeatedly adjudged. *Kuhn v. Farnsworth*, 69 Me., 404; *Tuttle v. Walker*, 46 Me., 280; *Moulton v. Trafton*, 64 Me., 218; *Leavitt v. Towle*, 8 N. H., 96; *Richardson v. Palmer*, 38 N. H., 212; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159.

The Presiding Justice instructed the jury, that, if the defendant dug outside the limits of the road upon the *locus*, where "it was cultivated for the crops of grass only, with trees

planted upon it," he would not be protected by R. S., ch. 18, § 65. To this instruction the defendant has excepted.

That statute authorizes the surveyor to dig for materials suited for the making or repair of ways, in land not inclosed or planted, and if the same are taken from land without the limits of the way, then at the charge of the town. The statute contemplates, that only uninclosed and uncultivated land shall be subjected to the will of the surveyor in such behalf. If the land is seeded or in any way prepared and used for tillage or for the production of crops or trees, useful or ornamental, the surveyor must not dig upon it; such land is "planted," that is, subjected to the uses of husbandry, reclaimed from a state of nature, so that it has become "tillage or mowing land," the same as "corn or meadow." *Barrows v. McDermott*, 78 Me., 441.

The Presiding Justice instructed the jury that if, from all the circumstances surrounding the case, the action of the surveyor in removing the trees planted within the limits of the road, "was reasonable, and not corrupt or oppressive," he would not be liable in trespass for the act. To this instruction the defendant has exception.

Public officers should act faithfully, discreetly and prudently, with honest purpose and without corrupt motive; when they act unreasonably, indiscreetly and without honest purpose, and with intent to oppress and injure, they do not have the protection of law; they are violators of it and become amenable to its salutary provisions that afford redress to the injured party.

The plaintiff had planted a row of shade trees along the line of the road, some within and others without the road limits. This he had a lawful right to do, if the public use is not thereby obstructed or endangered. The statute, R. S., ch. 8, § 59, VI, encourages this method of beautifying and adorning public thoroughfares. Trees so planted are a public benefit and ought to receive public approval, if not official care. They cannot be lawfully destroyed without the call of public necessity, R. S., ch. 127, § 9. Highway surveyors should protect and guard them, and not wantonly uproot and destroy them, without reason or necessity, as the jury found was done in this case, which is clearly of that class wherein exemplary damages may be awarded, if the jury are of opinion that such salutary relief ought to be given. The remaining exceptions are immaterial.

Exceptions overruled.

Peters Ch. J., Danforth, Virgin, Emery and Foster, JJ., concurred.

Henry W. PERKINS

Oliver B. MORSE.

A married woman in Maine may lease in her own name alone, for a term of years, real estate conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, although

by statutory provision she cannot convey the same without the joinder of her husband.

(Franklin—Decided December 16, 1885.)

FORCIBLE entry and detainer. *Defendant defaulted.*

The plaintiff's declaration alleges that Oliver B. Morse, on May 17, 1883, who had before that time lawful and peaceable entry into the lands and tenements of the said Henry W. Perkins, situated in said Town of Farmington, and described as follows, to wit: the farm formerly known as the Dr. Flint farm, on the easterly side of Sandy River, lying northerly of Hiram Gay's farm; and whose estate in the premises was terminated on June 18, 1883, then did and still does unlawfully refuse to quit the same, although the plaintiff, as he avers, gave due notice in writing to the said Morse, thirty days before June 18, terminating his estate in the premises, to the damage, etc.

And for plea the said defendant comes and defends, etc., when, etc., and says he is not guilty in manner and form as the plaintiff has thereof complained against him; and of this puts himself on trial.

Plaintiff put in evidence deed from William H. Bragg *et al.*, to Georgie E. Morse, dated December 9, 1881, conveying the premises in dispute.

Mr. H. L. Whitcomb, for plaintiff.

Mr. J. C. Holman, for defendant.

Peters, Ch. J., delivered the opinion of the court:

Real estate directly or indirectly conveyed to a married woman by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband; except real estate conveyed to her as security or in payment of a *bona fide* debt actually due to her from her husband. R. S., ch. 61, § 1.

In the case before us, it appears that a farm, with buildings thereon, was purchased in the name of a wife and paid for fully by her husband. They afterwards separated, now living apart. After the separation, he remaining upon the place, she let it under a sealed lease, in usual form, for two years, on a rent payable annually, to the complainant, who seeks to remove the husband from the possession. The only question presented by the case is, whether the lease is a conveyance within the meaning of the statute above quoted. It is the opinion of the court that it is not. There is much to sustain such a conclusion.

The word convey or conveyance must refer to an alienation of the estate, a transference of the title. It is "real estate" that cannot be conveyed. A lease is personal property. It bargains away a temporary possession, does not dispose of any fee or title. There is no inhibition against a sale of personal property by the wife alone, although given to her by her husband.

Real estate "conveyed to" a married woman is the property described. "Cannot be conveyed by her" are the words to be interpreted. A lease may be, in a sense, a conveyance; but such is not the commonly accepted nor the accurate

meaning of the term. When we say premises are leased, we generally mean that the use of them is transferred; and by the term conveyed, that the title is deeded. It is a significant fact that the word convey is many times used in the Revised Statutes, and especially in chapter 73 relating to conveyances, and generally, if not at all times, in the sense of an alienation of the title to real estate. The distinction is clearly observed in § 8, which provides that "No conveyance of an estate, etc., or lease for more than seven years" shall be effectual against third persons unless the deed be recorded.

If the Legislature intended that the wife should not lease property acquired by her through her husband, it would have been easy to declare its intention in explicit terms. It is hardly to be supposed that it was left to be implied. A married woman is not limited in the management of her property, however obtained by her. She may control its income, unless she releases it to her husband. How can she manage this property or control its income, when not occupying it, unless she can rent it? The counsel for the defendant argues that if the wife could lease at all, she can lease the farm for ninety-nine years; a lease practically equivalent to a conveyance of title. This argument is quite plausible but not, in our judgment, sound. If the wife cannot make a lease for two years, it must be because she cannot lease at all. If the lease is for ninety-nine years, a rent will be presumed to be reserved. It would be different from an absolute conveyance, which might result in a waste or loss of the property. If the statute needs amendment, the Legislature can amend it. We construe it as it stands.

An appeal to the authorities sustains the view advocated by the complainant. Jacob's Law Dictionary gives this as the old common-law definition of the word which is the key to the dispute: "Conveyance is a deed which passes land from one man to another." In *Abendroth v. Greenwich*, 29 Conn., 356, a party was to convey a bridge to a town. The court said: "To convey real estate, is by an appropriate instrument, to transfer the legal title to it from the

present owner to another." In *Mayor v. Mabie*, 18 N. Y., 151, a question arose as to the meaning of the word conveyance, in a statute which provides that "No covenants shall be implied in any conveyance of real estate;" and it was held that a grant of wharfage for one year was not a conveyance of real estate. In *Tone v. Brace*, 11 Paige, 566, it was decided that a lease for a term of years was not, in the ordinary sense of the term, a conveyance of land. In the case of *In Re Hunter*, 1 Edw. Ch., 1, it was decided that where a person was to convey an estate, he must transfer "the whole title." *Mott v. Ruckman*, 3 Blatchf. 71, decides that a charter-party is not a conveyance of a vessel; that it goes to the use and not the title. In *Livermore v. Bagley*, 3 Mass., 487, it was determined, upon a very learned discussion of the question by both bar and court, that the word conveyance in the Bankrupt Law of 1800 referred to a deed of land and not to a bill of sale of personal property.

We think the statutory provision under review should not be very generously interpreted for the husband, when the interests of third persons are likely to be imperiled thereby. The statute is very broad and, in many instances, has been a stumbling block in the way of innocent purchasers. The expediency of the statute is doubted by many. It adds one more opportunity for a defect in titles which the public records cannot disclose. With what safety or certainty can a purchaser ascertain whether an intervening grantor was a married woman when she obtained the estate; or whether the estate was paid for by her husband or herself; or who the husband's "relatives" are or were; and whether any of them gave her the property? Complete protection is attained only by taking no real property from any married woman without the joinder of her husband; and this rule of caution would operate harshly against married women who may wish to sell property held strictly in their own right.

Defendant defaulted.

Walton, Virgin, Libbey, Foster and Haskell, JJ., concurred.

NOTE.—In Maine the statutes confer on married women a liberal right of holding property to their separate use, independently of their husband's control, which the wife may relax with a revocable instrument enabling her husband to manage it; and the same liberal right to hold, acquire and control separate property exists in Massachusetts, the language of whose statutes has been followed in several of the Western States, and so far as the wife's control is concerned, the courts seem disposed to enlarge, as in Illinois, Wisconsin, Minnesota and Kansas. *Schoul, Dom. Rel.*, 212.

Property purchased with funds held to her separate use, or with the proceeds or income thereof, is her separate property. *Hutchins v. Colby*, 43 N. H., 150; *Kirkpatrick v. Banford*, 21 Ark., 268; see, *Teller v. Bishop*, 8 Minn., 226.

The tendency of modern legislation is to secure to the wife's separate use all compensation in the nature of damages for injuries sustained by her through the negligence of others. *Waldo v. Goodsell*, 38 Conn., 422; *Moody v. Osgood*, 50 Barb., 623; *Knapp v. Smith*, *supra*.

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In a case free from fraud or undue influence the wife may mortgage her separate property to secure a third person's debt. *Bartlett v. Bartlett*, 4 Allen, 440.

The rule in many States, under the married women's Acts, is that the husband must join the wife in contracts and conveyances relating to her separate property, particularly her real estate. *Alexander v. Saulsbury*, 1 Ala., 436; *Macley v. Love*, 25 Cal., 387; *Mayor v. Symmes*, 19 Ind., 117; *Haugh v. Blythe*, 20 Ind., 24; *Miller v. Wetherby*, 12 Iowa, 415; *Dodge v. Hollinshead*, 6 Minn., 25; *Eaton v. George*, 42 N. H., 375; *Miller v. Hine*, 13 Ohio St., 565; *Pentz v. Semenson*, 2 Beal., 232; *Wright v. Brown*, 44 Pa. St., 224; *James v. Everly*, 3 Grant, 150; *Murphy v. Bright*, 3 Grant, 236.

While in other States her sole deed of her separate real estate is sufficient to pass her entire interest. *Springer v. Berry*, 47 Me., 380; *Farr v. Sherman*, 11 Mich., 33; *Beal v. Warren*, 2 Gray, 447; and see, *Collier v. Connelly*, 15 Ind., 141; but her execution of a conveyance in blank is void. *Burns v. Lynde*, 6 Allen, 305.

SUPREME COURT OF VERMONT.

Royal BURNHAM

v.

TOWN OF STRAFFORD.

The question was, whether the plaintiff, while selectman, borrowed and paid to the defendant's treasurer for its benefit the sum of \$300. The treasurer denied it, and to strengthen his testimony, his book of accounts was introduced, on which there was no entry of such payment; held, such evidence was not admissible in rebuttal to prove other discrepancies in the treasurer's accounts, independent of and collateral to the question in issue.

(Decided January 12, 1886.)

ASSUMPSIT. Plea, general issue. Trial by jury, June Term, 1884. Judgment on verdict for the defendant. *Affirmed.*

The case is stated in the opinion.

Mr. C. W. Clark, for plaintiff:

Cited Churchman v. Smith, 6 Wharton, 146; *Cogswell v. Dolliver*, 2 Mass., 221; 1 Smith, L. Cas., 374.

Messrs. Heath & Willard, for defendant:

Cited Gardner v. Way, 8 Gray, 189; *Rodenbough v. Roebury*, 4 Zab., 491; *Hitt v. Stocum*, 37 Vt., 524; *Steph. Dig. Ev.*, art. 10; 1 Whart. Ev., § 29; 1 Best, Ev., § 255; 1 Phil. Ev., 171, ch. 7, § 8.

Walker, J., delivered the opinion of the court:

The question upon trial in the County Court was whether the plaintiff delivered to H. A. Hatch, the Treasurer of the Town of Strafford, \$300, which the plaintiff claimed that he, as one of the selectmen, borrowed for the Town and paid over to said Hatch as such treasurer on the 9th day of April, 1871. The defendant Town denied the receipt of the money from the plaintiff and called said Hatch as a witness, who testified that the money in question was not delivered to him, as claimed and testified to by the plaintiff; and to strengthen and corroborate his testimony, the town treasurer's book of accounts of moneys received and paid out, kept by said Hatch, was produced in evidence to show that no such credit appeared upon the book. The plaintiff then called S. F. Frary, who was one of the auditors of the defendant Town for the year 1870-71, and offered to show by him discrepancies in Hatch's accounts, and that he found an error, in the accounts of said treasurer Hatch for that year, of \$200. The County Court excluded the evidence thus offered.

It is contended by the plaintiff that this testimony was competent evidence to impeach the character of Hatch's book of accounts as treasurer, and to weaken the force of the evidence derived from the non-entry of the \$300 in question, upon it.

The evidence offered had relation to transac-

tions prior to and different from the transaction which was the subject of investigation and controversy in the suit on trial. It had no relevancy to the suit on trial.

Treasurer Hatch's book had been produced in evidence by the defendant, and it was open to any scrutiny and examination to which the plaintiff might choose to put it. Its credit as evidence depended upon its appearance, the manner in which it was kept, the order of the entries as to the time and freedom from erasures and alterations, etc.; but, as held in *Gardner v. Way*, 8 Gray, 189, the production of the book in evidence did not give the plaintiff the right, for the purpose of weakening and invalidating the force of the evidence derived from it, to show that an error had been discovered in Hatch's account, on a settlement previously made with the town auditor, concerning items and transactions entirely disconnected with the transaction in question; nor to show that in his accounts as treasurer with other persons, whether upon the same book or other books, dishonest charges had been entered, or that proper credits had been omitted therefrom.

It is claimed that the case differs materially from that of the production of a trader's book to show the sale and delivery of goods, in this: that the production of the book in the case at bar was for the purpose of deriving evidence from the absence of the entry, tending to show that the money was not delivered and received as the plaintiff claimed. We think there is no such distinction to be made, and that the principle which governs the admissibility or inadmissibility of the evidence is the same in each case. In the one case, the book is introduced as evidence tending to show the delivery and receipt of the goods by the charge thereof upon the book; in the other, as evidence tending to show that the money was not delivered and received, from the absence of any credit of the same upon the book where it was the duty of the witness to enter it if he had received it. The fact that Hatch's book was his book of accounts, as town treasurer, does not change the rule touching the admissibility of evidence relative to its credibility.

In law, the same rule is applied to the admissibility of evidence relative to a town officer's book of accounts as to a trader's book of accounts; and evidence which is inadmissible to attack and weaken the force of evidence derived from a trader's book, would, for the same reason, not be admissible to attack the credibility of a town officer's book. Their credibility must be tested by proper evidence under the same rules.

The objection to the admission of evidence of the character offered by the plaintiff in this case is, that it is evidence of an independent and collateral fact and wholly disconnected with the question in issue, and if admitted would tend to raise a new and independent issue which might draw the minds of the jury from the real point in issue and mislead them. Evidence of collateral matter is admissible only in exceptional cases. No authority has been referred to showing that evidence of the character offered, falls within any exception to the rule excluding evidence of collateral facts, and we are not disposed to depart from the long established rule upon this subject.

The judgment is affirmed.

James DOHORTY

v.

Robert MADGETT.

1. A **wrongful detention** of goods from the owner by a naked bailee, on proper demand, is a **conversion** for which trover will lie.
2. Under the **general issue**, the defendant cannot claim that the plaintiff has sued by the wrong name.
3. The **husband alone** is liable for the wrongful detention of property by his wife, which was **delivered in specie** to her in his presence, with his approval, and detained for their use.
4. Admitting the truth of the plaintiff's evidence, it is a **question of law** for the court, and not for the jury, whether he is entitled to a verdict.
5. The **Act of 1884**, whereby a married woman could sue and be sued, was passed after this action was commenced and **has no application**.

(Decided January 2, 1886.)

ON EXCEPTIONS by defendant. *Judgment affirmed.*

Trover. Plea, not guilty. Trial by jury, June Term, 1884, Orange County. Verdict for the plaintiff.

The facts are stated in the opinion.

Messrs. H. A. White and A. M. Dickey, for defendant:

The bailee is responsible only for gross negligence. *Story, Bailm.*, §§ 53, 58; *Spooner v. Mattoon*, 40 Vt., 300.

There was no conversion by the defendant. *Tinker v. Morrill*, 39 Vt., 477.

The basis of the tort is the breach of the contract of bailment. *Story, Bailm.*, §§ 44, 55, 96, 107.

The wife should have been joined. *Davis v. Taylor*, 41 Ill., 405; *Chit. Pl.*, 82; *Dic. Par.*, 476; *Jillson v. Wilbur*, 41 N. H., 106; 2 Hill, Torts, 5, 11.

Messrs. S. B. Hebard and Heath & Careton, for plaintiff:

The jury had nothing to do with the kind of action to be brought. *Underwood v. Hart*, 28 Vt., 120.

Trover will lie. 1 Cow., 332; 6 *Id.*, 757; 18 Pick., 278; 2 Esp., 589; 2 Greenl. Ev., § 644; 2 Saund., 137, *n.*; *Sibley v. Story*, 8 Vt., 15.

The misnomer, if any, could only be taken advantage of by plea in abatement. *Gould, Pl.*, ch. 5, § 79.

The action was properly brought against the husband alone. *Shaw v. Hallihan*, 46 Vt., 389; *Chit. Pl.*, 93.

Ross, J., delivered the opinion of the court:

This is an action of trover to recover for a valise and its contents, which the defendant and his wife, both, refused to deliver to the plaintiff on demand.

There was no question but the plaintiff was the owner of the property and had the right to its possession on demand, as against the defendant. He was the hired servant of the defendant and, as such, assigned a room by the

defendant in his house, in which to sleep and keep his valise. His evidence tended to show that on a certain occasion he delivered the valise, then in his room, and the key thereof to the defendant's wife, in the presence and with the approval of the defendant, and requested her to take care of the same, which she consented to do; and that having seen the valise in its usual place in his room, at noon on the 8th of August, about one hour after he had occasion to go to it, and asked the wife for the key, and on going to his room found the valise gone; that the defendant and his wife were both present in the kitchen, which adjoined his room, and he there demanded the valise of both and they both failed to deliver it and claimed to know nothing about it; that he never obtained his valise or its contents.

His evidence also tended to show that they knew the contents were valuable, and they, with the family, alone had been about the house during the interval of time since he last saw it.

I. The defendant requested the court to charge the jury that if the plaintiff's testimony was all true, he could not recover in this form of action, but the action should have been case against the bailee. The court refused thus to charge and the defendant excepted.

The request was manifestly erroneous, in that it called for a charge to the jury to that effect. It embraced a pure question of law which should be addressed to the court alone; but if addressed properly to the court, the court would have erred if it had complied with it. No principle of law is better settled than that the wrongful detention of goods, by a naked bailee, from the owner, on proper demand, is a conversion. *Sibley v. Story*, 8 Vt., 15; 2 Greenl. Ev., § 642.

The court properly refused to comply with this request.

II. Again; the defendant requested the court to charge that if they found that the plaintiff's name was Robert McIntosh, and not James Doherty, he could not recover. Strangely, the defendant relies upon *Type Foundry v. Spooner*, 5 Vt., 93, to support this request. The doctrine of that case is, that where no such person as the plaintiff named exists, *in rerum natura* the defendant must take advantage of it by a plea in abatement or by a plea in bar. It is there clearly stated that the plea of the general issue admits the existence of the plaintiff and his capacity to sue, and cases are cited from Massachusetts and the United States Supreme Court, in support of the doctrine. This request does not go to the length of claiming, on the general issue even, that there is no such person as the plaintiff named, but that his true name was Robert McIntosh. This request on the case, especially relied upon by the defendant, was properly refused by the court.

III. The defendant also excepted to the charge of the court to the effect, "That, if the defendant's wife wrongfully detained the property in question, on demand of her therefor, the defendant would be liable for the same, for that the wrongful detention of property by the wife, in a case circumstanced like this, would not be her tort but her husband's." We find no error in this portion of this charge.

Says Mr. Greenleaf, in Vol. 2, of his work on Evidence, § 647, on the general subject of trover: "If the action is against the husband and

wife the plaintiff must aver and prove, either a conversion by the wife alone before marriage, or a subsequent conversion by the joint act of both; and it seems, that in the latter case, the evidence ought to show some act of conversion other than that which merely goes to the acquisition or detention of the property to their use; for if the goods remain *in specie*, in their hands, it is a conversion only by the husband." To the like import are 1 Chit. Pl., 98; 2 Saund. (Wms.), 471; *Nelthrop v. Anderson*, 1 Salk., 114; *Draper v. Fulkes*, Yel., 166; *Shaw v. Halahan*, 46 Vt., 389.

The most which the plaintiff's testimony tended to show was an acquisition or detention of the property *in specie* by the defendant's wife, for their use. On these authorities the charge of the court was not erroneous.

We know of no statute nor decision of this court, existing at the time of this conversion, that gives any support to the defendant's further contention, that, under the modification and enlargement of the rights of the wife as they existed at common law, the wife alone should be held liable for her torts, even when committed in the presence and with the assent and under the implied authority of her husband. Whether the Statute of 1884 effected such a change in the law, we have, at present, no occasion to inquire nor declare.

The result is, the judgment is affirmed.

TOWN OF TUNBRIDGE
v.
TOWN OF ROYALTON.
—
TOWN OF CHELSEA
v.
SAME.

1. An attorney of a town instead of one of its officers, can properly sign its name to a petition brought under No. 18 of the Acts of 1884, praying to be relieved from liability of supporting a bridge in another town.
2. The Act of 1884 did not apply to pending cases; but a cause, heard and disposed of in 1881, under R. L., § 2978, was not pending. The former statute was passed to relieve towns from all expenses in such a case; the latter, to apportion them, and has no application.

(Decided November 21, 1885.)

PETITIONS to the Supreme Court of Orange County, heard at the General Term, 1885. The case is stated in the opinion.
Mr. S. B. Hebard, for the petitioners.
Messrs. Lamb & Tarbell, for the petitionee.

Taft, J., delivered the opinion of the court: These cases are petitions under No. 18 of the Acts of 1884, asking to be relieved from liability to support a bridge in the Town of Royalton. The petitionee moves to dismiss the petitions for that they are not properly signed.
VT.

The petition in each case is signed the name of the petitioning town, "by its attorney, S. B. Hebard." The Act authorizing the proceeding reads, "any town, etc., may petition the court." It nowhere provides for the signing by any particular officer of the town; and we are not aware of any law making it the duty of any officer of the town to sign such petitions. An attorney of the town may as well sign as the town agent, or the selectmen. The signature was sufficient.

The Act in question does not apply to cases pending at the time of its passage; and it is claimed, that the cause in which it was originally adjudged that the petitioning town should contribute to the support of the bridge is still pending, an adjudication in said cause having been had in March, 1881, under R. L., § 2978, which permits a town to apply every five years for a new apportionment of the expenses of maintaining the bridge. It is true, another application for a reapportionment cannot be made until March, 1886; but the case is not in court; it is not on the docket of the court, and the court have no power over it in any respect. It was not a pending case at the time of the passage of the Act of 1884.

Again; the petitionee urges that this proceeding cannot be sustained until the expiration of five years from the last adjudication under R. L., § 2978. There is no sound reason for so holding. Section 2978 presupposes the continued liability of the adjoining towns, and merely provided for a change in the apportionment of the expense of maintaining the bridge; but the Act of 1884 was passed for the purpose of relieving the outside towns entirely from bearing any part of the expense of supporting bridges or roads without their own limits; and application can be made for such relief at any time.

The motion to dismiss is overruled.

A. T. EASTMAN
v.
M. T. BARNES.

1. When a replevin bond is conditioned only for a return of a part of the property, the suit should not be dismissed except as to that for which no bond was given.
2. The plaintiff cannot remedy his mistake by filing a new bond.

(Decided November 21, 1885.)

REPLEVIN.
R Heard on motion to dismiss and motion to file a new bond, June Term, 1884, Orange County, Rowell, J., presiding. Motion to dismiss sustained, and plaintiff's motion overruled.
Mr. J. K. Darling, for the plaintiff, cited: R. L., § 1282; *Campbell v. Morey*, 27 Vt., 575; *Bennett v. Allen*, 30 Vt., 684; *Bent v. Bent*, 48

NOTE.—In replevin, against attaching officer, the demand by a chattel mortgagee which specifies only part of the property mortgaged is defective as to the residue; even though referring to the record. See, *Woodward v. Ham* (Mass.) *ante*, 209.

Vt., 42; *Driscoll v. Place*, 44 Vt., 252; *Thurber v. Richmond*, 46 Vt., 395; *Clapp v. Guild*, 8 Mass., 153; *Mansir v. Crosby*, 6 Gray, 384; *Morse v. Hodson*, 5 Mass., 314; *Wilder v. Stafford*, 30 Vt., 399; *Tripp v. Howe*, 45 Vt., 523.

Mr. **John H. Watson**, for the defendant, cited: *Bennett v. Allen*, 30 Vt., 684; *Stoddard v. Gilman*, 22 Vt., 568.

Taft, J., delivered the opinion of the court:

Replevin for a cow and calf. The defendant moved to dismiss, for the reason that the bond taken at the time the writ was served, and which was regular in all other respects, was conditioned for the return of the cow only. The fact that the calf was not mentioned in the bond, did not render the bond null as to the cow; it was valid as to the latter, but void as to the calf. The bond being good as to part of the property, the suit should not have been dismissed, except as to that part for which no bond was given. The security taken by way of bond, in replevin, is a substitute for the property; and the defendant is entitled to such security at the time his property is taken; if he does not get it then, he never may, and the defect cannot be cured by filing a bond subsequently.

The motion to file a new bond was properly denied.

Judgment reversed. Judgment for the return of the calf, with damages to be assessed by the clerk; and cause remanded.

John SPRAGUE

v.

Royal ABBOTT, Jr.

1. The statute provided that the selectmen should annually assess a state school tax previous to the first day of January, but did not specify the list on which it was to be assessed; held, on general principles of law, that it should be assessed on the list last completed and in force at the time of the assessment; in this case, the quadrennial list completed and legalized by the Legislature Nov. 18, 1882.
2. It is presumed that the assessment was after the legalization of the list, as the exceptions do not show that it was before.

(Decided January 12, 1886.)

TRESPASS and case. Plea, general issue and justification under certain rate bills and warrants. Trial by court, December Term, 1884. Judgment for the plaintiff. *Reversed.*

The facts and case are stated in the opinion.

Messrs. **M. P. Dillingham** and **N. L. Boyden**, for defendant:

The tax in question was a state school tax. The money collected does not belong to the town, and cannot be recovered of the town. The town collected it as an agent. *Vt. Cent. R. Co. v. Burlington*, 28 Vt., 200; *Spear v. Braintree*, 24 Vt., 419; *Wilson v. Seacey*, 38 Vt., 221.

The tax was legally assessed on the fall list of 1882. This position is fully sustained by

Royce, J., Clove Spring Iron Works v. Cone, 56 Vt., 603.

The state school tax is provided by general law, R. L., § 656, and is not voted by the town. The Act of 1882, No. 1, provides for assessing state and county taxes on the list next previous to laying the tax.

Messrs. **Heath & Willard** and **S. B. Hebard**, for plaintiff:

The tax was not a state but a town tax. It should have been assessed on the May list. R. L., §§ 338, 354, 657.

The Legislature uses the term "state taxes," in the sense of taxes paid into the state treasury. All provisions of law relating to the special fall list and all statutes directing any taxes to be assessed on such list were repealed by No. 1 of the Acts of 1882; hence, the assessment was illegal; because there was no law prescribing that state or any other taxes should be assessed on such list.

Walker, J., delivered the opinion of the court:

The defendant, as collector of taxes for the Town of Brookfield, received from the selectmen of said town four rate bills of taxes for the year 1882, to wit: town, state, county and state school rate bills, each containing a tax against the plaintiff, with warrants attached thereto for collection. The plaintiff having neglected and refused to pay the said several taxes, the defendant levied upon and sold two shares of stock of Randolph National Bank belonging to the plaintiff, to satisfy said taxes in accordance with the provisions of law; and this suit is brought to recover the value of the stock. The defendant's defense is, justification under said rate bills and warrants. No question is made as to the proceedings of the officer under the several warrants, if the taxes were properly assessed. So if the taxes were properly assessed the defendant's justification is made out.

There were two grand lists for the year 1882: one made up of the appraisal of personal property and polls taken in the spring, and the appraisal of real estate made in the spring of 1881, called the spring or annual list; the other made up of the spring appraisal of personal property and polls, and the quadrennial appraisal of real estate for that year, called the quadrennial or fall list. The latter was required to be completed by October 1, 1882; but in the Town of Brookfield this fall list was not completed until a later date, and was afterwards legalized by an Act of the Legislature, approved November 18, 1882; and then it became a complete and legal list.

Of the taxes thus received by the defendant for collection, the town tax was assessed upon the spring or annual list of Brookfield for the year 1882, and the state, county and state school taxes, upon the quadrennial or fall list of 1882.

The legality and assessment of the town, state and county taxes are not questioned. But it is objected that the so called state school tax was assessed upon the wrong list, and claimed that it should have been assessed upon the spring or annual list and not upon the quadrennial list.

This state school tax, as it is usually called, is a tax required by the statute to be assessed

upon the grand list annually by the selectmen of the town previous to the first day of January, and to be collected and paid into the treasury of the town before the first day of the succeeding March, and during the month of March to be divided among the school districts of the town. R. L., §§ 657, 661. The town treasurer does not receive the money so collected, as money belonging to and subject to the control of the town. The officers of the town are made by law agents to assess and collect the tax and distribute the money to the school districts. Neither the town nor the school districts have any voice or vote in the appropriation, nor any control over the same by their respective votes. It is a tax imposed by authority of a general law of the State, and required to be assessed and paid over annually to the school districts; and on failure to comply with the law a penalty of double the amount of the tax is imposed upon the town.

Act No. 1 of the Acts of 1882 amended § 351 of the Revised Laws specifying upon what grand lists taxes should be assessed so that it reads as follows, viz.: "Town, village, school and fire district and highway taxes voted, on or after the first day of March in any year and before the first day of March following, shall be assessed on the list returned to the town clerk's office in May. The highway tax required to be assessed by § 3044, shall be assessed upon the list returned to the clerk's office in May of the year in which such tax is assessed." Section 351, R. L., § 35 of No. 1 of the Acts of 1882.

By this Act of 1882, state and county taxes were to be apportioned among the towns and cities according to their population, and a warrant for the amount apportioned to each town transmitted to the selectmen; and when received, the officers of the town were to determine the per cent of the tax necessary to raise the sum called for, and assess the same on the grand list completed next previous to the passage of the Act, and cause the same to be collected and paid into the proper treasury, or draw an order on the town treasury for the amount, or borrow the amount on the credit of the town.

The Act of 1882 repealed all the sections of the Revised Laws specifying upon what lists taxes should be assessed in organized towns except § 351, which was amended so as to read as hereinbefore stated. It made provisions for the assessment of all taxes voted by towns, school districts, etc., and for the assessment of a highway tax required to be assessed by § 3044, and for the assessment of state and county taxes apportioned *per capita* to the towns, particularly specifying upon what list the same must be assessed, but made no provision as to what list the state school tax shall be assessed upon. The only law relating to the assessment of the state school tax in force at the time of the assessment of the tax in question was § 657, requiring that it shall be assessed upon the grand list, without specifying upon what list.

The quadrennial list of Brookfield for the year 1882 was completed and legalized November 18, 1882, and was in force from that date as a legal list of the town, upon which all taxes were to be assessed, that were not required by law to be assessed upon an earlier list. The selectmen assessed the tax upon this quadren-

nial list; and as the exceptions do not show that the tax was assessed before the completion and legalization of the same, the presumption is that it was assessed after the list was completed and in force.

The court will not presume error when none is shown to exist, and no error was claimed as to the time of the assessment. The counsel, upon both sides, argued the case upon the assumption that the tax was assessed after November 28, and before December 21, 1882, and within the period required by law for the assessment of this tax.

This assessment, then, was made upon the list last completed and in force at the time of the assessment; and we think rightfully and in accordance with the provisions of law. This tax was not voted by the town, and was not designated in § 351, R. L., as a tax required to be assessed upon the spring or annual list; and its assessment must, therefore, follow and be governed by general principles of law.

It is well settled that taxes voted by any municipal body must be voted and assessed upon the grand list last completed and in force at the time of the voting or laying of the tax, unless otherwise provided by law.

And we think the same principle applies to the assessment of a tax required to be assessed under a general law of the State; that is, in the absence of any statute directing upon what list the same shall be assessed, it must be assessed upon the grand list, completed and in force at the time of the assessment, if made within the period limited by law; and no question is made but that the assessment of the tax in question was made within the time required by the law.

There was no other list then in force, upon which the tax could have been legally assessed.

The appraisal of real estate in the spring of 1881 was substituted for the quadrennial appraisal of 1878, and was to continue in force in lieu thereof only until the next quadrennial appraisal. So, necessarily, the completion of the quadrennial list rendered the spring list of 1882 invalid for the assessment of any tax, except such taxes as were particularly designated and required by law to be assessed upon it.

Therefore, as the state school tax is not, by the statute, required to be assessed upon the spring list, it follows that the quadrennial list was the only list in force upon which the assessment could have been legally made, at the time it was made. As this holding is decisive against the plaintiff, it is not necessary to consider the other questions raised in the case.

The judgment of the County Court is reversed and judgment rendered for the defendant.

Asa SOUTHWORTH

v.

A. L. KIMBALL'S ADMR.

- 1 A bill in equity will not lie against the administrator of a deceased married woman's estate to recover the value of a government bond, claimed to have been delivered by mistake to the intestate in her lifetime, as there is an adequate remedy at law, if any.
2. But if the orator had any equity, the

bill should be **dismissed** on demurrer; as it is not alleged that the intestate left any **separate estate to be charged** with the payment; or, if so, that it was sufficient to **pay all claims in full**; or that the bond had been converted into money; or that commissioners had been appointed,—the prayer of the bill being that the value of the bond be decreed to be paid **out of the funds of the estate**.

3. The law will not raise an implied promise against a married woman, who cannot make a valid contract.

(Decided January 2, 1886.)

BILL IN CHANCERY. Heard on demurrer, December Term, 1884, Orange County. Bill dismissed. *Affirmed.*

The facts are stated by the court.

Messrs. Farnham & Chamberlin, for orator:

The orator did nothing to protect his rights for a tort; nor was he obliged to. The law will raise a promise to pay. The separate estate of a *feme covert* is chargeable for debts contracted on the credit of it, or for contracts made in benefit of it. *N. A. Coal Co. v. Dyett*, 7 Paige, 9; *Dale v. Robinson*, 51 Vt., 21; *Yale v. Dederer*, 18 N. Y., 265; *Sargeant v. French*, 54 Vt., 384.

The rule applies as well to an implied as to an express promise. *Murray v. Barlee*, 4 Sim., 88; *S. C.*, 3 Mylne & K., 225.

There was no adequate remedy at law. Claims of an equitable character cannot be passed upon by commissioners. *Hendrick v. Cleveland*, 2 Vt., 829; *Brown v. Sumner*, 81 Vt., 671; *Sparhawk v. Buell*, 9 Vt., 71.

The intestate's estate will be made liable in equity. *Picard v. Hine*, L. R., 5, Ch. App. Cas., 274.

Mr. John H. Watson, (Bradford) for defendant:

A married woman's express contract is not chargeable upon her separate estate, unless the credit was given to the estate, not to the individual. *Sargeant v. French*, 54 Vt., 384.

Her general engagements, being void at law, will not be enforced in equity. *Dale v. Robinson*, 51 Vt., 21.

No promise can be implied. *Curtis v. Engel*, 2 Sandf. Ch., 287; *Johnson v. Gallagher*, 8 De Gex., F. & J., 494.

The same doctrine is held in New Jersey. *Armstrong v. Ross*, 20 N. J. Eq., 109; *Perkins v. Elliott*, 22 N. J. Eq., 127.

The torts of a married woman cannot be satisfied out of her separate estate. *Perry, Tr.*, § 659; *Wright v. Chard*, 1 De Gex., F. & J., 567; 4 Jac. Fish. Dig., 6108.

The remedy is adequate at law, if any. *R. L.*, § 2133; *Currier v. Rosebrooks*, 48 Vt., 84; *Shaw v. Hallihan*, 46 Vt., 389; *Adams v. Adams*, 22 Vt., 50.

Ross, J., delivered the opinion of the court: The defendant has demurred to the orator's bill of complaint. The contention is, whether the facts admitted by the demurrer entitle the orator to relief in a court of equity. The controlling facts set forth in the bill are: that in 1863, the orator took two United States gold bearing bonds of \$100 each from the intestate,

who was then a married woman, to exchange for other like bonds having a longer term to run; that he did so exchange them and, on the 5th of August, 1863, by mistake, delivered to her three, instead of two, such bonds; that she remained a married woman until her decease in 1868, and that he has never had the \$100 bond, so delivered by mistake, returned to him, or any payment or interest therefor. He prays that the defendant, who is administrator on her estate, may be decreed to pay him the value thereof with interest out of funds belonging to her estate. There is no affirmative allegation, that the intestate left any estate, nor, if so, that it is sufficient to pay all claims against it in full; nor that he ever demanded said bond of the intestate nor of the former or the present administrator on her estate; nor that she or they have converted said bond into money; nor of the time when he first discovered his mistake, except it was after the death of the intestate; nor that she was ever made aware of it in her lifetime; nor that the bonds were her sole and separate property; nor whether commissioners have ever been appointed on her estate.

It was held by this court in *Brown v. Sumner*, 31 Vt., 673, that a debt resting upon a promise of a married woman for its foundation (in that case it was a promissory note) could not be proved and enforced through commissioners on her estate, such promise being void. But in the case at bar, no promise is alleged and none could be implied from the facts and circumstances stated in the bill. It does not appear that she ever used the bond; she may have kept it as the property of and for the orator. It follows logically, that, against a person incapable of making a valid promise, the law would not raise an implied promise or undertaking. *Curtis v. Engel*, 2 Sandf. Ch., 287; *Perry, Tr.*, § 659; *Murray v. Barlee*, 4 Sim., 88.

To charge the separate estate of a married woman, it is not enough to show her promise, express or implied, to pay the debt. It must be shown that the debt, for the payment of which the promise was made, went to the benefit of her separate estate or for her benefit on the credit of such estate. *Sargeant v. French*, 54 Vt., 384.

If it be admitted, which is not alleged, that the bond went to the benefit of the intestate, there is no allegation that it went for the benefit of her separate estate, or that she left any sole and separate estate to be charged in equity with its payment. It is not alleged that any interest on the bond was paid to her in her lifetime. The facts of the bill negative that the bond was delivered on the credit of her separate estate. If it should be held that the orator's remedy is to have her estate in the hands of the administrator charged with the payment, the bill is lacking in the proper allegations to raise such equity. But we think that if the orator has any remedy, he has an adequate remedy at law. If the bond was converted by the wife during her lifetime the tort did not, at common law, survive. *Hamblly v. Troit*, 1 Cowp., 871.

Neither could the tort be satisfied out of her separate property, if any she had; because there is no contract, express or implied; which shows an intention to charge her separate estate; nor

can property, delivered by mistake, be said to be delivered to a married woman, on the faith or credit of her separate estate or for its benefit, which is necessary for equity to charge the estate with its payment. *Dule v. Robinson*, 51 Vt., 20.

By our statute, § 2188, trover for personal estate survives. If the intestate had converted the bond to her own use during her lifetime, by converting it into money and adding it to her separate estate, the orator could have maintained trover against her and her husband and could have taken the execution issued on such judgment against the property of either. If she had simply detained it, *in specie*, the conversion would have been to the use of the husband for which he alone would be liable, as held in *Doherty v. Madgett* [*ante*, 846], the present term, and in *Shaw v. Hallihan*, 46 Vt., 389. If the conversion was of such a nature that she would be liable with her husband, so that her property could be taken on the execution, we do not see any legal objection against proving it against her estate before commissioners, if they have been appointed; and if no commissioners have been appointed, against its enforcement by a suit at law against the administrator, unless the claim has become barred by the appointment of commissioners and a failure to prove the claim before them, or by the Statute of Limitations, by failure to sue the administrator.

If the bond came intact into the hands of the administrator, it being the property of the orator, and never converted by any act of the intestate, the orator had the right to pursue the administrator at law, personally, for the bond or its conversion.

The bill is lacking in substance necessary to furnish the orator with equitable relief; and, we think from the facts not alleged, which properly might be brought into the bill, by way of amendment, that the orator has adequate remedy at law for the wrong, if any, either against the estate of the intestate, against her husband or against the administrator personally, unless he has lost and suffered his rights to become barred, by non-action or neglect.

The decree of the Court of Chancery, dismissing the bill, is affirmed and the cause remanded.

Zadock H. CANFIELD

v.

Seymour HARD.

1. A party must show that he was injured by the charge, where the only error, if any, was, that it was inapplicable.
2. A mortgage of land in the actual adverse possession of one claiming to hold adversely to the mortgagor, is void as to the claimant; thus, in an action of ejectment between a mortgagee and such claimant, the court instructed the jury, that if the defendant's possession was "actual, visible, open, notorious and hostile, under a claim of ownership," the mortgage was void as to him; held, correct.
3. The purchaser was put upon inquiry; VT.

and it was not sufficient to inquire of the mortgagor, but he should have inquired of the possessor, and before the mortgage was taken. He cannot now assume from any subsequent reply, that he could not have learned the truth from the party in possession by due inquiry.

4. One may have a homestead in a house which he has erected on land occupied by him under a verbal agreement to convey, but such an agreement as a court of equity would decree to be performed; and, under our statute, he cannot relinquish his right by any oral statement nor by acknowledging himself as tenant to one who claims under a mortgage executed by the original owner of the land after the erection of the house.
5. In an action of ejectment, where the defendant is entitled to a homestead, and the premises in contention are worth more than \$500, the plaintiff cannot recover the excess; as the statute, R. L., § 1907, which provides for setting out the homestead by commissioners, is not applicable to a trial by jury. The verdict could not properly describe what was recovered.
6. In an action of ejectment, general reputation in the vicinity of the premises as to the ownership thereof, is not admissible.
7. Distinction between a gift of land, not enforceable, and a contract with a consideration.

(Decided January 2, 1886.)

EJECTMENT. Plea, general issue. Trial by jury, June Term, 1883, Bennington County. Judgment on verdict for the defendant. *Reversed.*

The plaintiff's evidence tended to show that Levine Hard mortgaged his farm to him and his brother in 1871, and also, a few days later, to one Montgomery; that said Montgomery foreclosed his mortgage, and on July 21, 1879, conveyed the premises to the plaintiff; that pending said foreclosure proceedings, said Levine conveyed said farm to Mary Houston; that in April, 1880, the plaintiff rented the demanded premises to the defendant for one year, and that the letting was renewed the next year; and that the premises in question were a part of said farm. The defendant's claims and evidence are sufficiently stated in the opinion of the court.

The plaintiff, in rebuttal, offered evidence tending to show that said defendant's occupation of said premises was not adverse to the said Levine, but by his permission; and that the defendant did not treat nor claim said premises as his own private property; that when the plaintiff, in 1879, was about to buy the Montgomery title, he applied to the said Levine to know if the defendant had any claim or right in said premises, and that afterwards the defendant came to the plaintiff and stated that he did not make any claim thereto, and also sent word to the same effect.

The plaintiff also introduced a deed from the said defendant to said Mary Houston, dated

November 19, 1879, and one from said Mary Houston to the plaintiff dated September 14, 1880.

The plaintiff's 18th, 14th and 15th requests to the court to charge the jury, in substance, were: that if the jury find that the defendant was holding in July, 1879, adversely to the Montgomery mortgage, it would not be the duty of the plaintiff, when buying that mortgage, to do more than make reasonable inquiry of the defendant, as to the terms of his possession; that the plaintiff is chargeable, not with what the defendant now claims, but with what the plaintiff would have learned by such inquiry in 1879; that if the plaintiff at that time would not have learned by reasonable inquiry of the defendant that he was holding adversely to the Montgomery mortgage, then the plaintiff was not chargeable with notice of the defendant's claims.

Messrs. Burton & Munson and J. K. Batchelder, for plaintiff :

The court erred in refusing the plaintiff's 18th, 14th and 15th requests, which were, in substance, that if the defendant was holding adversely in 1879 to the Montgomery mortgage, it was the duty of the plaintiff to only make reasonable inquiry of the defendant as to the terms of his possession; and that plaintiff is chargeable by reason of such possession, not with what the defendant now claims, but with what the plaintiff would then have learned. The question is: did the plaintiff make reasonable inquiry? *Savings Bank v. National Bank*, 53 Vt., 89; *Seymour v. Darrow*, 31 Vt., 189; *Stafford v. Ballou*, 17 Vt., 329; *Blaisdell v. Stevens*, 16 Vt., 186.

Open, exclusive possession is sufficient to put the purchaser on inquiry; *Shaw v. Beebe*, 35 Vt., 205; but this possession was not such as to render this mortgage void. *Ripley v. Yule*, 18 Vt., 220; *S. C.*, 19 Vt., 156.

The defendant's homestead interest could not attach until the expiration of fifteen years. His evidence tends to show nothing more than a parol gift of the land. A court of equity will not enforce a voluntary agreement. *Autrobus v. Smith*, 12 Ves., Jr., 89; *Edwards v. Jones*, 1 Mylne & C., 226; *Meek v. Kettlewell*, 1 Hare, 464; *Taylor v. Staples*, 8 R. I., 170.

The fact that the defendant made improvements does not help the case towards an equitable ownership. *Pinckard v. Pinckard's Heirs & Admrs.*, 23 Ala., 649; *DeVeaux v. DeVeaux*, 1 Strob. Eq., 288; *Rucker v. Abell*, 8 B. Mon., 566; *Boze v. Davis*, 14 Tex., 381.

Some of the cases hold that the donee has an equitable lien for what he has expended; but there can be no homestead in such lien. Possession under a contract not enforceable in equity is not adverse. *Briggs v. Prosser*, 14 Wend., 227; *Jackson v. Johnson*, 5 Cow., 74.

At all events, the plaintiff can recover the excess above the homestead. *Earl v. Dunton*, Brayt., 67; 1 Burr., 329; *Guy v. Rand*, Cro. Eliz., 18.

Mr. J. C. Baker, for defendant:

The consideration for the land on which the house was erected, was the removal of the defendant to it, and taking a permanent interest in the father's business. Lasting improvements were made on the land. A court of equity would have decreed specific perform-

ance. *Story, Eq.*, § 761; *Brown, Fict.*, § 487; *Adams v. Rockwell*, 16 Wend., 285; *Harder v. Harder*, 2 Sandf., 17; *Stark v. Wilder*, 86 Vt., 752; *Griffith v. Abbott*, 56 Vt., 356; *Holmes v. Caden*, 57 Vt., 111.

A parol promise to "give" land, accompanied with possession and with substantial improvements, will be enforced in equity. *Freeman v. Freeman*, 43 N. Y., 34; *Hardesty v. Richardson*, 44 Md., 617.

In such case the land is treated precisely as if the conveyance had been made. *Story, Eq.*, 790; *Huffman v. Hummer*, 2 C. E. Green, 263; *Worrall v. Munn*, 88 N. Y., 187; *Seton v. Slade*, 7 Ves. Jr., 264.

The defendant had a homestead in the premises, which could not be lost by any statement, or acknowledgment of tenancy, or by his deed, unless his wife joined. *R. L.*, § 1904; *Abell v. Lathrop*, 47 Vt., 375; *Whiteman v. Field*, 58 Vt., 554; *McClary v. Bizby*, 36 Vt., 254; *Jewett v. Guyer*, 38 Vt., 218; *Danforth v. Beattie*, 43 Vt., 188.

Certainly the defendant had an equitable interest in this land, as soon as he completed his house; and one may have a homestead right in such interest. *Morgan v. Stearns*, 41 Vt., 398; *Doane's Est. v. Doane*, 46 Vt., 485.

The plaintiff could not recover the excess above the homestead. *Pardee v. Lindley*, 31 Ill., 174.

The mortgage was void as to the defendants. *Stevens v. Whitcomb*, 16 Vt., 121; *Ripley v. Yale*, 19 Vt., 156.

The plaintiff was put upon inquiry; and took by his deed subject to the rights of the party in possession. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt., 274; *Stevens v. Goodenough*, 26 Vt., 676; *Pope v. Henry*, 24 Vt., 560; *Sellick v. Starr*, 5 Vt., 255.

Ross, J., delivered the opinion of the court: The plaintiff placed his right to recover the demanded premises upon the fact that he held the record title.

The defense rested upon three grounds: that the defendant was in adverse possession of the premises, claiming to own them when the plaintiff took his deed thereof; that he had acquired a possessory title thereto by fifteen years of continuous, open, adverse possession, under a claim of ownership; and that if he had not acquired such title, he went into the occupation of the premises under such circumstances, that an equitable interest therein at once accrued to him, and thereby, a homestead right which he could not state away nor defeat, by acknowledging himself to be tenant to the plaintiff, and could only convey by deed in which his wife joined. He gave evidence, which was more or less contradicted by the evidence introduced by the plaintiff in support of these several grounds of defense. It was, therefore, incumbent upon the court to adapt its instructions to the jury, to the issues thus formed.

1. It is not contended that the instructions in regard to the acquiring a possessory title to the premises were incorrect; but it is claimed that they were not applicable to the case, because that issue was not really in the case; and for that reason, such instructions were confusing to the minds of the jurors. We think this issue

was fairly and fully raised by the defendant's evidence, and hence the instructions were properly given. But if this issue was not fully raised, the plaintiff fails to show that giving correct instructions thereon was legal error causing him injury, which is necessary to entitle him to a reversal of the judgment, and a trial *de novo*.

2. Nor do we discover legal error in the instructions of the court upon the subject of the defendant's adverse possession and occupancy of the premises, defeating as to him, the operation of the plaintiff's deed thereof. When the defendant took possession, the premises were owned by Levine Hard, from whom both parties claim title, or right to title. The Montgomery mortgage, under which the plaintiff derives his title, was given several years after the defendant went into actual possession of the demanded premises. The court told the jury that if the defendant was in actual adverse possession of the premises when the Montgomery mortgage was given, it would be void as to him, "Because the statute provides, R. L., § 1953, that deeds, leases and other conveyances of land shall not have effect to convey such lands, as against an adverse claimant, his heirs or assigns, if, at the time of the delivery thereof, such lands are in the actual adverse possession of the person claiming possession to the same adversely to the grantor." It defined the possession that was necessary to thus operate, as actual, visible, open, notorious and hostile, under a claim of ownership as against the grantor. This is a full statement of the law, in regard to such adverse possession and its effect upon a conveyance made pending such possession. The court told the jury that such possession was notice to the purchaser of the rights of the possessor. The defendant does not contend that this is an erroneous statement of the law in regard to such possession, but contends that it was erroneous in this case, because the plaintiff's testimony tended to show that upon inquiry of the defendant, subsequently to acquiring his rights under the foreclosure of the Montgomery mortgage, the defendant did not claim to own said premises. But the defendant squarely denied making any such concession. It is true that the purchaser, by such possession, is not put upon inquiry of anything which he would not have learned if he had duly and fully inquired of the person in possession, in regard to the rights he claimed in the premises which he was thus occupying. The instructions of the court do not leave the jury to find that the plaintiff would be affected by any knowledge in regard to the character of the defendant's possession, which he would not have learned by due inquiry of the defendant. The fallacy of the plaintiff's contention on this point is in assuming that, upon due inquiry, he would have learned only what he claims by his evidence that he did learn by subsequent inquiry. The jury must have found, under the instructions, that if the plaintiff had made inquiry of the defendant when he took his title, he would have learned that the defendant claimed to be in possession as equitable owner. The plaintiff intimates, though he does not fairly claim it, that it was enough for him to inquire of Levine Hard, the grantor. The rule is inflexible that the inquiry must be made of

the person who is holding the premises adversely to the grantor. The grantor would not have an interest to disclose such adverse holding if he knew of it.

3. The court told the jury, in substance, that if the defendant in 1865 went into possession of the premises under such an arrangement and agreement with his father as his evidence tended to show, and that he thereupon erected a house on the premises at his own cost and expense, and commenced to occupy and keep the same as his own for a home for himself and family, a homestead right attached at once to said premises, which the defendant could not state away nor defeat by acknowledging himself a tenant of the plaintiff, and which could only be defeated by the joint deed of himself and wife. The defendant's evidence tended to show that in 1864 his father had a perfect title to the farm, of which the demanded premises were a small part, and being under a temporary disability, the defendant went to carry on his father's farm and business on shares; that they had certain negotiations in regard to the defendant's taking a permanent interest in his father's business, and that in the fall of that year it was agreed that the father should give the defendant the piece of land in question to build a house upon, in which the defendant was to reside with his family; that, in accordance therewith the father staked out the piece, and agreed to convey it to the defendant; that the fences were moved to the line staked out, and the defendant went on and erected a house thereon at his own expense and had ever since occupied the same, as his own, for a home for himself and family, actually occupied them, except for about a year when he was away for a temporary purpose; that during this absence they were rented by him; and that the giving of the deed had been spoken of several times, and at one time a deed had been prepared by the father, which would have been executed but for a desire to change the line a very little by the defendant, and which the father, after examination, agreed to, but the fences ever remained where first placed.

Upon these facts the plaintiff contends that the instructions of the court were erroneous in two respects. He contends that the premises were a voluntary gift by the father, and that a court of equity would not decree specific conveyance of the premises; and that the defendant could not be said to have an equitable homestead in premises which a court of equity would not order to be conveyed to the donee. It is true that courts of equity do not enforce mere voluntary unexecuted gifts. Until the gift is duly executed by delivery or conveyance it rests in a promise, for which there is no consideration. In such case there is always a *locus penitentiae* to the promising donor. The plaintiff has cited several cases of this kind where the subject for donation was real property. We have no doubt of the soundness of these decisions. But the authorities cited by him show that where the promised donee has been allowed to go into possession of real estate, under the promise of a voluntary conveyance thereof, and made valuable improvements, equity will decree that he has a lien on the premises for such improvements and will not allow the donor to retake possession without

making full compensation for such improvements. It is questionable whether such a lien would not serve as the foundation for an equitable homestead right in the premises under the decisions of this State. *Morgan v. Stearns*, 41 Vt., 398; *Doane's Err. v. Doane*, 46 Vt., 485.

It is not unfrequently that a court of equity orders a reconveyance of an executed voluntary conveyance of property where subsequently the donor's circumstances have changed and it has become necessary, in order to provide the donor with a comfortable support. Rarely, if ever, will a court of equity decree a specific performance of a promise to make voluntary conveyance of real estate, although the expected donee has been put in possession and made valuable improvements upon the premises. Neither will a court of equity allow the expected donee to be ousted from the premises, until fully compensated for such improvements. But we need not concern ourselves with the subject of voluntary conveyances, or what a court of equity will do or refuse to do in regard to such promised conveyances. None of the plaintiff's requests brought that subject to the attention of the County Court; besides, the defendant's evidence tended to show a consideration for his father's promise to convey the land; in short, that the father agreed to convey to the defendant the demanded premises as a part of the negotiations whereby the defendant was to take a permanent interest in the father's business. The court throughout the charge put the defendant's right to a homestead in the premises upon the contingency that the jury found the facts to be such as his testimony tended to show. These facts, if found true, disclosed a legal consideration for the father's agreement to convey to the defendant the premises, on which to build himself a house for a home for himself and family, while thus engaged in business with the father. The demanded premises were then but a small piece of land, of little worth. Now that the defendant has been allowed to go into possession and erect a house thereon at a very considerable expense, the promise of the father to convey, being, on the theory of the charge for a consideration, he has and has had, ever since the erection of the house, the right to have a court of equity decree that the father specifically perform his agreement by making conveyance. But the plaintiff further contends that, conceding that the defendant had a homestead right in the premises, the wife had but an inchoate right therein, that was liable to be defeated by acquiring another homestead, or by permanently abandoning it with his family; and that the husband could defeat himself and family of all right therein, by stating to the plaintiff about the time of his purchase, that he claimed no right therein, or by becoming a tenant thereof to the plaintiff.

We do not, under our statute, think this contention is sound. The statute is explicit, R. L. § 1904, that: "No homestead nor any interest therein shall be conveyed by the owner thereof, if a married man, except by way of mortgage for the purchase money thereof, given at the time of such purchase, unless his wife joins in the execution," etc. To hold that he could relinquish such a homestead by verbal statement or by acknowledging himself a tenant, would be to repeal the statute by implication.

What he might do with it, when it ceases to be a homestead, by abandonment or by the purchase and use of another homestead, has no application to the facts of this case, which show that during all the time he was occupying and keeping the premises as a homestead.

4. The plaintiff further contends that, on the conceded facts, he was entitled to a verdict and judgment for the excess of the premises above the homestead. The plaintiff had become vested with the interest therein, which the defendant had conveyed by his sole deed to Mary Houston, which the court construed to convey all his interest in the demanded premises above the homestead. The evidence also tended to show that the whole premises were worth about \$800, while the homestead can only exist to the value of \$500.

He contends that the court should have taken an indefinite verdict for the plaintiff, and then proceeded under the statute to have the homestead severed and set out, and have rendered judgment for what there was left, by metes and bounds. We do not think that this was feasible. The judgment would then be on something very different from the declaration or verdict, both of which have uniformly, in actions of ejectment, been required to describe the premises with such accuracy and certainty, that the same being incorporated into the writ of possession, the officer executing it could put the plaintiff into possession of the exact, or exact fractional portion of the premises for which recovery was had. It is true, the plaintiff recovers according to his right in such cases, and may recover only a portion of the premises described in his declaration; but it must be for some definite proportion or parcel thereof. In the case at bar, the verdict must be indefinite; because it could not be known what particular part would be set out for a homestead and what part, if any, the plaintiff might be entitled to when the homestead was severed.

We do not think the statute, R. L., § 1907, intended to apply or is applicable to a jury trial, where, intervening the verdict and the judgment, the homestead must be set out; and the proceedings setting it out must be incorporated into the verdict, to determine the judgment and the writ of possession which may issue thereon. Under this section, the commissioners appointed by the court are to appraise and set out the homestead, so that it would be impossible for the jury to value the whole premises and return a verdict for such a fractional part thereof as the excess above the homestead, as found by them, might bear to the whole value of the premises. The court, therefore, did not err in refusing to allow a recovery for the excess, inasmuch as, under the statute, such excess could not be lawfully determined by the jury.

5. The plaintiff excepted to the rulings of the court as to the admissibility of certain classes of testimony. After finding that the court was correct in the law of its charge to the jury, we are sorry to be compelled to say, we think it clearly erred in admitting the testimony of T. B. Davis, so far as excepted to. This witness was allowed to testify, "that it was generally reputed in the vicinity of the premises that the house in question was Seymour's house." We know of no rule of evidence that

would allow the admission of this class of evidence. Titles to real estate cannot be established nor lost by general reputation as to the ownership, in its vicinity. Such evidence is not the best evidence. The law provides for records as such evidence. Besides, it is wholly misleading. Nothing is more common than to speak of a house, occupied by a person in whatever capacity, as the house of such person; far from meaning thereby that he is the owner. But it is said this was admissible, on the ground that it tended to show that he was occupying it under a claim of right. Under the claim of what right? It is wholly misleading in regard to what right. Moreover, the witness did not pretend that this reputation came from the defendant. It was mere neighborhood talk at most. It was further said by the defendant that it was immaterial. It was on a point in issue, whether the defendant's occupancy was under a claim of right or ownership. Its tendency was injurious to the plaintiff. What influence it might have had with the jury it is impossible to determine; nor will this court attempt to determine when it is clearly of an injurious tendency. For this error the judgment of the County Court must be reversed. The other exceptions in regard to the admission or rejection of testimony, we think, were not well taken.

The judgment of the County Court is reversed and the cause remanded, for a new trial.

STATE OF VERMONT

John H. AMADON.

When an indictment contains two counts charging the same crime, one ending with and the other without the words, "**contrary to the form, force, etc., and against the peace**" and **dignity of the State**, the defective count can be amended by adding those words, although the Constitution provides that indictments shall conclude with the words, "**against the peace and dignity of the State**;" as it is a matter of form, and not of substance.

(Decided January 14, 1886.)

INDICTMENT. Heard on motion to amend, April Term, 1885, Lamville County. Amendment allowed. *Affirmed.*

Mr. H. M. McFarland, for the State.

Mr. W. Brigham, for respondent.

Ross, J., delivered the opinion of the court:

The respondent excepted to the allowance, by the County Court, of an amendment to the first count in the indictment, by adding at its close, the words "contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the State." The indictment is for an assault with a dangerous weapon and contains two counts. The second count closes with the words allowed to be added to the first count. The counsel for the respondent contends that the amendment was one of substance and, for that reason, beyond the jurisdiction of the County Court to allow; and he bases his con-

tention upon § 32 of the Constitution of the State which declares: "All indictments shall conclude with these words, against the peace and dignity of the State." He insists that what the Constitution declares that an indictment shall contain is a matter of substance. Suppose this contention is conceded. Does not this indictment close with the very words prescribed? The indictment does not close at the end of the first count thereof. That count ends in the middle of the indictment. The two counts taken together form the indictment. As the indictment closes with the very words prescribed by the Constitution, the contention upon that basis is without support or foundation. In indictments, matters of form may be amended; matters of substance may not be. It may be difficult to express in exact language, that will be applicable to every case, what constitutes the substance of an indictment and what is merely formal. In general, I think, it may be laid down, that the statement of every fact necessary to be proven, to make the act complained of a crime, is matter of substance in an indictment; and that all beyond, the order of arrangement, the precise words, unless particular words alone will convey the proper meaning, is formal.

Says Judge Barrett in *State v. Arnold*, 50 Vt., 785: "It is obvious, without illustration, that a defect that does not affect the merits of the case, or the evidence necessary to be given to maintain the indictment, can be regarded as only formal."

Says Lord Chief Justice De Grey in *Rex v. Horne*, 2 Cowp., 682, and adopted by Mr. Chitty in Vol. 1, p. 215, of his work on Pleadings: "The charge must contain such a description of the crime that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of 'guilty or not guilty' upon the premises delivered to them, and that the court may see such a definite crime that they may apply the punishment which the law prescribes."

Again, says Lord Chief Justice De Grey: "As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed must be set out; and all beyond is surplusage."

Mr. Chitty concludes, p. 214: "Hence, the science of special pleading may be considered under two heads: 1, the facts necessary to be stated; and 2, the form of the statement."

The jury cannot take cognizance of a fact necessary to constitute a crime, unless it appears upon the record in proper averment, or an averment that is traversable and capable of being proved or disproved. It has not been and cannot be seriously contended that the words allowed to be added to the first count of the indictment by the County Court contain an averment of any fact necessary to constitute the crime charged, an assault, or that was required to be proved or disproved, to establish the crime charged, or to defend against the same. We conclude, therefore, that the amendment allowed was not matter of substance, but matter of form and within the jurisdiction of the County Court to allow.

The judgment is, that the respondent takes nothing by his exceptions, and the cause is remanded.

Ira Allen THAYER and Wife

v.
Victor T. SPEAR, *Exr.*

The will provided that the legatee should have the **income** of the estate, and such further sums as her wants might demand, so long as she remained the wife of I. A. Thayer; but if she was "**left a widow, or for any cause should cease to be the wife of said**" Thayer, the **whole estate** should be given to the legatee; **held**, that the condition is valid, and not against public policy.

(Decided January 15, 1886.)

APPPEAL from Probate Court. Heard by the court, December Term, 1884, Orange County. *Affirmed.*

The provisions of the will are sufficiently stated in the opinion of the court.

Mr. E. J. McWain, for plaintiffs:

Cited, *Jones v. Randal*, 1 Cowp., 87; *Egerton v. Earl of Brownlow*, 4 H. L. Cas., 1; *S. C.*, 28 L. J. Ch., 848; 1 Story, Eq., 291; 2 Redf. Wills, 298; *Conrad v. Long*, 88 Mich., 78.

Mr. N. L. Boyden, for defendant:

Cited, 3 Jarm. Wills, 706; 1 Redf. Wills, 445. This case does not come within the spirit of *Conrad v. Long*, 88 Mich., 78. There the legacy was given upon the express condition that the legatee should live separate and apart from her husband; but if she continued to live with her husband until her death, then it was given to another person.

Royce, Ch. J., delivered the opinion of the court:

Rosan M. Leathers bequeathed to her daughter, Alice E. Thayer, all of the income of her estate, and such further sums out of said estate as her needs and wants might demand, so long as she remained the wife of Ira Allen Thayer, and left the amount of the sums to be paid to the said Alice to the judgment and discretion of her executor. In case her said daughter "should be left a widow, or for any cause should cease to be the wife of the said Ira Allen Thayer," then all of the estate should be given to said daughter and subject to her control.

The case comes here upon exceptions taken to the judgment of the county court affirming a decree of distribution made by the Probate Court. That decree followed the disposition made

by the will, and directed the executor to pay to the said Alice all the income of the remainder of said estate, and such other sum as in his judgment and discretion he deems best, so long as the said Alice remains the wife of Ira Allen Thayer; and that in case the said Alice should be left a widow, or for any cause should cease to be the wife of the said Ira, he, the said executor, was directed to pay over all that might remain of said estate to said Alice. The appeal was taken by the said Ira and his wife, and it is claimed by the appellants that the condition named by the testatrix in making the bequest is void, as being against public policy, and that the entire estate should have been decreed to the said Alice.

The ground upon which it is claimed that the provision of the will violates public policy, is that it furnishes an inducement to the wife to become the widow of her husband, or to separate herself from him in such a manner that she would cease to be his wife. The appellants, to sustain this claim, rely upon the rule as stated in 2 Redf. Wills, 298; 1 Story, Eq. Jur., 291, and the case of *Conrad v. Long*, 88 Mich., 78.

The cases cited in support of the rule laid down in Redfield and Story, it will be found on examination, do not sustain the rule as here sought to be applied. They are generally cases in which an inducement was directly held out to encourage a voluntary separation of husband and wife, and where the intent to encourage such a separation could be found in the language employed in making the bequest. They are none of them so similar in their facts, to the case at bar, that they can be considered authorities in it.

The first object is to ascertain, if possible, what the intention of the testatrix was; and we find no difficulty in reaching the conclusion that it was to have her estate disposed of just as it has been by the Probate Court. It was a wise and prudent provision to make for her daughter. While she should remain a wife, her husband would be under obligation to support her, and hence, the income only, was absolutely left her during the continuance of that relation; but when she should cease to be a wife, and so become dependent upon her own resources, it was just and wise to provide that she should have the entire estate.

The judgment is affirmed and ordered to be certified to the Probate Court.

NOTE.—Although the rule is that devises in restraint of marriage are void, yet the rule has many limitations and exceptions. These distinctions do not apply to devises of or charges upon real estate; *Rives v. Herne*, 5 Vin. Ab., 341; *Hervey v. Aston*, 1 Atk., 581; *Reynish v. Martin*, 3 Atk., 380, but are confined to personal legacies, or money arising out of the sale of lands. *Bellairs v. Bellairs*, L. R., 18 Eq., 510.

If the gift be made in the form of a limitation of the estate, as where land is devised to A., until marriage, then over; the gift is good. *Otis v. Price*, 10 Gray, 581; *Parson v. Winslow*, 3 Mass., 166; *Selden v. Keen*, 27 Gratt, 576; *Lloyd v. Branton*, 3 Meriv., 108; *Morley v. Rennoldson*, 2 Hare, 579; *Harmon v. Brown*, 53 Ind., 207; *Randall v. Marble*, 60 Me., 310; *Maddox v. Maddox*, 11 Gratt., 804.

A devise over is not necessary to render a condi-

tion annexed to land in direct restraint of marriage void. *McCullough's App.*, 12 Pa. St., 197.

A condition that a widow shall not marry is not unlawful; *Collier v. Slaughter*, 20 Ala., 263; *Barton v. Barton*, 2 Vern., 308; *Lloyd v. Lloyd*, 2 Sim. 2N. S., 255; whether the bequest be by the husband or another. *Newton v. Marsden*, 2 J. & H., 356; *Dumey v. Schoeffler*, 24 Mo., 170; *Phillips v. Medbury*, 7 Conn., 568; *Scott v. Tyler*, 9 Brown Ch., 497; *Chapin v. Marvin*, 12 Wend., 538; *Snider v. Newsom*, 24 Ga., 129; *Hughes v. Boyd*, 2 Sneed, 512; *Clark v. Tennison*, 33 Md., 85; *Lingart v. Ripley*, 19 Ohio St., 24; *Comm v. Stauffer*, 10 Barr., 360; *Cornell v. Lovett*, 35 Pa. St., 100.

An annuity during widowhood is good. *Jordan v. Holkham*, Amb., 206; also a condition to marry or not to marry one T. Jarvis v. Duke, 1 Vern., 19.

SUPREME COURT OF MAINE.

Howland W. MAXWELL

v.

Daniel ALLEN.

One partner agreed in writing to sell to a copartner his interest in the company's property, consisting of a store, a stock of goods, furniture therein and some other property, the whole worth about \$25,000; the sale was to be at cost for most of the property and for the balance at an appraisal, if the parties could not agree on its value; and the terms were cash on delivery, and either party who should break the contract should forfeit to the other the sum of \$500. Held, that the \$500 was intended for the parties to be liquidated damages.

(Androscoggin—Decided December 21, 1885.)

ASSUMPSIT. Defendant defaulted.

This is an action of *assumpsit* brought to recover the sum of \$500 with interest thereon, as liquidated damages for the breach of an agreement made by the defendant to purchase from plaintiff his interest in certain property, owned and occupied by the late firm of Allen & Maxwell, composed of plaintiff and defendant. The writ is dated January 6, 1885. The defendant pleaded the general issue.

Messrs. N. & J. A. Morrill, for plaintiff:

The tendency of the later American and English decisions is towards admitting the agreement of the parties, when fairly made and clearly expressed, to be conclusive on this point. 30 Am. Rep., 28, note.

NOTE.—The cases in the Federal Courts which attempt to formulate general principles on the subject are the following: an agreement to perform certain work by a limited time, under a certain penalty, is not to be regarded as liquidating the damages which the party is to pay for a breach of his covenant. In general, a sum of money in gross, stipulated to be paid for the non-performance of an agreement, is considered a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It is incumbent upon the party who claims that such amount is to be considered as liquidated damages, to show that such was the intention of the contracting parties. Where the contract calls it a penalty, it is not to be regarded as liquidated damages, unless, at least, it be very clear that such was the intention. *Taylor v. Sandiford*, 7 Wheat., 13.

Where a penalty or forfeiture is inserted in a contract, merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only an accessory. But in every such case, the test by which to ascertain whether relief can or cannot be had in equity is, to consider whether compensation can or cannot be made. *Klein v. Insurance Co.*, 104 U. S. (Law. ed. bk. 26), 88.

A mere penalty designed solely to secure observance of a contract will not be construed as liquidated damages nor prevent an injunction. *McCaull v. Braham*, 16 Fed. Rep., 37.

If a sum stipulated by a contract to be paid, on a breach, is termed in the contract a "penalty," it will be treated only as a penalty. If it is termed "liquidated damages," it may be treated either as a penalty or as liquidated damages, according to the apparent intent. *White v. Arleth*, 1 Bond, 319.

If a contract by which an employer engages an employe for a term of years, at a stated salary, provides a round sum as liquidated damages for a

The "unwise reluctance" shown by the U. S. Courts to admit the agreement to be so conclusive, seems to have been since overcome. 2 Sedg. Dam., 7th ed. 248, note.

The parties themselves best know what their expectations are in regard to the advantages of their undertaking and the damages attendant on its failure; and when they have mutually agreed upon the amount of such damages, in good faith and without illegality, it is as much the duty of the court to enforce that agreement as it is the other provisions of the contract. As in construing the other parts of a contract, so in giving construction to the stipulation concerning damages, the intention of the parties governs. *Dwinel v. Brown*, 54 Me., 470.

In ascertaining the intention of the parties, the court will not be bound by the particular phraseology of the instrument. The words "penalty," "forfeiture," or "liquidated damages," are not conclusive, and the court will examine the other provisions of the contract, its subject-matter, the situation of the parties and the course or usages of trade as well as this particular language, and gather the intention of the parties from the whole taken together. *Dwinel v. Brown*, 54 Me., 472; 2 Sedg. Dam., 7th ed. 244, and note; *Williams v. Vance*, 80 Am. Rep., 28, note.

Nor does the use of the word "forfeit" lend any additional stress to the other words of the instrument and thereby justify the court in construing the sum named as a penalty, in contradiction to the intent of the parties. *Lynde v. Thompson*, 2 Allen, 456; *Hall v. Crowley*, 5 Allen, 804; *Streeper v. Williams*, 48 Pa. St., 450, cited in 2 Sedg. Dam., 7th ed. 244, note.

To aid in thus giving effect to the intention of the parties, a set of rules has been framed

breach, this should be construed as a penalty; for it is not reasonable that the same sum should be claimed for a breach, early in the term, as for one near its close. Ex. p. Pollard, 17 Bank. Reg. 228.

Where the sum named is intelligently and unequivocally stated to be the ascertained or liquidated damages for the breach of a contract, and the language is not qualified or rendered doubtful by other expressions contained in the paper; and especially where the actual extent of damage is difficult of ascertainment, and the sum named is not very greatly in excess of the probable injury, the amount will be treated as liquidated damages. *Nielson v. Read*, 12 Fed. Rep., 441.

A clause in a contract, stating that "in further confirmation of the said agreement, the parties bind themselves each to the other, in the penal sum of, etc.," is not to be considered as liquidated damages for the breach of the agreement, at the option of the obligor, but as a penalty superadded. *Robinson v. Cathcart*, 2 Cranch (C. C.), 590.

For cases exemplifying the application of these principles in particular instances, see, *Grand Tower Co. v. Phillips*, 23 Wall., 471; *Taylor v. The Marcella*, 1 Woods, 302; *Allegheny Base Ball Club*, 14 Fed. Rep., 257; *Texas & St. Louis Ry. Co. v. Rust*, 19 Fed. Rep., 239; Ex. p. Pollard, 17 Bank. Reg., 228; *Goldsborough v. Baker*, 3 Cranch (C. C.), 48. See, also, a case where the contract for the exclusive services of a singer in opera provided for "the forfeiture of a week's salary, or the termination of the engagement at the manager's option, without debarring him from enforcing the contract as he might see fit;" and it was held that this clause was not liquidated damages, and that an injunction should issue to restrain a threatened violation of the contract. *McCaull v. Braham*, 16 Fed. Rep., 37. A note to this case (p. 42) reviews the cases in England as well as in this country, in which the question has arisen with reference to contracts for skilled, professional services.

which we find stated with substantial similarity in *Bagley v. Peddie*, 16 N. Y., 471, and in 2 Sedg. Dam., 244, 250, *et seq.*, note, and more at large in an exhaustive note to *Williams v. Vance*, *supra*.

These considerations seem to clearly bring the case within the rule recognized in *Lynde v. Thompson*, 2 Allen, 456, that where "There is only one event, on the happening of which the money is to become payable and there is no adequate means furnished, by the contract or otherwise, of ascertaining the precise damage," the sum named will be considered as liquidated damages.

The court says: "A transaction of such a nature, involving the transfer and surrender of the business and good will connected with the trade and manufacture in which the plaintiffs had been engaged, differs essentially from an ordinary agreement for the sale of goods or the payment of money. It is impossible to estimate with accuracy, or to measure by any definite or precise rule, the extent of damage which either party might sustain by reason of the breach of the contract. *Leary v. Laffin*, 101 Mass., 384; *Chase v. Allen*, 18 Gray, 42.

In *Streep v. Williams*, *supra*, the owner of a hotel had agreed to sell it for \$14,000, of which \$3,000 was to be paid on a specified date when the deed was to be signed. Possession of the bar room was to be given immediately. The parties mutually agreed to "forfeit" \$500 in case of failure to keep the agreement. The \$500 was held to be liquidated damages.

In *Gobble v. Linder*, 76 Ill., 157, cited in 2 Sedg. Dam., 7th ed. 258, note, the plaintiff and defendant had agreed to exchange farms. The contract contained a provision that either party failing to make the deed in exchange, should "forfeit and pay as damages" \$1,500. The sum was held to be liquidated damages.

The case of *Noyes v. Phillips*, 60 N. Y., 408, which related to an agreement to exchange lands and give a good and sufficient deed or "forfeit the sum of \$500," has been considered as opposed to the Illinois case; but the opinion shows that the court was not called to pass upon the question of liquidated damages.

Messrs. Savage & Oakes, for defendant:

The sole question presented is, whether it is or is not to be regarded as liquidated damages.

Whether a contract may be one to pay liquidated damages or a penalty, will be, to a great extent, determined by construction, by a consideration of the terms of the instrument, the subject matter, and the intention of the parties. 1 Am. Dec., 381, note; 17 Wend., 447; 22 Wend., 201; 11 Mass., 76; 13 Gray, 42.

In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty and not as liquidated damages. *Taylor v. Sandiford*, 7 Wheat. (5 U. S.), 13, Op. Marshall, Ch. J.; *Spear v. Smith*, 1 Denio, 464.

It is the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled, as a penalty and not as liquidated damages; for, by treating such sums as a penalty, the recovery can be apportioned to the actual damages, or loss actually sustained. *Leggett v. Mut. Life Ins. Co.*, 53 N. Y., 394, and cases cited in note to *Taylor v. Sandiford*, *supra*; *Shute v. Taylor*, 5 Met., 67.

Where the agreement imposes several distinct duties or obligations of different degrees of importance, and the same sum is named as damages for a breach of either indifferently, the sum is to be regarded as a penalty. See cases cited in same note. *Chase v. Allen*, *supra*.

Where the damages are capable of being known and estimated, the sum fixed upon as damages will be treated as a penalty, although declared to be intended as liquidated damages. See cases cited in same note. This is clearly a case where the damages are capable of being known and estimated under this rule.

Where it is doubtful on the face of the instrument whether the sum mentioned was intended to be stipulated damages or a penalty to cover actual damages, the courts hold it to be the latter. *Bagley v. Peddie*, 5 Sandf., 192; 11 Bouv. L. Dic., tit., Liq. Dam.

The subject matter of the contract was certain real and personal property, all of which had an easily ascertainable market value. The contract price was ascertainable by mere computation, and the damages occasioned to either party would be easily and accurately ascertained. *Graham v. Bickham*, 1 Am. Dec., 328; *Spencer v. Tilden*, 5 Cow., 144.

For the breach of any one of these particulars, the same sum, \$500, is named as a forfeiture. *Watt v. Sheppard*, 2 Ala., 425; *Sawyer v. McIntyre*, 18 Vt., 27; *Jackson v. Baker*, 2 Edw. Ch., 471.

If the parties use the term "penalty," it is well nigh conclusive that penalty is intended and not liquidated damages; while the use of the term liquidated damages is not at all conclusive. Sedg. Dam., 6th ed. 504.

In construing the use of the words "forfeit" or "forfeiture" all courts lean very strongly to the notion of a penalty, and in some cases it is said that "Where the contract itself terms such gross sum a forfeiture, it must be construed to be a penalty, and the parties deemed to have so intended, unless the agreement plainly indicates that it was intended as liquidated damages." *Colwell v. Lawrence*, 36 How. Pr., 306, N. Y. Ct. App.

In *Horner v. Flintoff* 9 Mees. & W., 678, the plaintiff and defendant "Mutually bound themselves the one to the other in the sum of £100 as settled and liquidated damages, to be paid and forfeited, without any deduction, by such of them as should make default in the premises, unto the other of them requiring the same." Held, that the sum of £100 was a penalty only.

In *Betts v. Burch*, 4 Hurl. & N., 506, Eng. Exch., by an agreement in writing, the plaintiff agreed to sell, and the defendant to purchase, the household furniture and stock in trade by valuation; B. to value for plaintiff, and M. for the defendant; the goods to be valued and possession given, on or before a given day; and in the event of either of the parties not complying in every particular set forth in the agreement, he should forfeit and pay £50 and all expenses attending the same. Held, that the sum of £50 was a penalty and not liquidated damages. See, *Magee v. Lovell*, L. R., 9 C. P., 107.

In *Dennis v. Cummings*, 8 Johns. Cas., 297, A and B entered into a written agreement by which A agreed to convey to B 700 acres of land, thereafter to be appraised, in part payment of a farm

valued at \$3,750, which B agreed to sell to A; and it was covenanted that in case either party failed to perform, the party failing "should forfeit and pay to the party who should fulfill the agreement, the sum of \$2,000 as damages." The sum of \$2,000 was held to be a penalty and not liquidated damages. See, *Shiell v. McNitt*, 9 Paige, 101; *Spear v. Smith*, 1 Denio, 464.

In *Gray v. Crosby*, 18 Johns., 219, it was held that "Where a party insists on the payment of stipulated damages as a discharge, it must appear that the damages stipulated are in lieu of a performance of the contract, the payment of which is an alternative for his election." See, *Perkins v. Lyman*, 11 Mass., 82.

By the contract in *Lampman v. Cochran*, 16 N. Y., 275, the vendor agreed to convey on or before a certain day, provided the vendee on or before that day, paid him \$500, and then gave him his note on time for \$200, and a bond and mortgage for \$2,100, and the parties agreed to pay, the one to the other, \$500 as liquidated damages, in case one of them should fail to perform the contract. Held, a mere penalty. See, *Leggett v. Mut. Ins. Co.*, *supra*; 15 Mass., 488; 1 Pick., 443; 14 Gray, 165.

In *Curry v. Laver*, 7 Pa. St., 470, 49 Am. Dec., 486, it was held to be a penalty and not liquidated damages, where a person agreed to deliver two boat loads of coal at different days, and another person bound himself in the sum of \$200 that the former would perform all his agreements, and in default of his delivering said boat loads or either of them, that then the obligee might recover said sum from the obligor.

In *Robeson v. Whitenides*, 16 Serg. & R., 320, the court observes: "Stipulated damages can only be where there is a clear, unequivocal agreement, which stipulates for the payment of a certain sum, as a liquidated satisfaction, fixed and agreed upon between the parties, for the doing or not doing certain acts, particularly expressed in the agreement." We also cite, *Heard v. Bowers*, 28 Pick., 455; *Fisk v. Gray*, 11 Allen, 183; *Brown v. Bellows*, 4 Pick., 179.

In the cases, in any way resembling the one at bar, almost without exception, where the forfeiture has been held to be liquidated damages, it has been either because they have come within the rule of *Holbrook v. Tobey*, 66 Me., 410, or because of some peculiarity in the contract or in the subject matter, the damages have been deemed uncertain and incapable of estimation. *Nobles v. Bates*, 7 Cow., 807; *Williams v. Dakin*, 23 Wend., 201; *Chase v. Allen*, *supra*; *Cushing v. Drew*, 97 Mass., 445.

The remarks of the court in 2 Allen, 456, upon this subject are *obiter dicta*; the case having been decided upon the express terms of the contract which declared the forfeiture should "be paid in full."

Peters, Ch. J., delivered the opinion of the court:

One partner agreed in writing to sell to a copartner his interest in the company's property, consisting of a store, a stock of goods, furniture therein and other property, most of the same at cost and the balance at an appraisal if the parties could not agree upon the value, cash to be paid therefor on delivery, either party who should break the contract

to forfeit to the other the sum of \$500. The purchaser, after binding himself to the bargain, refused to carry it into execution. The entire property was worth upwards of \$25,000.

Is the sum of \$500 recoverable by the would-be seller as liquidated damages? We think that must have been the intention of the parties. There are several reasons which have an influence in inducing us to think so. In no view was it a large or an unreasonable sum to pay for the seller's disappointment. It was the purchaser's proposition. It includes all which the purchaser was to pay for a total failure to perform. There would be more question about the meaning of the parties, had the non-performance been partial only. It would be a difficult and expensive task to ascertain what the real damages were. The good will of the business was an element of value not easily measurable. The parties wisely concluded to have the damages assessable at an agreed sum. We think it would be the instinctive judgment of business men generally, that the parties used the word "forfeit" in a conversational sense, and not technically.

The case belongs to a class of difficult and often uncertain and shadowy questions, very few cases being much alike, and therefore an appeal to the authorities for support, is not of much use further than to make an application of general principles. But the case of *Lynde v. Thompson*, 2 Allen, 456, relied on by the plaintiff, goes a good way towards establishing the position he contends for; and *Holbrook v. Tobey*, in our own State, 66 Me., 410, goes in the same direction.

Defendant defaulted for \$500 and interest from February 15, 1885.

Walton, Virgin, Libbey, Foster and Haskell, JJ., concurred.

Samuel E. SHEPHERD

Mary E. HALL et al.

An action cannot be maintained in the name of an ex-sheriff, for the benefit of the creditor, against the receiptors on an accountable receipt taken by such officer, while in office, for property attached on a writ, unless it appears that the property was demanded of such ex-sheriff by an officer, holding the execution, within thirty days from the date of the judgment in the first suit; a demand on the receiptors is not sufficient.

(Knox—Decided December 9, 1885.)

ASSUMPSIT on officer's receipt. *Nonsuit.* In 1879 Samuel E. Shepherd was sheriff of Knox County, and while in office he attached the schooner Linnet.

Shepherd delivered the schooner attached, to these defendants and took from them an accountable receipt, upon which this action is based. The receipt was as follows: "That, in consideration of one dollar paid us by the above named officer, the receipt whereof we hereby acknowledge, we hereby promise and agree safely to keep and redeliver all the property

above mentioned, to the officer, to his order or to his successor in office, * * * and further agree that if no demand be made we will within thirty days from the rendition of judgment in the action aforesaid redeliver all the above described property as aforesaid, that the same may be taken in execution."

Before judgment, Shepherd's term of office expired and W. S. Irish was elected and qualified in his place. Shepherd was not a deputy under Irish at any time, nor his agent.

Judgment was obtained and execution issued in the original suit on the 28th day of November, 1883.

The execution was committed to Irish, who, within thirty days, made demand upon these defendants but did not have the receipt with him. Irish never made any demand upon Shepherd, the attaching officer and the plaintiff in this case.

Mr. J. E. Hanly, for plaintiff:

Prima facie, the plaintiff is entitled to recover. 74 Me., 366.

The receiptors are liable without demand. *Hunter v. Peaks*, 74 Me., 367.

The liability of the officer continues until he delivers to the defendant from whom he takes the property and places it in the hands of the receiptors, or turns it over to the legal purposes of the attachment, or to be taken on execution. *Moulton v. Chapin*, 28 Me., 505.

Messrs. Rice & Hall, for defendants:

The statute provides that "An attachment of real or personal estates continues for thirty days, and no longer, after final judgment in the original suit." R. S., ch. 81, § 67.

To fix the liability of the attaching officer for the property attached, a demand must be made upon him by the officer holding the execution, or he, the attaching officer, "being without notice that the creditor has not obtained payment in some other mode, may be obliged to restore the goods to the debtor." *Humphreys v. Cobb*, 22 Me., 380; *Norris v. Bridgham*, 14 Me., 429.

The defendants are liable to the plaintiff in this action, according to the terms of their contract. But his right to prosecute has been understood to depend on his liability over, to the attaching creditor. Wherever it has been made to appear in suits upon receipts of this description, that such liability does not exist, or has been discharged, the receiptors have not been holden. *Sawyer v. Mason*, 19 Me., 49; *Bradbury v. Taylor*, 8 Me., 180.

The decision in the case of *Hunter v. Peaks*, 74 Me., 363, affords no parallel upon this point.

The creditor in the original action had not taken the receipt as a substitute for the property attached and, therefore, was not entitled, as equitable assignee, to the security which it afforded. *Moore v. Fargo*, 112 Mass., 254.

Peters, Ch. J., delivered the opinion of the court:

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This is an action by an ex-sheriff upon an accountable receipt given for property which he attached. An execution, issued in the suit in which the attachment was made, was delivered to the plaintiff's successor in office within thirty days after judgment was recovered, and he made a demand on the receiptors, but no demand is shown to have been made on the present plaintiff within thirty days.

The liability of a receiptor is contingent. Unless the officer is liable to either the creditor or the debtor for the production of the property attached, the receiptor is not liable to the officer. The officer has no personal interest in the property or its possession. He holds it merely for the purposes of the law. The creditors' lien continues for thirty days only after judgment, unless steps are taken within that time to retain or perfect the lien. In this case the debtor had no claim upon the officer, for the property had returned into his possession; nor has the creditor any claim upon him, because he failed to assert his claim by a demand within the thirty days. Any claim upon either officer or receiptor is lost. *Bradbury v. Taylor*, 8 Me., 129; *Norris v. Bridgham*, 14 Me., 429; *Humphreys v. Cobb*, 22 Me., 380; *Moulton v. Chapin*, 28 Me., 505.

It is readily seen that a demand upon the receiptor is not an excuse for the want of a demand upon the officer. The receiptor is under no obligation to the creditor. His agreement is not with him. There is no privity between them. The officer is responsible to the creditor, whether the receiptor is liable to him or not. The receipt is for the officer's protection, not for the creditor's. *Phillips v. Bridge*, 11 Mass., 247; *Pearsons v. Tyncker*, 36 Me., 384. In the present case an unnecessary demand was made upon the receiptors, and a necessary demand upon the officer was omitted.

We do not mean to say that there may not be a case where a receiptor would be liable without a demand upon a retiring officer to whom the receipt was given. We have been speaking of the usual relation, such as appears to have existed in the case at hand. An exception exists where the receipt has been assigned by officer to creditor. It may be an equitable assignment. It has been held that such an assignment arises where an officer takes a receipt at the instance of the creditor, upon his approval and at his risk, the creditor by agreement relying upon the receipt and not upon the obligation of the officer. In such case the creditor is substituted for the officer. He owns the right. He need make no demand upon the officer. He is acting in his behalf in calling upon the receiptor. A demand on the officer is implied or waived. *Haggood v. Fisher*, 30 Me., 502; *Laurence v. Rice*, 12 Met., 527; *Moore v. Fargo*, 112 Mass., 254.

Plaintiff nonsuit.

Walton, Danforth, Libbey, Emery and Foster, JJ., concurred.

SUPREME COURT OF CONNECTICUT.

SAUGATUCK CONGREGATIONAL SOCIETY, *App't.*,

v.

EAST SAUGATUCK SCHOOL DISTRICT.

1. **Adverse possession cannot be proved by the declarations of the party in possession, except when part of the res gestæ.** The mere declarations of a party cannot be admitted in his own favor, nor can the mere absence of such declarations be shown against him.
2. **The declarations of a party in possession as to his holding adversely, are only material when he speaks against his interest or fails to speak when required to do so.**

(Decided December —, 1885.)

A PPEAL from a judgment of the Fairfield County Court of Common Pleas, in favor of defendant. *Reversed.*

This is an action of ejectment. The premises described in the complaint comprise an inclosure in which the church building of the plaintiff stands, and also, in the rear of the church, a two story schoolhouse or academy, the upper story having, until August, 1883, been accessible from an outside entrance only. The plaintiff claimed to recover possession of this upper story, conceding that, for more than fifty years before commencement of suit, the defendant had occupied the lower story, which also was accessible from an outside entrance only, for its district school. Inside the building there had never been any passage way between the two stories, prior to the disseisin of the plaintiff in 1883.

The schoolhouse had, prior to November, 4, 1880, stood on a parcel of ground jutting into the front of the church lot. Soon after that date it was moved to its present position in the rear of the church.

The plaintiff Society, for which the land in question was held by certain individuals, was organized in 1832, and claims to own the fee of the land to which the schoolhouse was moved. The upper part of the schoolhouse, from 1832 until 1876, was occupied by a Miss Leavenworth for a private school, who paid no rent for it. During this period and afterwards, the plaintiff held prayer-meetings there, and between 1880 and 1882 used it for a pastor's study and claimed to be in possession thereof until, as it alleges, it was dispossessed by the wrongful entry of the defendant in August, 1883. In December, 1882, Miss Leavenworth executed to plaintiff a quitclaim deed of the upper room of the building.

Messrs. Curtis Thompson and John H. Perry, for appellant:

As to the finding of the court below that plaintiff has used the room in question from time to time, ever since the removal of the schoolhouse, but that this use "was not adverse to the defendant;" we say that the use of the record owner of premises is not exactly "adverse" to a trespasser or tenant at will, whose occupation does not interfere with his; and besides, adverse use is a question of law.

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Munro v. Merchant, 26 Barb., 383; *Bowie v. Brahe*, 3 Duer, 85.

Corporations cannot speak except by their records. "The intention of a corporation can only be learned by the language of its recorded acts; and neither the private views nor the public declarations of individual members of such corporation are, for this purpose, to be inquired after." *Bartlett v. Kinsley*, 15 Conn., 334.

Even the declarations of officers of a corporation are not evidence against it. *Turnpike Co. v. Thorp*, 13 Conn., 173; *Hartford Bank v. Hart*, 3 Day, 494; *Angell & A. Corp.*, § 809.

Corporations speak by their majorities, and hence, can only speak by their votes. *Eggleston v. Doolittle*, 33 Conn., 401, 402.

The evidence objected to attempted to show that the plaintiff has no title, by evidence of reputation, violating the maxim that "A title to real estate cannot be proved by reputation." *South School District v. Blakeslee*, 18 Conn., 228.

Mr. Robert E. DeForest, for appellee:

The plaintiff must recover, if at all, by the strength of its own title, and not by the weakness in the title of the defendant. 1 *Swift's Dig.*, 507; *Tracy v. Norwich & W. R. R. Co.*, 39 Conn., 394.

Carpenter, J. delivered the opinion of the court:

From a careful analysis of the facts of this case it appears that the record title to the land on which the schoolhouse stands, is in the plaintiff. The building itself was constructed and paid for principally by the proprietors of the academy in 1804, the School District contributing to the funds of the academy the sum of \$127, being the avails of the sale of the old schoolhouse.

The equitable title to the building, therefore, seems to have been originally in the proprietors; and is now in their heirs, unless one of the parties to this suit has acquired title thereto by adverse possession. It is proper to remark, however, that the controversy relates solely to the upper room in the building, it being practically conceded that the district has been in possession of the lower room under a claim of right since 1807. On the trial, both parties claimed title to the upper room by adverse possession; the plaintiff claiming partly under Miss Leavenworth, who occupied said upper room for a private school from 1832 to 1876.

The following quotations from the record will serve to show what the questions are which we are called upon to decide:

"During the trial of said cause, the plaintiff having offered evidence of the adverse occupation by said Miss Leavenworth and others, the defendant, for the purpose of characterizing such occupation, and to show that it was not adverse to the defendant, called as a witness, Thomas D. Elwood, who testified that he had taught said district school since 1864, excepting two years, and defendant thereupon asked said witness the following question: 'During that period, did you ever hear that the Congregational Society pretended to have any claim or right of ownership of the building and grounds occupied by the school until 1883?' Plaintiff objected to and the court admitted said question, and said witness answered: 'I never did, in any shape or manner.'"

The following question of said witness was objected to by plaintiff and admitted by the court: "What did Mr. Hart, the pastor before referred to, say to you, if anything, respecting the necessity of the District making repairs to the building?" Ans. "Mr. Hart said to me, I think the District should go to work and repair that roof; if not, you will have to have an umbrella down there before long."

Of defendant's witness, Charles H. Taylor, who testified that he was fifty-four years of age, and had resided all his life in Westport; that he had attended Miss Leavenworth's school; had been two years treasurer, and six years committee of said District, prior to 1888, defendant asked the following question which was received against the plaintiff's objection: "During all that time did you ever hear that the plaintiff made any claim or right of ownership to the schoolhouse and yard until last year?" Ans. "I did not."

Against said objection of the plaintiff, said witness further answered: "I never heard of Miss Leavenworth making a claim of ownership, until the record of this deed." (Deed from Miss Leavenworth to the Society, Dec., 1882.)

Similar questions were put to and similar answers obtained from other witnesses.

It is difficult to vindicate the reception of this evidence. Possession does not receive its adverse character from the declarations of the party in possession, except when such declarations may be regarded as *res gestæ*. The mere declarations of a party cannot be admitted in his own favor. It follows that the mere absence of such declarations cannot be shown by the adverse party against him.

A party is not bound to make public proclamation that he holds adversely; therefore, whatever he says or omits to say is a matter of no importance, unless he speaks against his interest, or fails to speak when required to do so. The adverse character of the possession is ordinarily, if not always, shown by the facts of the case, and not from loose and casual declarations. Therefore, the absence of such declarations has no tendency to prove that the possession is not adverse. A corporation usually speaks by its agents authorized to speak for it, and through its votes and acts. Here the absence of rumor in the community is allowed to have weight in the judicial scales. It is not merely hearsay that is invoked, but it is the absence of hearsay. Equally objectionable is the declaration of Mr. Hart. Being no party to the suit, whatever he said was mere hearsay.

The judgment must be reversed and a new trial ordered.

In this opinion the other Judges concurred.

Daniel S. SHEEHAN, *Appt.*,

v.

William STURGES.

1. The extent and reasonableness of the punishment administered by a school teacher to a pupil, is purely a question of fact.
2. A teacher has a right to require obedience to reasonable rules and a proper

submission to his authority, and to inflict punishment for disobedience, including personal chastisement if necessary.

3. In inflicting corporal punishment, the teacher must exercise sound discretion and judgment; and must adapt the punishment, not only to the offense but to the offender; it is proper for him to consider past offenses of the pupil, and he need not, at the time of the punishment, remind the pupil of them.
4. In an action of assault against a teacher, based upon his chastisement of a pupil, the teacher should be permitted to show prior and habitual misconduct on the part of the pupil.

(Decided November 24, 1885.)

A PPEAL by plaintiff from a judgment of the Superior Court, Fairfield County, in favor of defendant. *Affirmed.*

The case is stated in the opinion.

Mr. John S. Seymour, for plaintiff:

All that took place at the time of the injury complained of, was admitted by the court and correctly. Circumstances that accompany and give character to a transaction are always admissible in evidence. *Bracegirdle v. Orford*, 2 Mau. & Selw., 79; see, also, *Avery v. Ray*, 1 Mass., 12.

Not so with respect to the conduct of the plaintiff, at other times and upon other occasions. *Id.*

Such evidence is not admissible in any action, for the sufficient reason that a party cannot meet it, and it needlessly multiplies the issues. *Matthews v. Terry*, 10 Conn., 459.

What would be said by the defendant's counsel, of a claim to introduce evidence tending to show that the schoolmaster's conduct was habitually brutal; that his treatment of his pupils was at all times harsh and unreasonable; that on slight provocations he was violent and ungovernable; and that he had no right understanding of the responsibilities of his calling? *Givens v. Bradley*, 3 Bibb, 192.

There is a class of cases in which the nature of the action involves the character of the plaintiff; but in such cases the evidence is confined to general expressions and does not extend to specific acts or misconduct. So in a case of slander, Kent, *Ch. J.*, said: "Every man is supposed capable of sustaining his general character, though no man is presumed capable of repelling a specific charge without notice." The learned Judge has been followed in this opinion by the undivided court, both in his own State and in many others. *Murphy v. People*, 2 Cow., 815; *Ross v. Lapham*, 14 Mass., 279.

The evidence of the plaintiff's character is admissible in actions for assault and battery. *Bruce v. Priest*, 5 Allen, 101. But when its introduction manifestly had a tendency deeply to prejudice the plaintiff in the minds of the jury, we are of opinion that on this ground also the verdict should be set aside. *Brown v. Gordon*, 1 Gray, 182, 185.

In *Hall v. Power*, 12 Met., 482, 487, which was an action for assault and battery for forcibly removing the plaintiff from a railroad de-

pot for disobeying the rules of the superintendent, it was held that evidence of other violations of the rules on former occasions was inadmissible.

To prove the bad character of a horse, particular vicious acts may be shown. *Whittier v. Franklin*, 46 N. H., 23; *contra*, as to the character of a man. *Reg. v. Rowton*, 11 Jur. (N. S.), 325; *Steph. Dig.*, Ev., 112; 1 *Greenl. Ev.*, § 55, and n. 3, and § 25.

The punishment of a pupil must be for some specific offense which the pupil has committed, and for which he knows he is being punished. *State v. Mizner*, 50 Iowa, 145.

If the testimony as to specific past transactions is irrelevant, the defendant ought not to be heard now to claim that it did not affect the judgment, after claiming in the court below that it was relevant and should affect the judgment. *Harris v. Woodstock*, 27 Conn., 567; *Doe v. Perkins*, 3 Term R., 749; *Walker v. Probstner*, 6 Ves. Jr., 70; *Hilliard, New Trials*, ch. 13, §§ 3, 5, 6, 40.

Still more objectionable is evidence of habitual conduct, for it is no more than a general allegation of badness, or like procuring witnesses to state that the boy ought to be punished on general principles, without assigning any particular offense. It is impossible to meet such testimony, except by producing other witnesses who were of the contrary opinion. It was received for an illegitimate purpose, and its reception furnished ground for a new trial. *Nalley v. Hartford Carpet Co.*, 51 Conn., 524.

Messa, John H. Perry and Winthrop H. Perry (Norwalk), for defendant:

Where the question is simply whether or not the punishment was excessive, its decision is for the jury not the court. 1 *Bish. Cr. Law*, § 882.

Whether, under all the facts, the punishment of the pupil is excessive, must be left to the jury. *Commonwealth v. Randall*, 4 Gray, 39.

The court should have permitted the defendant to prove that the whipping was a reasonable chastisement of the prosecuting witness, as his pupil, for misconduct in school, and should have left to the jury to determine whether or not the whipping was under all the circumstances reasonable. *State v. Mizner*, 45 Iowa, 248; 24 *Am. Rep.*, 773.

The law requires that a man shall in all cases act with reasonable care. What is reasonable care and whether a man so acts are questions of fact. *Bill v. Smith*, 39 Conn., 210.

In the case of *Vedder v. Fellows*, 20 N. Y., 126, a passenger stated to his fellow travelers in the absence of the conductor, that if the conductor should attempt to enforce the delivery of his ticket he would give him "a licking." The conductor subsequently attempted to enforce the delivery of the ticket, by ejecting the passenger; in a suit for the assault the court said: it seems that when such damages are awarded, the amount should depend in some degree upon the conduct and disposition of the plaintiff at the time, although not known to defendant.

By the terms of the statute under which this appeal is taken, Acts of 1882, ch. 50, § 8, a new trial shall not be ordered if the errors complained of "are immaterial or such as have not injuriously affected the appellant."

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Granger, J., delivered the opinion of the court:

This is a complaint for an assault and battery. The defense is, that the plaintiff was at the time a pupil in a school kept by the defendant; that he willfully violated the reasonable rules of the school and disobeyed the reasonable commands of the defendant as his teacher, and that for this misconduct the defendant, as such teacher, whipped him in a reasonable manner. The sole controversy upon the trial was, as to the reasonableness of the punishment inflicted. The court found that "such whipping was not unreasonable or excessive, and was fully justified by the plaintiff's misconduct at that time."

The extent and reasonableness of the punishment administered by a teacher to his pupil is purely a question of fact. This is too well settled to make the citation of authorities necessary. The finding of the court therefore settles the question as to this, unless the court acted upon improper evidence.

The plaintiff testified as a witness in his own behalf, and on his cross examination the defendant, against the objection of the plaintiff's counsel, was allowed to ask him whether, on two former occasions, both of them more than a week before the whipping in question, he had not assaulted the teacher while he was chastising him. And the defendant afterwards, in his testimony in his own behalf, was allowed, against the objection of the plaintiff, to state that the plaintiff's conduct in school was habitually bad, and that on two former occasions, one of them about two weeks, and the other seven or eight days before the whipping in question, the plaintiff had assaulted him while he was chastising him.

The defendant was also allowed, on the plaintiff's cross examination, against objection, to inquire of him whether he had not, seven or eight days before the whipping in question, put stones in his pocket and declared that he was going to attack the teacher with them. The plaintiff, in answer to the inquiry, denied that he had done so, and the defendant, against the plaintiff's objection, was allowed to show by a witness that the plaintiff had so done.

The defendant did not inform the plaintiff, at the time of the whipping, that he was punishing him for his past and habitual misconduct.

We think the court committed no error in admitting the inquiries and evidence. The right of the schoolmaster to require obedience to reasonable rules and a proper submission to his authority, and to inflict punishment for disobedience, is well settled. It is said in the *Encyclopedia of Education*, edited by Kiddle and Schem, page 189, that "The School Codes of the United States are generally silent in regard to the right of teachers to inflict corporal punishment; but there are numerous judicial decisions in favor of this right. By English and American law a parent may correct his child in a reasonable manner, and the teacher is *in loco parentis*," citing 2 *Kent, Com.*, 208; 1 *Bl. Com.*, 453; *Commonwealth v. Randall*, 4 Gray, 36; *State v. Pendergrass*, 2 Dev. & B. L., 365; *Stevens v. Fassett*, 27 Me., 280; *Lander v. Seaver*, 32 Vt., 123.

As incident to this relationship it is the right of the teacher in the absence of rules estab-

lished by the school board or other proper authority, to make all necessary and proper rules for the good conduct and order of the school; and it is his duty to see that order is maintained and the rules observed. And if any scholar violates the rules and disobeys the orders of the teacher, it is the duty of the latter to enforce compliance, and to that end it may be necessary to inflict personal chastisement, as without it he might lose all control of the school.

In inflicting such punishment the teacher must exercise sound discretion and judgment, and must adapt it, not only to the offense but to the offender. Horace Mann, a high authority in the matter of schools, says of corporal punishment: "It should be reserved for baser faults. It is a coarse remedy, and should be employed upon the coarse sins of our animal nature, and when employed at all should be administered in strong doses." Of course the teacher, in inflicting such punishment, must not exceed the bounds of moderation.

No precise rule can be laid down as to what shall be considered excessive or unreasonable punishment. Reeve's Dom. Rel., 288. Each case must depend upon its own circumstances. In *Commonwealth v. Randall*, 4 Gray, 36, it is held that, "In inflicting corporal punishment, a teacher must exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment by the nature of the offense, and the age, size and apparent powers of endurance of the pupil." And we think it equally clear that he should also take into consideration the mental and moral qualities of the pupil; and as indicative of these, his general behavior in school and his attitude towards his teacher become proper subjects of consideration.

We think, therefore, that the court acted properly in admitting evidence of the prior and habitual misconduct of the plaintiff, and that it was perfectly proper for the defendant, in chastising him, to consider not merely the immediate offense which had called for the punishment, but the past offenses that aggravated the present one, and showed the plaintiff to have been habitually refractory and disobedient. Nor was it necessary that the teacher should, at the time of inflicting the punishment, remind the pupil of his past and accumulating offenses. The pupil knew them well enough, without having them brought freshly to his notice.

There is no error.

In this opinion the other Judges concurred.

Walter C. QUINTARD, County Treasurer,
v.

Christian KNOEDLER *et al.*, *Appts.*

A verdict of guilty is a conviction, although no sentence or judgment has been pronounced. So held in a suit instituted under § 2, pt. 4, Act of 1882 (Pub. Acts 1882, p. 181), providing for suit on a licensed liquor dealer's bond whenever he "shall be convicted," etc.

(Decided November 24, 1885.)

APPEAL from the Court of Common Pleas, Fairfield County. *Affirmed.*

The case and facts are stated in the opinion. **Mr. F. L. Holt**, for plaintiff:

Ordinarily, the word conviction signifies the finding by the jury, by verdict, that the defendant is guilty. It does not mean, also, that sentence against him has been rendered. *Bish. St. Cr.*, § 348; 4 Bl. Com., 362; *York Co. v. Dalhousen*, 45 Pa. St., 372; *Kehoe v. Commonwealth*, 85 Pa., 138.

Conviction may accrue in two ways, either by his confession of the offense and pleading guilty, or by his being found so by verdict of his country. After trial and conviction, the judgment of the court regularly follows, unless suspended or arrested. *Commonwealth v. Richards*, 17 Pick., 296; Tomlins, L. Dic., 414; *McNeill's Case*, 1 Caines, 72; 4 Bl. Com., 365, § 14; Swift, Dig., old ed. 412-417; *Commonwealth v. Lockwood*, 109 Mass., 323, and cases there cited; *Shepherd v. People*, 25 N.Y., 406; 1 Bouv. L. Dic., 362; *Blair v. Commonwealth*, 25 Gratt., 850-857; *Rapalje & L. L. Dic.*, 291.

Conviction; this word ordinarily signifies the finding of a prisoner guilty by the verdict of a jury. When it is said there has been a conviction, or that one is a convict, the meaning is not usually that sentence has been pronounced, but that the verdict has been rendered. 1 *Bish. Cr. L.*, § 228; 4 Bl. Com., § 362; *U. S. v. Gilbert*, 2 Sumner, 19; *State v. Valentine*, 7 Ired., Law R., 225; *Commonwealth v. Williamson*, 3 Va. Cases, 211; *Skinner v. Perot*, 1 Ashm., 57; *State v. Fuller*, 1 McCord, 178; *Reg. v. Faderman*, 4 New Sess. Cases, 161; 3 Whart. Cr. L., § 3227; 1 Temp. & M., 286; *Stevens v. People*, 1 Hill (N.Y.), 261; *Commonwealth v. Richards*, 17 Pick., 295.

A plea of former conviction is supported by proof of a lawful trial and verdict or confession on a sufficient indictment, although no judgment be given upon it. *Shepherd v. People*, 25 N.Y., 406; *State v. Elden*, 41 Me., 165; 4 Bl. Com., 386; *People v. Goldstein*, 82 Cal., 432; *State v. Benham*, 7 Conn., 414; *People v. Goodwin*, 1 Wheel. Cr. Cas., 477; *State v. Norvell*, 24 Am. Dec., 458; 3 Whart. Cr. L., § 3243; *State v. Shepard*, 7 Conn., 54; *U. S. v. Perez*, 9 Wheat., 579 (22 U. S.).

The word conviction is frequently used in the Conn. statutes, in instances which show the meaning of the word, as used, is a finding of guilty by the jury, or by a plea of guilty, and not a judgment or sentence in addition.

Any person convicted of a violation of the provisions of § 1 of this Act, shall be deemed guilty of a misdemeanor and shall be punished for the first offense, etc. For any subsequent conviction for the same offense, shall be fined not less than \$25 nor more than \$50, etc. Laws, 1880, 345, § 2.

"In case of conviction for any high crime or misdemeanor at common law, the offender may be imprisoned in the state prison, not more than five years, and in case of a conviction for any other offense at common law, the offender shall be imprisoned in a jail," etc. Gen. Stat., 540, § 21.

Every person having been convicted of any crime punishable by imprisonment in the state prison, for a term less than life. Id., § 22.

Sentence to imprisonment in the state prison

shall be pronounced by the judge, in the presence and hearing of the convicted person. Gen. Stat., 539, § 13.

But no writ of error to reverse the judgment rendered upon a conviction of any offense punishable by death, shall supersede the execution of said judgment, etc. Gen. Stat., 539, § 16.

When a justice of the peace may punish any convict by imprisonment in jail, he may instead, punish him by imprisonment in a work house, etc. Gen. Stat., 535, § 13.

Any justice of the peace or person officially connected with any court, who shall fraudulently convert to his own or to the use of another, money or property received or held in his official capacity, shall be punished as if he had been convicted of stealing property of the same value. Gen. Stat., 525, § 10.

If any person shall be guilty of a violation of the provisions of § 2 of this Act, he shall, upon conviction thereof, be punished, etc. Laws, 1877, 250, § 3.

Whenever any person is convicted of an offense for which the punishment may be confinement in the state prison, it shall be the duty of the court before which he is convicted, to pass sentence within ten days from the conviction, unless there be a stay of proceedings by order of the court. Laws, 1878, 270.

The word conviction is used also in a similar manner in the following statutes: Laws, 1879, 452, § 1; Laws, 1880, 524, § 10; Laws, 1832, 185, §§ 1, 3.

Messrs. Lockwood & Beers, for defendant:

The statute upon which this suit is brought is as follows: "And whenever the person so licensed shall be convicted of a violation of any of the provisions of part 6 of this Act, and no appeal is pending, said bond shall thereupon become forfeited, and the treasurer of said county shall, in his own name, institute suit upon said bond for the benefit of said county, and upon due proof of said conviction, the court before which said suit is brought, shall render judgment in favor of said treasurer for the entire amount of said bond with costs. Public Acts, 1832, 181.

After verdict a *nolle prosequi* may operate as a pardon. Whart. Cr. Ev., 573.

The attorney for the prosecution has the right to *nolle* a case after verdict. *Commonwealth v. Tuck*, 20 Pick., 866; *Commonwealth v. Briggs*, 7 Pick., 177; *Commonwealth v. Jenks*, 1 Gray, 490; *State v. Burke*, 38 Me., 574; *State v. Roe*, 12 Vt., 93; *People v. Van Horne*, 8 Barb., 158; *State v. Fleming*, 7 Humph., 152.

The verdict of a jury is not a conviction; there must be a judgment on the verdict. 1 Greenl. Ev., § 875; *Cushman v. Loker*, 2 Mass., 108; *Reg. v. Hinks*, 1 Den. Cr. Cas., 84, S. C., 2 Car. & K., 464; *Lee v. Gansel*, Cowp., 3; *Smith v. Commonwealth*, 14 Serg. & R., 69; *Commonwealth v. Gorham*, 99 Mass., 420.

Conviction must be proved by record. Whart. Cr. Ev., 8th ed., 153, §§ 489, 153; Greenl. Ev., § 872.

A verdict of guilty, without judgment, is not a conviction. Whart. Cr. Ev., § 489; *U. S. v. Dickinson*, 2 McLean, 325; Com. Dig., 854, Testm. A., 5; *King v. Castell Caronion*, 8 East, 77; Buller's *N. P.*, 392; *Fitch v. Smalbrook*, Ld. Raym., 33; *People v. Whipple*, 9 Cow., 707;

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People v. Herrick, 13 Johns., 82; *Blaufus v. People*, 69 N. Y., 107; *Skinner v. Perot*, 1 Ashm. (Pa.), 57; *State v. Valentine*, 7 Ired., Law R., 225; *State v. Duncan*, 6 Id., 98; *Dawley v. State*, 4 Ind., 128; *Faunce v. People*, 51 Ill., 311; *Reg. v. Ackroyd*, 1 Car. & K., 158; 1 Swift, Dig., 740 side p.; *Sutton v. Bishop*, 4 Burr., 2286.

"By conviction, I conceive, is intended not barely a conviction by verdict when no judgment is given, but it must be a conviction by judgment." 1 Hale, P. C., 686.

As a general rule a verdict cannot be put in evidence unless judgment has been entered on it. Whart. Cr. Ev., § 609; Whart. Ev., § 831.

Judgment must have been entered on the verdict to make the record admissible. Whart. Cr. Ev., 8th ed. § 602; *State v. Duncan*, 6 Ired. Law., 236.

The judgment, and that only, can be received as legal evidence of the party's guilt for the purpose of rendering him incompetent to testify. The finding of a jury is insufficient, because it may be reversed or set aside. Bouv. Ins., 8188; *Rea v. Luckup*, 2 Strange, 1048; *State v. Benham*, 7 Conn., 414, 419.

The conviction and judgment must be proved by a copy of the record. *Castellano v. Peillon*, 2 Mart. (La.), 468.

It is not competent for a party, when a person is offered as a witness, to give evidence to prove him to have been guilty of a crime. Even the verdict of a jury if not followed by judgment is inadmissible. "Competency of witnesses," by George Sharswood. 1 Am. Law Reg., (N. S.), 264.

In criminal proceedings, the judgment is the sentence of the court on the verdict of the jury. Rapalje & L. L. Dic., *ad verbum*, "judgment," § 23; 1 Archb. Cr. Pr., 196, 197, side p. 60; *Hills v. Colvin*, 14 Johns., 182.

A judgment of conviction consists of two parts, to wit: 1. The facts, judicially ascertained, together with the manner of ascertaining them, entered of record. 2. The recorded declaration of the court pronouncing the legal consequences of the facts thus judicially ascertained. Freem. Judg., 8d ed. § 50, a; *Mayfield v. State*, 40 Tex., 290; *Roberts v. State*, 3 Tex. App., 47; *Anschinck v. State*, 43 Tex., 587; *Fulcher v. State*, 38 Tex., 505.

The defendant cannot appeal until final judgment, and no judgment is final unless it condemns the prisoner to be punished and sets forth particularly the amount, duration and place of punishment. Freem. Judg., 8d ed. § 21, a; see, cases last above cited.

The word "convicted" has a definite signification in law. It means that a judgment of final condemnation has been pronounced against the accused. The word "convicted" is the proper statutory word to convey the idea that a party is disqualified from voting because he has been tried and condemned for a felony. *Gallagher v. State*, 10 Tex. App., 469; 2 Russ. Cr., 507; 1 Phillips, Ev., 81.

There cannot be two final judgments in the same case in force at the same time. *Hall v. Paine*, 47 Conn., 431; *Ex Parte Lange*, 18 Wall., 163 (85 U. S., XXI., Law. ed., 872); *Commonwealth v. Foster*, 122 Mass., 317.

It is not to be denied that the word "convicted" is sometimes used in a narrower sense

But in one of the best considered cases, *Commonwealth v. Lockwood*, 109 Mass., 323, Judge Gray says: "When, indeed, the word 'conviction' is used to describe the effect of the guilt of the accused as judicially proved in one case, when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict, or confession of guilt; as for instance, in speaking of the plea of *autrefois* convict, or of the effect of guilt, judicially ascertained, as a disqualification of the convict."

And it might be held to have the same meaning in the somewhat analogous case, in which the Constitution provides that "No person shall ever be admitted to hold a seat in the Legislature or any office of trust or importance, under the government of this Commonwealth, who shall in the due course of law have been convicted of bribery or corruption in obtaining an election or appointment." *Id.*, 329.

Loomis, J., delivered the opinion of the court:

The complaint seeks to recover the penalty named in a bond, dated May 28, 1883, given by Knoedler, one of the defendants, as a licensed liquor dealer, to secure his compliance with the provisions of the Act under which his license was granted.

The breach of the bond consisted in the fact, which was established by proper evidence, that before the Superior Court for Fairfield County at its February Term, 1884, upon proper information and proceedings, Knoedler was found, by the jury, guilty of keeping open, on Sunday, a place where it was reputed intoxicating liquors were sold contrary to the statute. After the verdict, the attorney for the State moved that the court pronounce sentence against the defendant, but it was found that he had fled, and thereupon the bond was called and forfeited; but no sentence was pronounced. No appeal or other proceedings have ever been taken to set aside the verdict or for a new trial. In this condition of things the plaintiff, as county treasurer, instituted this suit, pursuant to the provisions of § 2, p. 181, part 4, of the Act of 1882, which is as follows: "And whenever the person so licensed shall be convicted of a violation of any of the provisions of part six of this Act, and no appeal is pending, said bond shall thereafter become forfeited, and the treasurer of said county shall, in his own name, institute suit upon said bond for the benefit of said county; and upon due proof of said conviction, the court, before which said suit is brought, shall render judgment in favor of said treasurer for the entire amount of said bond, with costs."

The only defense was that no sentence was rendered pursuant to the verdict. The question was raised in two ways: by objecting to the record of the Superior Court offered in evidence by the State and by claiming, after it was received, that no breach of the bond was shown; but the question for review is one and the same, viz.: whether, within the meaning of the statute, there could be a conviction without a sentence or judgment by the court. The only difficulty in answering this question arises from the fact that the word "conviction" has been sometimes used by courts as including the final judgment of the court; but that such is not the

ordinary and usual meaning may be demonstrated by reference to numerous authorities; which, however, we do not deem it necessary, particularly to cite.

The principles established are well summarized by Bishop in his treatise on Statutory Crimes, § 348, as follows: "The word 'conviction' ordinarily signifies the finding of the jury by verdict that the prisoner is guilty. When it is said there has been a conviction, or one is convicted, the meaning usually is, not that sentence has been pronounced, but only that the verdict has been rendered. So a plea of guilty by the defendant constitutes a conviction of him."

Lord Coke distinguishes thus: "The difference between a man attainted and convicted is, that a man is said to be convicted before he hath judgment; as if a man be convicted by confession, verdict or recreancy. And when he hath his judgment upon the verdict, confession or recreancy, or upon outlawry or abjuration, then he is said to be 'attaint.' Yet the word 'conviction,' when it stands in such a connection with other words as to indicate a secondary, or unusual meaning, sometimes denotes the final judgment of the court."

See, also, the definition of the word as found in the law dictionaries of Jacobs, Wharton and Burrill.

In *Commonwealth v. Lockwood*, 109 Mass., 323, the defendant was tried upon an indictment for cheating by false pretenses, and the jury returned a verdict of guilty; but exceptions were taken to the rulings of the presiding Judge, and no sentence was pronounced. While the exceptions were pending, the Governor, with the advice of the council, granted the defendant a pardon. But the Constitution of that State commits to the Governor and council the pardoning power, under this limitation: "But no character of pardon granted by the Governor, with the advice of the council, before conviction, shall avail the party pleading the same." The accused did not pursue his exceptions, but filed his charter of pardon in bar. To this the district attorney replied that the pardon was null and void under the constitutional provision referred to, in that it had been granted before conviction. The court held in a very elaborate opinion by Gray, J., that the term "conviction," as used in the Constitution, should be construed in its usual and ordinary sense, and that it did not include the sentence or judgment.

It will be observed that the court held the verdict of guilty by the jury a conviction, notwithstanding the pendency of exceptions, which, if pursued, might have set the verdict aside. In our statute the pendency of an appeal is provided for. It prevents a suit on the bond. If this provision has any effect it would seem to make the reason for the construction we have given stronger, rather than weaker, inasmuch as it involves an implication that the omission of such a provision might have made the defendant liable, notwithstanding an appeal. There was here, not only no appeal but no possibility of one.

If now we pass from the most approved legal definitions of the term under consideration and seek what light we may from the actual use of the same word in other statutes, we are confi-

dent that nothing can be found to militate against the definition assumed. In a large majority of instances where it is used, it manifestly refers to a finding of the party guilty by verdict or plea of guilty, and not to a sentence in addition.

Our conclusion, therefore, is that the verdict was a conviction, and there being no appeal or ulterior proceedings of any kind pending to set aside the verdict, there was a breach of the bond in suit.

There was no error in the judgment complained of.

In this opinion the other Judges concur.

SHALER & HALL QUARRY CO.

v.
C. C. CAMPBELL & Co., *Appts.*

1. Where an auditor or committee to hear a case is once legally appointed, and the case runs from term to term by continuance, the auditor or committee remains such, and the case continues to stand referred until the appointment is directly or impliedly revoked by the court. An actual reappointment at every term of court is not necessary.
2. Under the rule of court adopted in 1879, the reappointment is made by the law without motion; and the omission of the clerk to enter the same is an error which may be corrected at any time and does not affect the power of the committee to act in the case.
3. The adjournment or continuance of a referred case is, in the absence of statute, in the discretion of the committee; and his action in reference thereto is not subject to review, in the absence of corruption, fraud or prejudicial unfairness.

(Decided October 23, 1885.)

APPPEAL from the Superior Court, Middlesex County. *Affirmed.*

The case is stated in the opinion.

Mr. S. H. Warner, for plaintiff.

Messrs. Crafts & Tillinghast and E. B. Birdsey, for defendants:

The committee had no authority to hear said cause, and was not legally constituted as such at the time of said hearing before him. The statute under which the committee was appointed originally, requires him to report to the next term. Gen. Stat. Conn., 1875, § 8, tit. 19, ch. 9, 428. If not made at that term, "there must be a new appointment," etc.

To continue the appointment, which is a repetition of the same act, requires the same consent of parties as to originate it. *Hall v. Hall*, 3 Conn., 808, 809, 810.

In accordance with this decision, the rule of court on this subject was made. See, 7th Rule of Practice, § 3, recognizing the fact that the authority of the committee expires at the commencement of each term.

It is true that at the time this appointment was originally made, and for several years

thereafter, the consent of all the parties was not requisite to an appointment or reappointment of committees. But the authority of this committee expired at the commencement of each term, and by ch. 25, Pub. Acts, 1884, a committee could be appointed by "the written consent of all parties in said action, and not otherwise."

In this case, no entry of a reappointment was ever made on the written docket, although the name of the old committee was continued on the printed docket. Courts have no control over judgments, orders or decrees after the term when rendered. *Sheppard v. Atwater Mfg. Co.*, 48 Conn., 451.

The authority of the committee had expired. How could he or anyone else be appointed, except under the amended statute? The statute was amended on the idea, doubtless, that the old provision of the law was unjust. That such statutes affect pending actions, even retroactively, see, *Hine v. Belden*, 27 Conn., 890, 892; *Taylor v. Keeler*, 30 Conn., 826, 827.

The committee "ought never anywhere to allow of unfairness or advantage of any party or their attorneys." *Wethersfield v. Humphrey*, 20 Conn., 226.

In *Chatham v. Niles*, 36 Conn., 424, the court ordered such a hearing reopened for the purpose of allowing the defendants to put in their evidence, on the ground that injustice had been done, although attributable "to the defendants' own folly."

The committee has power, after drawing up a report and before rendering it to court, to open the hearing for newly discovered evidence or other good cause. *Welles v. Harris*, 31 Conn., 368.

The right to a fair trial is guaranteed by the Constitution of the State, and the right of a party to testify in his own case is allowed and given by the statute. No doubt a court would have a right, in a civil as in a criminal trial, to limit the argument of counsel. The abuse of this power, as by total denial, would constitute ground for a new trial. *State v. Hoyt*, 47 Conn., 536.

As to the proper method of making account books admissible, see, 1 Greenl. Ev., § 115, *et seq.* If the books were not admissible, certainly no copy would be.

The improper exercise or abuse of discretion on the part of the committee or of the Superior Court is sufficient to justify the granting of a new hearing. The discretion to be exercised is a legal and not an arbitrary one. *Huntington v. Birch*, 12 Conn., 154; *Carrington v. Holabird*, 17 Conn., 588.

The Superior Court has authority to allow new trials of cases tried before it, and certainly before its committee, for "want of a reasonable opportunity to appear and defend," etc. Gen. Stats., 1875, tit. 19, ch. 15, p. 447.

Granger, J., delivered the opinion of the court:

This case is an action of *assumpsit*, with the common counts, brought under the old practice. It was brought to the Superior Court in 1872, was continued from term to term until 1878, when it was referred to C. G. R. Vinal, Esq., as a committee, who heard the case in February, 1885, and made his report to the court

then in session. The defendants remonstrated against the acceptance of the report, but the court overruled the remonstrance, accepted the report and rendered judgment for the plaintiffs. The defendants appealed to this court.

The reasons of appeal are substantially those set up in the remonstrance, and though put in a variety of forms may be stated briefly as follows:

1. That the committee had no authority to act.
2. That the committee erred in refusing the defendants' request for an adjournment.
3. That the committee erred in receiving evidence.

As to the first point. The finding is that the committee, after the first appointment in 1878, which it is admitted was in all respects a legal one, "Was not subsequently reappointed, and no entry was made on the written docket of the court after that term, showing that he had been reappointed, but his name was regularly entered as committee in the printed term dockets of each succeeding term."

The printed term docket, of which every lawyer practicing in that court had a copy, gave notice to all parties interested, of the fact that Mr. Vinal was a committee in the case, and was all the information needed by either party to enable him to take measures for having the case heard by the committee. But, without relying on this docket as taking the place in law of the regular permanent docket, or as giving validity to the continued tenure of the committee by Mr. Vinal, it is sufficient that he had been in the first instance legally appointed and that he had not been removed by the court or superseded by any other appointee, or, the case disposed of in any other way. Where an auditor or committee is once legally appointed and the case runs from term to term by continuance, the auditor or committee remains such and the case continues to stand referred until the appointment is directly or impliedly revoked by the court. An actual reappointment at every term of the court is not necessary. The failure of both parties to bring the matter to the attention of the court is an acquiescence on the part of both in the continuance of the auditorship or committee.

A rule of court was adopted in 1879 that, in a suit referred to an auditor or committee, "such auditor or committee will be reappointed without a formal motion by either party; and the clerk may make the necessary entries therefor

without any special order of the court." There had been a rule substantially like this adopted in 1859, and for many years before this had been the general practice in the courts of the State.

It is claimed, on the part of the defendants, that this rule implies that, unless the clerk makes the entry of reappointment in his docket, there is no proof of reappointment, and, consequently, no reappointment; the rule authorizing the clerk to enter such reappointment on his docket without action on the part of the court, but not dispensing with such entry by the clerk. But the case is one of reappointment made by the law, and simply of a failure of the clerk to enter up the reappointment. But such a clerical omission can always be corrected, and the clerk would have the right to-day to supply the needed record. There is nothing in this reason for appeal.

As to the second reason. It is a well settled rule that all questions of adjournment or of the continuance of a case, where there is no provision of statute determining the matter, are questions for the discretion of the court and cannot be made the subjects of error. And the same rule applies to auditors and committees. And it does not affect the case that the question in the particular case is one of grave importance to the party asking for an adjournment or delay and that he seems to have been harshly treated in refusing it. In the absence of conduct on the part of the triers that indicates corruption or fraud, or a prejudice or unfairness that is equivalent to fraud, their action in the matter is final, and cannot be reviewed.

As to the third reason. It appears that the claim of the plaintiffs did not depend on the accuracy of the entries on their account book, regarded as original entries. They presented their claim in a bill of particulars, and the witness was asked whether that was a correct statement and whether the goods therein mentioned were actually delivered. There can be no objection to this evidence.

In regard to the evidence claimed by the defendants, that a receipt was given for payment made for some of the articles mentioned in the bill of particulars, the court finds expressly that it did not appear that the receipt was for the same articles.

There is no error.

In this opinion the other Judges concurred.

SUPREME COURT OF MASSACHUSETTS.

ATTORNEY-GENERAL, *ex rel.* HARBOR
& LAND COMRS.,v.
Henry Bigelow WILLIAMS.

1. An appeal from a decree of the court, ordering the removal of obstructions erected in a passageway, in violation of the restriction in a deed from the Commonwealth to defendant, reserving such passageway, to be kept open for a certain width for certain uses; taken upon the ground that each and all of the abutters on the passageway, have subsequently to such decree, assented that the obstruction may remain, is frivolous.
2. The rights reserved by the Commonwealth, whether for the benefit of other land, or of the public, or both, are not confined to the abutters who have released, and they could not discontinue the passageway by private agreement among themselves.

(Suffolk.—Decided November 24, 1885.)

A PPEAL from a decree made by a Justice of the Supreme Judicial Court, in accordance with an opinion given by the full bench of the Supreme Court, in a suit by information, for the removal, within thirty days, of certain obstructions in a passageway erected in violation of a restriction in a deed from the Commonwealth to defendant, reserving a passageway to be kept open for the use of abutters in common and for sewerage, etc. *Affirmed.*

Defendant filed a petition for rehearing which was denied, and appeal was taken to the full court. The question the defendant asks to have submitted to the judgment of the court is whether, after a conveyance of all its title by the Commonwealth, an information can be maintained; and, if this be answered in the affirmative, yet whether, after a release by the abutters, the Commonwealth, as their trustee or on any other ground, can by its Attorney-General maintain a suit by information. The defendant also claimed that the decree made no provision for the costs of removal, and that the rights of a mortgagee had intervened since the original suit was brought.

Mr. Harvey N. Shepard, Asst. Atty.-Gen., for petitioners:

If the defendant's petitions for a rehearing and for setting aside the decree are now addressed to the full court, they are not in proper form for consideration. *Winchester v. Winchester*, 121 Mass., 127.

If the defendant's petitions were addressed to a single Justice of this court, they were addressed to his discretion, and his decision is not subject to the review prayed for. *Steines v. Franklin Co.*, 14 Wall. (81 U. S., XX., Law. ed., 848), 22.

The defendant has no right of appeal from the decree, as it covers nothing which has not been passed upon by the full court, and even if an appeal lie, the decree is right and should be affirmed, since it follows the bill and the opinion,

and is justified by the record. *Ross v. Harper*, 99 Mass., 175; *Weid v. Walker*, 180 Mass., 422.

Mr. George S. Hale, for defendant:

There is no statute provision which authorizes the Attorney-General, by an information, to enforce the stipulations in contracts made by the State with individuals. Such information is authorized, aside from express authority by statute in the given case, only in cases of public nuisances or charitable trusts. *Atty-Gen. v. Tudor Ice Co.*, 104 Mass., 244; *Atty-Gen. v. Salem*, 108 Mass., 188.

"The extent of the grantee's right (under this or other deeds on other streets or passageways), beyond the limits of his land, will depend upon the nature and character of the way and its connection with the public streets, as affording a convenient outlet from his land," although when defined by a plan, it extends to the whole way as so defined. *Langmaid v. Higgins*, 129 Mass., 358, 358; see, *Fox v. Union Sugar Refn.*, 109 Mass., 292, 297; *Stetson v. Dow*, 16 Gray, 372.

In Re 29th Street, 1 Hill (N. Y.), 189, the court says: "I do not say that his dedication will extend to all his lands on the site of the street, however remote from the lots sold; but it will, I think, extend to all his land on the same block, or in other words, to the next cross street or avenue on each side of the lots sold;" cited in *Boston Water Co. v. Boston*, 127 Mass., 374; *Williams v. Water Co.*, 184 Mass., 406.

The exhibition of a passageway on the plan of this very Back Bay District, referred to in numerous deeds, gave no "easement or other interest," in the passageway to grantees of land "remote from, not immediately connected with the lot sold." *Coolidge v. Dexter*, 129 Mass., 167, 169, note.

It would seem clear that an appeal would lie from a decree settled by a single Justice, although the full court has ordered a decree without stating its form. *Sewall v. Sewall*, 180 Mass., 201, 207.

Holmes, J., delivered the opinion of the court:

We assume, in favor of the defendant, that the case now stands for the purposes of the present decision, as if all the abutters on the passageway between Dartmouth and Exeter Streets had executed releases in such form as to preclude themselves or any subsequent purchasers from them, from making any complaint hereafter in respect of the present structures; but we are of the opinion that, in view of the form of the stipulation in the bond of the Commonwealth to Williams and the statutes in force when that bond was executed, the rights reserved by the Commonwealth, whether reserved for the benefit of other land, including that owned by itself, or of the public, or both, are not confined to the abutters who have released; and that those abutters could not discontinue the passageway by private agreement among themselves. If the only purpose had been to create a private way for the use of the adjoining estates between Dartmouth and Exeter Streets, we may presume that an easement would have been reserved and granted in the ordinary form, and that the intervention of the Commonwealth and the cumbrous machinery provided by statute for setting the Board of Harbor and Land

Commissioners in motion, would not have been thought necessary. Pub. Stats., ch 19, § 5.

The appeal is frivolous. The only matters in the decree of the single Justice, not covered by the rescript, are the time within which the projections are to be removed, and the question of costs. The record certainly discloses no reason why costs should not be given against the losing party, according to the usual rule. As to the time allowed, the only evidence which we could consider would be that on which the single Justice acted, and that evidence is not reported. It cannot have been supposed that we could say, as a matter of law, that thirty days was not ample time to remove bay windows. These are the only points before the court.

Decree accordingly.

The court ordered the removal of the obstructions within thirty days.

COMMONWEALTH OF MASSACHUSETTS

v.

Thomas LEONARD.

1. An indictment, in several counts, for receiving stolen goods, each count describing certain articles, different from those in the preceding counts, as stolen, and charging the defendant with receiving the articles "so as aforesaid" stolen, is good. It is clear that the articles in each count alleged to have been received, are the articles in that count alleged to have been stolen.
2. Where it has been shown that defendant, a licensed junk dealer, did not keep a junk dealer's book, it is competent to prove that he knew that the statutes and ordinances required him to keep such a book.
3. If the property had actually been stolen and defendant knew all the facts, and such facts constituted larceny as distinguished from embezzlement, it is no defense that defendant thought that the facts constituted embezzlement. If defendant did not know the facts, but believed from the circumstances that the property had been either embezzled or stolen, and it had been actually stolen, it is competent for the jury to find him guilty of receiving stolen property.
4. The weight of evidence of the good character of defendant should be left to be determined by the jury, in connection with all the other evidence in the case. The old rule that such evidence is not to be considered by the jury, unless the other evidence leaves their minds in doubt, is not now the law.

(Decided January 8, 1886.)

ON defendant's exceptions. *Sustained.*

Indictment in three counts, for receiving stolen property. The first count alleged that certain articles were, on a certain date, stolen and afterwards feloniously received by defend-

ant. The second count alleged that certain articles differently described were; on another date, stolen and feloniously received by defendant. And so in the third count. The several allegations of receiving, in the different counts, refer to articles "so as aforesaid" feloniously stolen, etc. Defendant moved to quash the indictment, claiming that it is not clear whether such allegations of receiving, refer to the articles alleged, in the particular count in which they appear, to have been stolen; or to all the articles mentioned in the several counts which precede the allegation of receiving.

The motion to quash was overruled.

The defendant requested the court to make the following rulings to the jury:

"If the jury are not satisfied beyond a reasonable doubt that the accused knew that the goods were stolen, he is entitled to an acquittal."

"To justify a conviction it is not sufficient to show that the accused had a general knowledge of the circumstances under which the goods were stolen, unless the jury is also satisfied that he knew that the circumstances were such as constituted larceny."

"Good character, like all other facts in the case, should be considered by the jury; and if therefrom a reasonable doubt is generated in the mind of the jury as to the guilt of the accused, it is their duty to acquit."

But the court refused to make such rulings or any of them, and upon the matter of defendant's request for rulings, instructed the jury as follows: "When a man is put on trial, charged with a criminal act, he has a right to put in evidence the reputation which he has from those who know him; his character, in other words, by way of rebuttal of the inference that he might be likely to commit the act of which he is accused; if a person is charged with any act which implies dishonesty, the party accused has a right to put in his reputation of being an honest man, in order to furnish evidence that the character of the man accused is such that you would not be likely to expect crime to be committed. Character may properly be thrown into the scale to increase any reasonable doubt that the jury might have on the case in question; of course, character is no excuse; a good name is no answer against decisive evidence; it is in a case where the evidence is doubtful and the mind of the jury is in doubt, that the evidence of good character is thrown into the scale in behalf of the man. Of course, if a man should come before a jury, a credible witness, and say he saw the accused party commit a crime, it would be no answer for that party to say: my character has always been good. It is important, where the evidence to convict is doubtful, that it should be thrown into the scale in his favor; but where the evidence is strong and his guilt is impressed on the minds of the jury, of course it is not of the slightest consequence."

"He must know that the goods were stolen, but he don't need to know the hour nor day they were stolen. He must undoubtedly have notice which would put him on his guard, as: knowledge that the goods were acquired and turned over to him by a person not taking them by mistake, not by right, but taking them as thieves take them; that is, for purpose of

defrauding the railroad and cheating them out of their property."

Defendant's counsel here suggested, "By larceny," and the court then further instructed: "By the taking and carrying away of property, is meant the fraudulent taking away of the property of another for the purpose of converting it to the taker's use, to deprive the owner of it. These goods must have been taken that way and were stolen goods; they must have been taken by McCarty, as thieves take them; not by mistake or accident or by taking from those who had no right to give, but taking when he knew that he had no right to take them."

The jury found the defendant guilty on the third count, and not guilty on the first and second counts of the indictment.

Messrs. Chas. J. McIntire and George A. Perkins, for defendant:

The evidence of officer Murray, admitted against the objection of defendant, relating to a conversation between him and Murray in May, 1883, where defendant said he had not before then kept the book required by law, of junk dealers, had no tendency to establish the guilt of the defendant and should not have been permitted. It was evidently relied upon in part as proof of the crime for which he was charged. It was incompetent and calculated to prejudice the cause of the defendant. *Commonwealth v. Madden*, 1 Gray, 486; *Commonwealth v. Smith*, 2 Allen, 517; *Hall v. Power*, 12 Met., 482, 487.

The several rulings should have been given as requested. The instructions are not sufficiently explicit; do not cover the particular points raised; are misleading and otherwise in error in many important particulars.

First: in regard to the point whether the evidence that the goods alleged to have been received showed them to have been stolen, instead of embezzled or taken in any other wrongful manner.

Under this indictment, unless the jury was satisfied that the facts showed the goods to have been stolen and not taken under other circumstances such as would not constitute the crime of larceny, they had no right to convict. For the receiving of goods embezzled is an offense entirely distinct from this. Pub. Stat., ch., 203, §§ 48, 51; *People v. Hennessey*, 15 Wend., 147; *People v. Dalton*, 15 Wend., 581; *Commonwealth v. Simpson*, 9 Met., 138; *Commonwealth v. King*, 9 Cush., 284.

Although a belief that they were stolen, without actual knowledge, would be sufficient to convict of receiving, provided that they actually were stolen, a belief that they were stolen when they were in fact embezzled, obtained by false pretenses or in any other method than by larceny, would not be sufficient under this indictment to justify a conviction. *Reg. v. Rymes*, 3 Car. & K., 327; *Rez v. Densley*, 6 Car. & P., 399.

"To justify a conviction it is not sufficient to show that the accused had a general knowledge of the circumstances under which the goods were stolen, unless the jury is also satisfied that he knew the circumstances were such as constituted larceny." *Reg. v. Adams*, 1 Fost. & F., 86.

Second: good character should be consid-

ered like all other facts in the case; for the intent with which the act charged as a crime was done is of the essence of the issue, and the prevailing character of the defendant's mind, as evinced by the previous habits of his life, is a material element in discovering that intent in the instance in question. 1 Greenl. Ev., 18th ed. § 54, note 6; *Commonwealth v. Webster*, 5 Cush., 324.

If, from considering the previous good character of the defendant, a reasonable doubt is generated in the mind of the jury, as to his guilt, he is as much entitled to the benefit of that doubt, arising from that evidence, as from any other testimony which might be introduced. *Commonwealth v. Hardy*, 2 Mass., 817; *Atty-Gen. v. Radloff*, 26 Eng. L. & Eq., 416; *Rez v. Stannard*, 7 Car. & P., 673.

Good character is a fact relevant to the question of the guilt or innocence of the accused, and may alone create a doubt in the mind of a jury. *Rez v. Stannard*, 3 Greenl. Ev., § 25; 2 Russ. Cr., 785.

Good character alone should uniformly be allowed to outweigh the testimony of an accomplice. It should be allowed to rebut the presumption of guilt arising from such evidence. In cases like this, character becomes important; it is a perfect shield. *People v. Vane*, 12 Wend., 82; *Townsend v. Graves*, 3 Paige, 455, 456.

Mr. Edgar J. Sherman, Atty-Gen., for plaintiff:

The motion to quash the indictment was properly overruled. *Commonwealth v. Darling*, 129 Mass., 112.

The verdict of guilty on one count only renders the consideration of this question unnecessary.

The rulings upon the subject of the defendant's requests, taken altogether, were correct.

"It is important, where the evidence to convict is doubtful, that it should be thrown into the scale in his favor, *but where the evidence is strong, and his guilt is impressed on the minds of the jury, of course it is not of the slightest consequence.*"

This paragraph must be taken in connection with all the instructions on that subject.

The words above italicized, are the same in substance as those used by Chief Justice Shaw, in *Commonwealth v. Webster*, 5 Cush., 325. "Against facts strongly proved, good character cannot avail."

"In doubtful cases, a good general character, clearly established, ought to have weight with a jury; but it ought not to prevail against positive testimony of credible witnesses." *Commonwealth v. Hardy*, 2 Mass., 317.

Field, J., delivered the opinion of the court:

The motion to quash was rightly overruled. The articles in each count alleged to have been feloniously received are the articles in that count alleged to have been stolen.

As testimony was introduced that the defendant did not keep a junk dealer's book, the testimony of Murray was competent for the purpose of showing that the defendant knew that the statutes of the Commonwealth and the ordinances of the City of Boston required him to keep such a book. See, P. S. ch. 102, § 29.

If the defendant intentionally neglected to keep a book which was required by law, mani-

festly for the purpose of tracing all articles purchased by him as a junk dealer, the fact was competent to be considered by the jury.

The offense of receiving stolen property, knowing it to have been stolen, must be considered as distinct from the offense of receiving embezzled property, knowing it to have been embezzled, although embezzlement under our statutes has been held to be a species of larceny. *Commonwealth v. Pratt*, 132 Mass., 246; P. S., ch. 208, §§ 48, 51.

The punishments of the two offenses may be different, as the offense of receiving embezzled goods may be punished by a fine without imprisonment. If the property had actually been stolen, as belief on the part of the defendant that it had been stolen is tantamount to knowledge, if the defendant knew all the facts and the facts constituted larceny as distinguished from embezzlement, it would be no defense that the defendant thought that the facts constituted embezzlement. If the defendant did not know the facts, but believed from the circumstances that the property had been either embezzled or stolen, and it had been actually stolen, it was competent for the jury to find the defendant guilty of the offense charged. The second request for instructions was, therefore, rightly refused.

The first request for instructions states the law with substantial correctness. It is contended that the instructions given on this point rightly construed are the same in effect. We find it unnecessary to decide whether the case called for a more careful definition of larceny as distinguished from embezzlement, or from willful trespass.

The third request was, we think, a correct statement of the law as it must now be held in this Commonwealth. The case was peculiarly one where evidence of the defendant's general reputation for honesty in his business deserved consideration. Such evidence is always competent in the trial of offenses of this character. It is not now the law, we think, that evidence of character can only be considered by the jury where the other evidence is doubtful, and that "it is not of the slightest consequence" when the other "evidence is strong" and the guilt of the defendant "is impressed on the minds of the jury."

In *Commonwealth v. Hardy*, 2 Mass., 817, it was said that: "In doubtful cases, a good general character clearly established ought to have weight with a jury; but it ought not to prevail against the positive testimony of credible witnesses;" and in *Commonwealth v. Webster*, 5 Cush., 295, a distinction was taken between crimes "of great and atrocious criminality" and "smaller offenses," and it was said that "against facts strongly proved, good character cannot avail," and that in the smaller offenses such as "pilfering or stealing," when the evidence is doubtful, proof of character may be given with good effect. Both these decisions were before G. S. ch., 115, § 5, P. S. ch., 153, § 5, which provided that: "The courts shall not charge juries with respect to matters of fact, but may state the testimony and the law." The distinction taken in *Commonwealth v. Webster*, if it be regarded a matter of law, has been expressly disapproved in *Cancemi v. People*, 16 N. Y.,

501; *Harrington v. State*, 19 Ohio St., 264, and *People v. Garbutt*, 17 Mich., 9.

The old rule that evidence of the good character of the defendant is not to be considered by the jury, unless the other evidence leaves their minds in doubt, has been much criticised and the weight of authority is now against it. 1 Bish. Cr. Pro., 3d ed. §§ 1115, 1116; 2 Russ. Cr., 391, 598; 8 Greenl. Ev., § 25; Whart. Cr. Ev., 9th ed. § 66; *Stewart v. State*, 22 Ohio St., 477 n.; *People v. Ashe*, 44 Cal., 288 n.; *State v. Henry*, 5 Jones, Law. (N. C.), 65; *Romsen v. People*, 43 N. Y., 6; *State v. Lindley*, 51 Iowa, 848; *Heine v. Commonwealth*, 91 Pa. St., 145; *State v. Daley*, 58 Vt., 442; *Coleman v. State*, 59 Miss., 484; *Cancemi v. People*, *ubi supra*; *Harrington v. State*, *ubi supra*; *People v. Garbutt*, *ubi supra*.

If evidence of reputation is admissible at all, its weight should be left to be determined by the jury in connection with all the other evidence in the case. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt in the minds of the jury, although, without it, the other evidence would be convincing. To instruct a jury that they are first to consider the other evidence in the case and that, if they are thereby convinced beyond a reasonable doubt of the guilt of the defendant, they are to disregard the evidence of good character, and that they are only to consider this evidence when their minds are left in doubt by the other evidence, and when, perhaps, the defendant does not need the evidence of character for his acquittal, is a practice that finds even less support in reason than in authority. The old practice of charging juries that evidence of character was of little or no weight, except in doubtful cases, undoubtedly grew up when judges were accustomed to express their opinions to juries upon matters of fact and the weight to be given to evidence, and was, perhaps, just enough in particular cases, but we think it ought not to have been made a rule of universal application; that is, a rule of law; and since the passage of G. S. ch., 115-85, it is open to the objection that it is charging juries upon the weight to be given to evidence, when the law, as we think, does not define the degree of weight to be attached to it.

Exceptions sustained.

NEW ENGLAND TRUST CO., Trustee,
Appt.,
v.

Mary J. EATON.

1. Upon the settlement of the account of a testamentary trustee in the probate court, it may be determined whether a sum of money should be treated as the capital or as the income of a trust fund.
2. Where a trustee has, within his authority and discretion, invested trust funds in terminable securities, such as municipal and corporate bonds, at a premium, it is proper for him to retain from the actual income or annual inter-

est upon such securities, such amounts as will, at the date of the maturity of the securities, leave the original capital intact, and to pay over to a life beneficiary, only the net income remaining after such deductions.

(Decided January 8, 1886.)

A PPEAL from a decree of a single Judge of the Supreme Judicial Court, affirming a decree of a Probate Court. *Reversed.*

The New England Trust Co., as trustee under the will of Elizabeth L. Eaton, holds a fund, the net income of which it is, by the terms of the will, its duty to pay to the appellee at such times and in such sums as she may request during her life, and upon her death, to pay the principal of said sum to certain remaindermen, the children of the appellee; or, in default of such children, to certain charitable and religious institutions.

This fund it has invested in United States, state, city and railroad bonds, and in national bank stock. From the income of these various securities it has, from time to time, deducted and retained from the appellee \$1,853.37, and added the same to the principal of the fund, so that securities which cost the trustee \$102,904.40, stand charged to it upon its books at only \$101,099.40. This deduction of \$1,853.37 from the actual income upon the securities held by the trustee was made without reference to the value of the securities at the time of the deductions, and upon the assumption that the securities were to be held until maturity in any event.

The probate court, upon hearing, ordered the trustee to pay to the appellee said sum of \$1,853.37 thus deducted and retained by it, from the actual income received upon the fund held for her benefit. The trustee appealed from this decree, and upon hearing before a single Justice of this court, the decree of the probate court was affirmed, from which decree of affirmation the trustee appealed to this court.

Mr. J. L. Stackpole, for appellant.

Mr. J. H. Benton, for appellee:

The only question in this case is whether the trustee had taken "reasonable care to hold the balance even between opposing interests." *Hemenway v. Hemenway*, 134 Mass., 446-452.

Whether the trustee had done this is a pure question of fact, the decision of which, by the court below, ought not to be reversed here. *Reed v. Reed*, 114 Mass., 372.

The decree appealed from was right. It has assumed that the premiums paid for investments have been paid for interest alone, while this court has said in *Hemenway v. Hemenway*, 134 Mass., 449, that this is not true, but that such premiums are paid for the safety of the capital as well, and probably much the greater part of them is made up of this and other elements which ought to fall on the remaindermen.

But, says the trustee, it is of no consequence what the value of the securities is at any time; we did not buy them to sell but to hold; and in order to enable us to hold them to maturity with absolute safety to the capital, we must deduct from the actual income sums sufficient to absolutely repay to capital the entire premiums paid.

A sufficient answer to this suggestion is found in the decision of this court in *Hemenway v. Hemenway*, above cited, that such premiums were not paid for interest alone, but also and mainly for the safety of capital, and should therefore not be taken out of the income at the sole expense of the life tenant.

Additional brief for appellee upon reargument.

Under the decisions in this Commonwealth, which do not confine trustees to investments which are not to be paid off, or the payment of which is so remote as not practically to affect their value during the continuance of the trust, it is impossible to lay down any universal rule to govern all cases which may arise, as to the application of the income between the life tenant and the remainderman. *Hemenway v. Hemenway*, 134 Mass., 446, 450.

This court is only to see to it that the trustee takes reasonable care and exercises the reasonable discretion for which it is paid, and holds the balance between opposing interests even, so that the burden of insuring the safety of the property is not borne wholly by either party. *Id.*, 446, 452.

Whether the trustee in any given case has done this, is a question of fact which can be decided only upon the special circumstances of that particular case. *Brown v. French*, 125 Mass., 417.

The probate court "may, concurrently with the Supreme Judicial Court, hear and determine in equity all matters in relation to trusts created by will." Pub. Stat., ch. 141, § 27.

In *Estate of Shields*, in 1881, 14 Phila. Rep., 307, the orphans' court, in a case of a perpetual trust, said: "We think it would be injudicious to adjust the equities of the parties, entitled to the principal and income, until it has been shown to us that the trust moneys cannot be invested in a mortgage or mortgages at a higher rate of interest than 2 8-10 per cent."

In *Furness' Estate*, 12 Phila. Rep., 130, the same court, in 1878, held that the premium paid for an investment should not be charged to the income, but to the principal. A party who is to receive income is not often consulted with regard to the mode of investment, and the amount paid in the way of premium is usually dependent upon other considerations than mere productiveness; i. e., such as facility of transfer, ease of reconversion into cash, etc., of more importance to the ultimate owner of the principal than to the recipient of the income.

In *Purker v. Johnson*, 37 N. J. Eq., 366, it was held that the profit on the sale of a part of the trust property belonged to capital, the court saying that it was "like a premium realized on the sale of government bonds in which the funds might be invested. It belongs to the fund."

The authorities seem to be clear that any profit arising to the fund by increase in the value of the property in which it is invested, although it may result from a reduction in the general rate of interest, belongs to the principal. *Van Blarcom v. Dager*, 31 N. J. Eq., 783, and authorities there cited; *Atkins v. Albee*, 12 Allen, 359; *Whitney v. Pharis*, 4 Redf., 180-196; *Matter of Pollock*, 3 Redf., 101-108.

Expenses incurred in changing one trustee for another are properly chargeable upon the

principal. *Donovan v. MacDowall*, 2 Dem. (N. Y.), 218.

In *Whittemore v. Beekman*, 2 Dem., 275-285, it was held that the loss upon U. S. bonds, called for payment, was to be charged to the principal, and not to the income.

And the same was held in *Farwell v. Tweedle*, 10 Abb. (N. C.), 94, cited by appellant.

In *Scovel v. Roosevelt*, 5 Redf., 121, it was held that the bonus paid by the government to holders of called bonds, as an inducement to present them early for redemption, belonged to the principal.

There is no policy in this Commonwealth nor in the United States which requires a court, in case of doubt between the life tenant and the remainderman, to favor the latter. In the case of a trust established by will for the evident purpose of providing a support for a child or widow during life, the inclination of the court should be, in all doubtful cases, to make the income as large as is fairly consistent with the safety of the principal. *Reed v. Head*, 6 Allen 174; *Batch v. Hallet*, 10 Gray, 402.

Devens, J., delivered the opinion of the court:

This is an appeal from a decree affirming a decree of the probate court, by which the account of the New England Trust Company, a trustee holding a fund the income of which was payable to a tenant for life, with remainder over, was disallowed. The system which had been pursued by the trustee with reference to the investments which he had made in bonds and other promises to pay, of the United States government or of municipal or railroad corporations, due on a day certain, for which premiums had been paid, was to ascertain by tables in use among bankers and brokers what was in fact the net income arising from these promises, considering the premium actually paid by the investing trustee, which would not be repaid at the maturity of the bond, the rate of interest, the date of payment of the security, and to pay over this net income to the life tenant; the difference between this net income and the actual rate of interest as received going to a fund, which at the date of the maturity of the promise, would leave the original capital intact. The decree appealed from directed the trustee to pay to the life tenant, as income, the services thus rendered for the purpose of being returned to capital.

Whether the question presented may be heard and adjudicated by the probate court and then by this court, on appeal, has been doubted. The New England Trust Company is a testamentary trustee, compelled by statute to render its accounts, at least once a year, to the probate court, of the hearing on which the fullest notice must be given, and the question is one immediately connected with the administration of the trust. The probate court has full power to see and provide that every interest shall be fully represented, and it is to be observed that this court has also concurrently with the Supreme Judicial Court, full jurisdiction to hear and determine in equity all matters in relation to trusts created by will. P. S., ch. 141-143. It had the right to determine whether, upon the account rendered by the trustee, it was its duty to account for the sums it had set aside as a part

of the capital of the estate or as its income, and to hold or pay them over accordingly.

Without discussing those cases in which it has been held that, in settling the accounts of the executors of a will, the relative rights of legatees under a will, and other questions arising under the will in reference thereto cannot be recorded, all of which are not, perhaps, fully reconcilable, they do not affect the question of jurisdiction here involved. *Granger v. Bassett*, 98 Mass., 469; *Cowdin v. Perry*, 11 Pick., 512; *Burbank v. Whitney*, 24 Pick., 151, first paragraph.

Even if we should hold that it was intended that in the administration of an estate the probate court should not pass upon the difficult questions of construction often arising out of wills, but should determine simply the amount of property subject to distribution, it could not affect the present inquiry. The specified object of requesting trustees to render annual accounts is to ascertain whether the trustee has properly dealt with the trust property. In such a case as the one at bar, the trustee necessarily includes in his account the payments he has made, and describes the investments in which he holds the trust property. If he has paid over to the tenant for life that to which the tenant was not entitled, he should not be allowed therefor, and if, on the other hand, he has transferred to the *corpus* of the fund that which he should not, this should be corrected. Before the hearing in the probate court and in this court upon the account of trustees, questions similar to the principal one in the case at bar have heretofore been determined. See *Harvard College v. Amory*, 9 Pick., 446, where it was determined whether a sum received by the trustees of an estate was rightfully paid to the widow of a testator, instead of being reinvested by the trustees as a part of the capital of the trust fund.

In *Heard v. Eldredge*, 109 Mass., 258, upon the appeal by the life tenant from the decree of the probate court allowing an account by which a certain sum was treated as capital and not as the income of a trust fund, the decree of the probate court was affirmed. To the same effect are *Bowker v. Pierce*, 180 Mass., 262, and *Dodd v. Winship*, 138 Mass., 859.

The case of *Wright v. White*, 136 Mass., 470, is not inconsistent with the view that, upon the settlement of an account of the trustee, it may be determined whether a sum of money should be treated as the capital or the income of a trust fund. The decree upon such an account deals only with what has been done in the past, although a decree allowing an account of what has been done may afford a guide in ascertaining what will be allowed in the future. What is said on this subject in *Wright v. White*, is that, in a decree allowing an account, a direction as to the mode in which a trustee should thereafter manage the trust fund was not properly a part of the decree allowing an account and was to be stricken out. We proceed, then, to consider whether the course pursued by the trustee was correct, and thus whether the account of what he has done is to be allowed. It is the general rule that when investments are made in property of a permanent character, and not in terminable securities, the loss or gain in such investment is that of the *corpus* of the

estate. If for any cause it be reduced in value, and it becomes necessary to sell it, the sum for which it is sold becomes a new principal, on which the life tenant is to receive the income. In the management of real estate, when permanent improvements are placed thereon, these are a proper charge of the capital; while usual and ordinary repairs, when made, are a deduction from the income. *Parsons v. Winslow*, 16 Mass., 361.

If a trustee purchases shares in the capital stock in a bank, inasmuch as the remainderman will receive exactly that which is purchased, the tenant for life should receive the full income thereof undiminished. Such was the course pursued by the trustee, in the case at bar, in regard to the bank shares purchased by it. Now, does it become the duty of the trustee to sell such shares, should they appreciate in value, after he has invested in them, and pay over to the tenant for life the amount which they have increased in value? If it becomes necessary to sell such shares in the proper administration of the trust estate, the gain or loss is that of the capital of the estate, and the sum recovered constitutes a new principal."

The tenant for life does not seek any order by which the bonds, the interest on which is here under discussion, are to be sold or the investments changed; nor can it be contended that these securities are not of a class in which trustees may invest, if due care has been used in the selection. The rule "That no investment can be considered safe, or can be approved by a probate court or court of equity, except in public securities, however well supported by authorities," says *Chief Justice Shaw*, "as a rule well established in English courts of equity, is wholly inapplicable and untenable in this country." *Lovell v. Minot*, 20 Pick., 116.

While there are now many more public securities than those which existed when this remark was made, investments cannot be confined to them. A loan at a fixed rate of interest, even if secured by the stock of a manufacturing or other business corporation as collateral security, if proper security is taken against fluctuations, is not necessarily injudicious. *Brown v. French*, 125 Mass., 410.

There are many stocks under public supervision, bonds of corporations, where there is sufficient capital to insure their safety which, with bonds of municipalities, loans secured by mortgage, constitute proper investments. The purchase of the bonds of the trustee appears to have been judiciously made. Substantially all have appreciated in value, and they are of the class of securities contemplated as investments by the statute under which the trustee does its business. Stat. 1869, ch. 182, § 5; Stat. 1871, ch. 142; P. S., ch. 116, § 20.

Assuming that the purchase of bonds even at a premium was safe, prudent and such as judicious men would make in the conduct of their affairs, which is substantially the rule heretofore laid down, the question arises, inasmuch as it is certain that the corpus of the fund is to be diminished if this investment is permanent, whether the trustee may retain such sums annually as will restore to the fund at its maturity exactly what was taken therefrom at the time of the purchase. This is what the trustee has undertaken to do. If, as suggested in argument, there is any inaccuracy in the cal-

culatation by which this result is reached, this is a subordinate matter, to be determined by more accurate accounting, should it be required, not necessary now to be discussed. That which is really income from a bond purchased at a price above par, say 120, and payable in ten years, is not the amount received in interest annually, but that amount deducting therefrom the sums necessary to restore at the end of the ten years the \$20 premium. No prudent man would treat as income from his property the whole amount received, when there was thus to be a diminution of his principal amounting at the end of the ten years to this premium and steadily tending to this during the entire period. To deal with interest thus received as income purely, would, to the extent of the premium, exhaust the capital. The premium paid is no more than an advance from capital, which the remainderman is entitled to have repaid if he is entitled to receive the capital intact. If in such a case the tenant for life should die before the maturity of the bond, and thus the whole advance not then be repaid, he would have paid no more than his just proportion. Unless the premium is to be restored, it is not easy to see how investments in bonds having a premium can be made in justice to the remainderman, whose property, where a bond is kept to maturity, is diminished solely for the benefit of the tenant for life. Into the question how much income an investment at a premium in a bond payable at a fixed future time produces, the loss of the premium at that time necessarily enters as a factor. The bonds purchased by the trustee have substantially all appreciated in value, and this to such an extent that, if they were now sold, the surplus beyond the sum which would be necessary to restore to the capital all that was paid at the time of purchase by way of premium, would enable the trustee to pay the tenant for life the deductions that have heretofore been made, in order to repair the principal at the maturity of the bond. The life tenant, therefore, insists that the trustee should now be ordered to pay to her those sums; as, if a sale were made at this moment, they would not be needed to repair any deficiency in the principal. The trustee is to manage the fund in his hands, not for the purpose of speculation, "but in regard to the permanent disposition of the fund." *Harvard College v. Amory*, 9 Pick., 461; *Lovell v. Minot*, 20 Pick., 116.

The argument of the tenant for life that the practice of holding securities until their maturity, would deprive him of the "very care and ability in the management of the trust, for which he pays compensation to the trustee," can readily be pressed so far as to sanction the practice of trading and trafficking in trust securities which would be attended with dangerous results to the trust fund. Investments carefully and judiciously made, are not, as a general rule, to be disturbed. The argument of the tenant asserts that the income obtained for the tenant is less than one half of that which might be obtained on absolutely safe mortgages. The case affords no evidence of this, nor in this proceeding, which only concerns the account of the trustee and the amount of his payments to the tenant, could it be settled whether, in this view, the trustee should be ordered to dispose of the securities.

But, if the securities were sold, and a larger sum realized than would be necessary to restore to the *corpus* of the estate that which was taken from it when they were purchased, the question would still be, whether the appreciation of the securities in market value was the property of the tenant for life, or of the remainderman. There is no ground on which it can be contended to belong to the tenant for life, unless he is also to be made responsible where loss occurs in the purchase and subsequent sale of securities. There cannot be this chance of profit for him, unless there is to be a corresponding risk in such transactions. If the rule that, when a security is kept to maturity, income is to be paid only to such an extent as shall leave the *corpus* of the estate at that time intact by restoring to it the premium paid at the time of purchase be just, it is equally just that the gain or loss that occurs by a sale thereof, if for any cause one shall become necessary, while it is running, should be that of the *corpus* of the fund. The estate of the tenant for life will be unaffected thereby, except so far as it may be altered when a change is made in securities by the increase or diminution of the sum to be reinvested. To expose the estate of the tenant for life to any risk beyond what is involved in this, and because there may be a possible chance for gain under some circumstances by changes in investments; to subject it to the loss which occurs, when, for any cause, it becomes necessary to sell at a diminished price securities purchased for the trust estate, would be to defeat the object for which tenancies for life are, in most cases, created. In *Parson v. Winslow, ubi supra*, where there had been a loss to the trust estate by the defalcation of the trustee, whose successor had been able to recover from him in value only a portion of the property originally intrusted to him, it was held that the diminished fund thus received would constitute a new principal, and that the loss would thus "be apportioned in the same manner as if it had arisen from the fall in the price or value of any public stocks, or of any land in which the fund should have been invested, according to the provisions of the will."

It is said by *Mr. Justice Jackson*: "It would be unjust and contrary to the manifest intent of the testator, if the tenant for life, on the one hand, should continue to receive the whole amount of the interest on the original fund after the principal had been thus reduced; or if, on the other hand, the income should be applied to replace the principal. In the one case, the tenant for life would be left for an indefinite period, without any support or benefit from the intended bounty of the testator; and in the other, the remainderman might lose all that was intended for him."

It has been suggested that a suspense account might be kept by the trustee, to which sums such as have in the case at bar been retained, might be carried, and if hereafter the bonds should be sold before maturity at an advance, the life tenant would be entitled to receive therefrom all that was not required to restore the capital originally invested. This suggestion is based upon the theory that any possible profit made by the sale of securities belongs to the tenant for life, and still involves the idea that he must bear the possible loss. We can-

not consider this, except so far as his estate is affected by the increase or diminution of the sum to be reinvested. Such a suggestion would require, as a corresponding duty, that when a bond was depreciating in value there should be retained from the life tenant's income such sums as would be necessary to repair the loss to the capital of the estate by such depreciation, should it be sold before maturity.

There can ordinarily be no better test of the income which a sum of money will produce, having regard to the rights of both the tenant for life and the remainderman, than the interest which can be received from a bond which sells above par and is payable at the termination of a fixed term, deducting from such interest as it becomes due such sums as will at maturity efface the premium. If such a bond has increased in value since its purchase, assuming it to have been an entirely safe investment, and none other should have been made, it has been because a change in the rates of interest or some similar cause has altered market values. There would be no reason to suppose that such a bond could be sold and the amount received reinvested at any higher rate of interest, unless at the sacrifice of some safeguard in the investment. The investments of trust property should be made with a view to permanency, and not in any spirit of speculation; nor should changes be made except after much inquiry and circumspection, and ordinarily with an immediate and advantageous reinvestment in contemplation. In making such changes the trustees are not entitled so to exercise their authority as to vary or affect the relative rights of the *cestuis que trust*. *Hill, Trust., 488.*

The only case in this country which we have found, or to which we have been referred, deciding the question we have considered, is *Farrell v. Tweedle*, 10 Abb. (N. C.), in which it was held that a course similar to that pursued by the trustee in this case, was correct and proper. Not much assistance was to be expected from the English cases, as, until the 22-23 Vict., ch. 85, § 82, authorizing investments in East India stock, only one security, the 3 per cent consols, bank stock, was there recognized as proper for trust estates. An investment in the 3 per cents, which it is not contemplated will ever be paid, and the holders of which have been considered as perpetual annuitants, has been deemed the only safe investment and peculiarly adapted for the purpose, as, until a recent period they have been below par. The principle is well established by all the English cases that the *corpus* of the trust capital is to be kept intact so that the remainderman may thus receive it, while in justice to the life tenant it must be kept in income producing property. When the testator makes a general gift of his estate, to or in trust for a person for life, with remainder over, so much of the property as consists of leaseholds, terminable annuities or other interests of a perishable nature must be converted and invested in these permanent securities. As they are permanent, whether purchased above or below par, the life tenant receives the full income, the remainderman receives undiminished that which has been purchased, and no adjustment of the relative rights of the *cestuis que trust* has been necessary. It is contemplated that there may be specific gifts of ter-

minable or perishable securities which shall show an intention on the part of the testator that the life tenant may exhaust or consume them, in which case reinvestment would not be required, nor indeed proper. In the absence of these, if in contradiction of the general rule, the trustees suffer the tenant for life to receive the whole income arising from such securities, he will be decreed to refund what he may have received over and above what he would have received if the conversion had been only made, and the proceeds invested, in the 3 per cents. This difference is treated as capital to be invested for the benefit of all parties entitled, and the tenant for life is bound to make it good in the first instance. On his failure, the trustees are responsible therefor. *Hill, Trust., 886, and Perry, Trusts, § 547.*

The same principles have been applied since investments of trust funds were, by the Statute of 23 and 24 Vict., ch. 85, permitted to be made in East India stock, which is a security that, as well as certain other stocks named, may be redeemed. The courts have constantly refused to allow any investments to be made therein, unless there were peculiar reasons for favoring the life tenant, or at the request and on the application of the settlor of the trust. *Equitable Reversionary Interest Society, and Fuller, 1 J., 2 H., 379; Hemenway v. Hemenway, 134 Mass., 446.* In such cases the direction has sometimes been that the investment should not be made unless the stock could be purchased at par. *Watts v. Littlewood, 41 L. J. (N. S.), ch. 886.*

One reason given in *Cockburn v. Peel, 3 DeGex, F. & J., 170*, for refusing to permit a purchase of East India stock, was that it must be purchased at an advance, and that there was no provision in the Act for any sinking fund by which the deficiency made could be supplied.

In *Hume v. Richardson 4 DeGex., F. & J., 29*, it was held that for the period between the death of the testator and the passing of the Statute 23-24 Vict., § 85, the life tenant was entitled only to such income as she would have received had the stock been converted and invested in consols; and that, although, after the passage of this statute, she was entitled to the whole income, yet the trustees were only justifiable in keeping the East India stock until a suitable investment could be made in land, in which, by the will, the trustees were directed to invest.

Brown v. Gellatly, L. R., 2 Ch. App. Cases, 751, decides no more on this subject than that, when the testator authorizes investments as permanent, which would otherwise be unauthorized, the life tenant has the full income. This authority, given by the will, indicated a preference of the life tenant to this extent, which took the case out of the ordinary rule. "I understand," says the *Chancellor*, "the words of the will as amounting to the constitution by the testator of a larger class of authorized securities than the court would have approved of, and the court has merely to follow his directions and treat the income accordingly as being the income of authorized securities." Other securities not coming within this class were ordered by the *Chancellor* to be converted as soon as possible, and until this could be done the life tenant would be entitled thereon "to the dividends on so much 3 per cent stock as would have been produced by the conversion and in-

vestment of the property at the end of the year."

The method in which the English courts deal with leasehold estates, a common species of terminable securities not known in the same form in the United States, when they are settled in trust for life with remainders over, under such circumstances that the settlor must have regarded them as continuing interests for all the beneficiaries of the trust, including the remainderman, is strictly analogous to that which the trustee in the case at bar has pursued. These estates, which are terminable on a life or lives, or at the end of fixed terms, are renewable, sometimes by express contract and sometimes by custom, which has been recognized as legal, upon the payment of certain fines and other expenses. It is held to be the duty of the trustees to preserve the leasehold estates by renewing at the usual periods for the benefit of the parties in remainder. In the absence of other direction by the settlor, the fine, etc., for renewal is to be paid out of the rents and profits in the proportion in which the *cestuis que trust* enjoy the estate. If a renewal becomes impracticable, the tenant for life does not reap the whole advantage of non-payment of the sum properly due for renewal, if there was an express trust for renewal. His interest, minus the expenses of the renewal, is all that was given him, and his proportion of the amount fairly to be paid for renewal, is still a proper charge on the leasehold estate for the benefit of the remainder. When the leasehold estate is for years, the amount to be paid is readily ascertainable by the proportion which the tenant for life enjoys of the leasehold estate; and when it is for lives, and there is no express fund created for the renewal, it is more difficult, and the court has sanctioned the plan of insuring the lives of the *cestuis que vie* to an amount sufficient to cover the usual expense of renewing on the dropping of a life. *Hill, Trust., 486.*

While the cases on this subject are complicated by the express provisions made in the settlements, and appear in some respects confused, they establish fully the position that, in the absence of direction otherwise, the property received is to be turned over by the tenant for life as he received it, and that his income is not the full rent and profit, but those after deducting therefrom, as accurately as it can be ascertained, his just proportion of the expense of maintaining the security by renewal of the lease.

The tenants for life rely much upon *Hemenway v. Hemenway, 134 Mass., 446*. This was a bill in equity, by which was brought before us the whole management of a large estate, in which very ample discretionary powers had been given to trustees. The testator had left, subject to the trust, bonds payable at a fixed period. As between the tenant for life and the remainderman it was decreed that the trustees, by the authority conferred by the clause of the will, "to hold the said property as they may receive the same, or at their discretion to sell the same," were entitled to continue their investments as such, and to retain these bonds until they were paid off, and that "the whole net income of the investments thus authorized must go to the tenants for life by the terms of the will."

There was also an investment made by the trustees in certain bonds, having nearly eighteen years to run, on which a small premium had been paid. The case was decided upon its own peculiar circumstances, which, so far as disclosed, were held to show no special reason why the tenant for life should not receive the interest paid on the bonds. The investment constituted "a very small proportion of a large estate," and *Mr. Justice Holmes* remarks: "We have no reason to doubt that, taking the whole administration of the trust into account, the balance has been evenly held between the two parties, and the relation between the remainderman and the life tenants is such that there is less call than there might be in some other cases for treating the life tenant with great strictness." It certainly was not held that the trustee might not for the trust estate purchase, under some circumstances, at a premium, bonds payable at a fixed time, and, exercising his discretion honestly and for the purpose of dealing fairly with both parties, might not reserve, as received, some portion of that paid as interest, sufficient at the end of the period to restore the premium to the capital, by the loss of which it would otherwise be depleted.

Upon the account rendered by the trustee in the case at bar, as heretofore said, the question whether, by virtue of our supervision over trusts, the trustee should be ordered to change his investments, is not sought to be brought before us. Upon these, as they exist, the deduction from the full interest reserved to restore the premium at the end of the term was properly made. It is only thus that the property can be turned over to the remainderman undiminished. If the estate of the tenant for life terminates before the bond expires, the cost of effacing the premium will be borne in the right proportion by the respective *cestuis que trust*.

In the opinion of the majority of the court the entry should be "decree reversed."

Holmes, J., dissenting:

If the opinion of the majority rests on the ground that, so far as appears, the trustees might have made their investments with the intent to keep them until the trust expired or the bonds matured, and in the exercise of its discretion as a business manager, in view of the particular circumstances of the case, thought it necessary to retain a fund in suspense against a probable loss of premium, speaking for myself alone, I should have been disposed to acquiesce in that opinion. But from the main line of reasoning actually adopted, I must dissent, upon grounds both of principle and authority.

Shortly stated, I understand that reasoning to be this: that, if a bond is bought at a premium, it must be assumed that the premium is paid, for the single reason that the rate of interest on the bond is higher than the market rate, because it must be assumed that the investment is absolutely safe; that, therefore, the analogy of wasting investments, such as leaseholds, applies, and that an annual deduction from interest is proper.

So far, this is precisely the argument that was pressed upon us with much force in *Hemenway v. Hemenway*, and which was rejected after the gravest deliberation. A great part of the opin-

ion was devoted to answering it, and it still seems to me that the discussion was necessary to the decision of the case.

Hemenway v. Hemenway did not bring before us the whole administration of the estate, but certain specific questions, one of which was whether the interest should make good the premium paid by trustees for bonds purchased by them above par. If the rule now adopted had been recognized, it would have been unnecessary and improper to look beyond the particular bonds to the rest of the account. It was because that rule was repudiated that it was said, and deliberately said, that nothing showed that the premium was paid for interest above the market rate, and that the whole administration of the trust might be considered. The latter principle is not the law in jurisdictions where authorized investments are limited in number, as in New York, but each investment is dealt with separately. The only reason for departing from the precedents elsewhere was that in the latitude allowed trustees in this Commonwealth it was thought impossible to assume that premiums were paid in respect of interest alone.

I think, therefore, that the opinion of the majority is opposed to one of the points directly decided in *Hemenway v. Hemenway*, as it certainly is to the whole course of reasoning in that case, and I am confirmed in my opinion by the fact that two other of the four surviving justices who took part in the decision are of the same mind. I must suppose that *Hemenway v. Hemenway* has been accepted by trustees as expressing the settled opinion of the court. I cannot foresee the extent or nature of the evil that may follow from our abandoning what has been acted on as law. But I should be most unwilling to overrule a decision which I supposed to have been accepted as a guide in dealing with property, even if I thought it wrong. I do not, however, think either the decision or the reasoning in *Hemenway v. Hemenway* wrong, and I refer to that case for what I do not deem it necessary to repeat here.

But I understand the opinion of the majority not to stop with overruling *Hemenway v. Hemenway*. In this case the bonds thus far have not depreciated, but have risen in value. No part of the premium has been lost as yet; but the argument is either that it is to be presumed that the bonds will be kept until the premium is lost, or else that the approach to maturity is a constantly acting cause which depreciates the bonds so much each year with mathematical certainty, and that even if the depreciation is disguised by a more powerful motion the other way, it must be allowed for, because the rise in value belongs wholly to the *corpus*, and would have been so much greater but for the counteracting influence.

I think I fully appreciate the logical force of this argument, but it appears to me to illustrate the danger of relying on logic when your premises are fictitious. The necessary premise for casting the whole burden of repaying premiums upon interest is that the premium is paid solely for interest above the market rate. If that premise is a fiction, as I think it is, and if considerations of policy are held, nevertheless, to justify its adoption, at least the conclusion to be drawn from it should be guarded and re-

strained by considerations of a similar nature. I can hardly think that, if the trust had been terminated or the bonds sold at the date of the account, when the coupons had actually gained by the investment, the sums retained from interest would be paid over to the remainderman. Yet that conclusion would follow from the reasoning.

I think, in other words, that the question of holding the balance, even between tenant for life and remainderman, is a problem so dependent on the particular facts, and so complex, that while we cannot hope to solve it with perfect accuracy, everyone would feel that to cut the knot with a formula in the case I have supposed, would be an unnecessary abandonment of the discriminations within our power and, as a practical judgment, would be as likely to work injustice as justice.

If I am right so far, what difference can it make that the trustee has not sold? Whether it is or is not true, as is said in *Hemenway v. Hemenway*, that a determination not to sell, if a sale is possible, stands on much the same footing as a purchase, I apprehend that if a trustee, having the usual powers, sells and reinvests twenty times in as many days he is not *ipso facto* guilty of a breach of trust, and that if the reinvestments are proper and profitable his conduct would not be open to animadversion. On this point the English books can give us no light. At all events this trustee might sell now if it saw fit. On what ground is the determination of the trustee not to sell, a determination which the court cannot revise, to change the relative rights of the *cestuis que trust*?

Let us look a little further into the rule adopted. Suppose a sale to have taken place and other bonds to have been bought at a price above par. The trustee will, of course, compute the rate of interest to be received by the tenant for life in the future by deducting the annual sums necessary to replace the new premium paid. But there is no particular sanctity in the rate which happened to prevail at the moment of purchase: Still less in the rate artificially determined by the premium paid. If there has been no sale, but the market price of the bonds has risen, *ex hypothesi* the rate of interest is conclusively proved to have fallen, because the fall in the current rate of interest is the only recognized ground for a rise in price. Why is not the remainderman entitled to have a new computation started on that footing? Why is not the tenant for life entitled to have the reservation diminished if the rate of interest rises? And, pushing the principle to its logical result, why is not the trustee bound to follow the fluctuations of the market from day to day, attributing them all to the fluctuations of interest, as he is bound to do?

I now recur to the premises of the argument which I am opposing. I repeat what was said in *Hemenway v. Hemenway*, that I do not see how we can start with the assumption that all proper investments are absolutely safe when the leading case in this State is to the very point, that an investment may be unsafe and yet justifiable. *Lovell v. Minot*, 20 Pick., 116.

But the assumption appears to me to be inconsistent with facts which we must notice, and to lead to the conclusion not yet mentioned, which we could not accept. Within a few

years the first mortgage 4 per cent bonds of a flourishing railroad have sold at 85, while at the same time United States 4 per cents stood at 120 or more, and city 4 per cents of a high rank stood at about par. The differences were not to be accounted for by the difference of time which the bonds had to run nor by exemption from taxation. I should be surprised to learn that either bond was not a proper investment. If they were all proper investments, the difference in price could not be referred to difference in interest.

Again; if the fiction of safety be adopted, I still do not see why it does not follow, that if a bond is bought below par the tenant for life is equally entitled to an annual increment on the interest received by him, as the bond gradually approaches maturity. This was argued in *Hemenway v. Hemenway*, but I must believe that such a doctrine would disconcert trustees not a little. Of course it would call for sales of capital from time to time to produce funds for the tenant for life beyond the amount received on the bonds. There is a well known bond which was purchased by trustees a few years ago at 50 per cent, and which now stands at 120 or over. How is a case like that to be dealt with?

If it be said that the consequences suggested follow only upon an attempt to carry logic too far, and that they are to be controlled by practical judgment, I agree. But I think that the same thing ought to be true of the step now taken, as I have said already. If we are to start with a fiction and then apply logic, I think these results follow. If we are to use our judgment, I do not see why we should not use it at every step, and I believe that to make the tables referred to, the universal arbiter between tenant for life and remainderman, is not so near an approach to justice as we may hope to make. I am much more disposed to regard trustees as a sort of domestic tribunal *ex necessitate* between the parties, subject to the control of the courts in case of a want of good faith or reasonable judgment.

Finally; I must repeat what was said in *Hemenway v. Hemenway*, after an elaborate examination of the English books, that, in my opinion, the English cases do not apply the principle of wasting investment to premiums on authorized permanent investments. But, even if they did, I should consider that, in view of the latitude of investment allowed in Massachusetts, and the great fluctuations of American securities, it would be undesirable to accept that principle at present, and still more so to adopt the simple device of the tables as the means of working out that principle.

I express no opinion upon the question of jurisdiction, which I have not thought it necessary to examine, as both parties desire to have the case dealt with upon its merits now.

I am authorized to state that the *Chief Justice* and *Mr. Justice Charles Allen* concur in the views which I have expressed.

COMMONWEALTH of Massachusetts

2.
William F. DAVIS.

1. The ordinance of the City of Boston providing that no person shall, except by permission of the city government committee, deliver a sermon, lecture, address or discourse on the Common or other public grounds, is valid.
2. The statutory provision requiring by-laws of towns to be recorded in the office of the Clerk of the Superior Court, has no application to the ordinances of the City of Boston.
3. The ordinance in question is not rendered invalid by the fact that it was not published.

(Decided January 8, 1886.)

ON defendant's exceptions taken at a trial in the Superior Court for Suffolk County, of two criminal complaints appealed from the Municipal Court of the City of Boston. *Exceptions overruled.*

The defendant was charged with having, on May 17 and May 24, 1885, delivered a sermon, lecture, address and discourse on Boston Common, without permit and in violation of § 11, ch. 37, Revised Ordinances of the City of Boston. The trial resulted in a verdict of guilty.

Mr. James F. Pickering, for defendant:

These complaints were made under the following ordinance: "No person shall, except by the permission of the said committee, deliver a sermon, lecture, address, or discourse on the common or other public grounds." Rev. Ord., ch. 37, § 11.

The police authorities and officers of the City of Boston, in the exercise of the powers, and performance of the duties, imposed by the laws of the State, act as public officers, and not as officers of the City. *Buttrick v. Lovell*, 1 Allen, 172; *Walcott v. Swampscott*, 1 Allen, 101; *Hafford v. New Bedford*, 18 Gray, 297; *Barney v. Lovell*, 98 Mass., 570; *Brimmer v. Boston*, 102 Mass., 19; *Fisher v. Boston*, 104 Mass., 87; *Hill v. Boston*, 122 Mass., 344; *Crushing v. Bedford*, 125 Mass., 526; *Lemon v. Newton*, 134 Mass., 476; *McCarthy v. Boston*, 185 Mass., 197.

"Whoever willfully interrupts or disturbs an assembly of people met for the worship of God, shall be punished by imprisonment in the jail not exceeding thirty days, or by fine not exceeding \$50." Pub. Stat., ch. 207, § 21.

"It is the right as well as the duty of men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested or restrained in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments; provided, he doth not disturb the public peace or obstruct others in their religious worship." Const. Mass., Bill of Rights, art. 2.

"If any worship was necessary to the good order and happiness of a community, it must be public worship. The worship of the cell and the cloister had nothing to do with society." Debates in Mass. Convention of 1820, 349.

"It is not lawful for any State in this Union

to make any law which may restrain the free expression of religious belief, or the free exercise of religion and religious worship, according to the dictates of the conscience." Cooley, Const. Lim., 469.

Mr. Edgar J. Sherman, Atty-Gen., for the Commonwealth:

Every city and town duly established has the right and duty to make by-laws and ordinances for the proper protection of the property of the town or city, and for the rights of inhabitants thereof; it is an inherent right to their existence. Dill. Mun. Corp., 2d ed. § 250.

While the court has unquestionably the power to deny effect to an unreasonable by-law or ordinance, "It is, however," in the language of Dewey, J., in *Commonwealth v. Robertson*, 5 Cush., 442, "a power to be cautiously exercised."

The ordinance under which the defendant was convicted has never been repealed, set aside, annulled or abandoned, and it is not obsolete. An ordinance cannot become obsolete; it remains in force until repealed. Dill. Mun. Corp., 2d ed. § 249.

By ch. 27, § 21, Pub. Stat., it is provided that: "Before any by-law takes effect it shall be approved by the Superior Court, or in vacation, by a justice thereof, and shall with such approval be entered and recorded in the office of the clerk of the courts in the county where the town is situated."

So much of this section as relates to the approval of the court was originally passed in 1785, ch. 75, § 7, and is to be found, in substance, in all revisions of the general laws of the Commonwealth.

The portion of the section relating to the recording of the ordinances and by-laws was originally passed in 1855, ch. 222, § 2. Section 1 of said chapter provides that: "In all cases in which it is necessary to procure the approval of the court of common pleas of an ordinance" the approval of a single justice is sufficient; and section 2, aforesaid, provides that: "Before such ordinance or by-law shall take effect it shall be recorded," as in § 21, ch. 27, Pub. Stat.

Now the charter of the City of Boston, under the authority of which the ordinance was passed, under which ordinance the complaint in this case was made, was originally passed in April, 1834, ch. 448, Acts of that year. Section 35 provides that "All the powers heretofore by law vested in the Town of Boston, shall be vested in the mayor, aldermen, and common council of the said city."

The last clause providing that no sanction of any court or other authority is necessary to the validity of an ordinance passed by the common council, being inconsistent and repugnant to the provision requiring such approval, passed in 1785, and found in the R. S., ch. 15, § 13, 1836, is in accordance with the decisions in *Goddard v. Boston*, 20 Pick., 410, and *City of Somerville v. Boston*, 120 Mass., 575, and, so far as the ordinances of the City of Boston are concerned, a repeal of said provision.

And the statute requiring it to be recorded was passed subsequently, 1855, ch. 222, § 2, to the passage of the Act of the charter of the City of Boston, 1854, ch. 448, in which no approval or authority was necessary to the validity of its ordinances, and, hence, upon the

face, would be, in its turn, a repeal of said provision just referred to.

The provisions in ch. 27, Pub. Stat., are inapplicable to the ordinances of the City of Boston, because of the provisions of its charter. See, *Commonwealth v. Brooks* 109 Mass., 355.

Again; the ordinance was not published as is required by Pub. Stat., ch. 27, § 28. This, however, is not necessary. The provision of the charter of the City of Boston, passed subsequently, as shown above, to the passage of this statute, nullifies its effect so far as applicable to the City of Boston.

This is true, although in § 2, ch. 1, Rev. Ord., 1883, it is provided that: "All ordinances shall be recorded * * * and, except when otherwise provided, shall be published." This provision is not a condition precedent to the validity of an ordinance; it is nowhere said that the ordinance shall not take effect, unless or until recorded and published.

Section 11, ch. 27, under which the complaint was found, is exactly the same in effect as § 14 of that passed in 1870, which was shown to have been published, and, hence, being the same in effect, is but a continuation of said ordinance of 1870, and should be so construed. Therefore, § 11, ch. 27, being a continuation of, and the same in effect, as the ordinance of 1870, it is, in law, that ordinance, and it, as has been shown, was duly published. The defendant's fifth request, as well as the others, was properly overruled.

Morton, Ch. J., delivered the opinion of the court:

By the city charter of Boston the city government has "The power to make all such needful and salutary by-laws or ordinances, not inconsistent with the laws of this Commonwealth, as towns by the laws of this Commonwealth have power to make and establish, and to annex penalties not exceeding \$50 for the breach thereof; which by-laws and ordinances will take effect and be in force from and after the time therein respectively limited, without the sanction or confirmation of any court or other authority whatsoever." Stat. 1854, ch. 118, § 35.

In pursuance of this power the city government committee framed the ordinance under which these complaints were brought, which is as follows: "No person shall, except by permission of the said committee, deliver a sermon, lecture, address or discourse on the Common or other public grounds." Rev. Ord., ch., 27, § 11.

This ordinance is not inconsistent with any law of the Commonwealth, and we see no ground for holding it to be unreasonable and invalid. Its purpose is to promote the public peace and to protect the public grounds from injury, and it is calculated to effect these ends without violating the just rights of any citizen.

The defendant's claim that this ordinance has become obsolete, because the same or similar ordinance enacted in 1862 has not been enforced, and has been repeatedly violated, cannot be sustained. A statute or ordinance remains in force until it is repealed. The ordinance under which the defendant was con-

victed was enacted in 1883, and the evidence offered to show that the ordinance of 1862 had been disregarded or disused was immaterial and rightly rejected.

The defendant contends that this ordinance is invalid, because it has not been recorded in the office of the clerk of the Superior Court for the County of Suffolk, under Pub. Stat., ch. 27, § 21.

But this provision requiring a record in the clerk's office, applies only to the by-laws of the towns which are required to be approved by the Superior Court or a justice thereof. The provisions of the twenty-seventh chapter of the Public Statutes apply to cities only, "So far as they are not inconsistent with the general or special provisions relating thereto." Pub. Stat., ch. 28, § 2.

As we have before seen, the thirty-fifth section of the charter of Boston provides that the ordinance shall take effect and be in force from and after the time therein respectively limited, without the sanction or confirmation of any court or other authority whatsoever.

The provisions of the twenty-fifth section of chapter 27 are inconsistent with this special provision, and, therefore, that section has no application to the ordinances of the City of Boston.

The defendant also contends that this ordinance is invalid because it has not been "published two weeks consecutively in three daily newspapers published in the city," as required by the ordinances. There are two answers to this claim.

The revised ordinances require such publication, but there is no provision that the ordinances shall not take effect until such publication; the provision requiring publication is directory; it contemplates a publication after the ordinance is enacted, and a compliance with it is not a condition to the validity of the ordinance. But if this were otherwise, it appears that the ordinance under which the defendant was convicted is a *résumé* or continuation of an ordinance in the same terms passed in 1870, and which was duly published. The revised ordinances provide that "So far as their provisions are the same in effect as those of previously existing ordinances, they shall be considered as continuations of these ordinances." Rev. Ord., ch. 1, § 3.

It would seem that the ordinance would not require a new publication of those old ordinances, which are merely compiled and contained in the revised ordinances. It follows that none of the exceptions taken at the trial can be sustained.

Exceptions overruled.

John J. JOHNSON

v.
Isaac S. PARSONS.

In the absence of evidence that protest of a note was necessary to hold the indorser and was a right upon which he could insist and could, therefore, waive, the word "protest" in a waiver signed by the indorser, can be taken as meaning "notice" and that the indorser had waived notice of demand and refusal.

(Hampshire—Decided October 24, 1885.)

ON defendant's exceptions. *Overruled.*
Suit against the indorser of a promissory note.

Mr. D. W. Bond, for defendant:

Various forms of expression have been used with reference to waivers by indorsers, and the decisions are not uniform as to the effect of expressions used.

"I waive notice and protest and guarantee payment," was the form used in *Wolford v. Andrews*, 29 Minn., 250, and the court held this a waiver of demand and notice. *S. C.*, 48 Am. Rep., 201.

"We waive protest and hold ourselves responsible for the note which is hereby extended thirty days from this date," held, that this waived notice of non-payment as well as protest at the original maturity of the note as well as at the extended time. *Blanc v. Mutual Nat. Bank*, 28 La. Ann., 921; *S. C.*, 26 Am. Rep., 119.

"Protest and notice waived," was the form used in *Baker v. Scott*, 29 Kan., 186, and the court held this a waiver of demand. *S. C.*, 44 Am. Rep., 628.

"Protest and notice of protest waived" was the form used in *Gordon v. Montgomery*, 19 Ind., 110, and the court held this sufficient to include a waiver of demand; cited in *Sprague v. Fletcher*, 34 Am. Rep., 589.

"I waive notice of protest for non-payment," was the form used in *Sprague v. Fletcher*, and the court held this did not waive demand of payment. 34 Am. Rep., 587.

The same form of expression was used in *Cont. Life Ins. Co. v. Barber*, 50 Conn., 567, where there was a demand, and the court held it was not necessary to protest the note.

"I waive the necessity of either protest or notice," was the form used in *Harvey v. Nelson*, 81 La. Ann., 434; and the court held this included a waiver of demand. *S. C.*, 33 Am. Rep., 222.

"Please not protest * * * and I will waive the necessity of the protest," was the form used in *Coddington v. Davis*, 8 Denio, 16.

The Supreme Court construed the waiver in view of these circumstances, and held that by taking security and waiving "the necessity of protest," connected with the acts of the parties under the assignment, demand and notice was waived. *Id.*

"I do request that hereafter any notes that may fall due in the Union Bank, in which I am or may be indorser, shall not be protested, as I will consider myself bound in the same manner as if said notes had been or should be legally protested," held not of itself sufficient to waive demand and notice. *Union Bank v. Hyde*, 6 Wheat., 572 (19 U. S.).

Mr. J. C. Hammond, for plaintiff.

W. Allen, J., delivered the opinion of the court:

1. The signature of the defendant which he did not deny in his answer and expressly admitted at the trial, appeared to be an indorsement of the note and waiver of protest, and was *prima facie* evidence of both.

2. In the absence of evidence that a protest of the note was necessary to hold the indorser, and was a right upon which the indorser could

insist and, therefore, could waive, the court might well have found that the word "protest" as used by the defendant, meant notice, and that the defendant had waived notice of demand and refusal. See, *Brannon v. Hursell*, 112 Mass., 63, 70; *Coddington v. Davis*, 8 Denio, 16; *S. C.*, 1 N. Y., 186.

3. It does not appear that anything was said in the conversation between the defendant and Cornish which would be admissible as part of the *res gestae* and which would not come within the common rule which excludes declarations.

Exceptions overruled.

Warren K. BLODGETT, Exr.,

Leander M. MOORE, Appt.

SAME

Christopher FOSTER, Appt.

The will and codicil of a woman are revoked by her subsequent marriage.

(Middlesex—Decided January 26, 1886.)

PROBATE OF WILL. Approval and allowance of a last will and testament. *Decree reversed.*

This is an appeal from the decree of the Probate Court of the County of Middlesex, held at Cambridge, November 27, 1883, admitting to Probate the will dated August 21, 1874, and the codicil dated August 30, 1878, as the last will and testament of Mary E. Foster, late of Watertown, deceased, wherein the said Warren K. Blodgett was named as the sole executor.

At the time of the execution of said will and codicil the testatrix was the widow of the late Thomas E. Nichols, of Watertown, deceased, was of sound and disposing mind, and said will and codicil were properly executed and attested in the presence of three witnesses.

Said Mary E. Nichols, subsequent to the execution of both said will and codicil, to wit: on July 4, A. D. 1882, was married to Christopher Foster, now of said Watertown, and continued to live with him as his wife until her death at said Watertown, June 25, A. D. 1883.

There was no issue born alive of either of said marriages with Thomas E. Nichols or the said Christopher Foster, and the said Foster had no knowledge of this will except that said testatrix informed him after marriage that she had made a will, but talked of changing it. The testatrix left an estate valued at \$35,750.93.

The appellant duly filed his claim and reasons of appeal in the Probate Court, and it is agreed that the only issue raised upon the above statement of facts and the record in this case, is whether or not the said will and codicil were revoked by the marriage of the said testatrix to said Christopher Foster.

The case was heard before the Probate Court and the instrument approved and allowed as the last will and testament of the deceased.

Mr. John T. Wilson, for contestant, Moore, appellant:

The will and codicil were revoked by the marriage of the testatrix to Christopher Foster. *Swan v. Hammond*, 138 Mass., 45; Pub. Stat., ch. 127, § 8.

This case does not differ in essential particulars from *Swan v. Hammond*, and must be governed by the very clear and decisive rule there laid down.

Mr. Henry D. Hyde, for contestant, Foster, appellant:

The sole question, therefore, in this case is whether the court will overrule their decision in that case. It has long been the settled doctrine in England, that the will of a *feme sole* is revoked by her subsequent marriage. *Forre v. Hembling*, 2 Coke, pt. 4, 60 b; *Doe, dem. Hodsdon v. Staple*, 2 T. R., 684; *Hodsdon v. Lloyd*, 2 Bro. Ch., 534; *Long v. Aldred*, 8 Addams, 48; *Warner v. Beach*, 4 Gray, 162.

The true reason for holding the will revoked is, that by reason of the marriage a material change in the testatrix's circumstances had occurred, in consequence of which new moral testamentary duties have accrued, and that she should perform her new obligations in the light of her new surroundings, untrammelled by anything she had done when a *feme sole*. *Swan v. Hammond*, 138 Mass., 45; *Loomis v. Loomis*, 51 Barb., 257; *Jones v. Moseley*, 40 Miss., 261; *Sneed v. Ewing*, 5 J. J. Marsh., 471; *Duryea v. Duryea*, 85 Ill., 41.

That the legislators generally have considered it wise to preserve this old rule of the common law, while giving to a married woman testamentary power, may be seen by the large number of States that make it the law by statutory enactment:

- Alabama: Code, §§ 2283, 2713.
- Arkansas: Dig. Stat., 1884, § 6496; Const., art. 9, § 7.
- California: Code, 1876, §§ 5162, 6800.
- Connecticut: Acts, 1875, ch. 84; Gen. Stat., 1875, 186.
- Dakota: Code, 1883, §§ 684, 709.
- Georgia: Code, 1878, §§ 2410, 2477.
- Illinois: 1 Starr & Curt., Annot. Stat., ch. 39, § 10; 2 Id., ch. 148, § 1.
- Indiana: 2 Stat., 1876, 570, §§ 1, 5; *Bowers v. Bowers*, 58 Ind., 490; *Vail v. Lindsay*, 67 Ind., 528.
- Kentucky: Gen. Stat., 1878, 832, §§ 4, 9.
- Missouri: Rev. Stat., §§ 3961, 3965.
- Montana: Rev. Stat., 1879, 271, 274 §§ 435, 460.
- Nevada: 1 Comp. Laws, 1873, 200, §§ 818, 822.
- New York: 3 Rev. Stat., 63, § 41; p. 160, § 7; *Lathrop v. Dunlop*, 4 Hun, 214; *S. C.*, 63 N. Y., 610; *Loomis v. Loomis*, 51 Barb., 257; *Brown v. Clark*, 77 N. Y., 369.
- North Carolina: Battle, Rev. Stats., 1878, 847, §§ 3, 42.
- Oregon: Gen. Laws, 788, §§ 2, 7.
- Pennsylvania: Bright., Purd. Dig., 1712, § 19; p. 1709, § 2; p. 1151, § 14; *Fransen's Will*, 26 Pa. St., 204.
- Rhode Island: Gen. Stat., 1872, 331, § 13; p. 374, § 6; *Wheeler v. Wheeler*, 1 R. I., 364; *Miller v. Phillips*, 9 R. I., 141.
- South Carolina: Gen. Stat., 1882, §§ 1860, 1869.
- Virginia: Code, 1878, 910, § 7; *Phaup v. Woodridge*, 14 Gratt., 332.
- West Virginia: Rev. Stat., 1878, ch. 122, § 3, ch. 201, § 6.

The question has been so far settled by statute in this State as not to admit of a change by construction. Pub. Stats., ch. 127, § 8.

The validity of the will has been sustained in Michigan, New Hampshire, New Jersey and Vermont. In New Jersey, they have no statutory provisions for implied revocations, and so *Webb v. Jones*, 36 N. J. Eq., 163, is no authority against the appellant.

In *Noyes v. Southworth* (Mich.), the provision about implied revocation was not, so far as appears, brought before the court.

In *Morton v. Onton*, 45 Vt., 145, the statute was not cited by counsel, nor discussed by the court.

In *Re Polly Carey*, 49 Vt., 286, it was cited by counsel, but not discussed by the court.

Messrs. Augustus Russ (Boston), and **Dudley A. Dorr**, for executor:

The proponent of this will also desires to call attention to the fact that the case of *Brown v. Clark*, 77 N. Y., 369, which is cited, rests upon the terms of a statute of the State of New York, differing so materially from our statute that it cannot be said that the decision of the New York case is an authority for the recent decision of this court. The exact language of the statute of New York, cited in the opinion is: "A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage."

As the court say in that opinion, "The language of the statute is the declaration of an absolute rule."

The introduction of the clause in the statute of Massachusetts, Pub. Stat., 127, § 8, providing for the manner in which a will may be revoked, and that "Nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator," first appeared in Rev. Stat., 1836.

The statutory provision is not an adoption or declaration of the common law by express enactment: it is merely a recognition of the existing rule, whatever that might be. It did not undertake to define or declare what that rule was. "What those changes are, the statute does not intimate: it is left to be decided by the general rules of law." *Warner v. Beach*, 4 Gray, 162, 163.

Numerous emancipating statutes, enlarging the powers of married women, have been subsequently enacted. Stat. 1842, ch. 74; Stat. 1845, ch. 208, § 5; Stat. 1850, ch. 200; Stat. 1855, ch. 304, § 5; Stat. 1857, ch. 249, § 4; Gen. Stat., ch. 108, § 9; Stat. 1864, ch. 198; Stat. 1864, ch. 276; see, also, Stat. 1874, ch. 184.

There were certainly no greater or more radical changes in the statute laws of New Hampshire and Michigan, which brought the courts of those States, after full discussion, and without a dissenting opinion, in the cases above cited, to the conclusion that "Marriage alone, without birth of issue, will not revoke a woman's will."

The reasons and grounds of those decisions, it is respectfully submitted, are well worthy of careful examination. See, Gen. Laws, N. H., 1867, ch. 164; Gen. Laws, N. H., 1878, ch. 163; N. H. Stat., 1860, ch. 2342; N. H. Stat., 1865, ch. 4060; Comp. Laws, Mich., 1871, ch. 171; 2 Howell, Stat. Mich., 1883, ch. 239.

The Supreme Court of New Jersey, in *Webb v. Jones*, 36 N. J. Eq., 163, upon similar facts following corresponding changes in the statute law, came to the same conclusion.

In Illinois it was held in a case decided in 1875 that since the Statute of 1861, the will of a *feme sole* is not revoked by her subsequent marriage. *In Re Tuller*, 79 Ill., 99, 102, 103.

And the conclusions and reasoning of these elder courts of long established reputation may be supplemented by the less authoritative decision of *Morgan v. Ireland*, in the more distant court of Idaho, 1 Idaho (N. S.), 786. The court say in this case, page 789, "When the reason for the rule does not exist, the rule itself must fail also."

The rule was originally declared in *Forbes v. Hembling*, 2 Coke, pt. 4, 61, and it has stood ever since upon the authority of that case.

The court in that case says: "It would be against the nature of a will to be so absolute that he who makes it, being of good and perfect memory, cannot countermand it; and therefore this taking of a husband, being in the case at bar her proper act, shall amount to a countermand in law."

No serious discussion of the principle involved in the rule as there laid down has occurred in any subsequent case. It was barely mentioned as an existing rule of law in *Cotter v. Layer*, 2 P. Wms., 623, decided in 1781, and recognized in *Doe v. Staple*, 2 T. R., 684, 695, and in *Hodsdon v. Lloyd*, 2 Bro. Ch., 534; and these are all the cases in which the rule has had any recognition down to the commencement of the present century.

In all subsequent decisions in which the rule has been adverted to, the reasons given therefore have been the same. See, *Doe v. Staple*, 2 T. R., 684, 695; *Hodsdon v. Lloyd*, 2 Bro. Ch., 534, 544; *Morton v. Oxton*, 45 Vt., 145; *Brown v. Clark*, 77 N. Y., 869, 873.

It was decided in several cases in the ecclesiastical courts borrowing a rule from the civil law, that, in case of a man, marriage and the birth of a child operated as an implied revocation of a will, but this rule was first announced in *Oerbury v. Oerbury*, 2 Show. K. B., 242, a case which related solely to personal property in the ecclesiastical courts.

"A presumptive revocation of a will arising from marriage and the birth of a child is not mentioned, as far as I am aware, by any ancient text writer upon the law of England as a part of the English jurisprudence; nor as far as I am informed, was it a part of the ancient jurisprudence of any other country. It is not mentioned as a rule existing in Swinburne's time, nor is it enacted by the Statute of Frauds or any other statute." *Johnston v. Johnston*, 1 Phillim., 447.

"Certainly the words of the statute are very strong, 'no devise of lands shall be revocable except' by certain modes prescribed by the statute, 'any former usage to the contrary notwithstanding.' No words can well be more clear than these words. But, strong as they are, the judges venture to get over them so far as to consider the case out of their operation; and the decision in that case, *Christopher v. Christopher*, 4 Burr., 2132, has been adopted in other cases and has been approved by the judges." *Johnston v. Johnston*, 1 Phillim., 468.

"The rule of revocation by marriage and issue stands, in point of authority, not upon any ancient rule of law, not upon positive enactments, but as the result of decisions of courts

of justice, even against strong words of positive law." *Id.*

In *Warner v. Beach*, it is doubted whether the marriage of a *feme sole* works an absolute revocation or operates as a suspension merely. 4 Gray, 163.

The position we take is clearly sustained by the reasons which support the decision in the recent case of *Butler v. Ives*, 139 Mass., 202; where it is said: "At common law the note would have been void *ab initio*, because a married woman had not the legal capacity to make such a contract; and the mortgage being only security for the note, would also have been void." *Heburn v. Warner*, 112 Mass., 271.

"The reason for this was, that at common law husband and wife were regarded as one, and one of the incidents of this unity or identity was that the husband was entitled to the personal property and choses in action of the wife, and to the rents and income of her real estate, and was liable to pay her debts;" and that a note of a wife is extinguished and paid, if the husband becomes the owner of it, the main reason for the rule having ceased to exist, the rule itself ought not to remain in force. *Butler v. Ives*, 139 Mass., 203.

By the Court:

The will and codicil of the testatrix were revoked by her subsequent marriage to Christopher Foster. *Swan v. Hammond*, 188 Mass., 45.
Decree reversed.

COMMONWEALTH OF MASSACHUSETTS

v.

James KELLEY.

The provision of the statute which relates to the use and management of premises licensed for the sale of liquors, expressly intends that an unobstructed view of the interior shall at all times be obtained by persons outside and is addressed to the licensee only, forbidding him to do or permit to be done the prohibited act, whether by himself in person or by his agent left by him in charge of his business.

(Suffolk — Decided January 7, 1886.)

ON EXCEPTIONS. Overruled.

Complaint in the Municipal Court of the City of Boston against defendant for violation of § 12, of ch. 100, of the Public Statutes, on the use of premises licensed for the sale of liquors.

It was admitted that the defendant was, on December 14, A. D. 1884, being Sunday, the proprietor of the store No. 80 Salem Street, Boston, and that he was duly licensed as a common victualer and as a seller of intoxicating liquor, under a license of the first class. It was in evidence, uncontradicted, that on that day, there were, upon the windows and door of said store, curtains, which entirely obstructed the view of the interior of said premises; that no person was in the store on said Sunday; that the defendant went away from the store on Saturday evening, December 13, 1884, at 11 o'clock,

leaving his bartender in charge, and did not visit the place again until the following Monday; that the defendant's bartender, on said Saturday evening, between 11 and 12 o'clock, closed said curtains, while counting some money, and left said premises before 12 o'clock, midnight, forgetting to draw the curtains back, and the curtains remained in that position during Sunday, December 14, 1884, obstructing the view of the interior of said premises. The defendant testified, and it was uncontradicted, that he had instructed his bartender, and that it was a standing rule, that the curtains should not be drawn, and that at all times the premises should be so kept that the view of the interior of said premises and of the business carried on therein, should be unobstructed. The bartender testified, and it was uncontradicted, that he had received such instructions from the defendant, and that it was a standing rule.

The defendant requested the court to rule and instruct the jury that, if they believed that the illegal act was done by the bartender without the knowledge of the defendant and in opposition to his will, and in no way participated in, approved or countenanced by him, then the defendant ought to be acquitted; but the court refused so to rule and instruct the jury, and ruled and instructed the jury that, if they should find that the illegal act was committed by a person the defendant had left in charge of the premises, then the defendant should be found guilty; and it was no defense that the illegal act was committed without the knowledge and consent of the defendant and against his express instructions.

To the refusal to rule as requested, the defendant excepted and exceptions were allowed.

Mr. Harvey M. Shepard, Asst. Atty. Gen., for Commonwealth:

The ruling of the court was correct. One who has a license must, at his peril, keep within the terms thereof. *Commonwealth v. Barnes*, 138 Mass., 511; *Same v. Holmes*, 119 Mass., 195; *Same v. Uhrig*, 138 Mass., 492; *Same v. Casey*, 134 Mass., 194; *George v. Gobey*, 128 Mass., 289.

Mr. Owen A. Galvin, for defendant:

A principal is not liable to be punished criminally for the acts of his servant, in which act he does not participate personally, unless there is such assent or concurrence therein on his part as would involve him, morally, in the guilt of the action. *Commonwealth v. Nichols*, 10 Met., 259.

At most, the illegal act of a servant is only *prima facie* evidence against the master, subject to be controlled by evidence that the act was the act of the servant, and done without the assent or concurrence of the master.

W. Allen, J., delivered the opinion of the court:

We think that the ruling and instructions were correct. The provision of the statute relates to the use and management of licensed premises, and its express intent is to receive an unobstructed view of the interior at all times by persons outside. It is addressed to the licensee only; no other person can violate it. It forbids him to do or to permit to be done the prohibited act, and by fair intendment includes

acts done in the use of the premises in carrying on the business licensed, whether they are done by the licensee in person or by his agent, left by him in charge and management of the business. *Commonwealth v. Emmons*, 98 Mass., 6; *Same v. Uhrig*, 138 Mass., 492; *Re v. Medley*, 6 Carr. & P., 292; *Re v. Dizon*, 8 Maule & S., 11.

Exceptions overruled.

Merrill W. JACKSON

v.

J. U. OLNEY and Trustees.

SAME v. SAME.

1. In the absence of fraud or imposition, one who enters into a contract is conclusively presumed to understand the terms and legal effects of it, and to assent to them.
2. Evidence on the part of the maker of a note, to show that signature was obtained by the payer through fraud, examined and found insufficient.

(Hampden—Decided October 24, 1885.)

ON plaintiff's exceptions, taken at a trial in the Superior Court. *Sustained.*

These two actions were brought to recover on two promissory notes, both dated August 2, 1885, for \$750 each, one payable in two months and the other in four months from date. The notes were signed, jointly: M. K. Olney, by Mary L. Olney, atty., and Mrs. J. U. Olney; and payable to M. W. Jackson or order. The defense was want of consideration, and that the defendants' signature was fraudulently procured.

The evidence in reference to the defense of fraudulent procurement is stated in the opinion.

Mr. D. W. Bond, for plaintiff:

The plaintiff having indorsed the notes for the accommodation of the defendant's husband, by which the husband was able to negotiate them at the bank, had the right to pay the bank the amount of the notes and maintain a suit against the makers on the notes, the same as the bank might have done. *Fowler v. Strickland*, 107 Mass., 552; *Pinney v. McGregory*, 102 Mass., 186; *McGregory v. McGregory*, 107 Mass., 543; *Ellsworth v. Brewer*, 11 Pick., 315.

This is not a case of constructive or presumptive fraud; the evidence must show actual fraud, deception. Actual fraud is fraud in fact, involving turpitude. Bigelow, Fraud, Introduction.

All fraud, in the proper sense of that term, is accompanied by and indeed worked out through deception. Bigelow, Fraud, ch. 1.

Mr. Wm. G. Bassett, for defendant:

There are facts and circumstances which show that defendant was imposed upon and led to do a thing she would not be likely to do, sufficient to go to the jury. *Forsyth v. Hooper*, 11 Allen, 419; *Heywood v. Stiles*, 124 Mass., 275.

There was no separate request to rule that

there was no evidence for the jury, but one request embraced the two subjects of evidence of fraud and consideration as applicable to defendant. The particular prayer was not applicable to the evidence. There was no evidence that plaintiff indorsed on the strength that Mr. and Mrs. Olney had signed. Plaintiff's testimony had been shaped to meet the question of consideration. *Horton v. Cooley*, 185 Mass., 589, 590.

No exception was taken to the refusal to take the case from the jury. The objection to the conversation when the notes were signed was to it as a whole, not specifically to what Mr. Olney might say. His declarations did not harm, but rather helped plaintiff, giving him opportunity to argue that the reason why defendant's name was to go on was suggested, if not answered. *Howe v. Ray*, 113 Mass., 88, 91; *Potter v. Baldwin*, 138 Mass., 427; *Penn. Mut. Life Ins. Co. v. Crane*, 134 Mass., 56, 59.

The declarations were made at the time of executing the notes and were part of the *res geste*. Upon such a question broad latitude is permitted. 1 Greenl. Ev., § 108, and notes; *Stiles v. Allen*, 5 Allen, 320, 322; *Townsend Bank v. Whitney*, 3 Allen, 454; *Akers v. Demond*, 103 Mass., 321; *Brookfield v. Warren*, 128 Mass., 287, 288; *Fogg v. Middlesex Mut. F. Ins. Co.*, 10 Cush., 337, 348.

Devens, J., delivered the opinion of the court:

The defendant, Mrs. Olney, admitted signing the notes in suit, and contended that she did not do so intelligently but was induced so to do by the design and fraud of the plaintiff. It was correctly ruled that if there was fraud on the part of the plaintiff, by which she was induced to sign the notes, the plaintiff could not take advantage of a signature thus obtained, but that it was for the defendant to satisfy the jury that there was such a fraud. There was no confidential relation between the parties which prevented their dealing with each other on the ordinary principles by which the conduct of different individuals should be guided. In the absence of fraud or imposition, one who enters into a contract is conclusively presumed to understand the terms and legal effect of it, and to assent to them. *Rice v. Dwight Mfg. Co.*, 2 Cush., 80.

Mrs. Olney cannot, therefore, be allowed to say as a defense to the action that she signed the notes not thinking of such a thing as binding herself upon the notes, unless she was induced so to believe by the fraud of the plaintiff or his agent. The only question on this part of the case is whether there was any evidence which would authorize a verdict for the defendant. While the evidence on her part was contradicted in many particulars, in determining this question we assume that, in a conflict of evidence, it might all have been believed by the jury to the exclusion of that by which it was sought to be controlled or controverted.

There had been a previous note given by Mr. Olney, the husband of the defendant, who died before the trial, for a debt to the plaintiff in the sum of \$1,500. This note had been discounted at the Hampshire County Bank, of which one Warner was cashier, it having been indorsed by the plaintiff. Just before it became due, Olney sent for Warner, who agreed to renew the note

if the plaintiff would indorse it. At Warner's request, according to the testimony of the defendant, the plaintiff came to see Olney and agreed to take care of the note, and saying that he would have it put into two notes, adding, "Don't worry about these at all. I will take care of them. All we want of you is to get well." Mrs. Olney further testified that nothing was said to her about signing any note; that she had no property at the time, but had a policy of insurance, which would be available only at her husband's death. It further appeared, on behalf of the defendant, by the testimony of Miss Olney, who was the daughter, that she went to the bank to get a power of attorney to her for her father to sign; that she obtained this from the attorney of the bank; and that Warner gave her the two notes of \$750, pointing out how they were to be signed, and saying: "Take them home to your father and tell your father to sign there, and your mother there." She knew that the two notes were to take up the \$1,500 note, as she stated, because she was so told by her mother. The conversation which took place at the time of signing the notes was admitted, against the objection of the plaintiff, and was testified to by Mrs. and Miss Olney, substantially to the effect that the daughter repeated what Warner had said; that Mr. Olney said: "I do not see why your mother's name should be on there," and that he sank back and said, "I guess it is all right." The power of attorney was signed by Mr. Olney, after which the daughter signed his name as it now appears on the notes. Mrs. Olney then signed the notes. Mrs. Olney further testified that she had never been spoken to about signing the notes; that she did not think of binding herself on the notes; that she signed them at once after her daughter signed them; that the daughter went right back with the notes, and that her husband was very sick, and she thought the plaintiff very kind not to worry her husband about the notes.

Upon this testimony we do not perceive that there was any evidence of fraud or deceit practiced upon the defendant, by which she can avoid the promise made by her in signing these notes. While she says she did not sign them intelligently, but mechanically only, she could not have failed to understand what she was doing; and the very remark made by the husband shows that her attention was called to the responsibility she was assuming. No person was present representing the plaintiff; she had full opportunity to consider the act she was about to do, and she signed the very paper she intended to sign, and not one differing therefrom or substituted therefor. She knew that these two notes of \$750 were to be taken up for the \$1,500 note. Even if she had a right to believe, from her conversation with the plaintiff, that he would himself take up the \$1,500, when the next day she received the message from Warner, she was informed that, in order that the note should be taken up, she must herself sign the two notes which were to be used for that purpose. If this were a violation of the promise that the plaintiff had made, there was still no fraud or deception on his part or on that of Warner, if it be assumed that Warner acted as his agent and that the plaintiff is thus responsible for his conduct by which she was betrayed into signing an instrument she did not intend to sign, or one

which she did not understand. We are thus brought to the conclusion that there was no sufficient evidence of fraud to warrant a verdict for the defendant, and that the court should have so ruled.

The plaintiff further objected to the admissibility, in evidence, of the conversation which took place at the time of signing the note. As the case may be again tried, it is proper to say that, so far as this forms a part of the act done by the defendant, as, for instance, in showing that she signed in consequence of the message brought to her from Warner, this evidence was properly admissible. But it would not be competent to use the declaration then made by Mr. Olney to contradict the evidence of the plaintiff that Mrs. O. was to sign the notes. This declaration in no way qualified the act done by the wife in signing the notes.

Exceptions sustained.

C. Allen and Gardner, JJ., absent.

COMMONWEALTH of Massachusetts
v.

James J. BARNES.

1. When a person is licensed to sell intoxicating liquors "in the front and rear room" of a certain floor of a building and is not required by the licensing board to remove the partition between the rooms, the partition is not within the statutory prohibition, although it may obstruct the view of the interior of one or other of such rooms from the street.
2. The prohibition, against a licensee's maintaining upon the licensed premises used by him for the sale of intoxicating liquors any partition, does not apply to leaving in statu quo the walls of these several premises contemplated by the license as remaining distinct.

(Middlesex—Decided January 7, 1886.)

ON defendant's exceptions, taken at a trial in the Middlesex Superior Court, of a complaint to the Second District Court of Eastern Middlesex. *Exceptions sustained.*

Complaint for maintaining a liquor nuisance. The selectmen of Watertown, on June 6, 1884, duly granted and issued to the defendant a license of the first class under § 10 of ch. 100 of the Pub. Stat., to be exercised in the front and rear rooms on the ground floor of the building described in said license; the words of the license being to James J. Barnes, victualler, "doing business at building on north side of Main Street, owned by Mrs. Eldridge and others, to sell or expose, or keep for sale until May 1, 1885, spirituous or intoxicating liquors to be drunk on the premises, to wit: in the front room and rear room on the first floor contiguous to street."

There was no evidence that the license had at any time been declared void, forfeited or revoked by the selectmen or any court or tribunal. The licensed building was a one story wooden structure, on the northerly side of Main

Street, in the business portion of the town, quite close to the line of the public sidewalk, with a frontage on the street of about eighteen feet and a depth of about twenty-eight feet, and contained but two rooms, the front and rear rooms referred to in the license. There was no evidence whether the partition, which was made of matched boards, between the two rooms was a part of the original construction of the building or not; but it had existed before and ever since defendant first leased and occupied the premises, covering a period of more than ten years, precisely the same as it was during the time referred to in the complaint. The partition ran parallel with the street, giving a depth of about twelve feet to the front room and had two permanent openings, of the ordinary doorway height from the floor upward, one two feet eight inches wide, the other two feet ten inches wide; they were about six or seven feet apart, were unprovided with doors and had never in any way been screened; there was on the side of the building fronting the street a large window, containing a glass area of twenty-two feet, extending downward quite low and near the ground; it was directly opposite one of the openings in the partition, and furnished to the public a complete view of the interior of the front room and the business done there, and a view of portions of the rear room through both of said openings. The said window was unprovided with any curtain, shutters or blinds and had never been screened. The place where the liquors were kept was at all times within the view afforded by this window. Were it not for said partition there would be but one room.

Mr. J. J. Sullivan, for defendant:

A criminal or penal statute is to be construed strictly, and if it is susceptible of two constructions, both reasonable, but one adverse and the other favorable to the defendant, the latter construction should be adopted. *Commonwealth v. Martin*, 17 Mass., 382; *Monson v. Chester*, 22 Pick., 387; *Taunton Bank v. Richardson*, 5 Pick., 440.

In *Commonwealth v. Costello*, 138 Mass., 192, it was apparently assumed that the licensee had a right to do business in rear room on ground floor and rear room on second floor.

That the Government's construction is not tenable, is shown by the fifth clause of § 9, ch. 100. The license shall "specify the room or rooms in which such liquors shall be sold or kept by a common victualler."

No licensee, except an innholder, shall "keep, sell or deliver any such liquor in any room or part of a building not specified in his license." Section 12, relates to screens, etc., and applies to innholders as well as others.

A limiting clause in a statute is to be referred to the last antecedent, unless there is something in the subject matter that requires a different construction. *Cushing v. Worrick*, 9 Gray, 382.

Mr. Harvey N. Shepard, Asst. Atty-Gen., for plaintiff:

The defendant's license was no justification. One having a license must, at his peril, comply with all its conditions. "The placing or maintaining of any of said obstructions," named in § 12, ch. 100, Pub. Stat., "shall of itself make the license void." Acts, 1882, ch. 259, § 1; *Commonwealth v. Barnes*, 138 Mass., 511.

The instructions of the court, as to whether

the partition was an obstruction within the meaning of the statute, was sufficiently favorable to the defendant, and the question was properly left to the jury. *Commonwealth v. Costello*, 138 Mass., 192.

Holmes, J., delivered the opinion of the court:

We are of opinion that when a man is expressly licensed to sell intoxicating liquors "in the front and rear room" of a certain floor of a building, and is not required by the licensing board to remove the partition between the two rooms, this partition is not within the provisions of the Pub. Stat., ch. 100, § 12, although it may obstruct the view of the interior of one or other of such rooms from the public street. By Pub. Stat., ch. 100, the notice of application is to designate "the building or part of building to be used." By § 9, the license shall specify "The room or rooms in which such liquors shall be sold or kept by a common victualler. No person licensed as aforesaid and not licensed as an innholder shall keep, sell or deliver, any such liquor in any room or part of building not specified in his license, as aforesaid."

This language plainly imports that a license may be granted to sell liquors, not only in one room but in more than one room. If any room alone, that room may be any room in the building, so far as any direct expression of the statute goes. If more than one are licensed, they must be separated by a partition which may and probably will interfere with a view of the interior of one of them. As the statute seems to us to contemplate these possibilities and leave them to the discretion of the licensing board, we cannot read the provision that the board shall require the licensee to remove any obstruction which may interfere with the view of the interior of the licensed premises, as limiting their power to license; or as requiring that all licensed premises shall be or be turned into front rooms on the lower story, any more than as requiring that the whole front of the building shall be of glass. We think a license might be granted to use a room on the second floor, or a back room, or a room lighted only by a sky light. *A fortiori*, we are of opinion that the prohibition against the licensee maintaining upon the licensed premises used by him for the "sale," of intoxicating liquors, any partition, does not apply to leaving in *statu quo* the walls of the several premises contemplated by the license as remaining distinct.

Exceptions sustained.

The following four cases, involving the same question as *Commonwealth v. Barnes*, *supra*, were decided in accordance with the opinion in that case.

COMMONWEALTH of Massachusetts
v.

Edward DONAHUE, Jr.

(Middlesex—Decided January 7, 1886.)

ON defendant's exceptions.

Mr. J. W. McDonald, for defendant.
Mr. Harvey N. Shepard, *Asst. Atty-Gen.*, for plaintiff.

The exceptions were sustained by the court.

COMMONWEALTH of Massachusetts
v.

James J. FLANNERY.

(Middlesex—Decided January 7, 1886.)

ON defendant's exceptions.

Mr. J. B. Goodrich, for defendant.
Mr. Harvey N. Shepard, *Asst. Atty-Gen.*, for plaintiff:

The rulings of the court were correct. The evidence of a violation of the license held by defendant, in maintaining or having screens or other obstructions to the view of the licensed premises, was proper and competent under the complaint in this case. *Commonwealth v. Barnes*, 138 Mass., 511; Acts, 1882, ch. 259.

The rulings of the court that the partition between the front and rear room was such an obstruction, as to said rear room, as was prohibited by the statutes, was clearly correct and in accordance with Pub. Stat., ch. 100, § 12; Acts, 1882, ch. 259.

There was evidence, uncontradicted, that on one or more Sundays the lower half of the windows of defendant's place was covered by shutters that obstructed the view of the interior of said premises. This alone is sufficient to warrant a conviction. *Commonwealth v. Auerberton*, 133 Mass., 404; *Commonwealth v. Costello*, 138 Mass., 192; *Commonwealth v. Casey*, 134 Mass., 194.

The exceptions were sustained by the Court.

COMMONWEALTH of Massachusetts
v.

Michael McGRATH.

(Middlesex—Decided January 7, 1886.)

ON defendant's exceptions.

Mr. J. J. Sullivan, for defendant.
Mr. Harvey N. Shepard, *Asst. Atty-Gen.*, for plaintiff:

By § 1 of ch. 259, Acts of 1882, the maintaining of any obstruction to a view of the interior of licensed premises makes, of itself, the license void. The evidence of such obstructions was proper under this form of proceeding. *Commonwealth v. Barnes*, 138 Mass., 511.

The exceptions were sustained by the court.

COMMONWEALTH of Massachusetts
v.

Israel SANVILLE.

(Middlesex—Decided January 7, 1886.)

ON defendant's exceptions.

Messrs. W. B. Gale and J. W. McDonald, for defendant.

Mr. Harvey N. Shepard, *Asst. Atty-Gen.*, for plaintiff:

The ruling of the court, that it would not be a compliance with the law to have a view of the whole licensed premises by combining a view from the two streets, was clearly correct. The view of the whole interior of the premises and the business to be there carried on must

not be obstructed. And it might as well be contended that if a view of the whole premises could be obtained by looking down into them from an elevated position across the street, it would be a compliance with the law, as to contend that the combined view from two streets would be sufficient. If from two streets, why not three or even four? There should have been a plain and unobstructed view from the main, or Lincoln Street, and one obtained without difficulty. *Commonwealth v. Costello*, 133 Mass., 192; *Commonwealth v. Casey*, 134 Mass., 194.

The exceptions were sustained by the court.

COMMONWEALTH of Massachusetts

Edward SHEDD.

1. An indictment charging an attempt to break into a house with intent to steal, and alleging that the accused, in such attempt, did break open windows, but was intercepted "in the execution of said offense," is not bad for uncertainty. The "said offense" is the burglary.
2. Where the evidence tended to prove the facts as alleged in the indictment, the jury might well have inferred from the attendant circumstances and from the conduct and declarations of defendant, that the act was done for the purpose of stealing from the building; and it was not error to refuse to instruct that the jury could not find a verdict of guilty.

(Decided January 7, 1886.)

ON defendant's exceptions taken at a trial in the Middlesex Superior Court. *Overruled.*

The indictment was as follows:

"The jurors for the Commonwealth of Massachusetts on their oath, present, that Edward Shedd, otherwise called Edward McSweeney, late resident of Malden, in the County of Middlesex and Commonwealth aforesaid, on the 28th day of July, A. D. 1884, with force and arms, at said Malden, in the county aforesaid, a certain building, to wit: the dwelling-house of one Sylvester K. Abbott, there situate, in the night time of said day, feloniously did attempt to break and enter, with intent the goods and chattels in said building, then and there being found, then and there feloniously to steal, take and carry away; and in such attempt did then and there break and open three windows in said dwelling-house, said windows then and there being parcel of the dwelling-house aforesaid; but the said Edward Shedd, otherwise called Edward McSweeney, was then and there intercepted and prevented in the execution of said offense, against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided."

In the Superior Court, before impaneling the jury, the defendant filed a motion to quash said indictment. Said motion was overruled by the court, to which ruling the defendant excepted.

At the trial, the following named witnesses

testified in behalf of the Government: Daniel W. Sullivan, Hattie C. Plummer, and Ralph K. Abbott.

Daniel W. Sullivan testified as follows: I am a police officer of the City of Malden; I saw the defendant on Main Street twice during the night of July 28, 1884, once near the house of Abbott; I was afterwards walking in the direction of Sylvester K. Abbott's house when I saw the defendant on the piazza in front of the house; he turned the corner of the house; I followed; he then ran through the yard into hollyhocks that were there growing; I then lost sight of him; I went across the street and borrowed a lantern, came back and made search for him; I found him lying on the ground; his face was covered with a handkerchief, and he was apparently asleep; he said something about the night being warm and the mosquitoes troubling him; he also told me that he had been drinking; I then arrested him; three windows on the lower part of Mr. Abbott's house were open and the fastenings turned aside; the windows were fastened from the inside.

Mrs. Hattie C. Plummer, testified: that she was housekeeper for Mr. Abbott, and that the occupants of the house were Mr. Abbott, his son Ralph, a gentleman and herself; that on the night in question she retired while Mr. Abbott and his son were out; that Mr. Abbott and his son were both out late that night; that she admitted the son, but that his father was not at home when she did so; that the windows were shut and fastened when she retired; but that the room, in which two of the windows were, was but little in use and that she had not examined them that day; she did not at any time see the windows open after the alleged offense was committed.

Ralph K. Abbott testified as follows: he did not notice the windows that day or night; he was out late that night, but he found the door to the front porch of the house open when he returned, and he locked it.

When the aforesaid Daniel W. Sullivan went to the house he found the porch door open. The defendant made contradictory and false statements about his name and residence.

This evidence was the case of the Government. The defendant offered no evidence, but his attorney asked the court to instruct the jury that this evidence did not constitute the offense charged in the indictment, and that they would not be warranted on the evidence to find him guilty of the offense charged in the indictment. The Presiding Judge declined to so instruct the jury and the defendant excepted.

Mr. John F. Dore, for defendant:

The indictments for attempts, so far as they appear in the reports, show the practice of the pleader to have been to recognize and avoid the ambiguity to be found here.

In *Commonwealth v. McDonald*, 5 Cush., 365, the pleader says that said defendant "Did fail in the perpetration of said offense of stealing from the person of said man, and was intercepted and prevented in the execution of the same."

In *Commonwealth v. Sherman*, 105 Mass., 169, it is said that the defendant "Then and there did fail in the perpetration of said offense of committing larceny from the person," etc.

In *Commonwealth v. Flynn*, 8 Cush., 529, the words are "Did then and there fail in the per-

petration of said offense, so as aforesaid attempted to be perpetrated by him."

In *Commonwealth v. Harney*, 10 Met., 422, the defendant is charged with an attempt to set fire, and "In such attempt did then and there" do certain things "Towards the commission of such offense, but was then and there intercepted and prevented in the execution of the same."

In *Commonwealth v. McLaughlin*, 105 Mass., 460, the defendants are charged with an attempt to poison a horse, "That being an offense prohibited by law, and in such attempt did then and there do a certain overt act towards the commission of said offense," which act is set out, and "Then and there did fail in the perpetration of said offense, and were intercepted and prevented in the execution of the same" leaving no doubt, whether arising from grammatical usage or otherwise, upon the mind of any reader as to what the expression refers.

The framers of the statute have been equally sedulous. Pub. Stat. ch., 210, § 8.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth:

The motion to quash the indictment was properly overruled. The indictment contains all the necessary allegations to constitute the crime charged. Pub. Stat., ch. 208, § 11; ch. 210, § 8.

It is not necessary that the description of the offense in the indictment shall be identical with the language of the statute creating it. It is sufficient, if it is set forth fully and plainly, substantially and formally. *Commonwealth v. Fogarty*, 8 Gray, 491; see, *Same v. Flynn*, 3 Cush., 529; *Same v. Harney*, 10 Met., 422; *Same v. McLaughlin*, 105 Mass., 460.

W. Allen, J., delivered the opinion of the court:

The defendant was indicted under Pub. Stat., ch. 210, § 8, for an attempt to commit burglary.

The indictment alleges that the defendant, a dwelling house, described, "In the night time feloniously did attempt to break and enter, with intent the goods and chattels in said building then and there being found, then and there feloniously to steal, take and carry away; and in such attempt did certain acts but "was then and there intercepted and prevented in the execution of said offense." The indictment is sufficient. *Commonwealth v. Flynn*, 3 Cush., 529; *Commonwealth v. McLaughlin*, 105 Mass., 460.

It is argued that it is uncertain whether the words "said offense" refer to the burglary or to the larceny, or to the attempt to commit burglary. But there is no uncertainty. The intent to commit larceny is alleged only as a part of the offense of burglary, which the defendant is alleged to have attempted to commit; and the burglary, and not the attempt to commit it, is certainly the offense in the execution of which the defendant was alleged to have been intercepted and prevented. The motion to quash was rightly overruled.

There was evidence tending to prove that the defendant broke and opened two windows, which was the act alleged to have been done in the attempt to commit the burglary; and the jury might well have inferred, from the circumstances attending the act and from the con-

duct and declaration of the defendant, that the act was done for the purpose of stealing from the building.

The court could not properly have given the instructions prayed for, that on the evidence the jury would not be warranted in finding a verdict of guilty.

Exceptions overruled.

Samuel READ

v.

BOSTON & ALBANY R. R. CO.

A person employed on a railroad train and injured on Sunday, previous to the enactment of ch. 37, Statutes of 1884, **cannot recover damages, unless the running of the train was a work of necessity or charity.**

(Decided October 24, 1885.)

ON plaintiff's exceptions. *Overruled.*

Action for damages for injuries sustained by an employé of a railroad company, upon a freight train, in the running of which he was employed. The injury was received on Sunday.

Mr. H. W. Ely, for plaintiff.

Mr. A. L. Soule, for defendant.

W. Allen, J., delivered the opinion of the court:

Under the authority of *Day v. Highland Street Railway Co.*, 135 Mass., 118, the ruling that the plaintiff was not entitled to recover was correct, unless the running of the railroad freight train on which he was employed was a work of necessity or charity. The Statute of 1884, ch. 37, was passed after the injury complained of and does not apply to this action. *Bucher v. Fitchburg R. R. Co.*, 181 Mass., 156.

The only evidence that the plaintiff was engaged in a work of necessity or charity was his own testimony "That the train was made up of box and stock cars and that there was stock on the train;" "That there was no convenience for feeding or watering stock at Pittsfield," the place he had left, and "that he did not know how they were to be fed and watered there." This is not sufficient to prove that there was stock on the train which could not have been fed and watered at Pittsfield, and that the purpose of running the train was to transport stock to a place where it could be fed and watered, or that the work was necessary for the proper and humane treatment of living creatures being transported upon the road, or for compliance with the requirements of the Pub. Stat., ch. 207, § 55.

As the work in which the plaintiff was engaged upon the Lord's Day contributed to his injury and was not a work of necessity or charity, the ruling of the court was correct, without regard to the question whether there was any evidence that the negligence of the defendant caused the injury.

Exceptions overruled.

C. Allen and Gardner, JJ., absent.

SUPREME COURT OF CONNECTICUT.

WEBB, Admr.,
v.
GOODNOUGH *et al.*

A will gave all the property of the testatrix to A. G. S. and then concluded as follows: "I nominate, constitute and appoint my husband, J. G., the executor of this my last will and testament, who is to have his support out of the property and may dispose of any or all of the above property, if necessary for his support. All that remains at his death is to be given, as written above, to A. G. S.; she to have the entire control and use during her lifetime. At her decease it shall be given to J. W. S., he to have possession when twenty-one years of age; and if other children are born to her, they shall share equally when twenty-one years old. If she leaves no issue, it shall be given to B." **Held,**

1. That **J. G., the husband, was entitled to possession of the property during life from the death of the testatrix; to apply the income and the principal, if necessary, to his own support, including, under the circumstances, the maintenance of his second wife and reasonable legal expenses incurred by him in defending the estate, etc.**
2. That **A. G. S. took a life estate only, commencing at J. G.'s death, in the property remaining at his death.**
3. That **the remainder vested in the child of A. G. S., now living, subject to open and let in after born children.**

(Decided December 16, 1885.)

SUIT for the construction of a will. The facts are sufficiently stated in the opinion.

Mr. James H. Webb, for plaintiff.

Mr. John W. Alling, for defendant, Jeremiah Goodnough.

Messrs. Doolittle & Bennett and A. N. Wheeler, for other defendants.

Carpenter, J., delivered the opinion of the court:

The testatrix gave all her property to Addie G. Stewart. The will concludes as follows: "I nominate, constitute and appoint my husband, Jeremiah Goodnough, the executor of this my last will and testament, who is to have his support out of the property and may dispose of any or all of the above property, if necessary for his support. All that remains at his death is to be given, as written above, to Addie G. Stewart; she to have the entire control and use during her lifetime. At her decease it shall be given to Jesse W. Stewart, he to have possession when twenty-one years of age; and if other children are born to her, they shall share equally when twenty-one years old. If she leaves no issue, it shall be given to Sarah J. Brown, of Wilkinsons ville, Mass."

The first and third questions will be considered together. They are, in substance, what

interests do Mrs. Stewart and Mr. Goodnough take respectively?

The will is crude, and carelessly drawn; but, in the light of the facts as they then existed, it is not very difficult to ascertain the intention of the testatrix. Mr. and Mrs. Goodnough lived together 52 years. They had no children, and Mrs. Stewart was brought up and educated by them. The property in question was given to Mrs. Goodnough by her husband during their married life, without other consideration than love and affection. The will was made in 1882, and Mr. Goodnough was then about 76 years old. A part of the property is the house in which the parties lived. It will not be presumed but must be shown, if the fact was so, that she intended that her husband upon her death should be rudely severed from all his home associations and driven to find shelter and a home elsewhere. There are certainly no surrounding circumstances rendering such an intention probable. If we turn our attention to the will itself, we not only fail to find it there but we do find indications of a contrary intention. He was named executor, and as such was to have such possession of the property as that office entitled him to. He was to have his support out of the property during life, and there is no intervening trustee to possess and control it. In connection with his support, he was authorized to dispose of any and all the property, if necessary, for that purpose. From these provisions there is an implication, more or less strong, that he was to have the possession of the property during life.

The only other person that can lay any claim to it is Mrs. Stewart. Her interest is more clearly defined. The first clause of the will, if taken by itself, would give her the property absolutely from the death of the testatrix. But, taken in connection with what follows, her interest is not only reduced to a life estate, but that estate is made to commence at Mr. Goodnough's death. "All that remains at his death is to be given, as written above, to Addie G. Stewart, she to have the entire control and use during her lifetime." Then follows a disposition of the remainder to children. The possession and control of the property by Mrs. Stewart during Mr. Goodnough's life are not consistent with the provisions of the will in his favor.

It is objected that this construction makes the first clause in the will, giving the estate absolutely to Mrs. Stewart, inoperative. But that clause, so far as it purports to give her a fee simple, is clearly made inoperative by the subsequent provisions. As thus qualified, it only operates to give her a life estate. It was competent for the testatrix in this manner, not only to cut down the estate devised but also to postpone its commencement. We think she has done both.

It is further objected that it would necessitate the raising of an estate in a trustee by implication, and vesting the title in him during the life of Mr. Goodnough. If necessary to consider the will as raising a trust, we do not think it is necessary to call in the assistance of a third person as trustee. So long as Mr. Goodnough is capable of properly managing the estate, he is in some sense, and may be so regarded, a trustee; to apply the income, and the principal

if necessary, to his own support, and the remainder at his decease to be delivered to Mrs. Stewart.

It is also said that this construction leaves a portion of the income undisposed of. It does not appear that the income will be any more than sufficient for his support. The testatrix clearly contemplated the probability that it would be necessary to sell a portion of the principal for the purpose. The estate is not large and is incumbered. The testatrix does not seem to have had in mind the possibility of a surplus. She knows that she wanted to provide for the support of her husband and having done so in the simplest possible manner, she did not concern herself with details and incidents. In a well considered and carefully written will, especially if the estate is relatively large, an omission of this character might be entitled to much consideration; in a case like this it can have but little weight. Forgetting a matter of this kind cannot seriously affect the disposition of other and more important matters which she evidently had in mind. It is possible, should Mr. Goodnough live many years, that in some years there may be a surplus, while in others there may be a deficiency. We see no difficulty in allowing any surplus to remain in his hands to provide for such deficiencies. At his death any surplus will be included in what "remains," and will go to Mrs. Stewart.

The second question is, what interest does Roy G. Stewart take? Jesse W. Stewart was a son of Addie G. Stewart, and is now dead. Roy G. Stewart, another son, is now living. We think it is very clear that the remainder vests in him, subject, of course, to open and let in after-born children.

The next question is whether Mr. Goodnough is entitled, as a part of his support, to the expense of keeping and providing for his present wife in a proper and suitable manner. "It is found that from a period shortly before the marriage of Mr. Goodnough with his present wife, to the present time, Mr. Goodnough, owing to his advanced age and bodily infirmities, has been and now is in need of an attendant to take care of him. He will probably continue to need such an attendant the rest of his life. For about half of said period he has been sick and under the care of a physician. He has for such period needed the services of a nurse. Such services were rendered by his wife." The provision for his support should be liberally construed. He is not to be required to change essentially his style of living, to board at the lowest possible rate, nor to live alone. It seems reasonable that he should be permitted to continue in the house in which he lived so long. If so, it is necessary that some one should care for his house, and take care of him in health and sickness. For that purpose it may not be unreasonable that he should have a wife. Possibly it is the most economical arrangement he can make. We do not care, therefore, to discuss the abstract question whether provision for a man's support includes as matter of law the support of a wife. It seems to us that the real question is whether it is reasonable, under all the circumstances, that he should have a wife. We are disposed to advise the superior court that, under the circumstances of this case, the support of a wife may be prop-

erly included in his own support. The expenses of a housekeeper or nurse, or both, may be more than the cost of supporting the wife. Hence it may be better for all concerned.

We answer the fifth question by saying that Mr. Goodnough is entitled to his support, from the death of the testatrix.

As to the expenses of litigation. We do not think that sufficient facts appear to enable us to decide this matter. The facts stated hardly raise any legal question. We will only say, generally, that we are aware of no inflexible rule of law that will prevent their payment. If Mr. Goodnough was without fault, or even if he was legally in fault, the circumstances may be such as to make them a proper claim. He may have been called upon to defend the estate, or to settle some conflicting claims respecting his own rights. In these and like cases a liberal construction of the will would allow to him any legal expenses reasonably incurred.

The questions relating to the sale of stock and real estate are to be determined upon business rather than legal principles. We ought not, in this proceeding certainly, to be called upon to settle them. If a sale of either is to be effected, it may be necessary to invoke the aid of the courts. The time to settle any legal questions that may arise, will be when they are presented in a regular proceeding and all the facts are ascertained.

In this opinion the other Judges concurred.

Charles HARRIS, *Admr.*,

Frank N. TAYLOR, *Appt.*,

A claim against an estate of a decedent cannot be set off against a claim of the administrator of such estate for rent of realty belonging to the estate under a lease made by him. There is a want of mutuality in the claims.

(Fairfield—Decided November 13, 1885.)

APPEAL from a judgment of the Court of Common Pleas for Fairfield County, in favor of plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. H. S. Sanford and D. C. Birdsall, for defendant, appellant:

Nichols v. Dayton, 84 Conn., 65, can scarcely be regarded as authority at all on the point in discussion.

It will be noticed that there is a broad difference between the general Statute of Limitation and the short one provided for claims against estates. That difference is ably pointed out by *Chief Justice Park*, *Gorham v. Bulkeley*, 49 Conn., 91, distinguishing *Berrigan v. Pearsall*, 46 Conn., 276.

If *Berrigan v. Pearsall*, does not rule the case at bar, the reasoning certainly has an important bearing on it.

If the estate is to be regarded as insolvent, we insist still that we are entitled to a set-off. *Hosmer v. Merriam*, 1 Root, 427; *Hosmer v. Brattle*, 1 Id., 347; see also, as to sale of the realty, Acts, 1882, 210, Gen. Stat., 375, 392-394.

Messrs. Curtis Thompson and A. M. Tallmadge, for plaintiff, appellee:

The questions of law arising in this case appear to have been raised in the case of *Nichols v. Dayton*, 84 Conn., 65, wherein the court decided against the claims of the defendant.

By the statute on this subject, the right of set-off is limited to mutual debts between the plaintiff and defendant; and the same law exists in England by Stat. 2 Geo. II., ch. 22, § 13; Gen. Stat., 424, § 13; *Palmer v. Green*, 6 Conn., 19.

It may be stated generally that if a person contracts a debt with the executor or administrator of a deceased person and is sued for the same, he cannot set off a debt due to him from the testator or intestate. Wat. Set-off, § 181. and cases there cited.

In the case of *Hills v. Tallman*, Admr., 21 Wend., 674, the court, says: "The English statute of 2 Geo. II., ch. 22, § 13, is substantially like our own, under which it has been determined, in a suit by an executor, whether describing himself as such or not, to recover a debt, when the cause of action accrued after the death of the testator, the defendant cannot set off one debt due him from the estate." Willes, 264, n., and 104 n. a; Bab. Set-off, 64, 65; *Fry v. Evans*, 8 Wend., 530; *Dale v. Cooke*, 4 Johns. Ch., 13. The reason is, if allowed, it would alter the course of distribution.

It seems to be well settled in England, that a debt which accrued in the lifetime of the testator cannot be set off against a debt that accrued to the executor after the death of the testator. *Colby v. Colby*, 2 N. H., 419; Mont. Set-off, 34; *Shipman v. Thompson*, Willes, 103; Butler, N. P., 180; *Hutchinson v. Sturges*, Willes, 264, note.

Granger, J., delivered the opinion of the court:

The plaintiff is administrator of the estate of one Goodsell, who died March 24, 1884, and is settling the estate as a solvent estate. The defendant, from April 1, 1884, to April 1, 1885, occupied under the plaintiff as administrator, certain real estate belonging to the estate, and the sum of \$300 is found to be a reasonable charge for this occupation. This has never been paid, and the plaintiff as administrator sues to recover it. The defendant admits his right to recover it, unless he can legally set off against the claim a claim of his own against the intestate in his lifetime, and now against his estate. The whole of the claim which the defendant thus seeks to set off is \$413.64, of which \$162 was within the time limited by the probate court, duly presented against the estate, but by mistake the whole claim was not presented. The plaintiff objected to this set-off, because, in the first place, the debts were not mutual, the claim sued on being due to the administrator in his character as such and not in his representative character, and the claim sought to be set off being due originally from the intestate and now from the administrator only as the representative of the intestate; and secondly, because the estate is, in fact, insolvent, although in settlement as a solvent estate.

The plaintiff offered proof that the debts proved against the estate were largely in excess of the value of the estate, making the estate, in

fact, insolvent. To this evidence the defendant objected, but the court admitted it and found that the estate was, in fact, insolvent, and also held the set-off not admissible on the ground that the debts were not mutual. The defendant appeals from the judgment against him, claiming the court to have been in error in both these rulings.

We regard the case of *Nichols v. Dayton*, 84 Conn., 65, as decisive of this. There such a set-off was held inadmissible. It is true that the estate was there in settlement as an insolvent estate. But the decision is not put upon that ground at all, but wholly on that of the want of mutuality. Hinman, Ch. J., giving the opinion of the court, says (p. 66): "The debts were not mutual. The executor under the statute has the same control of the real estate, during the settlement of the estate, that he has of the personal property, and the same title to it and possession of it; and although he holds in trust for the benefit of the estate, the title is still in him; whereas, the note against the deceased is not in any sense the executor's debt, or a debt against him, but is solely due from the estate, and if put in suit and a judgment recovered upon it, execution would go against the assets of the estate only."

A certain appearance of mutuality is given to the claims because the plaintiff sues as administrator. But he need not have sued in that way; the claim is due to him personally and not as a representative of the intestate, and his description of himself as administrator is mere surplusage.

The objection of the want of mutuality being fatal to the right of set-off, it is of no consequence whether the estate was, in fact, solvent or insolvent, or was represented as either; and the ruling of the court admitting evidence that it was insolvent was of no importance.

There is no error in the judgment appealed from and it is affirmed.

In this opinion the other Judges concurred.

Harriet A. TRUBEE

v.

Elonzo S. WHEELER, Appt.

1. The penal sum named in a bond given on the release of attached property, conditioned for the payment of the value of the property attached at the time of the attachment, in default of payment of such judgment as might be recovered, is not *prima facie* evidence of the value of a part of the attached property.
2. The report of a committee in an action of trover, in which an attachment issued, is not admissible as evidence on the question of the value of the attached property, in a suit on the bond given on release of such property against an obligor other than the defendant in the original suit.
3. Such report, purporting to show the value of the property at the time of its conversion, is not competent as proof of the value of the property at the time of its subsequent attachment.

(Fairfield—Decided January 16, 1886.)

APPEAL by defendant from a judgment in favor of plaintiff. *Reversed.*

Action upon a bond entered into by the defendant, Wheeler, and another, as obligors, to obtain the release of property attached by the plaintiff in an action of trover against one Georgia V. Alden. The condition of the bond was in the following words:

"You, Jonathan Godfrey, of Fairfield, in said County of Fairfield, and Elonzo S. Wheeler, of Westport, also in said county, acknowledge yourselves jointly and severally bound unto said Harriet Ada Trubee and said Samuel Curtis Trubee, and each of them jointly and severally, in the sum of \$14,000, conditioned that if the said Georgia V. Alden shall pay such judgments as may be recovered against her in each and either of said suits, or if in default of such payment, you pay to the officer having the execution or executions which may be issued on such judgments or either of them, on demand, the actual value of the interest of said Georgia V. Alden in said attached property at the time of said attachments, not exceeding the amount of this recognizance, then this recognizance shall be void."

Messrs. Amos S. Treat and Goodwin Stoddard, for defendant, appellant:

The bond upon which this suit was brought was taken under the Gen. R. S., 1875, 406, 407, in an action founded in tort for the recovery of unliquidated damages. *Curtis v. Ward*, 20 Conn., 207; *Cook v. Loomis*, 26 Conn., 486; *Lazarus v. Ely*, 45 Conn., 505.

The substitution of a bond in lieu of property attached was introduced in 1848. Sess. Laws, 1848, 8.

The condition of the bond was, "That if the said C. D. shall pay the judgment that may be recovered against him in said suit, not exceeding the amount of this recognizance." Sess. Laws, 1848, 8; Rev., 1866, 10.

The penalty in the bond had no connection with the actual value of the interest of the original defendant in the property attached. One thing cannot be *prima facie* evidence of another, unless there is some natural or necessary connection between the two. 1 Greenl. Ev., § 33.

The bond was taken in the old form and bore date, August, 1869. *Perry v. Post*, 45 Conn., 354. The question decided in that case could not arise under the Act of 1875, because that provides that it is the value of the interest of the original defendant at the time of the attachment, which makes the rule of damages.

This being an action on a penal bond, it was incumbent on the plaintiff to assign the breaches of the conditions, to prove them and also the damages she had sustained. 1 Saund. Pl. & Ev., 322; 2 Phillips, Ev., 169; 2 Greenl. Ev., 289; 1 Swift, Dig., 672, 678; *Dale v. Dean*, 16 Conn., 583, 584; Gen. Stat., p. 444.

This court has decided that at any time prior to the satisfaction of the judgment in trover, any creditors of the plaintiff can attach the converted property as the property of the plaintiff, and obtain satisfaction for his debt therefrom. *Curtis v. Ward*, *supra*; *Pierce v. Benjamin*, 14 Pick., 361; *Lazarus v. Ely*, *supra*.

Another controversy in this case is, as to the

charge that the recital in the bond was *prima facie* evidence that the property attached was the property of the original defendant, at the time of the attachment.

The policy of the law is to construe this class of bonds favorably to the obligors. Murfee, Off. Bonds, §§ 620, 710, 720, 729.

The legal effect of the recital in the bond was that the property was merely found in the possession of the original defendant. *Dayton v. Merritt*, 33 Conn., 186.

Carpenter, J., delivered the opinion of the court:

It appears that on the 3d day of April, 1874, one Georgia V. Alden converted to her own use a large amount of personal property belonging to the plaintiff. On the 29th day of July following, the plaintiff commenced an action of trover to recover the value of the property so converted, and attached the property itself; whether all or a part only, does not appear. In February, 1875, the attachment was dissolved, by substituting for it the bond in suit. In June, 1877, a portion of the property was returned to the possession of the plaintiff. In March, 1880, the plaintiff recovered judgment in the action of trover, for the value of that portion of the property which was not returned, and which was found to be, at the time of its conversion, \$8,813.33, and for the damage to the property which was returned, which was estimated at \$7,276.26. These two sums, with interest, made up the amount of the judgment. The judgment was not paid, and this suit was brought.

On the trial, the plaintiff offered in evidence the report of the committee in the action of trover. The defendant objected to its admission, but the court admitted it, only for the purpose of showing the foundation of the judgment and fixing the amount thereof.

The court expressly held that it was inadmissible for the purpose of showing the damage to the property which was returned, but seems to have admitted it as showing or in some way tending to show the value of the property which was not returned. That was the real question in this part of the case.

The action is on a penal bond given to secure the performance of a condition therein named; that is, that the said Georgia V. Alden should pay the judgment recovered against her, and in default thereof, that the obligor should pay the value of the property attached at the time of its attachment. The plaintiff, if entitled to recover, is only entitled to recover such value. The pleadings present this issue as follows: the plaintiff alleges that a portion of the property was returned in a damaged condition, and that the balance was worth \$8,813.33, at the time of the attachment.

The defendant neither admits nor denies the return of the property, nor the damage thereto, but leaves the plaintiff to prove the same. But the allegation as to the value of the balance is denied. The burden, therefore, is on the plaintiff to prove the value as alleged.

As the case is presented to us, no evidence was offered on that point, except the report of the committee; and as that was received for another purpose only, there seems to have been no evidence before the jury to sustain this allegation. In this state of things, the court told

the jury that the bond was *prima facie* evidence of the fact that the property in question was the property of the original defendant, and by fixing the sum of \$14,000, fixes, *prima facie*, that amount as the actual value of the interest of the defendant in the original suit. If it be true, in any sense, that the bond was *prima facie* evidence of the value, obviously it was *prima facie* evidence of the value of the whole property, including that which was returned as well as that which was not, and could not be *prima facie* evidence of the value of either portion of it. The bond, when taken, could have had no reference to a subsequent division of the property. The charge, therefore, was not adapted to the case, and was not what the pleadings required. Assuming, but for our present purpose only, that the bond was *prima facie* evidence of the value of the whole property attached, yet it was necessary to go one step further, in order to prove the allegation in the complaint, and prove the value of that portion of the property which was not restored to the plaintiff, either directly or indirectly, by proving the value of that which was returned and deducting it from the amount named in the bond. There seems to have been no such proof. But the court, after rejecting the report as evidence of the value of the property returned or the damage to it, turned its attention to the value of that part which was not returned. And here, so far as we can discover from the record, the court must have adopted one of two alternatives; either it accepted the allegation in the complaint as to the value as true without proof and notwithstanding the denial of the defendant, or else it treated the report as evidence of such value. If the former, the error is apparent without argument; if the latter, although not so obvious, still the error exists. For we are of the opinion that the report was not admissible on the question of value. It was strictly *res inter alios*. The defendant was neither party nor privy to that proceeding, except that he could not controvert the judgment and could not deny that the property was worth when converted the sum named, for that fact was essential to the judgment rendered. But the question now is: what was the value of the defendant's interest in the property when it was attached? The former judgment neither proves nor tends to prove, legally, the value at that time. Moreover, that report purports only to show the value of the property when converted, April 3, 1874; it does not even tend to prove that the same property, nearly four months later, was worth just the same sum. We deem it unnecessary to consider the other questions in the case.

For the reasons given, the judgment must be reversed and a new trial ordered.

In this opinion the other Judges concurred—

Elias MESSER, *Appt.*,

v.

Alexander WILDMAN *et al.*

The land within the limits of the lay-out and alteration of a street, becomes part of the public streets and ceases to be private property, on acceptance of

the lay-out by the borough. This is so, notwithstanding the fact that an appeal by an owner of lands taken as to the damages to be awarded, is pending at the time of acceptance.

(Fairfield—Decided November 13, 1885.)

APPEAL from a judgment of the Court of Common Pleas, Fairfield County, in favor of defendants. *Affirmed.*

The action was for damages for a trespass upon land. The defense was that the *locus in quo* was a public highway; that the plaintiff had unlawfully erected a fence thereon; and that defendants had removed the same by direction of the warden and burgesses, after due notice to the plaintiff.

The main question raised in the case was whether the land had been legally acquired as a public street, the plaintiff insisting that it had not been so acquired, for the reason, among others, that an appeal by one Versoy, over a part of whose land the highway ran, was still pending. This appeal was taken only on the question of the amount of the assessment and the damages which should be awarded.

Messrs. Wm. F. and H. W. Taylor, for appellant:

Until the appeal has been determined, the borough proceedings are inchoate and incomplete, and the land of the plaintiff still vested in him, and its use had not been transferred to the borough. *Carson v. Hartford*, 48 Conn., 84-92; *Stevens v. Borough of Danbury*, August 22, 1885.

The taking of private property by the law of eminent domain is a proceeding *in invitum*, under the provisions of positive law and in derogation of the common law; and every requirement of the statute should be complied with, and should appear upon the face of the proceedings under which the property is attempted to be taken. *Nichols v. Bridgeport*, 23 Conn., 208.

Every taxpayer has the right, if his property is not condemned by a lay-out, to a public notice of a proposed expenditure of public money in opening and ever afterwards in maintaining a highway; and if his property is also condemned, he has the right as one of the public, independent of his notice as land owner, to know that the other taxpayers know of the proposed expenditure of public money in opening and maintaining the road, and for which all are to be taxed. The public notice required by law was not given, and the lay-out and the condemnation proceedings are void. This public notice is a statute requisite, which must affirmatively appear on the face of the proceedings to have been complied with. Dill. Mun. Corp., §§ 469, 470, 471; *Nichols v. Bridgeport* (*supra*).

Messrs. Brewster, Tweedy & Scott, for appellee:

The pendency of *Versoy's Appeal* did not affect the right of entry of the finality of the condemnation, but only the amount of compensation. Had the appellant in this case appealed from his assessment it would not affect the right of the borough to the condemned land in question. Mill, Em. Dom., § 334.

A fortiori, still less can an appeal of another

land owner, Versoy, affect the right of the borough to utilize at once the condemned land of the plaintiff, Messer, who had not appealed from his assessment. This is distinctly decided in *Riehle v. Heulings*, 88 N. J. Eq., 88, and is the logical result of the doctrine of *Gilbert v. New Haven*, 39 Conn., 471, and *Clapp v. Hartford*, 35 Conn., 66, which hold that the appeal only brings up the assessment of the particular appellant and not those of the other land owners.

All the notice required by the charter was given. No public notice is required, necessarily, by statute, provided such notice as the charter requires is given. *Nichols v. Bridgeport*, 23 Conn., 189; *Gilman v. Milwaukee*, 14 U. S. Dig., 582, § 11; *S. C.*, 55 Wis., 328.

The appellant cannot now object that the acceptance by the borough preceded the decision of the Versoy appeal; first, because no such point was made in the court below or in the reasons of appeal. Secondly, because the borough meeting is under the charter properly held before the determination or even taking of the appeals. This appears plainly from the order given in the original charter; 3 Private Acts, 211. In the amended charter, 5 P. Acts, 469, three sections are condensed into one as provisos, but there is evidently no intent to change the order of the several steps. The course taken is that prescribed by such charters generally. See, 3 P. Acts, 199, 205, 281, 244, 248.

The time from which and at which benefits and damages are calculated and fixed is at the time of the taking. *Mill, Em. Dom.*, §§ 155, 174; *Pierce, R. R.*, 209.

An entire payment may be made in benefits. When no damages are suffered over the local and peculiar benefit the owner has already been compensated. *Mill*, § 151, citing *Nichols v. Bridgeport*, *supra*; *Trinity College v. Hartford*, 82 Conn., 452; *Chicago & Pac. R. R. Co. v. Francis*, 70 Ill., 288.

For any change in the plan made after the assessment the owner may have his remedy, but not by attacking the validity of the original condemnation. *Mill*, § 219.

A deviation in the route at some other point than on complainants' land cannot be complained of. *Newton v. Agr. B. R. R. Corp.*, 15 Gray, 27.

Want of notice to other parties cannot be taken advantage of. *Nichols v. Salem*, 14 Gray, 490.

The fact that one owner appeals cannot enure to the benefit of one not appealing. *McKee v. St. Louis*, 17 Mo., 184.

There is no contract with surrounding property holders that a public improvement shall always continue as at present. *Mill*, § 317.

Although a certain portion of land is described in a petition as necessary for the improvement, a certain portion may be left out if needed. *Mill*, 314.

The officers of a city cannot make a contract by which they shall deprive themselves of the exercise of discretion in discontinuing a street. *Martin v. Mayor*, 1 Hill, 545.

The owner cannot obstruct the road although the damages have not been paid. *Chapman v. Gates*, 54 N. Y., 182.

See also, as to compensation, *Terry v. Hartford*, 39 Conn., 286, 292.

Park, Ch. J., delivered the opinion of the court:

It appears in this case, that the *locus in quo* lies within the limits of a lay-out and alteration of White and Canal Streets in the Borough of Danbury; which alteration was subsequently formally accepted by the Borough at a special meeting duly warned and held.

All this was done previously to the commission of the acts complained of by the plaintiff; and the only question is: did the lay-out, and acceptance of the same, constitute the alteration a part of the public streets?

If it did, then the plaintiff has no cause to complain, and the court below committed no error in so deciding. If it did not, then error was committed by the court, and the judgment must be reversed.

It appears further in the case that the warden and burgesses appraised no damages for the lands taken for the alteration, on the ground that the benefits, resulting to the owners of the same from the alteration, would be greater than their damages respectively; and that one of the owners had appealed to a Judge of the Superior Court to reassess his damages, which appeal was pending when the acts were committed for which the plaintiff complains.

The plaintiff insists that the appeal stayed all proceedings till it should be determined, and, therefore, the action of the borough in accepting the lay-out and alteration was void.

There is no virtue in this claim. The appeal called in question only the damages of the appellant. Whether those damages were one sum or another, the plaintiff and all others had no concern.

It is true the borough might have delayed their action in accepting the lay-out and alteration, till the appeal had been determined, had they felt so disposed. But they saw fit to accept the same during its pendency, and they were bound by their action as much as they would have been, had they waited for its determination, the only difference being, that up to the acceptance the borough could have abandoned the attempted improvement, which afterwards was not in their power, and therefore they would have had a longer time for consideration of the question of abandonment in one case than in the other.

But it is said that the plaintiff, like the others, was assessed no damages on the ground that his benefit, from the alteration, would be greater than his damages; that such benefit could result only from the whole alteration being made.

This is true. But the appeal does not and could not prevent the whole alteration from being made. It only calls in question the appellant's damages, as we have seen.

The borough is now bound to make the alteration, whether the appellant's damages are one sum or another.

The remaining questions raised by the plaintiff are clearly untenable and require no discussion.

There is no error.

In this opinion the other Judges concurred.

SUPREME COURT OF VERMONT.

A. P. POND

v.

Luther BAKER *et al.*

1. **Property held by one officer under attachment cannot lawfully be taken on process by another officer; but when attached, receipted for and left in the possession of the debtor it can be so taken. So property left in the possession of the debtor, which can be secured for forty days by leaving a copy of the writ in the town clerk's office, can be lawfully taken by a second officer, after the expiration of the forty days. So the second attachment will be held valid, where it does not appear from the case that the property was charged on an execution seasonably issued on the prior judgment.**
2. **The plaintiff as officer attached certain property in the possession of a lessee. The return was, in part, "I served this writ by attaching as the property of the within named defendant all the real estate in said town of M—, etc., all the neat cattle, horses, hogs and sheep, cows, oxen, etc., now on or kept on said farms, lands and premises or any part thereof, by the said G. M. Campbell; and on the same day I gave the said defendant, and also the said G. M. Campbell, lessee to the occupancy of said farms, lands and premises, immediate and personal notice," etc. The defendant had only one farm leased to C.; and on it were twenty-one cows, nineteen yearlings, fifteen calves, one horse, etc., leased. Held, that in view of the actual condition of the property, the live stock on the farm was legally attached; and that the return was sufficient to inform the defendant and any reasonable, prudent person dealing with him, that the property was under attachment.**
3. **The question, whether the plaintiff should have taken possession of the property immediately on the expiration of the lease, is not involved, as the defendants, who have converted the property in the case, are the assignees of the defendant in the original case, and stand only on his rights; and the attachment was valid as to him without a change of possession.**
4. **The interest which the lessor had in the hay and grain raised on the farm by the lessee was not attached, as it was not in existence at the time of attachment, although by the terms of the lease, the hay was substituted for the hay that was legally attached.**
5. **The damages are to be estimated at the time of the conversion, not at the time of the attachment.**

(Decided January 14, 1886.)

It appeared: on October 1, 1878, and for some time previous thereto, one John Campbell was the owner of a farm in Montgomery, known as the Kelton farm; and on October 1, the personal property declared for was on said farm and in his possession. On October 1, John Campbell leased said farm to G. M. Campbell for one year, by a verbal lease. The lessee was to have the use of one horse, twenty-one cows, one double wagon, one pair of work harnesses, one set of traverse sleds, one horse rake, one mowing machine, two plows, one drag, one grindstone, five shoats, and the sugar tools then on said farm (and returned as attached by the plaintiff) during the said term, and the right to use the horse power, thrasher and saws to do his own threshing and saw his own wood; and all the products of the farm, except the hay, were to be equally divided between the lessor and lessee. The lessee went into the possession of the said farm and personal property under said lease on October 2, 1878, and continued in possession during said term. The hay grown on said farm in 1878 was cut and stored on said farm by John Campbell, and was fed to the stock on said farm in the winter of 1878 and 1879; and it was agreed at the time said lease was made, that G. M. Campbell should cut and store the hay that might grow on said farm in 1879, for the benefit of John Campbell. At the time said lease was made, John Campbell was the owner of nineteen yearling heifers, which were then on said farm, and the same that were claimed to have been attached by the plaintiff; and it was agreed that said heifers should be kept on said farm, and those that might come in should be milked by G. M. Campbell, with the cows that were leased, and the products of the whole equally divided; and the lessor and lessee were at equal expense in hiring help to take care of said heifers and other stock, during the winter of 1878-9.

Thirteen of said heifers did come in in the spring of 1879, and were milked by G. M. Campbell during the time he occupied said farm.

John Campbell, at the time the lease was made, reserved the right to occupy a portion of the house on said farm and resided therein during the continuance of the lease. On November 25, 1878, George Wilkins prayed out a writ of attachment in his favor and against John Campbell, and the defendant Stiles as trustee, returnable to the April Term, 1879, of the Lamoille County Court, demanding \$6,000 damages; and the same was placed in the plaintiff's hands, who was then a deputy-sheriff for the County of Franklin, for service. On November 29, 1878, the plaintiff served said writ in the manner indicated by the original and amended returns made upon the same.

It appeared from a copy of an assignment and bonds filed in the probate court, that on August 16, 1879, the said John Campbell executed an assignment under the provisions of ch. 67 of the General Statutes, and therein selected and named the defendants assignees. They accepted said appointment and filed the bonds in the probate court.

At the time said assignment was executed said property all remained on said farm. Early in the morning of October 3, 1879, the defendants removed all the property so attached by the plaintiff off from said farm, and took and

TRESPASS and trover. Plea, general issue.
 Trial by court. September Term, 1884.
 Judgment for the defendants. *Reversed.*

VT.

have ever since retained the possession of the same.

The other facts are sufficiently stated in the opinion.

Messrs. H. E. Rustedt, H. C. Adams, and Cross & Start, for the plaintiff:

The officer's return was sufficient. All that is required is, that the property be described with reasonable certainty, that the defendant and any person having any dealings with him, aided by inquiries suggested by the return, may identify the property. *Bucklin v. Crampton*, 20 Vt., 261; *Fullam v. Stearns*, 30 Vt., 457; *Harding v. Coburn*, 12 Met., 333; *Winslow v. Merchants Ins. Co.*, 4 Met., 315; *Burditt v. Hunt*, 25 Me., 419; *Willey v. Snyder*, 34 Mich., 60. See this case reported in 55 Vt., 400; and in 56 Vt., 674.

The property, although in the possession of a lessee, was legally attached. Gen. Stats., ch. 83, § 32; *Brigham v. Avery*, 48 Vt., 602.

The defendants as assignees, stand in the place of John Campbell, the lessor. *Pond v. Baker*, 56 Vt., 674; Gen. Stats., ch. 68, § 10.

The rule of damages is the value of the property at the time of the conversion. 1 Add. Torts, 457; *Thrall v. Lathrop*, 30 Vt., 307; 88 Vt., 566.

Messrs. S. H. Royce and E. H. Powell, for defendants:

The property was under attachment when the plaintiff served his writ, and his attachment was, therefore, invalid, the first being made by another officer. *West River Bank v. Gorham*, 38 Vt., 649; *Rogers v. Fairfield*, 36 Vt., 641; *Vinton v. Bradford*, 13 Mass., 114; *Robinson v. Ensign*, 6 Gray, 300.

The amendment adds nothing to the return. The property must be described with reasonable certainty; the statute expressly requires that it shall be described. R. L., § 881; *Drake, Attach.* § 204.

It must be "described with a good degree of exactness and particularity in order to show identity." *Shaw, Ch. J.*, in *Baxter v. Rice*, 21 Pick., 197; *Brooks v. Farr*, 51 Vt., 396; *Jewett v. Guyer*, 38 Vt., 209; *Pond v. Baker*, 55 Vt., 400.

The plaintiff attached the reversionary interest of the lessor. R. L., § 1191. He could hold only what he attached. The title was in debtor. *First Ward Nat. Bk. v. Thomas*, 125 Mass., 278; *Jenks v. Silloway*, 30 Vt., 690.

The plaintiff had only an attachment lien. Trover will not lie. 6 Wait, Act. & Def., 151; *Clark v. Draper*, 19 N. H., 419; *Winship v. Neale*, 10 Gray, 382; *Dubois v. Harcourt*, 20 Wend., 41.

The property should have been attached as the lessor's, and described as in the hands of the lessee. *Meuley v. Zeigler*, 23 Tex., 88; *Drake, Attach.*, §§ 207, 356; *Olay v. Neilson*, 5 Rand., 596.

The assignment was good as against a prior invalid attachment. *Dey v. Dunham*, 2 Johns. Ch., 182; *Burr. Assts.*, 239; *Hall v. Dennison*, 17 Vt., 310; *Kellogg v. Slavson*, 15 Barb., 56; *Swift v. Thompson*, 9 Conn., 63.

Ross, J., delivered the opinion of the court:

The defendants contend that the attachment made by the plaintiff, if sufficient in other respects, was inoperative to create any lien in his favor on a portion of the property returned by

him as attached, for the reason that it was then under an attachment made by H. B. Ladd as constable of Montgomery. Ladd's attachment was made on July 18, 1878, by leaving a copy of the writ with his return thereon in the town clerk's office. It is settled that while such an attachment of personal property exists, the same property cannot lawfully be attached by another officer, either by leaving a proper copy of his process in the town clerk's office or by taking possession of the property. *Beach v. Abbott*, 4 Vt., 605; *Rood v. Scott*, 5 Vt., 263; *West River Bank v. Gorham*, 38 Vt., 649.

But within forty days of the attachment made by H. B. Ladd, the defendant procured a receipt for a part of the personal property so attached, and the receiptor allowed the property receipted to remain in the possession of the defendant in the writ. The property thus situated could lawfully be attached by the plaintiff. *Beach v. Abbott, supra*.

Certain of the remainder of the personal property attached by Ladd by copy in the town clerk's office he was required to take possession of within forty days after making the attachment, or his attachment became void as to subsequent attaching creditors and *bona fide* purchasers. No. 70, of Acts of 1876. Ladd did not take possession thereof, and this part of the property could lawfully be attached by the plaintiff. A portion of the property was of such a character that Ladd's attachment thereof by copy in the town clerk's office remained in force, notwithstanding he did not take possession thereof. But in regard to this portion of the property, the case fails to find that execution was seasonably taken out on the judgment recovered in the suit in which the attachment was made by Ladd, or that the property was lawfully charged on said execution so as to preserve the lien created by the attachment. Hence, the attachment made by Ladd does not, on the facts found by the county court, interfere with the attachment made by the plaintiff; and the question is as to the sufficiency of what was done by the plaintiff to create a valid attachment of the property in suit.

2. Various objections are urged to the validity of the attempted attachment of the property in suit by the plaintiff. It appears that John Campbell, the defendant in the suit in which the attachment was made, on October 1, 1878, leased his farm and most of the property in suit to G. M. Campbell for one year, and he took possession October 2, 1878. The attachment by the plaintiff was made on November 29, 1878. The validity of this attachment depends upon the amended return upon the writ upon which it was made. The defendants contend that the return does not sufficiently describe the property, to make a valid attachment thereof; that it does not attach it as the property of the defendant, John Campbell; and that certain of the property was not included in the lease to G. M. Campbell. The lessor's interest in property leased can only be attached in the manner provided by the statute, by giving the lessee a duly authenticated copy of the writ on which the attachment is made with the return of the officer thereon describing it. R. L., § 1190; *Brigham v. Avery*, 48 Vt., 602.

The officer's return in this case was not commended for clearness and perspicuity when be-

fore this court between these same parties as reported in 55 Vt., 400. This court then refused to pass upon the sufficiency of the plaintiff's return to attach the property in the hands of the lessee, G. M. Campbell. It must be confessed that the return is by no means a model to be commended to officers to follow in the future. There is much in it that is apparently confusing by its attempt to cover everything and everybody. In this suit the plaintiff seeks to recover mainly the property which he claims to have attached in the hands of G. M. Campbell, as the lessee thereof from the defendant, John Campbell; and for that purpose, in fairness, the return should be read with reference to said lessee and defendant, John Campbell, and all other indefinitely described persons should be eliminated therefrom. Thus eliminated, the return will show what the plaintiff claims to have done with reference to the attachment of the property in the hands of G. M. Campbell, as the lessee of the defendant. It will, when the extraneous matter, so far as relates to G. M. Campbell and John Campbell, is eliminated, read as follows:

"At Montgomery, on the 29th day of November, A. D. 1878, I served this writ by attaching, as the property of the within named defendant, all the real estate in said Town of Montgomery. And on the same day I attached all the hay, grain in the straw, corn, corn in the crib and in the stalk, potatoes in the cellar, and implements for the manufacture of maple sugar, in the house, barns, sheds, cellars, and other buildings on the farms, lands and premises occupied by one, G. M. Campbell, as tenant to or claiming to be tenant to the said defendant, situated in Montgomery aforesaid; and I also on the same day attached all the neat cattle, horses, hogs and sheep, cows, oxen, young cattle, and all mares, geldings, stallions, colts and weanling pigs, lambs, now on or kept on said farms, lands and premises, or any part thereof by the said G. M. Campbell; and on the same day I gave the said defendant, and also the said G. M. Campbell, lessee to the occupancy of said farms, lands and premises, immediate and personal notice of said attachment; I also, on the same day, attached three double wagons, four pairs traverse sleds, two pairs double harnesses, one single harness, one horse power and threshing saw rig and separator, one circular saw, one single sleigh, two mowing machines, one horse rake, one tedder, five plows, three drags, one grindstone; all of which personal property I found in the hands and possession of said G. M. Campbell, who claims to hold the same as lessee of said defendant; and on the same day I delivered to the said G. M. Campbell, a true and attested copy of this writ of attachment with a list of the property so attached thereon indorsed, with my return hereon thereon indorsed."

As said by Veazey, J., in 55 Vermont, when this return was before this court: "Reasonable intendments are made in favor of officer's returns. The presumption of law is in favor of their legality. *Drake v. Mooney*, 31 Vt., 619.

A valid lien is created by attachment by copy in town clerk's office when the return is sufficiently precise to show the identity of the property. *Fullam v. Stearns*, 30 Vt., 443."

The same intendments and presumptions in

favor of the return apply where the attachment is of property of the lessor in the hands of the lessee, by copy delivered to the lessee. Giving force and efficacy to this rule of construction, we think the plaintiff's return sufficiently shows that the property attempted to be attached in the hands of the lessee was the property of the lessor, John Campbell, the defendant in the writ. But the defendants contend that the statements in the return, "all the hay, grain in the straw, etc., all the neat cattle, horses, hogs and sheep, cows, oxen, young cattle, and all mares, etc., now on or kept on said farm, etc., by the said G. M. Campbell," is too indefinite; that they should be described by number, quantity or other and more definite specification. The rule in this State, which has prevailed in regard to the degree of definiteness of specification and description in the return of an officer of property attached, is that laid down in *Bucklin v. Crampton*, 20 Vt., 261.

It is there stated by Hall, J., as follows: "In order to give an officer the constructive possession of property attached by leaving a copy with the town clerk, it is undoubtedly true that it must be described with reasonable certainty; but such reasonable certainty is all that is required. The sufficiency of the return in this respect can only be determined by applying it to the actual state of the debtor's property at the time. If the debtor have no such property as that described, the attachment can have no operation. If he have such property, the question is whether it has been sufficiently pointed out, to enable the debtor and those with whom he may deal to be informed that it is attached."

Apply these tests to the return of the plaintiff. The actual state of the property of the debtor in controversy at the time of the attachment was as follows: he had but one farm in the Town of Montgomery, leased to G. M. Campbell. If he had had three or four farms so leased, the plaintiff's return might and doubtless should receive very different consideration. On this farm the debtor had, at that time, fifteen calves, nineteen yearlings, twenty-one cows, one horse and five pigs, besides the wagons, sleighs, threshing, etc. The farm is described as located in Montgomery, and in the occupancy of G. M. Campbell. This description of the farm is sufficient, to enable the debtor and anyone who might have occasion to deal concerning it, to identify it. The cows then on the farm would have been no more identified, nor would the debtor or those who might have occasion to deal with him have known any better or more certainly what cows were attached, if the plaintiff had described them as twenty-one cows rather than all the cows on the farm. The use of the numerical number would have added nothing to their information in this respect. If the debtor then had more than twenty-one cows on the farm, the use of the number twenty-one, in the plaintiff's return, would have given additional uncertainty to their identification, and lessened the information furnished by the return of the particular cows attached. In the then state of the debtor's property, the word "all" conveyed as much and as definite information of the cows attached, as the use of twenty-one would have done. The same reasoning is applicable to the other live stock then on the farm. To identify the prop-

erty described in either case, extrinsic evidence or evidence outside of the return would have to be resorted to, namely: evidence to show the particular cows that made up the twenty-one cows, or all the cows then on the farm, and named in the return. While the return stating that the officer attached all the personal property of the kind named in a town, has been held too indefinite to create a valid attachment (*Paul v. Burton*, 32 Vt., 148; *Rogers v. Fairfield*, 36 Vt., 641), it has not, so far as we are informed, ever been held, in this State or elsewhere, that a description in a return or conveyance was inoperative because of indefiniteness which described the property as all the property of the particular kind named in the possession of a particular person, on a designated farm in a town.

In *Winslow v. Merchants' Ins. Co.*, 4 Met., 306, it is held that a mortgage of all the goods, etc., in and about a certain building, is valid as to all articles that can be identified. The same is held in *Harding v. Colburn*, 12 Met., 383; and in *Burditt v. Hunt*, 25 Me., 419.

We think that the description of the live stock in the plaintiff's return is sufficient to comply with the rule enunciated in *Bucklin v. Crampton*, *supra*; that, when read with reference to the situation and condition of John Campbell's property in the possession of G. M. Campbell as his lessee on the farm leased, it was sufficient to inform John Campbell or any reasonable, prudent person, who might have occasion to deal with him in regard to any of the same, that it was under attachment by the plaintiff.

We also think that the thirteen yearling heifers which came in, and the horse power, threshers and saws were, by the contract, included in the lease. The lessee was entitled to their possession and use during the term of the lease. The plaintiff would have been a trespasser if he had undertaken to remove them from the lessee's possession. The property, other than the live stock in the lessee's possession, is described by number as well as kind. It is not seriously contended that the return insufficiently describes this; and yet it could be identified only by evidence extrinsic to the return.

3. It is further contended that the plaintiff lost the lien created by his attachment, by his failure to take possession of the property immediately upon the expiration of the lease to G. M. Campbell. On the facts found, the lease expired on the first or second day of October, 1879. When the attachment was made, the plaintiff asked G. M. Campbell, in the presence of John Campbell, what property was included in the lease and when the lease expired. G. M. Campbell replied that all the personal property on the farm was included in the lease, and that the lease expired October 3, 1872. The statute, R. L., §§ 1189, 1190, 1191, authorizing an attachment and sale of the interest of the lessor in property leased, while in the lessee's possession, is silent in regard to the duty of the officer, or what is necessary to be done by him to preserve the attachment, if the lease or bailment should expire before the sale. It is claimed by the defendants that the officer must take possession of the property the moment the lease expires, or the lien created by

the attachment is lost. There seems to be force in the contention, under the decision in this State, that if the property pending the attachment is released from the operation of the lease and returns to the possession of the lessor, it becomes subject to attachment by other creditors of the lessor, and to sale to *bona fide* purchasers. But how the law should be held on the supposed state of facts, we have no occasion to inquire nor decide. The property has not returned to the possession of the lessor and there been attached by other creditors of the lessor, or been purchased by *bona fide* purchasers. On July 18, 1879, John Campbell assigned all his property to the defendants for the benefit of all his creditors. The defendants, early on the morning of October 3, 1879, took possession of all the property attached, removed it from the farm and have converted most of it into money. The plaintiff appeared at the farm October 3, 1879, after the defendants had taken possession of the property and removed it, and demanded the property of the lessee, and subsequently and before bringing this suit, of the defendants. If it was the duty of the plaintiff to ascertain the time when the lease expired and take possession of the property attached at the expiration of the lease to preserve the lien created by the attachment in the hands of the lessee, we think all that can be required of the officer is the exercise of reasonable and prudent inquiry to ascertain the time when the lease expires, and reasonable diligence to take possession of the property at the expiration of the lease. This the plaintiff did. The lease was unwritten. He inquired of the lessee in the presence of the lessor. He was present to take possession of the property on the very day on which he was informed the lease expired. Any stricter rule would be open to the practice of frequent and gross frauds on the attaching officer and creditor. It may well be questioned whether, under the law when an attachment was made of property in the hands of a bailee, pledgee or lessee, such bailee, pledgee or lessee can lawfully deliver the property so attached on the termination of the bailment, pledge or lease, to the owner; whether by the attachment the law has not impounded it in his hands, and whether he is not under a legal duty, at least, to notify the officer of its termination and call upon him to take possession. But on the facts of this case there is another satisfactory answer to this contention. The defendants are neither attaching creditors nor *bona fide* purchasers of the property. *Stickney v. Crane*, 35 Vt., 89.

They occupy against the plaintiff in that respect no better position than their assignor, John Campbell. Against him, the plaintiff's attachment of the property continued valid, whether made by a legally authenticated copy of the writ with his return delivered to G. M. Campbell as lessee, or by like copy and return lodged in the town clerk's office, although he did not take actual possession of the personal property so attached. No. 70, Acts 1878; *Blodgett v. Adams*, 24 Vt., 25.

Such attachments being legal, when made, created a legal lien on the property attached which continued in force against the defendant, without more being done by the officer, until thirty days after final judgment in the suit on which the attachment was made. Hence, the

plaintiff's attachment of the calves, which were not included in the lease as agreed upon by the parties thereto by a copy of the writ in the town clerk's office, was valid against these defendants. Therefore, it is unnecessary to consider whether John Campbell and his assignees are estopped by the statement of G. M. Campbell that the calves were included in the lease and that the lease expired October 8, 1879. The execution on the judgment in favor of the attaching creditors was seasonably taken out and placed in the plaintiff's hands for collection, and the property attached duly demanded and charged thereon. This perfected the right of the plaintiff to recover the value of the property thus legally attached and charged in execution against John Campbell.

The hay and grain raised on the farm by the lessee under the lease was not in existence when the attachment was made, and therefore could not be attached. Although by the terms of the lease the hay cut by the lessee, in 1879, was substituted for the hay on the premises when the lease was agreed upon, which latter was legally attached by the plaintiff, it was not attached, and the plaintiff never acquired any right to it and cannot recover for its conversion, nor for the conversion of John Campbell's half of the corn and oats raised on the farm that season.

4. The only remaining question is whether the plaintiff is entitled to recover the value of John Campbell's reversionary interest in the property attached at the date of the attachment, or the value of the property attached when converted by the defendants. We think he is entitled to recover the value of the property when converted. It is true, by the provisions of the statute, only the interest of the lessor in property leased can be attached and sold. But when, before the sale, the property is discharged from the lease, that interest is the entire value of the property. It is the value of his interest in the property at the time of the sale and not at the time of its attachment, which the creditor is entitled to take and apply in satisfaction or towards the satisfaction of the judgment.

The result is, the pro forma judgment of the County Court is reversed, and judgment rendered for the plaintiff to recover of the defendants the sum of \$1,260.77, with interest from October 5, 1879, and his costs.

Chester B. NEWELL

TOWN OF WHITINGHAM.

The plaintiff interlined the oath attached to his inventory required by the tax law of 1880, with the words, "to my best knowledge and belief." The listers refused to accept it and proceeded under the section of the statute, R. L., § 826, which directs them, in case of a willful omission to make, swear to and deliver a legal inventory, to ascertain the amount of the taxpayer's taxable property, appraise the same and double the sum so obtained, as a basis for the delinquent list. Held, that the

action of the listers was lawful; that it was the duty of the plaintiff to take the oath as formulated in the statute; and that his refusal was willful, although conscientious.

(Decided January 23, 1886.)

ASSUMPSIT. Plea, general issue with notice. Trial by jury, March Term, 1884, Windham County. Judgment for defendant. *Affirmed.*

The court *pro forma* directed a verdict for the defendant, that the question might be settled by the Supreme Court. But in doing this, the court stated: "We think that there is no ground for saying that Mr. Newell acted in this matter otherwise than in the utmost good faith and honesty, and that he really and honestly entertained the doubts and scruples that he said he did."

The words "to my best knowledge and belief" were inserted in the oath just after the words "taxable property." The required oath was:

"I, _____ of _____, do solemnly swear (or affirm) that the above is a full, true and correct list and description of all my taxable property, both real and personal, and all property which should be set in the list to me, and that I have set down only such debts as I am unconditionally bound to pay, to the amount of the deduction claimed; that my answers to these interrogatories are correct, and that I have not conveyed or disposed of any property or estate in any manner, or created any fictitious debt for the purpose of evading the provisions of law, or affecting the value and amount of my taxable estate. So help me God."

The collector sold the plaintiff's property to satisfy the tax; and this action was brought to recover for the same.

The other facts are sufficiently stated in the opinion of the court, and in the dissenting opinion of Judge Ross.

Messrs. C. B. & C. F. Eddy and H. N. Hix, for plaintiff:

In every essential particular, the oath tendered was all the Act required. The plaintiff had a right to propose the form of the oath which he would take, if the same was thus binding upon him. 1 Greenl. Ev., 484; 1 Swift, Dig., 789; 1 Stark. Ev., 20.

This Act, like all others, must have a reasonable construction. The object of the statute is: first, to provide revenue; second, to secure the citizen against injustice. It was not intended to confer upon listers lawful power to inflict upon a taxpayer inequality and injustice, for no other reason than that he has been honest and exactly truthful. The case shows that the plaintiff was in honest and conscientious doubt as to whether he had a taxable interest in some wool and cattle, or in what might be due him ultimately in respect to them. It is not a mere formula of words that constitutes the law; its substance, the true rule of action prescribed, must be gathered from the object and spirit of the enactment, as well as the mere letter. *Holland v. Osgood*, 8 Vt., 280.

Not every verbal variance, either in the omission or addition of words, will vitiate. *Shrevebury v. Mount Holley*, 2 Vt., 220; *State v. Bartlett*, 11 Id., 650; *Blodgett v. Holbrook*, 89 Id.,

841; *Ayers v. Moulton*, 51 Id., 115; *Charles-town v. Comrs.*, 1 Allen, 199; *Lanesborough v. Comrs.*, 181 Mass., 424; *Tonnele v. Hall*, 4 N. Y., 140; *Walker v. Cochran*, 8 N. H., 166; *Leach v. Blakely*, 84 Vt., 184; *Fairbanks v. Kittredge*, 24 Id., 18.

Mr. J. Barrett, for defendant:

The plaintiff was subject to taxation; hence, if he can recover, it is because the tax was unlawful. If the listers accepted a different inventory than was provided by law, they were liable to forfeit \$200. § 14 of the Act of 1880.

It could not be unlawful for them to stand on the explicit requirement of the statute. Unless the statute required the listers to accept the oath, they had no authority to accept it. It is not the lawful function of this court to change the law of 1880, in respect to the oath. The language of the statute being explicit and plain, without ambiguity as to its meaning, there is no subject or occasion for construction. The current of authority at the present day, is in favor of reading statutes according to the material and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. Courts cannot correct what they deem either excesses or omissions in legislation. *Walker v. Harris*, 20 Wend., 555; *Sedg. Stat. L.*, 243.

The omission to make and deliver the proper inventory was willful. *Smith v. Wilcox*, 47 Vt., 587.

Again, the authorities are uniform in marking the distinction between ministerial and judicial functions of listers. *Day v. Peasley* 54 Vt., 812; *Wilson v. Marsh*, 84 Vt., 359; *Fuller v. Gould*, 20 Vt., 649.

The plaintiff's action compelled the listers to act judicially and construe the statute. The good faith with which the plaintiff omitted to make the prescribed oath does not avoid the consequences visited by the statute. Did the listers do anything unlawful? They obeyed the statute in every particular. The plaintiff must show the illegality of the tax. 44 Vt., 235; 38 Id., 221; 25 Id., 20; *Cooley, Taxn.*, 566; *Burr. Taxn.*, 441.

Veasey, J., delivered the opinion of the court:

The listers of the defendant Town were satisfied with the inventory of the plaintiff as filled out and tendered by him, with the exception of the interlineation in the oath, and for this reason only refused to receive it and administer the oath. The interlineation was in the words, "To my best knowledge and belief." By section 4 of No. 78, of the Act of 1880, it was provided as follows: "Said inventories shall also contain the following oath;" then followed the form just as printed in the blank inventory, and in which said interlineation was made by the plaintiff. Section 14 of said Act was this: "If a lister accepts the inventory of a person not made out and sworn to as provided in this Act, he shall, for each inventory so received * * * forfeit to the town or city where he resides the sum of \$200; and any taxpayer in such town, in the name of the town, may sue and recover such penalty for the benefit of such town."

The plaintiff insists that the interlined oath was a substantial, if not literal compliance with

the requirements of the statute and that that is sufficient in the construction of an Act of this kind.

The test is the legislative intent, to be deduced from the terms of the enactment as a whole. We think it is plain that the intention was to confer upon the listers the right to exact the oath prescribed. This is indicated by the provisions quoted and by others. The listers could not take up the inventories before April 1; and were limited to April 25 to complete and arrange in alphabetical order, and lodge the personal lists of all the taxpayers in the clerk's office. § 15.

The variation of the form of the oath, under a claim that it did not vary the substance or legal effect, would present practical difficulties to the listers that could not have been contemplated, in view of the liability and limitation upon them. The plaintiff's claim seems to come to this: though in terms subject to a penalty for any deviation from the statute, yet the listers must stop and deliberate as a tribunal, upon every qualification of oath offered and decide whether it is a substantial variation or not; that they are liable to prosecution for the penalty if they decide in favor of the taxpayer; and are liable to suit against themselves or the town for the illegality of the tax if they decide against the taxpayer; and this in respect to a statutory provision concededly not doubtful or uncertain in terms.

Nor is this all. No one claims that the listers should receive an oath differing in substance or legal effect from the statutory form. Then why should the listers not be protected in requiring that form? Why should the Legislature have intended that they should be troubled with the fanciful notions of every taxpayer in respect to form, especially when every deviation from the prescribed form would involve the difficult question as to whether it was matter of substance or form? Where the legislative enactment is plain and certain in terms, and nothing in substance is to be gained by a deviation, and substantial convenience and advantage, without injustice, is subserved by literal compliance, we think such compliance was intended. It would seem to be novel to predicate legal error upon the action of the listers for adhering to the plain provisions of the statute in the discharge of official duty, and declare a tax unlawful, where their right to proceed under the statute is conceded.

The view taken renders it unnecessary to pass on the question whether the oath tendered varied in substance from the oath prescribed. The refusal of the plaintiff to make, swear to, and deliver an inventory as required, though conscientious, was intentional, therefore willful, in the sense in which that term is used in § 10. It being willful, the duty of the listers to "ascertain and double" followed as provided in said section.

The list and tax was therefore lawful; and the pro forma judgment of the County Court is affirmed.

Ross, J., dissenting:

The Act of 1880 is entitled "An Act to Equalize Taxation." It seeks to accomplish this purpose by requiring every taxpayer to make in writing, and give in his list, an inven-

tory of taxable property, under oath, and to therein furnish such information as will enable the listers to ascertain just what taxable property he owns, and what debts of all kinds are due to and owing by him, by requiring the Secretary of State to make and publish inventories, with suitable interrogatories on all subjects necessary to give the listers full information in regard to his taxable property, to which is added a prescribed form of oath to be subscribed and taken by the taxpayer; by requiring the listers to appraise the property inventoried at such a sum as they would appraise the same in payment of a just debt due from a solvent debtor; and by making them liable to a penalty of \$200 if they receive and act upon an inventory not properly filled out and sworn to.

To secure from each taxpayer the required inventory properly sworn to, the Act further provides that if he willfully omits to make, swear to and deliver said inventory, or to answer any interrogatory therein, or makes a false answer or statement therein, or if the listers have sufficient reason to believe that an inventory does not contain a full, true and correct statement of the taxable property of the taxpayer filling out such inventory, "then the listers are to find what taxable property he owns, as best they can, appraise the same at its just value in money, and double the sum thus obtained for the basis of his list."

It is to be observed that this provision of the Act is highly penal and that the conditions which give the listers jurisdiction to impose the penalty are carefully stated. The provisions of the Act, when considered together, as they must be, require the utmost good faith, honesty and fairness in complying with its provisions by the taxpayer, the Secretary of State, and the listers, to the end that each person subject to taxation may bear his just and lawful proportion of the public burdens; no more, no less. So to construe any of the provisions of the Act, that an honest taxpayer, who has scrupulously complied in essence with all its provisions, shall be obliged to bear more than his just and lawful proportion thereof, is as gross a violation of the scope and spirit of the Act, as is the non-enforcement of any of its provisions. The tendency and effect of both are to defeat the end and purpose of the Act, equalization of taxation.

The plaintiff seeks to recover of the defendant money which he claims he has been compelled to pay to it in violation of the provisions of the Act, and hence wrongfully and illegally. That he undertook honestly and faithfully to comply with the provisions of the Act is unquestioned. It is admitted that he filled out an inventory to the full satisfaction of the listers; that he therein honestly and fully disclosed all his taxable property, and subscribed an oath thereto and requested the listers to administer it to him, and accept the inventory. The listers refused to administer the oath or to accept the inventory, if the oath should be administered by another magistrate, because in the prescribed oath after the words taxable property, he had inserted "to my best knowledge and belief." The refusal of the listers to accept the inventory, with this oath attached, properly sworn to, was a waiver of any necessity for him

to swear to it before another magistrate and then tender it to them. The only objection which the listers made to the inventory tendered was the fact that he had inserted the words named in the oath. In all other respects the inventory was satisfactory to the listers, and on this argument no other objection is raised thereto. They did not object to administering the oath, but objected to the inventory with that oath duly subscribed and taken by him. If the oath subscribed and tendered was, in legal contemplation and essence, the oath required by the Act, the plaintiff tendered a legal compliance with the Act, to the listers, and did not willfully omit to make, swear to and deliver the required inventory.

Hence, the single question is: was the oath tendered, in legal essence and force the oath prescribed by the Act? If the added words abated or lessened the legal essence and force of the oath in any particular, he did so omit, and the listers both had authority and were under a duty, in common language, to doom him. But they were under no such duty and had no such authority, if the added words did not lessen, or abate a scintilla from the legal force and effect of the oath prescribed by the Act. A fair way to test whether the added words did lessen or abate from the legal force and effect of the prescribed oath is to add them to the answer of each interrogatory in the inventory. Inserting them into the body of the oath was in legal effect adding the same words at the end of each answer to the several interrogatories contained in the inventory. It is to be observed that the words inserted are "to my best knowledge and belief," not or belief.

The interrogatories are of two kinds: those capable of an exact numerical answer based upon exact knowledge; and those requiring an answer founded on judgment and belief arising from knowledge gained by inquiry. Of the first kind is interrogatory 3: "What number of horses, over four months old, were owned by you on the first day of April 1881?" This is capable of a definite, numerical answer based upon knowledge. His answer is of that character, six. Now suppose, in fact, he then owned seven such horses, but had no knowledge that he owned the seventh; that some one unknown to him had, on the 31st day of March, made an absolute gift to him of the seventh horse and delivered it to a third person for him, would his answer, made under the obligations of the prescribed oath, have rendered him guilty of perjury in respect thereto? Manifestly not; because his want of knowledge of his ownership of the seventh, bereft his answer, false in fact, of the corrupt mind and purpose necessary to the commission of perjury. Would his conscience have been touched by the answer, false in fact? Certainly not, because he did not know of its falsity. If he had had knowledge of such ownership, he would have been guilty of perjury, and his conscience, if any he had, would have been touched, because of the possession of such knowledge. Now suppose he had added so that his answer read: "six, to my best knowledge and belief." Would anything have been taken from the legal force and effect of the answer, made under the prescribed oath, either on the score of perjury, or touching his

conscience? Not one scintilla! If he had known that he then owned seven, both the monitions of conscience, if any he had, and a liability for perjury, would have inhered in the answer. In fact, the words "to my best knowledge and belief" might have brought a new element into the answer, touching the conscience, that of belief, which may exist short of actual knowledge, and thus have added to rather than abated from the binding force of the answer.

The second class of interrogatories calls for an answer based upon judgment and belief, having their origin in best knowledge gained by inquiry. Of this character is interrogatory 8: "What amount of debts due from solvent debtors, whether on account, note or contract, bond, mortgage or other security, and whether then due or to become due thereafter, did you own on the first day of April, 1881?" The subject matter inquired about, the solvency of his debtors and the language of the interrogatory, alike, legitimately and impliedly call for an answer, true to the plaintiff's best knowledge and belief. The exact truth, stated with mathematical precision, cannot be given to such a question. The plaintiff could only answer it according to his best knowledge and belief. As to the amount due him from such debtors, he might be able to answer from his knowledge, with accuracy; but whether such debtors were in truth solvent, could only be known to him and answered as a matter of belief and judgment, based upon the best information he could gain by faithful inquiry. Hence, if he answered it with a definite numerical sum, the answer all the same implied that it was true to his best knowledge and belief. If he gave in his answer his honest belief in regard to the solvency of his debtors, he could not be convicted of perjury, how far soever from the truth, in fact, the answer might be. Nor could his conscience be touched in regard thereto beyond such belief. The addition of these words to his answers to this class of interrogatories would not lessen their legal quality, as regards perjury or conscience. Hence, the insertion of the words by him in the body of the oath subscribed did not lessen nor abate one particle from the moral or legal quality, force or binding effect of any of his answers to either kind of the interrogatories, but, if anything, added a moral force to his answers to the first class of interrogatories.

Hence, I conclude that the plaintiff tendered to the listers a full and perfect, moral and legal compliance with the force, spirit and requirements of the Act, and that the listers had no right to refuse to administer the oath tendered, nor to reject the inventory tendered; nor had they authority under the Act to doom him for willfully omitting to make, swear to and deliver a full and complete inventory of his taxable property as required by law. The taxes assessed against him were therefore assessed without the sanction of law and illegal, and he is entitled to recover back what the Town thus holds illegally from him.

But it is urged that the listers were required not to accept improper inventories, under heavy penalties; (What if they were? Is that any excuse for refusing a proper one?) that the plaintiff had no legal right to ask them to receive one attested by an oath which varied in

letter, even, from the prescribed oath; that the plaintiff was bound to know the law, and that the prescribed oath only required him to answer the second class of interrogatories according to his best knowledge and belief. The listers, too, as administrators of the law, were bound to know this, and that the law gave them no legal authority under the circumstances to doom him. Their want of knowledge did not add to their authority to inflict the penalty of doubling his list. The doubling process is highly penal and to be resorted to only in a clear case of willful omission on the part of the taxpayer. Besides, consider the circumstances. The law was new and had elicited a great deal of discussion, especially the iron clad oath, as it was called. The plaintiff was a plain, conscientious farmer, unlearned in the intricacies of the law. He fully declared to the listers the state of his property, and explained to them the purchase of the cattle and of the wool and said that he did not know but if he should intentionally make a mistake as to whether anything should turn out to be due him from those purchases, the prescribed oath might not only cause him to offend against his Maker, but expose him to a conviction for perjury. While the listers told him that they thought he could safely take the prescribed oath to his inventory, they absolutely refused to accept the inventory with the added words inserted in the body of the oath, thereby declaring by their acts plainer than speech, that he might be guilty of perjury if he made a mistake in the matters named. Moreover, they were administrators of the law and were supposed to know what it demanded. Under these circumstances, is it strange that a simple minded, conscientious man, unlearned in the law, should prefer to be doomed, rather than to incur the risk of being damned? In my judgment the listers ought to have administered the oath he tendered, and to have accepted the inventory. The inventory and oath tendered, being a full and complete compliance with every moral and legal requirement of the law, and lacking only in the prescribed words of the oath, to hold that the plaintiff was liable to be doomed for a violation of the law, to my mind is "to tithe the mint and cummin" which the law requires not, and to pass over judgment and justice in its administration to an honest, conscientious but unlearned taxpayer; to sacrifice substance to shadow; to disregard the vital principle, "the equalization of taxation," in order to stick to the letter of the law, even to the crossing of the t's and the dotting of the i's; to make the law, designed to further justice and an even distribution of the public burdens, an instrument of oppression, wrong and injustice; and all this simply because the listers, the administrators of the law, did not know their duty. Because the listers did not know their duty, I say, for it has not been contended, nor do I think it could be reasonably contended that the listers would have incurred any penalty under the law, by administering the prescribed oath to the plaintiff and then accepting the inventory tendered them. Why should their ignorance of the law and unfounded fears for themselves be made a penal offense on the plaintiff, and be visited on him by more than doubling his just taxes? I cannot consent to such a construction and enforcement of the

law. Heretofore this court has always held that a substantial compliance with the prescribed forms of the statute law was all that was required, and such have been the holdings of all the other courts of last resort so far as I have observed. I think that such a compliance is all that should be required of honest, conscientious taxpayers under this law.

I would reverse the *pro forma* judgment of the county court and render judgment for the plaintiff.

Cassandra LOVEJOY *et al.*

v.

Nathan R. RAYMOND *et al.*

1. A will, charging the real estate in contention with the payment of certain legacies, was recorded in the probate records. A deed of a portion executed subsequently by the residuary legatees, who accepted the real estate thus incumbered, specifically describing their interest and referring to the probate records, was recorded in the town clerk's office. There were several *mesne conveyances*, in which reference was made to previous deeds. The defendants purchased without actual notice. Held, that the law will impute notice to them; that they were put upon inquiry and charged with such knowledge as they would or might have acquired by making inquiry; that the orators, those interested in the legacy thus charged, have an equitable lien on the entire estate; but that part undisposed of, if any, should be first applied in payment, and the defendants should pay the balance in order to redeem.
2. One of the legatees who refused to become an oratrix cannot be joined as defendant.

(Decided January 15, 1886.)

BILL IN CHANCERY. Heard on bill and answers, December Term, 1883, Lamoille County and bill dismissed. *Reversed.*

The will was, in part: "I give and grant to my daughters * * * the yearly interest on the sum of \$800 each * * * which interest is to be paid to my said daughters by my said three sons. * * * And it is my will that the heirs of each of my said two daughters, if any, when they shall arrive at full and lawful age shall receive the sum of \$800 which shall be paid such heirs by my three sons unless my said daughters shall choose to have the said sum of \$48 each paid to them as before, in which case the money not to be paid to my said heirs until the death of my said daughters. * * * And I herein will and grant to my three sons * * * the sum of \$1,600 in trust for my two daughters; the principal in no case to be paid to either of them, but to share equally in the yearly interest. * * *

And it is my will, at the time of the settlement of my estate, if my said daughters shall require security for the payment of

such interest, yearly by my said sons, they shall give the same. And my said sons shall give security to my said wife. * * *

In case said sum of \$800 shall be paid to the heir first arriving at age, such heir shall receive said sum in trust for such heirs, sister or brothers; as it is my intention that the heirs of each of my daughters shall share equally in such sum so given in trust. Should either of my said daughters have issue and die before such shall arrive at full age, the interest to be paid for the support of said heirs by my said three sons until they shall arrive at full age, at which time the principal is to be paid to said heir in trust. * * * The residue and remainder of my estate, both real and personal, I give and grant to my three sons * * * in equal proportions, without regard to age or condition, on condition that they shall provide for and support their mother, Orpha Raymond, as is hereinbefore mentioned, so long as she shall remain unmarried; and shall also, at all times, do by their mother as is hereinbefore particularly mentioned, and treat her with all the civilities due her as a mother; and also, on condition my said sons shall faithfully perform their duties as trustees for my daughters and their heirs as is mentioned herein."

Mr. P. K. Gleed, for orators:

The words in the will, "residue and remainder," are sufficient to create a charge on the land received by the sons. 2 Jarm. Wills, 582, n.; *Dunbar v. Dunbar*, 3 Vt., 472; *Scott v. Patchin*, 54 Vt., 253; *Casey v. Casey*, 55 Vt., 518; *Sherman v. Sherman*, 4 Allen, 398; 1 Redf. Wills, 279; 1 Roper, Leg. 674; *Taft v. Morse*, 4 Met., 523; *Knotts v. Bailey*, 54 Miss., 285; 2 M. & C., 695.

The purchasers were put upon inquiry and were bound to take notice of all that is shown by the public records. *Hill v. Murray*, 56 Vt., 177; *Scott v. Patchin*, supra; 86 Vt., 210; 16 Id., 179; 49 Pa. St., 223; *Gardner v. Gardner*, 8 Mason, 178.

Mr. George Wilkins, for defendants:

It is insisted that, on a fair construction of the will, the three sons had an implied power of sale; the intention of the testator, not to embarrass his sons in the sale of the estate, by a charge thereon, is apparent from this provision in the will: "If my said daughters shall require security for the payment of such interest yearly by my said sons, they shall give the same." Thus clearly indicating the testator's expectation that, in the absence of a requirement of such security, the performance of their duty under the will would depend on their personal honor. If there had been an express provision in the will that the sons could sell, there would be no doubt but that they could convey a complete title to a *bona fide* purchaser, who would be under no obligation to see that the fund was properly applied. Story, Eq., 1124—1135; Hill. Trust., 863; 12 E. L. & Eq., 357.

An implied power to sell is as effective as an express power.

Royce, Ch. J., delivered the opinion of the court:

Asahel Raymond, by his will executed April 27, 1849, devised the yearly interest on \$800 to each of his two daughters, Harriet R. Thomas,

and Elizabeth R. Lovejoy, and directed that such interest be paid to them by his three sons, as is mentioned hereafter; and further directed that when the heirs of either of his said daughters should arrive at lawful age said sum of \$800 should be paid to them, unless his said daughters should choose to have said sum of \$48 paid to each of them annually, as before. There were further provisions as to the disposition to be made of said \$1,600 in case of his daughters or either of them, dying without issue, which are not necessary to be noticed. He devised to his three sons, George, Asa and Nathan R. Raymond, the sum of \$1,600 in trust for his two daughters aforesaid; the principal in no case to be paid to them, but they to share equally in the interest, which was to be paid to them yearly, commencing in one year from his decease, with a provision that in a certain contingency the principal might be paid to the heirs of his said daughter, as is above stated.

The residue and remainder of his estate, both real and personal, he devised to his three sons above named, upon condition that they should support and provide for their mother as required by the will, and faithfully perform their duties as trustees for his said daughters and their heirs, as is mentioned in said will.

The legacies to the testator's daughters were made upon the supposition and belief that the testator's estate, after paying debts and the expenses of settlement, would amount to \$5,000, and if the estate should not amount to that sum, the legacies were to be proportionally diminished. Upon the final settlement of the estate, the amount passed over to the trustees under the will was \$3,338.83.

At the time of the decease of the testator, he was the owner of the real estate described in the bill. His said three sons took possession of the same, after the probate of the will, claiming to be the owners, and have sold and conveyed portions of it to the defendants, Porter, Pike, Straw and Webster. The daughter, Elizabeth R., died September 25, 1852, leaving two children, the orators Don C. and Cassandra Lovejoy, and the orator Cornelius Lovejoy, the husband of the deceased Elizabeth R., who claims some interest in the estate of the said Asahel Raymond, by virtue of some conveyance from the said Don C. The other daughter, Harriet R., being a widow far advanced in years and having no children or heirs, or expectation of issue or heirs, refused to join as oratrix in bringing the bill, and so was made a defendant.

The orators pray that the amount due and to become due on account of those legacies may be ascertained; that the defendants may be decreed to pay the same, and that their payment may be decreed to be a charge upon all the real estate that the testator owned at his decease; and that in default of payment the possession of all said real estate may be decreed to them.

The legacies were made a charge upon the entire estate, for the residue and remainder was devised upon condition that the legacies should be paid as provided in the will; and the estate could not be relieved from that burden until they were paid, or security for their payment had been accepted. Such construction of the will best accords with the intention of the testator as manifested by the terms of the instrument, taken in connection with the subject mat-

ter and the surrounding circumstances. The residuary legatees took the estate burdened with their payment. The title that they acquired under the will was not absolute, but might become so upon the payment of the legacies. Their estate was an equity of redemption, and hence all they could convey was that equity.

The residuary legatees having accepted the provision made for them by the will, it became their duty to pay the legacies. A lien having been reserved by the will as security for the payment of the legacies, upon the entire estate, has anything since intervened which will in equity prevent its enforcement in the manner sought? As to that portion of the real estate which has not been conveyed by the residuary legatees there is no embarrassment. It is a part of the estate unincumbered by any legal or equitable right that can be claimed to be superior to the lien created by the will.

The residuary legatees have conveyed, for a valuable consideration, portions of the real estate to the defendants, Porter, Pike, Straw and Webster, who had no actual notice that there was any charge upon it; and they claim the protection which the law generally accords to *bona fide* purchasers without notice. It is to be determined whether they took their title under such circumstances that the law would impute notice to them of the provisions in regard to the legacies made by the will.

The will of Asahel Raymond was never recorded in the land records of the Town of Stowe. The first conveyance made by the residuary legatees was by George and Asa Raymond to N. R. Raymond, by deed dated November 18, 1861, in which the property was described as one equal, undivided half of the saw mill, grist mill and land attached, and the whole of about twenty-three acres of pasture land known as the Downer pasture, and one half of ten fifty acre wild lots, and all their right or interest to the estate of Asahel Raymond, late of Stowe deceased; meaning all their interest in and to the property of said estate, either real or personal, whether above particularly described or not; and reference was made therein to town and probate records for a description of said property; conditioned for the payment of certain debts, "and also to clear us from all interest and amount to be paid E. R. Lovejoy and Harriet Thomas or their heirs, as per said Asahel's last will and testament," and further describing their interest in said property as being what they obtained from said estate and what they thereby conveyed. At the same time, N. R. Raymond executed a mortgage to George and Asa Raymond of the same property, conditioned, among other things, that he, his heirs or assigns, should pay the interest due or to become due to E. R. Lovejoy and Harriet Thomas and their heirs, as per the last will of Asahel Raymond, and save them harmless and clear them from the same.

Several mesne conveyances were made of said property before it was conveyed to the defendants, Porter, Pike, Straw and Webster, and in all of said conveyances it was described either as having been purchased of N. R. Raymond, or as having belonged to the estate of Asahel Raymond, and reference was made to previous deeds. The circumstances under which the last named defendants purchased the property

were such as to put them upon inquiry as to the state of the title, and the law will impute to them such knowledge as they would or might have acquired by making such inquiry. Such an inquiry would have disclosed to them that the property they were purchasing was charged with the payment of the legacies named in the will of Asahel Raymond, and so they purchased the property with that charge resting upon it.

The orators have an equitable lien upon the entire estate that belonged to Asahel Raymond at the time of his decease to secure the payment of said legacy. If any part of that estate remains undisposed of it should be first appropriated to the payment of the legacy, and if anything shall then remain due, it is the duty of the other defendants who claim titles to other portions of it to pay the balance in order to redeem their estates. The sum that each should contribute cannot be determined upon any evidence now before us, and will have to be ascertained by the Court of Chancery.

The rights of Harriet Thomas under the will cannot be adjudicated in this suit. She refused to become an oratrix. The orators have no present interest in the legacy given to her, and we cannot anticipate that they will succeed to her rights as heirs to her estate. The bill, as to her, should be dismissed without costs.

The decree of the Court of Chancery is reversed and cause remanded, with a mandate that the amount due on the legacy given to Elizabeth Lovejoy be ascertained, and that a decree be entered for the orators for that amount with costs according to the prayer of the bill.

Newton BOUTWELL, *Plff.*,

v.

A. C. HARRIMAN *et al.*

The defendant, as agent of W., who had a mortgage in process of foreclosure on the farm occupied by the plaintiff, harvested and threshed the oats in contention, leaving them in the plaintiff's possession. W. supposed that her agent L. had purchased the oats for her and, on taking possession of the farm, the oats were consumed by her stock. But the court found that there was no sale. Held, that trover would lie; that the measure of damages was the value of the oats, less the expense of harvesting, etc.; and that a certified execution was properly issued.

(Decided January 15, 1886.)

TROVER with count in trespass. Plea, general issue. Trial by court, April Term, 1886, Lainsville County. Judgment for plaintiff against defendant, Harriman; and for defendant, Wiswell, to recover his costs. *Affirmed.*

It appeared that the wife of defendant Wiswell was the sole owner of a mortgage secured on the plaintiff's farm; that she had obtained a decree of foreclosure, and that the time of redemption expired October 1, 1880; that in July, 1880, Mr. Lamson, acting under authority from

Mrs. Wiswell, went to take possession of the farm under the mortgage, but was resisted by the plaintiff who remained in possession until the expiration of the decree. The defendant's evidence tended to show that Lamson, in behalf of Mrs. Wiswell, bought the hay on the farm and also the oats in question. The plaintiff's evidence tended to show that the hay was sold to Lamson, but that he declined to purchase the oats until he could consult Mrs. Wiswell. The court found that no sale of the oats was ever effected. It further appeared, that the defendant, Harriman, acting under Lamson's directions, before October 1, 1880, cut and drew the oats into the barn on the farm; that he threshed the oats, and they were left in the buildings on the farm, and the oats and straw were consumed by the stock placed there by Mrs. Wiswell after the plaintiff left. Harriman informed the plaintiff that Lamson directed him to cut the oats, and so the plaintiff made no objection, as he believed that Mrs. Wiswell had concluded to take them; but he gave no consent to the cutting of them. Mrs. Wiswell, relying upon Lamson's reported sale, believed that the oats belonged to her. But the court found that, at most, only a proposed sale was talked about; and that Harriman's entry was wrongful. The plaintiff left the oats on the farm, expecting the purchase would soon be accomplished. The court rendered judgment for the plaintiff to recover the value of the straw and oats, less the expense of harvesting and threshing. There was an amendment to the exceptions, stating that plaintiff used a few of the oats to feed his horse, and that the only reason he did not take them away from the farm when he moved was, he left them for Mrs. Wiswell, expecting she would take them under the trade.

Mr. J. P. Lamson, for defendant:

There was no conversion. The defendant did not act against the will of the plaintiff. There was, in law, a sale, as between the plaintiff and Mrs. Wiswell. The defendant left the property in the plaintiff's possession. *Errata v. Rollins*, 37 Vt., 295; *Yinker v. Morrill*, 89 Vt., 477.

Mr. P. K. Gleed, for plaintiff.

Royce, Ch. J., delivered the opinion of the court:

The entry of the defendant upon the premises where the oats were, and the cutting and threshing them, was a trespass. What was done by the defendant was an exercise of dominion over them which was inconsistent with the right of the owner. Their quality was changed, and the evident intention was to appropriate them to the use of a third person; those acts were a conversion of the property. The oats and straw were left in the possession of the plaintiff, but they were not appropriated to his use and were consumed by stock which Mrs. Wiswell put upon the farm after the plaintiff left it.

The defendant claims that the plaintiff is only entitled to recover nominal damages. The general rule is that where property has been converted, the owner is entitled to recover the value of it at the time of the conversion; but where, after the conversion, the property has been received back or has come to the use of the previous owner, such facts are considered in miti-

gation of damages. Here the property was not received back and did not come to the use of the previous owner. He was as effectually deprived of his property as he would have been if the defendant had removed it from his possession and destroyed or otherwise disposed of it.

There was no error in the judgment in the matter of damages; neither do we perceive any error in the granting of a certified execution. See, *Whiting v. Dow*, 42 Vt., 262; *Hill v. Cox*, 54 Vt., 627.

The judgment is affirmed.

A. M. CARPENTER

Town of CORINTH.

1. **Questions put to a witness by counsel are not evidence.** The excepting party must show that the answers were prejudicial; and where these are not given in the exceptions, no error will be found.
2. **The court cannot say that it was error to exclude the opinion of a witness offered as an expert, when the exceptions fail to show that the court below decided as a preliminary question that he was qualified as an expert.** And this is so, **although a witness on the other side of the case had given a contrary opinion**, it not appearing whether on direct or cross examination.
3. **In an action to recover for injuries that occurred to one traveling on the highway, whose horse ran, and the bits attached to the harness broke, and it became important to determine what effect the breaking of the bits had as to the accident; held, that the court properly excluded a witness, offered to prove that bits in a horse's mouth could be broken by pulling on the reins, and, particularly, if the horse stepped into a hole that would let him down; as it was an offer to give the opinion of the witness.**

(Decided January 15, 1886.)

ACTION to recover for injuries alleged to have been occasioned by the insufficiency of a highway. Trial by jury, June Term, 1884, Orange County. Judgment for the defendant. *Affirmed.*

The exceptions stated: "Doe, one of the selectmen of the defendant Town, was produced as a witness, on the part of the Town, and was asked on the direct examination by counsel for the defendant whether he learned, of anybody who pretended to know, that the tracks of the plaintiff, either horse or wagon, went into that gully on that occasion. The question was objected to. The counsel for the defendant said, it was to draw the inference that the claim had not been made at the time he went out of office. The objection was overruled, and the witness allowed to answer."

The answer did not appear in the exceptions. *Messrs. Farnham & Chamberlin and John H. Watson*, for plaintiff:

Carleton's testimony was admissible. 1 Best,

Ev., § 816; *Piggot v. East Counties R. Co.*, 3 Man. & G., 223, 240; *Hinds v. Barton*, 25 N. Y., 544; *Hogan v. Northfield*, 56 Vt., 721; 11 Pick., 161.

That the witness should have been allowed to state his opinion, see, *Morse v. Crawford*, 17 Vt., 499; *Sherman v. Blodgett*, 28 Vt., 149; *Cheney v. Ryegate*, 55 Vt., 499; *Westmore v. Sheffield*, 56 Vt., 289; *Knight v. Smythe*, 67 Vt., 529.

It was also legal evidence in rebuttal. *Hogan v. Northfield*, *supra*; *State v. Meader*, 54 Vt., 126; *Lytle v. Bond's Est.*, 40 Vt., 618; *Gottlieb v. Leach*, 40 Vt., 278.

Messrs. J. K. Darling and R. M. Harvey, for defendant:

It does not appear what the witness' answers were; so error cannot be predicated on them. *Randolph v. Woodstock*, 35 Vt., 291; *Harris v. Holmes*, 30 Id., 352; *Beard v. Murphy*, 37 Id., 99.

Carleton's testimony was properly excluded. *Crane v. Northfield*, 33 Vt., 124; *Oakes v. Weston*, 45 Id., 480; *Campbell v. Fair Haven*, 54 Id., 386; *Haynes v. Burlington*, 38 Id., 350; *Hine v. Pomeroy*, 40 Id., 108; *Richmond v. Aiken*, 25 Id., 324.

As to expert testimony, see, *Fraser v. Tupper* 29 Vt., 409.

Royce, Ch. J., delivered the opinion of the court:

This was an action brought to recover for injuries to the plaintiff's person and property occasioned by the insufficiency of a highway. The first exceptions taken were to the permitting of certain questions to be put to the witnesses, James W. Doe and John B. Locke. It does not appear what answers were given to the questions. It is incumbent on the plaintiff to show that the answers were prejudicial to him. The court cannot presume that they were; and nothing here shows that they might not have been favorable to the plaintiff. The questions were not evidence, and it was not error to allow them to be put.

The insufficiency complained of in the highway was a gully nearly in the center of it and extending several rods, into which the plaintiff drove in the night time. It appeared that the bits, attached to the harness of one of the horses the plaintiff was driving, were broken, and it was an important question what effect the breaking of these bits had in bringing about the accident, and whether they could have been broken by pulling on the reins or by the horse stepping into the gully. As tending to show how they were broken, the plaintiff offered to prove by one Carleton that bits in a horse's mouth could be broken by pulling on the reins, and, particularly, if the horse stepped into any hole or depression that would let him down. It was an offer to give the opinion and judgment of the witness in evidence, upon a question which it was the exclusive province of the jury to determine, and upon which they were as well qualified to judge as the witness.

Neither was it allowable to show by the same witness that he had had bits broken in a way similar to the way plaintiff claimed his were broken. If testimony of that character is to be admitted, it should certainly first be shown that the bits were similar in strength and construction.

The plaintiff then offered to inquire of the same witness, as an expert, how, in his judgment, the bits could have been broken. It will be observed that it does not appear that the court had decided that the witness was qualified to testify as an expert, at the time the offer was made. Whether he was so qualified or not, was a preliminary question to be determined by the court; and it not being shown that the court had decided that he was so qualified, we cannot say that it was error to exclude his opinion. The fact that a witness for the defendant had testified without objection, that, in his opinion, the bits were not broken in the manner claimed by the plaintiff, would not render the opinions offered admissible. It does not appear whether the opinion given by this witness was upon his direct or cross examination, and all reasonable presumptions are to be made in support of the judgment. If that opinion was given in cross examination, it was not allowable for the plaintiff to introduce the opinions of others in opposition to it.

There was no error, and the judgment is affirmed.

BRADLEY FERTILIZER CO.

DAVID L. FULLER.

1. **Plaintiff offered one witness on an important issue, so early in the trial that, if admitted, he could have procured the attendance of other witnesses. The court at first ruled against his admission, but on further consideration decided to admit the witness; but not until it was too late to summon the other witnesses. Held, a good cause for a new trial.**
2. In an action of replevin against the assignee of an insolvent debtor, to recover property claimed to have been obtained by the debtor through a fraudulent sale procured by false representations as to his financial condition, evidence is admissible of other similar purchases made about the same time.

(Decided January 15, 1886.)

PETITION for new trial. *Granted.*

The affidavit of the plaintiff's attorney stated, in part: "As to the testimony of the kind given in the deposition of B. W. Currier, I did have some knowledge, and intended to use it on said trial; but I was somewhat in doubt as to its admissibility, and what the court would do in admitting it. I, therefore, had one witness as to such testimony brought from Boston, and offered it; and it was excluded by the court. I did this the first day of the trial, so that I could telegraph to Boston for others that night and have them in court the next morning on the going in of court; and had ample time for that purpose before the plaintiff would rest its case." The deposition of Currier related to the false representations made in Boston, by Hosea Welch, Jr. The case was heard on exceptions and the petition for a new trial.

As to the evidence, the exceptions stated: "The plaintiff's evidence further tended to show that during the first days of October, 1882, said Welch, 2d, went to Boston and purchased goods on credit to the amount of about \$2,700; that said Hosea Welch, Jr., was present at one or more of the places where he was purchasing goods, and aided him in selecting goods. * * * The plaintiff offered to show that said Welch, 2d, and Welch, Jr., while thus together, made false representations as to the financial standing of said Welch, 2d, before and while making such purchases; but did not offer to show that such representations in any way came to the knowledge of the plaintiff or its agent before the sale of the phosphate. The court refused to admit the evidence."

Mr. S. C. Shurtleff, for plaintiff:

The evidence offered by the plaintiff as to the false representations was admissible. *Hall v. Naylor*, 8 Duer, 71; *Rowley v. Bigelow*, 12 Pick., 307; *Pequeno v. Taylor*, 88 Barb., 875; *Hennequin v. Naylor*, 24 N. Y., 189; *Conyers v. Ennis*, 2 Mason, 286; *Seligman v. Kalkman*, 8 Cal., 207; *Fitzsimmons v. Joslin*, 21 Vt., 129.

The plaintiff was taken by surprise by the action of the court, and is entitled to relief.

Messrs. Gordon & Gary and Lamson, for the defendant:

The court properly excluded the testimony as to the false representations made by Welch, Jr.; because the plaintiff did not show, nor offer to show, that such representations ever came to its knowledge, or that of its agent. 27 Me., 85; 3 Cush., 413.

A new trial should not be granted. The evidence was cumulative. *Knapp v. Fisher*, 49 Vt., 94; *Dodge v. Kendall*, 4 Id., 81; *Bullock v. Beach*, 3 Id., 73.

It must be a strong case to grant a new trial on account of surprise. *Briggs v. Gleason*, 27 Vt., 114; *Haskins v. Smith*, 17 Id., 263.

Royce, Ch. J., delivered the opinion of the court:

The plaintiff offered to show that when Hosea Welch, 2d, accompanied and assisted by Hosea Welch, Jr., was in Boston early in October, 1882, purchasing goods, the latter made false representations in regard to the financial standing and condition of Hosea Welch, 2d, in the presence of said Welch, 2d. Goods to the amount of about \$2,700, were purchased on credit at that time, and the representations were made in connection with the purchase of such goods. The phosphate replevied in this suit was ordered by Hosea Welch, 2d, October 28, 1882, at which time he was and for some time previous had been badly insolvent, and only sustained, financially, by credit furnished by Hosea Welch, Jr., and one Clark, who, November 1, 1882, refused longer to indorse his paper and took possession of his entire stock, including said phosphate, under an assignment which was subsequently vacated by proceedings under the Insolvent Act, in which the defendant was appointed assignee.

The evidence of what transpired in Boston was offered to show a fraudulent intent on the part of Hosea Welch, 2d, at that time, to get goods into his possession without the intention or expectation of paying for them, as tending to show a similar intent and purpose in contracting for

the phosphate a few days later. The court, early in the trial, ruled against the admissibility of this evidence, but afterwards, on further consideration, decided to admit it. The plaintiff's counsel made the offer early, so that if the evidence were admitted he could procure the attendance of witnesses from Boston, and it appears that had it then been admitted he would have had ample time to get them to St. Johnsbury; but when the court finally decided to admit the evidence, it was too late for the witnesses to be summoned and get to the place of trial before its conclusion.

It is now claimed that the evidence offered was not legally admissible. The title to the property replevied is in question in this suit. If Welch ordered or contracted for it with the fraudulent intent not to pay for it as agreed, the sale was voidable at the election of the vendor, and he has elected to rescind it by the bringing of this suit. *Benj. Sales, § 483, et seq.* It has long been the settled law that evidence of the making of other purchases or contracts shown to be tainted with such fraudulent purpose at about the same time, and under such circumstances as might fairly support the presumption that the purchase in question was made with

the same purpose and intent, is admissible. *Best, Ev., 487, note 1; 1 Greenl. Ev., § 53.*

The cases of *Pierce v. Hoffman*, 24 Vt., 525, and *Eastman v. Premo*, 49 Vt., 355, are full authority for that proposition in this State. The evidence offered was material as bearing upon the question of fraudulent intent on the part of the purchaser affecting the transaction in issue, and from what appears in the case it is clear that the plaintiff, without fault, has been deprived of the opportunity to use it. We cannot say with certainty that if the evidence contained in the affidavits, attached to the petition for a new trial, had been before the jury the result of the trial would have been different; but it seems highly probable that it would have been, unless that evidence were met by opposing testimony such as is not shown here. The petition for a new trial must therefore be granted.

As it does not seem probable that a consideration of the other exceptions taken on the trial would be of substantial benefit at this time, or tend to a more speedy or economical disposition of the case, we do not pass upon them.

The judgment in the principal case is pro forma reversed and case remanded, and the petition for a new trial is granted, but without costs.

NOTE.—Fraud renders all contracts voidable. *Adams v. Nelson*, 22 U. C. Q. B., 199.

In cases of fraud, it is essential that the means used should be successful in deceiving. *Daggett v. Emerson*, 3 Story, 732; *Bowman v. Carithers*, 40 Ind., 90; *Hague v. Grossman*, 31 Ind., 223; *Mason v. Crosby*, 1 Wood. & M., 342; *Clark v. Everhart*, 63 Pa. St., 347.

It is a well established rule that goods obtained by fraud may be reclaimed by the vendor. *Hoffman v. Noble*, 6 Met., 73.

One who has obtained goods by a fraudulent purchase cannot secure title by sale to a *bona fide* purchaser. *Schutt v. Large*, 61 Barb., 373.

The burden of proof is on the purchaser. *Dovoe v. Brandt*, 53 N. Y., 462; *Lynch v. Beecher*, 38 Conn., 490; *Lloyd v. Brewster*, 4 Paige, 537; *Hyde v. Ellery*, 18 Md., 496; *McLeod v. National Bk.*, 42 Mass., 99; *Joelin v. Cowee*, 60 Barb., 48; *Kinsey v. Leggett*, 71 N. Y., 387.

Whenever goods are obtained from their owner by fraud, whether the facts show a sale or a mere delivery, the vendor may affirm and enforce it, or may rescind it and sue in *assumpsit* for the price, or in trover for value of the goods. *Barker v. Dinsmore*, 72 Pa. St., 427; *Rowley v. Bigelow*, 12 Pick., 312; *Titcomb v. Wood*, 38 Me., 561; *Hewitt v. Clark*, 91 Ill., 605; *Butler v. Hildreth*, 5 Met., 49; *Stewart v. Emerson*, 52 N. H., 301; *McBean v. Fox*, 1 Bradw., 177; *Kellogg v. Turpie*, 2 Bradw., 55.

By bringing the action of *assumpsit* the party creates a conclusive presumption of affirmation of the contract. *Kellogg v. Turpie*, 2 Bradw., 55; *Magrath v. Taming*, 6 U. C. Q. B. (O. S.), 484; *Auger v. Thompson*, 3 Ont. App., 19; *Moriarty v. Stofferan*, 39 Ill., 523.

Where a buyer makes representations to induce the seller to sell, which are false on material points, and which influence the seller to consent to the sale, 30

equity will grant relief. *Warner v. Daniels*, 1 Wood. & M., 90; *Mason v. Crosby*, Id., 342.

The vendor of goods, where the vendee fraudulently conceals his insolvency, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract of sale and recover the goods. The defeasible title of the vendee only vests in the assignee of the vendee. *Donaldson v. Farwell*, 98 U. S., 631 (bk. 23, *Lawyers' Ed.*, 993).

To avoid a sale on the ground that vendees did not intend to pay, a fraudulent purpose must be shown; but evidence that they knew themselves to be insolvent without reasonable expectation of being able to pay, is admissible. *Biggs v. Barry*, 2 Curt., 259.

Where a buyer induces the seller to the contract to sell the property, by fraudulent representations upon the truth of which the seller relies, in an action by the buyer to enforce the contract, the fraud may be shown by way of defense. *Smith v. Countryman*, 30 N. Y., 655.

Where goods are purchased upon credit through false representations as to pecuniary condition of the buyer, the seller may repudiate the sale. *Scott v. Simmons*, 34 How. Pr., 66.

And so if a buyer obtains goods with a pre-conceived design not to pay for them. *Hennequin v. Naylor*, 24 N. Y., 139; *Nichols v. Michael*, 23 N. Y., 264.

Where notes were given by the purchaser, the seller was not bound to replevy the goods immediately, but may wait until their maturity. *Hathorne v. Hodges*, 28 N. Y., 496.

On reclaiming his property, the seller must protect a purchaser in good faith from fraudulent vendee from loss. *Trigg v. Hitz*, 17 Abb. Pr., 426.

If the buyer has parted with the property before disaffirmance of the sale, the seller can do nothing against the party in possession, except to demand possession of him. *Pearse v. Pettis*, 47 Barb., 376.

SUPREME COURT OF CONNECTICUT.

ROGERS & BROTHER, *Appls.*,

v.

C. ROGERS & BROTHERS.

1. **Where, in a suit by persons using "Rogers & Bro. A 1," as a trade-mark, to restrain the use of "C. Rogers & Bros. A 1," by others, the finding of the court below was that the word "Rogers" is the only misleading character and that the manner of using the marks is that employed in the trade generally, the appellate court, being controlled as to the facts, by the findings, cannot say, as matter of law, that the use of the mark sought to be enjoined is misleading.**
2. **The fair and honest use of one's own name, in the ordinary course of business, in the manner in which other manufacturers of similar goods are accustomed to use their names, in the preparation for sale, or sale of goods, cannot be enjoined; although a possibility may exist that the goods of one will be purchased to some extent by persons who knew no distinction, or even supposed them to be the goods of another.**

(New Haven—Decided October, 30, 1885.)

A PPEAL from a judgment of the Superior Court, refusing an injunction. *Affirmed.* The plaintiff is a Waterbury Corporation having a partnership name. The defendants are a Meriden partnership in name and in fact, consisting of three brothers of the name of Rogers. The plaintiff makes silver plated spoons, forks, and knives, stamping them in the usual way and place with its name in an abridged form, prefixed by a star and followed by a mark to indicate that they are "A No. 1" in quality, the whole mark being "Rogers & Bro., A 1."

The defendants, having been for many years in the silver plating business, have recently commenced making spoons and forks, which they stamp, in the usual way and place, with their own name and the customary mark of high quality employed by spoon and fork makers, their mark being "C. Rogers & Bros., A 1." The complaint alleges that the plaintiff has a trade-mark, of which the name "Rogers" is the vital part, and charges a fraudulent infringement of the plaintiff's rights by the defendants.

The complaint was served August 8, 1883, together with an injunction issued by the Judge of the Hartford City Court. On motion, the injunction was suspended until the Superior Court should be in session. A substituted complaint was filed on the opening of the Superior Court, other pleadings following. The case was then heard upon the merits; the issues were found for the defendants; the complaint was dismissed; the injunction was dissolved. This appeal was thereupon taken.

Mears, O. H. & J. P. Platt, for plaintiff: "Rogers & Bro. A 1," stamped on the back of the shank of forks and spoons, and upon the blades of knives, has become and is a pure,

technical, legal trade-mark, the right to use which is the plaintiff's property. That one may have a trade-mark in a specific and particular use of his name, either separately or in combination with words, symbols or devices, in connection with his goods, is abundantly sustained on principle and by the authorities. *Singer v. Wilson, Cox, Man. Tr. M., 477; Cloth Co. v. Cloth Co., Id., 228; Upt. Tr. M., 102.*

What constitutes a trade-mark? It is the appropriation and use by a trader of some name, symbol, device, or combination, which he may lawfully appropriate and use to mark his goods, so that when people see the goods so marked they will know them to be his goods. *Bradbury v. Breton, Cox, Man. Tr. M., 320; Singer v. Kimball, Id., 413; Stokes v. Langraft, Id., 121; U. S. v. Steffens, 100 U. S., 83 (XXV., Law. ed., 550).*

By the English Act, the "Name of an individual or firm, printed, impressed or woven in some particular and distinctive manner," constitutes a trade-mark. *Sebast., Tr. M., 18.*

The recent English and American cases recognize the right of trade-mark in a man's name, when the elements of the Trade-Mark Act are wanting. The whole progress of trade mark law has been and still is toward more ample and complete protection. *Hall v. Barrows, Cox, Man. Tr. M., 215; Cloth Co. v. Am. L. C. Co., Id., 228; Ainsworth v. Wamsley, Id., 257; Fulton v. Sellers, Id., 279; Rogers v. Rogers, Spurr & Co. 11 Fed. Rep., 445; Thorley v. Massam, 42 L. T. Rep. N. S., 851; Sebast. Tr. M., 25.*

This court in *Meriden Britannia Co. v. Parker*, in which the defense insisted that a personal name could not be a trade-mark, expressly held that the combination "1847 Rogers Bros. A 1," constituted the plaintiff's trade-mark, and as expressly held that the use by Parker of the stamp "C. Rogers & Bros. A 1," was an infringement. The stamp of the present plaintiff, referred to in the opinion, is unhesitatingly called a trade-mark and decided to be entitled to protection. *Meriden Brit. Co. v. Parker, 39 Conn., 450.*

There are cases holding that a geographical descriptive or generic name cannot be made a trade-mark, and it is largely upon the reasoning in such cases that the claim is urged that a personal name cannot become a trade-mark. *Canal Co. v. Clark, 18 Wall., 811*, is specially cited for this purpose, but there is no parallel between such cases and this case. The manufacturer's name is always used to inform the public by whom the goods are made; it necessarily implies origin and ownership; but a geographical, generic, or descriptive name can have primarily no such significance. To stamp spoons "Waterbury," "German Silver," "Silver Plated," would not primarily identify them as the goods of any particular maker, consequently such names want the first element of a trade-mark; but the use of the manufacturer's name is the strongest possible assertion that he is the maker of the goods on which it is stamped, consequently the best name for a trade-mark. But when a geographical, generic, or descriptive name comes by use and association to tell who makes the goods to which it is attached, it becomes a good trade-mark. Up to that moment it is true that anyone may use it; after that moment no one may use it in such a manner as

to pass his goods as the goods of another. *Stokes v. Langraff*, *supra*; *Wotherspoon v. Currie*, Cox, Man. Tr. M., 829; *Newman v. Alvord*, Id., 282; *McAndrew v. Bassett*, Id., 234.

If a trade-mark in one's name is property, no one, whatever his name, whatever his business, whatever his intent, may take, appropriate or injure it. The fact that one bears a name, a certain use of which makes it easy to appropriate the property of another, is a specially valid reason why he should be carefully guarded in the use of his name, rather than be given special opportunity to possess himself of what truly belongs to us. It is a reason why the court should be strict in the administration of equity. *Stokes v. Langraff*, Cox, Man. Tr. M., 131; *Blackwell v. Wright*, Id., 466; *Bradbury v. Beeton*, Id., 820; *Gillman v. Hunnewell*, Id., 541; *Ainsworth v. Wameley*, Id., 257.

The true rule as to what a man in business may do under and with the name which he has chosen as a business designation, is well stated by Judge Lowell in *Rogers v. Rogers, Spurr & Co.*, 11 Fed. Rep., 495; "Even if we grant all that has been said about the freedom to use names, and I grant upon that subject much more than has been argued for; I set no limits to that freedom, except interference with acquired rights; the books are full of cases in which defendants have been restrained from the use of their names in a way to appropriate the good will of a business already established by others of that name."

The case is in this respect analogous to that of *Williams v. Brooks*, 50 Conn., 278-280. There the trade mark was the plaintiff's name. "In combination with pink and yellow wrappers, well known to the trade. * * * All manufacturers of hairpins put them in ounce packages, combining the ounce into pound, and the pound into packages of six or more pounds, and many inclose the ounce packages in pink and yellow paper."

The defendants put up curvilinear hairpins in pink, and plain hairpins in yellow wrappers, and in ounce packages, and printed on such pink and yellow wrappers that the hairpins were manufactured by L. B. Taylor & Co., Cheshire, Conn. The pink and yellow wrapper was certainly as common to the hairpin trade as the stamping of the maker's name is to the spoon trade. They were not necessary to the hairpin trade. Nor is stamping the owner's name necessary to the spoon trade.

Ch. J. Hargis, of the Kentucky Court of Appeals, concluding his opinion in the case of *Avery & Sons v. Meikle & Co.*, March 1883, 27 Official Gaz., No. 10, 1027, comprehensively sums up the law applicable to this case and all cases: "In conclusion, we repeat that this law grows out of the common principle of justice that the rights of each should be so used as not unnecessarily to injure those of others whose skill has made their goods valuable in their reputation that finally compensates them for their enterprise, industry and fidelity."

There is nothing in the adjudged cases which authorizes the defendants to stamp "C. Rogers & Bros. A 1," on their articles, either because it inheres in their name, or because it is a necessity of their business, if the effect is the probable misleading of purchasers, and consequent injury of the plaintiff.

The defendants mainly rely on *Burgess v. Burgess*, 17 Eng. L. & E., 257; *Meneely v. Meneely*, 62 N. Y., 427; *Carmichel v. Latimer*, 11 R. L., 895; *McLean v. Fleming*, 96 U. S., 245 (XXIV., Law. ed., 822); *Clark v. Clark*, 25 Barb., 76; *Faber v. Faber*, 49 Barb., 358; *Comstock v. Moore*, 18 How. Pr., 424, and on the reporter's note to *Meriden Brit. Co. v. Parker*, 12 Am. Rep., 401.

A careful examination of these cases will show that none of them are cases in which the plaintiff seeks to have the defendant enjoined against the use of a stamp on goods claimed to infringe the plaintiff's trade-mark stamp. 12 Am. Rep., 401, expressly says that neither *Meneely v. Meneely*, nor *Faber v. Faber*, were trade-mark cases.

In addition to the cases already cited, in which judges have distinctly said that a trader's name used in connection with his goods might become a good trade-mark, the following are cited in which defendants have been enjoined against the use of their own names in a way calculated to deceive: *Croft v. Day*, 7 Beav., 84; *Metzler v. Wood*, L. R., 8 Ch. D., 606; *Fullwood v. Fullwood*, L. R., 9 Ch. D., 176; *Levy v. Walker*, L. R., 10 Ch. D., 486; *McLean v. Fleming*, *supra*; *Howe v. Howe Machine Co.*, 50 Barb., 236; *Shaver v. Shaver*, 54 Iowa, 208; *Thorley Cattle Food Co. v. Massam*, 42 L. T. Rep. N. S., 851.

In *Gilman v. Hunnewell*, 122 Mass., 139, label and stamp are placed on the same footing. "A person may have a right in his own name as a trade-mark, as against a person of a different name, but he cannot have such a right against another of the same name, unless the defendant uses the form of a stamp or label so like that used by the plaintiff, as to represent that the defendant's goods are those of the plaintiff's manufacture."

McLean v. Fleming, *supra*, is directly to the point that proof of intentional fraudulent result is unnecessary, and if the case is understood to say that there was no legal trade-mark as against the defendants in that case, the fact that the injunction was granted, although no intention to defraud was shown, makes it perfectly conclusive. *Filley v. Fassett*, 44 Mo., 178; *Dale v. Smithson*, 12 Abb. Pr., 237; *Dixon C. Co. v. Guggenheim*, Am. Tr. M. Cas., 559; *Amoskeag Co. v. Spear*, 2 Sandf. Super. C., 599.

The recent English cases are very clear on this question. *Thorley's Cattle Food Co. v. Massam*, *supra*; *Orr, Ewing & Co. v. Johnston & Co.*, 40 L. T. (N. S.), 307.

Our Connecticut cases had reached the same point earlier, and hold that evidence of fraudulent design or intent is unnecessary. It is the result with which the court deals; the act is the same, the injury the same. *Bradley v. Norton*, 38 Conn., 157; *Holmes v. Holmes*, *etc.*, *Mfg. Co.*, 27 Conn., 278; *Meriden Brit. Co. v. Parker*, 39 Conn., 450; *Williams v. Brooks*, 50 Conn., 278.

The rule, and the just rule, is that whatever a defendant does to cause his goods to be mistaken for the goods of another will be prohibited. The defendant must sell his goods as his own, not as the goods of another. *Seizo v. Procezdene*, 12 Jur. N. S., 215; *Kinnehan v. Bolton*, 15 Irish Ch., 75; *Harrison v. Taylor*, Am. Trade-Mark Cases, 675; *Gillott v. Easter*

brook, Am. Tr. M. Cas., 340; *Orr, Ewing & Co. v. Johnston & Co.*, *supra*.

An apparently serious claim is made by the defense, that the plaintiff is not entitled to relief because it has made representations with respect to its trade-mark which are untrue. ¶

It would seem, after the decisions in *Meriden Brit. Co. v. Parker* and *Rogers v. Rogers, Spurr & Co.*, to be unnecessary to dwell on this claim.

In the former case the claim was made that the mark itself told an untruth as to who manufactured the goods, and in the latter case the claim was based upon the assertion that the plaintiff, by circulars and advertisements, induced the public to believe that the original Rogers Brothers, or some of them, were still in the plaintiff's service.

It is not claimed, in this case, that the trade-mark in itself does now or ever did contain an untruth.

As to the matter of price lists, circulars and advertisements, they contain nothing which is materially deceptive, and the rule respecting such statements is well expressed by Judge Lowell, in *Rogers v. Rogers, Spurr & Co.* See also, *Curtis v. Bryan*, 88 How. Pr., 83; *note to Fiddling v. Howe*, Am. Tr. Mark Cases, 640; *Davis v. Kennedy*, 18 Can. Ch., 523.

In *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 87 Conn., 278, the court practically held the latter corporation must take care, in the selection of its name, not to infringe upon the rights which a prior corporation had to use its corporate name in business. See also, *Newby v. Oregon Cent. R. Co.*, Deady, 609.

Mr. C. R. Ingersoll, for defendants:

There has not been adduced out of the multitude of trade-mark cases, in this country or Great Britain a single one in which a person has been enjoined, under any circumstances whatever, from stamping his own name, simply and in the ordinary way, upon the goods of his own manufacture. On the contrary, the cases are numerous where such an injunction has been refused, even where the purpose of the person so stamping his goods was manifested, by accompanying *indicia*, to be deceptive.

In *Holloway v. Holloway*, 13 Beav., 209, there was a clear case of fraudulent purpose, but the master of the rolls limited his injunction to the misleading additions and refused an injunction against the name.

In *Burgess v. Burgess*, 17 L. & Eq., 257, the defendant was clearly induced by the popularity of the old concern to go into the same business, and he was enjoined from certain misleading acts, but he was allowed to use his own name with whatever advantage might belong to it.

In *Meneely v. Meneely*, 62 N. Y., 427, the court says that "If the evidence showed any attempt by the defendants by means of catalogues or by any other contrivance to induce the belief that the firm of Meneely & Kimberly was the successor of Andrew Meneely, or the managers of the plaintiff's bell foundry, these acts might have been restrained," but not the use of the name.

In *Clark v. Clark*, 25 Barb., 79, there was a wrongful purpose evidenced by misleading devices accompanying the name, and the use of

the device was enjoined, but not the use of the name.

And the law, in this respect, is correctly summed up by the annotator to *Meriden Brit. Co. v. Parker*, 12 Am. Rep., 401. Although a deceptive purpose is shown by the use of misleading marks or devices or affirmative acts, accompanying the name, "The use of such mark or device or the practice of such acts will be restrained, but not the use of the name."

In *James v. James*, L. R., 18 Eq., 421, the label complained of was "Lieut. James' Horse Blister." The inventor of the article was Lieut. Robert James. The defendant was named Robert Joseph James. He made the article known as "Lieut. James' Horse Blister," put on it that label, with the name of Robert James, dropping the Joseph. The court says: "The defendants must not lead the public to suppose that this is actually the manufacture of Lieut. James himself; they must put the words Robert Joseph James on their labels, and they must not make the labels so much alike as to make them appear to denote that the article is made by Robert James. The expression in the plaintiffs' advertisement that none is genuine without the signature of the proprietors is on the top label of every pot, to counterfeit which is forgery. This is perfectly true. All that any other person is entitled to is to put his own name on the top of the pot."

In *Fullwood v. Fullwood*, L. R., 9 Ch. Div. 176, the plaintiff's firm was R. J. Fullwood & Co., and the defendants E. Fullwood & Co. They were both manufacturers of annatto. The descriptive cards and wrappers of the defendants were enjoined but not the use of the name. The court says: "Of course I need not say that the defendants are entitled to carry on their business under the firm which they have adopted, if they are so minded, and to carry it on where and as they like, provided that they do not represent themselves to be carrying on the business which has descended to the plaintiff. But it appears to me that in the cards and wrappers which the defendants are proved to have used, they have been attempting to represent that the business which they carry on is the business of which the plaintiff is now the proprietor."

There is another class of cases referred to in this discussion but which clearly have no bearing upon the question just considered. They are cases like *Meriden Brit. Co. v. Parker; Holmes, Booth & Haydens v. Holmes, Booth & Atwood; Rogers Co. v. Rogers and Spurr*. These are not cases of a defendant stamping his goods with his own name. On the contrary, in each of those cases, the defendants took for that purpose the name of the plaintiff or a name resembling the plaintiff's, when they either had a different name of their own, or, as in the case of the corporations, they could just as conveniently have taken some other name than a name resembling the plaintiff's. The name which was thus taken was for the party taking it a sham name, and therefore deceptive.

The "Thorley's Cattle Food Case," *Massachusetts v. J. W. Thorley's Cattle Food Co.*, 42 L. T. N. S., 851, combines the characteristics of several classes of cases already adverted to, where the fraudulent method of a defendant in carrying on his business, so as to represent it to be the

business of the plaintiff, has been restrained. A careful examination of that case will show those characteristics to be:

1. The assuming a name resembling the plaintiff's for the purpose of carrying on a competing business, as in *Rogers v. Spurr*, and *Holmes, etc., v. Holmes, etc.*, J. W. Thorley was taken into the defendant company for the purposes of a figure head.

2. The false representations by means of labels, advertisements and method of putting up the packages of goods, which accompanied the trade words, "Thorley's Cattle Food," by which the impression was given to the public that the "Thorley" in those words was the plaintiff and not the defendant, as in the class of cases represented by *Holloway v. Holloway*.

3. The fact that the term "Thorley's Food for Cattle" had come to have a commercial meaning, designating an article, which was only made at the plaintiff's factory, as in the "*Glenfield Starch*" Case. James, L. J., says "Thorley's Food for Cattle" meant that food which for many years was manufactured at works belonging to Joseph Thorley, and afterwards was manufactured by his executors carrying on his business at the same works. 'Thorley's Food for Cattle' never became an article of commerce as distinguished from the particular manufacture from which it had proceeded."

The "*Glenfield Starch*" Case, *Wotherspoon v. Currie*, 5 (L. R. Eng. & Irish App.) H. L., 508, relied on by James, L. J., in the *Thorley Food Case*, is a case where a right of trade-mark was allowed in the name of a locality combined with the article.

The case is not entirely reconcilable with the decision by the Supreme Court of the United States in the *Canal Co. v. Clark*, 13 Wall., 811 [80 U. S., Bk. 20, Law. ed., 581]; but the differences do not concern us here.

There are two facts clearly found by the court in this case, and upon them the decision is based.

1. "The word 'Glenfield' had acquired a secondary signification or meaning in connection with a particular manufacture; in short, it had become the trade denomination of the starch made by the appellants. It was wholly taken out of its ordinary meaning." It was "a name which had become exclusively a designation of an article manufactured by the appellants."

2. The defendant's use of the word was a sham, and as he used it, told a falsehood. His true place of business was in Paisley, not Glenfield.

And the court enjoined the falsehood. It was the case of a man's assuming a name not his own, because it resembled the plaintiff's.

The decision has no application to the facts of the present case, because: 1. The word "Rogers" on a silver plated spoon cannot have any other meaning than the ordinary meaning, that the spoon was manufactured by some person of that name. 2. The defendant, having no other name than "Rogers," cannot tell a falsehood when he stamps the spoons of his manufacture with that name.

One of the very latest trade-mark cases in the English Courts, *Singer Mfg. Co. v. Loog*, 1880, L. R., 18 Ch. Div., 399, plaintiff's counsel, who were among the most eminent at the English bar, made this concession in argument: "In

order to justify the use by the defendant of the name of a rival trader, in connection with the articles which he sells, he must show either that he himself has a right individually to the name, or that the article in question is a specific article, known by a specific name, and that as in the case of Wellington boots or Hansom cabs, he is unable to designate the article in any other way than by its known name."

Messrs. Charles E. Mitchell and George A. Fay, also, for defendants:

A trade-mark is a mark applied to articles of trade to tell the buyer who the maker is. A business man, or a business corporation having a personal name, electing to associate its reputation with that name, instead of with an arbitrary symbol, cannot be heard to complain because other persons, having the same name, adopt the same business and conduct it in the usual way. See, *Meenely v. Meenely*, 62 N. Y., 427; *Carmichael v. Latimer*, 11 R. I., 395; *McLean v. Fleming*, 96 U. S., 245 (Bk. 24, Law. ed., 822); *Burgess v. Burgess*, 3 DeG., M. & C., 904; *Croft v. Day*, 7 Beav., 84; *Holloway v. Holloway*, 13 Beav., 209; *Clark v. Clark*, 25 Barb., 76; *Faber v. Faber*, 49 Barb., 353; *Comstock v. Moore*, 18 How. Pr., 424; *Decker v. Decker*, 52 How. Pr., 218; *Devlin v. Devlin*, 67 Barb., 290; *Fullwood v. Fullwood*, L. R., 9 Ch. D., 176; *Stonebraker v. Stonebraker*, 38 Md., 252; *Gilman v. Hunnewell*, 123 Mass., 139; *Meriden Brit. Co. v. Parker*, 89 Conn., 450; *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn., 278; *Williams v. Brooks*, 50 Conn., 280; *Wm. Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.*, 11 Fed. Rep., 495.

The affix "A 1" is a quality mark. The finding says: "The mark 'A 1' has been frequently used by manufacturers of such ware for many years as a mark of quality, and is so regarded in the trade." The finding is conclusive upon the question of fact, because: "When any mark, symbol, or device, is used merely to indicate the name, quality, style or size, of any article, it cannot be protected as a trade-mark." *Boardman v. Meriden Brit. Co.*, 35 Conn., 413.

But the combination "A 1," cannot be lawfully appropriated for any other purpose than to indicate quality.

In *Shaw Stocking Co. v. Mack*, 12 Fed. Rep., 711, Coxe, J., says: "It is very clear that no manufacturer would have the right exclusively to appropriate the figures 1, 2, 3 and 4, or the letters A, B, C and D, to distinguish the first, second, third and fourth quality of his goods respectively. Why? Because the general signification and common use of these letters and figures are such that no man is permitted to assign a personal and private meaning to that which has, by long usage and universal acceptance, acquired a public and generic meaning."

In *Candee v. Deere*, 54 Ill., 439, it was held that no exclusive right could be claimed in the letters and figures "A No. 1," "A X No. 1," "No. 1," "X No. 1," "No. 3," and "B No. 1," used to designate the different qualities of the ploughs.

In *Mfg. Co. v. Trainer*, 101 U. S., 55 (Bk. 25, Law. ed., 995), the court says of the letters A. C. A., used in addition to the manufacturer's name: "Used in that device to denote only quality, and so understood, they can be used by others for a similar purpose equally with the

words 'superior' or 'superfine,' or other words, or letters or figures having a like signification."

Only numbers arbitrarily selected can be appropriated to indicate origin and thus become parts of lawful trade-marks.

In *Boardman v. Meriden Brit. Co.*, 85 Conn., 402, the numbers were arbitrarily selected and it was expressly found that the "spoons were known by their respective numbers, and more generally ordered, bought and sold by the numbers on the labels." See also, *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass., 325, 327; *Gillett v. Esterbrook*, 48 N. Y., 374.

The plaintiff has no lawful trade-mark. The most satisfactory definition of a trade-mark is that contained in High on Injunction, § 672. "A trade-mark is a particular sign or symbol, which, by exclusive use, becomes recognized as the distinguishing mark of the owner's goods, and for the protection of which the aid of equity may be invoked."

A mere possibility of mistake, no court can guard against. "All that courts of justice can do, in that regard, is to say that no trader can adopt a trade-mark, as resembling that of another trader, as that ordinary purchasers buying with ordinary caution are likely to be misled." *McLean v. Fleming*, 96 U. S., 251 (Bk. 24, Law. ed., 890).

Again: "We hold, therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other." *Gorham Co. v. White*, 14 Wall., 528 (81 U. S., XX., Law. ed., 737).

Stoddard, J., delivered the opinion of the court:

As we understand the findings and rulings of the Superior Court, practically, the only question left for the determination of this court is in respect to the plaintiff's exclusive right, as against these defendants, to stamp the word "Rogers" upon silver plated flat ware, such as knives, forks, spoons, etc. In considering this subject it must constantly be borne in mind that all questions of fact are finally disposed of by the Superior Court, and that this court cannot, even by inference, supplement such finding, or supply omitted facts. Under our practice, this court is controlled by the finding as it comes to us. The case stands upon an answer denying the material allegations of the complaint, and in so far as the Superior Court omitted to find true the allegations and claims of the plaintiff, those allegations and claims must be regarded as not proved.

The defendants stamped upon the shanks of spoons and forks manufactured by them the combination of words "C. Rogers & Bros. A 1." The plaintiff's stamp is "Rogers & Bro. A 1." The finding states in detail the use by several different partnerships or corporations of stamps all bearing the common and distinctive word "Rogers," and differing from each other in all other material respects except in the use of this common and conspicuous word "Rogers," one concern using a stamp with the word "Rogers" alone. The finding then proceeds: "By reason of the numerous stamps on spoons,

forks and knives, containing the word 'Rogers,' as before mentioned, and of the efforts of the various concerns who have used such stamps since 1847 to promote the sale of their goods as 'Rogers goods,' the word 'Rogers' has become the conspicuous and familiar part of such stamps with a large class of retail buyers; and while jobbers and dealers and those retail buyers who are informed of the facts, readily distinguish between the stamps of the different manufactories by the word or symbols which such stamps do not possess in common, those retail buyers of the articles who buy by the stamps or the single article look only to the word 'Rogers,' and are for this reason liable to confound the various stamps; but generally the retail buyers who desire any information on the subject of the make of the goods, rely upon the dealer for such information."

It appears from the extract that there are two governing facts: 1, that the word "Rogers" is the conspicuous, familiar, material and valuable thing in the various so-called trade-marks; 2, that the stamps of the defendant is liable to be mistaken for that of the plaintiff because of the use of the word "Rogers," and by that limited class alone who "look only to the word 'Rogers.'" And again the case states: "Between the stamps so used by the defendants and the stamps used by the plaintiff upon similar articles manufactured by them, respectively, the dealers and jobbers in such articles have no difficulty in distinguishing. And this is also true of those retail buyers who look beyond the word 'Rogers.' But those who regard the word 'Rogers' only, would be liable to confound one with the other, as is the case of the various 'Rogers' stamps before mentioned. Retail buyers sufficiently acquainted with the various 'Rogers' stamps in the market to distinguish between the same would have no difficulty in distinguishing between the two stamps of plaintiffs and defendants; but the general resemblance between the two stamps is such that a person knowing that of the plaintiff and not knowing that of the defendants might, upon referring to it, but not reading it attentively, mistake it for that of the plaintiff." Thus, with reiteration the court below emphasizes the fact that the word "Rogers" is the controlling word, the one thing that is the basis of all possible confusion or mistake in the use of two stamps.

There is no finding, nor suggestion of fact that any other part of the defendants' stamp is answerable in any degree for that liability of mistake. If any other part of the stamp, in configuration, collocation or combination of words, figures or symbols, or in other respect, contributed, in any manner, to deceive possible purchasers, and enable the defendants to sell their goods as those of the plaintiffs, it should so have been found by the trial court. This court cannot find such facts, from an inspection of the stamp itself. This is not a case where this court can pronounce as matter of law that the defendants' stamp in other particulars so resembles that of the plaintiffs as to amount to a representation that the goods are the plaintiffs' goods. In this particular the case at bar differs from many of the cases cited in briefs of counsel. In some of the English cases relied upon, and in other instances, the court deter-

mined from the evidence in the particular case whether the stamp was of objectionable character, thus exercising a combined jurisdiction over fact and law. In our courts, as before stated, these jurisdictions are separated, the fact being committed to the Superior Court, and the law to this court.

It is said that "this stamp, 'C. Rogers & Bros. A 1' is stamped upon the backs of the shanks of the spoons and forks in the same manner and place as plaintiffs' goods are and have been stamped." This is undoubtedly an evidential fact, from which the trial court might, in connection with other circumstances, have found a liability to deceive, on account of the location and peculiar characteristic of the defendants' stamp, but the court has not so found; presumptively the evidence did not warrant that conclusion; and, on the contrary, the court repeatedly tells us that the word "Rogers" alone is the only possible misleading character. And further; we are informed that "the method of stamping their name upon such articles manufactured by them, and the locality of the stamp upon the article, has been that commonly employed by manufacturers of such silver-plated articles for many years. The mark 'A 1' has been frequently used by manufacturers of such ware for many years as a mark of quality, and is so regarded in the trade." Manifestly, upon this condition of facts, in the absence of a finding that the location of the stamp, combining with its form, might have a misleading effect, we cannot say, as matter of law, that it does have that possible effect, particularly in view of this finding, that the location of the stamp is common to the trade, and the addition of the marks of quality, "A 1," is commonly used by manufacturers as a quality mark. We feel constrained by the facts in the case to say that there is no foundation laid for the claim that we should rule as matter of law that the judgment of the Superior Court was erroneous, so far as that judgment relates to the stamp in question in other respects than the use of the word "Rogers."

This appeal raises the question of error or no error upon the facts found, and "When, therefore, on such appeal, the record omits to present facts essential to the case of the appellant, this court can simply affirm the judgment, and cannot remand the case to the lower court for amendment, or a further hearing or finding." *Schlesinger v. Chapman*, 52 Conn., 273.

Has this plaintiff, as against this defendant, an exclusive right to the use, in its stamp, of the word "Rogers"? Upon this branch of the case there is one further fact stated as follows: "The purpose of the defendants in stamping their firm name upon the spoons, forks and knives so manufactured by them, has been to indicate to the public that they are the manufacturers of the goods so stamped. But the defendants, in commencing the manufacture of such articles, had in view the popularity in the market of such goods bearing a stamp containing the word 'Rogers,' and an inducement to commencing such manufacture was the advantage they might derive from having their goods so stamped." And then the court finds: "The allegations of fraudulent design and acts on their, defendants', part, contained in articles 11, 12, 13, 14, 15 and 16 of the complaint, are found

to be not true." The 11th article contains an allegation that the defendants, "with intent to defraud" the plaintiffs, sent their goods into the market with marks closely resembling the claimed trade-marks of the plaintiff. By article 12 it is stated that by the external shape and appearance of the goods, together with the stamp and mode of selling, the defendants caused their goods to resemble the plaintiffs'. Article 13 contains an allegation that the defendants' stamp is a close imitation of plaintiffs', and is an infringement of their trade-mark and is well calculated to mislead and deceive and does deceive purchasers and induces them to buy the defendants' goods, supposing them to be of plaintiffs' manufacture. Article 14 alleges that the defendants' goods will become known as "Rogers" goods, and that thereby purchasers will be led to buy the defendants' goods, believing them to be plaintiffs'; and by article 15 it is alleged that the defendants fraudulently stamp the word "Rogers" on their goods, intending it to operate as a fraud upon the public, upon unwary purchasers and upon the plaintiffs, in the ways above set forth, etc. So far the trial court has wholly negated the claim of the plaintiffs that the defendants were actually fraudulent in the use of their stamp, and that such stamp was intentionally used to personate the plaintiffs' goods, notwithstanding the finding that the defendants had in view the popularity of goods marked "Rogers," and that one inducement was the advantage they might derive from so stamping their goods. But in saying that the allegations of fraudulent design and acts on their part, contained in article 16 of the complaint, are found to be not true, the trial court goes further than to deny the assertion of active, personal, intentional, fraudulent design and counterfeiting, and negatives the constructive fraudulent design implied in the statement contained in that article.

Article 16 is as follows: "That, by reason of the facts aforesaid the use of the word 'Rogers,' either as a whole or a part of their stamp upon spoons, forks and knives must and will, under the fixed circumstances inevitably connected with such use, necessarily infringe upon the plaintiffs' lawful enjoyment of the use and benefit of its trade-marks aforesaid, and must and will induce and cause unwary purchasers and others to purchase the spoons, forks and knives of the defendants, stamped with the word 'Rogers,' either as the whole or as a part of their stamp, in place of and supposing them to be spoons, forks and knives manufactured by the plaintiff, to the great injury of the plaintiff and in fraud of its rights." In this article there is no statement of active fraud, or intentional misrepresenting the defendants' goods to be those of the plaintiff, but only a statement that, inevitably, any use, no matter how honest and customary, of the word "Rogers" in the stamp, will induce and cause unwary purchasers to purchase goods of the defendants' make, supposing them to be plaintiffs', and therefore any use of the word "Rogers" in such stamp, by the defendants, is thus constructively fraudulent. This conclusion and assertion of the plaintiffs, so stated, is denied by the trial court. The plaintiffs' case is stripped, by the finding, of every fact collateral or additional to the mere use of the word "Rogers" in the stamp.

The plaintiffs' claim, as thus stated, is surely not warranted by any decided case or the authority of any text writer brought to our attention. Substantially all the leading and governing facts and characteristics of the recent English case of *Massam v. Thorley's Cattle Food Co.*, L. R., 14 Ch. Div., 748, a case that is largely relied upon by the plaintiffs, are eliminated from the plaintiffs' case. A few citations from the several opinions in *Massam v. Thorley's Cattle Food Co.* will indicate how fundamentally different was that case from the case with which we are dealing. And it should be borne in mind that this English court was considering questions of fact upon the evidence in the case. P. 155: "Thorley's Food for Cattle" meant that food which for many years was manufactured at works belonging to Joseph Thorley, and afterwards was manufactured by his executors carrying on his business at the same works. P. 156: We have held nothing like a satisfactory explanation of how J. W. Thorley's company came into existence, unless it was that the promoters thought that Thorley's food was a very profitable thing and had got a great reputation, and that they should like to steal the reputation which it had acquired. In order to do that they somehow or other got into communication with a brother of the late Joseph Thorley, who for some years had been in the service of Joseph Thorley, and during those years, according to his own account, which I take to be true, had acquired a knowledge of the recipe and of the manufacture, but who, for several years previous to the existence of this company, had never had anything to do with the manufacture of food for cattle. Having the name of Thorley, which was the distinguishing mark of the food for cattle, he either tendered himself for sale, or was found for purchase by some persons, in order that his name might be got into a joint stock company formed for the sake of selling these goods. Why was that name got in there except for the purpose of inducing the world to believe that it was the same concern, or that it was the Thorley; that it was the same Thorley or a continuation of the same Thorley whose name was the principal characteristic of the name of the article? The name of the company is, to my mind, a fiction. The meaning which the name of "J. W. Thorley & Co. Limited" would convey to any person's mind is that there had been a partnership of J. W. Thorley & Co., a real partnership, which had been carrying on business in the manufacture of this food for cattle and that, for some reason or other, such as we have seen constantly in our experience in this court, the partnership had been minded to convert itself into a limited company for the more convenient transaction of its business. * * * I am, therefore, of opinion that in this case what the defendant company have done has been calculated to deceive, and I am bound to say, in my judgment, I have no doubt was from the first intended to deceive the persons purchasing their article into the belief that they were purchasing the article which Joseph Thorley had formerly manufactured at the works which had attained the great reputation which Thorley's manufacture appears to have obtained.

Baggallay, *L. J.*, said: "I do not profess to say now whether J. W. Thorley, if honestly

carrying on business on his own account in the manufacture and sale of this article, might not call it 'Thorley's Food for Cattle,' provided he took proper precautions to prevent it being supposed that the article he was so manufacturing was manufactured by the representatives of Joseph Thorley, but I feel satisfied that the company has no right whatever to use that name. I am strongly inclined to the opinion, though it is unnecessary to decide that, according to the view of *Lord Westbury* in '*Glenfield Starch Case*,' the expression 'Thorley's Food for Cattle,' indicates the trade denomination of the article manufactured by the particular person; but even on the assumption that the defendant company had not only the right to manufacture this article, but to call it 'Thorley's Food for Cattle,' I have come to the conclusion on the evidence, that they adopted such a mode of endeavoring to push that article in the market as to induce many persons to entertain the reasonable belief that the article they were so putting upon the market had been manufactured by the representatives of Joseph Thorley."

Bramwell, *L. J.*, said: "The complaint of the plaintiffs is not that the defendants made and sold the same article that the plaintiffs made, but that it was sold in such a way as to induce purchasers to believe that it was the article manufactured by the establishment which was Joseph Thorley's and now is carried on by his executors. The learned counsel for the defendants admit that if that is so, there is a cause of action against them and that they must be restrained from doing it. The question, therefore, is one of fact: was the trade so carried on by the defendants as to give rise to that belief? It appears to me almost impossible to entertain a doubt upon that question."

James, *L. J.*, finally announced that an injunction would issue, and Mr. Glasse, who was of counsel said: "But is it not the substance of your Lordship's judgment that they are not to use the word Thorley in connection with their cattle food?" James, *L. J.*: "We cannot prohibit their using the name if they use it in a way not calculated to mislead the public."

Quotations are made at such length from this case because of the importance apparently attached to it by the plaintiffs. It will be seen that the case was regarded as one where a joint stock company had assumed the name of "Thorley" with the preconceived design of inducing the public to believe that their manufacture was that of the plaintiff, with the intent to pirate the marks of origin of the plaintiff's goods. In this view the English case goes no further than this court in *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn., 378. Further, as indicated by their opinions, the Judges strongly leaned to the position that "Thorley's Food for Cattle" had, under the evidence in the case, come to indicate the trade denomination of the article manufactured by the particular person, and had obtained that secondary meaning wholly apart from its ordinary and apparent meaning, assimilating, in this particular, to the *Glenfield Starch Case* in *Wotherspoon v. Currie*, 5 H. L., 508.

Lastly, the English case, as the final and de-

terminate view of the case, was treated as a case of intentional false representation by the defendants, in their method of advertisement by labels, and method of packing goods and carrying on their business. This is shown by the refusal of the court to enjoin the use of the word "Thorley" absolutely in the cattle food business, and permitting its use so long as that use was not calculated to mislead. The rationale of the decision of *Massam v. Thorley's Cattle Food Co.*, is that it was a case of actual intentional misrepresentation. The scope and limit of the ruling in *Massam v. Thorley*, in regard to the use of the name Thorley, is fixed by the decision of the same court in *Thorley's Cattle Food Co. v. Massam*, in which the court protected by injunction the "Thorley's Cattle Food Company" in the prosecution of its business in that name against circulars and advertisements of the defendants, the executors of Joseph Thorley.

Both James and Baggallay, *L. J.s*, in *Massam v. Thorley's Cattle Food Co.*, refer approvingly and as containing the gist of the law, to the language of Lord Justice Turner in *Burgess v. Burgess*, 3 D. M. & G., 896: "No man can have any right to represent his goods as the goods of another person; but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence, in each case, whether there is false representation or not."

Considered in the ordinary course of trade, it is a contradiction of terms to say that a man selling goods under his own name sells them as the goods of another, even if that other have the same name. The cases seem to require some element of false representation other than that implied in the fair, honest and ordinary use of a person's own name.

An examination of the following and kindred cases, wherein the use of a person's name has been regulated, will show that in most instances conscious, intentional, fraudulent misrepresentation, on the part of the defendant had been resorted to; in others, there was such a combined use of the name with other marks, characters, figures, or form and arrangement of circulars, advertisements, etc., as to amount to a false representation, and the combination only was enjoined. No instance can be found where the use of the name only, in good faith, has been stopped. See, *Croft v. Day*, 7 Beav., 84-90; *Holloway v. Holloway*, 13 Beav., 213; *Clark v. Clark*, 25 Barb., 78; *Sykes v. Sykes*, 3 Barn. & C., 541; *Metiler v. Wood*, L. R., 8 Ch. D., 608, 610; *Fullwood v. Fullwood*, 9 Ch. D., 179; *Devlin v. Devlin*, 69 N. Y., 214; *Landreth v. Landreth*, 22 Fed. Rep., 41; *Shaver v. Shaver*, 54 Iowa, 213; *Stonebraker v. Stonebraker*, 33 Md., 268; *Williams v. Brooks*, 50 Conn., 278; *Meriden Brit. Co. v. Parker*, 39 Conn., 450.

Upon the other hand there has been, from the first to the present time, a general consensus of judicial opinion that the use of a personal name in a fair, honest and ordinary business manner, could not be prevented, even if damage resulted therefrom. *Croft v. Day*, 7 Beav., 84; *Holloway v. Holloway*, *supra*; *Burgess v. Burgess*, 3 D. M. & G., 896; *Faber v. Faber*, 49 Barb., 357; *Clark v. Clark*, 25 Barb., 80; *Meneely v. Meneely*, 62 N. Y., 427; *Comstock v. Moore*, 18 How. Pr., 424; *Gilman v. Hunnewell*, 122 Mass., 139; *McLean v. Fleming*, 96 U. S., 252 (bk. 24, Law. ed., 831); *Carmichael v. Latimer*, 11 R. I., 395; *Landreth v. Landreth*, 22 Fed. Rep., 41; *Singer Mfg. Co. v. Loog*, L. R., 18 Ch. Dig., 412.

Other cases and *dicta* might be cited, but it is deemed unnecessary.

In one brief filed for the plaintiffs it is said that they make no exclusive claim to the word "Rogers;" but he couples with that disclaimer a statement that the word "Rogers" is the conspicuous and valuable part of their mark, and that any use of it by the defendants, in the ordinary way of manufacturers, by stamping their goods with it, either alone or in any combination, will indubitably produce results which they are now striving to prevent; and in the brief filed by the other counsel, the broad claim is made that the word "Rogers" used as a stamp should be stopped. And, as we have before said, this is the only contention left to the plaintiff by the finding of the court below.

In conclusion, we think there is neither authority nor reason in support of the doctrine that the fair, honest use of a name can be enjoined, when it is used in the ordinary course of business, in the way and manner in which other manufacturers of similar goods are accustomed to use their own name in the preparation for sale, or sale of goods; that such a rule would operate in restraint of trade and prohibit a person from using the ordinary means that all are entitled to use in the prosecution of business enterprises; that such use contains no element of false representation or personation in any just and true sense; and that while it may be true that a possibility exists that the goods of one will be purchased to some extent by persons who either know no distinction, or even by the occasional few who suppose them to be the goods of another; this condition of things is inevitable in trade and commerce, inhering in the nature of things and attaches in kind, if not in degree, in all cases where a manufacturer, sending goods of any particular description, but without distinguishing mark, into a district or country where such goods were before that time unknown, and establishing a reputation in that district or country as the manufacturer and vendor of such goods. Any new comer in the same district with similar goods would undoubtedly profit by the reputation of the former's goods; yet the benefit to the public generally of free competition and the natural rights of all, to seek any and all markets, would render ineffectual all attempts to shut out such new comer.

Since the preparation of the foregoing opinion the second edition of "Browne on Trade-Marks" has been distributed. That author upon a review of the cases lays down this proposition: "A manufacturer has a right to affix his

own name to an article of his own production. And any injury which another manufacturer, having the same surname, may suffer in consequence thereof is *damnum absque injuria*." § 420.

And in his "commentary" upon *Howe v. Howe Machine Co.*, 50 Barb., 236, he says: "This case is apt to mislead the superficial observer, and even for a moment stagger the preconceived notions of one used to critical examination. It has been cited more than once in support of this absurd proposition, to wit: when two men in the same trade have the same surname, one may employ that surname as a trade-mark, to the exclusion of any such right by the other; that is, when the two brothers have made and sold sewing machines, the one who first stamped his surname upon a machine was the sole possessor of the right to stamp his workmanship with his true name. This conclusion has no warrant from any authoritative source." § 423.

There is no error in the judgment of the Superior Court.

Loomis, J., dissenting:

The able argument in support of the majority opinion is so well calculated to produce the impression that the finding of the Superior Court leaves no possible basis for granting any relief to the plaintiff, that it will be necessary to examine the pleadings and finding somewhat carefully, to show the grounds for my dissent. If we exclude from paragraphs eleven to sixteen of the complaint all allegations of fraudulent designs and acts, there will remain the averments that the plaintiff is a Corporation duly organized under the laws of this State, and that since 1859 it has been and now is extensively engaged in the manufacture of silver plated spoons, forks and knives, and has large capital invested in that business; that in 1858 Asa H. and Simeon S. Rogers formed a partnership under the name of "Rogers & Brother," and engaged in the business of manufacturing and selling silver plated spoons and forks and knives, which was continued till December 18, 1859, when the plaintiff Corporation was organized and purchased the property, and succeeded to the business and all the rights of said partnership; that said partnership had adopted and used in its business the trade-mark "C. Rogers & Bro.," sometimes adding the suffix "A 1"—stamping it upon the goods manufactured by said firm, and that the plaintiff upon succeeding to the business of said partnership lawfully continued to use and has ever since lawfully used and intends in the future to use in its business said trade-mark with said suffix, stamping the same upon the spoons, forks and knives manufactured by it; that the sale of the plaintiff's goods so stamped has been widely extended, and that owing to the skill and integrity of the plaintiff in their manufacture they have constantly maintained a special, peculiar, good and valuable reputation among the trade and among purchasers generally, and that the business of the plaintiff has been largely built up and extended by such reputation, and is now largely dependent for its profitable continuance upon the reputation so attached to its goods by the use of such stamp thereon; that said trade-mark is of great value to the plaintiff and will con-

tinue to be so if the wrongful acts of the defendants shall be stopped; that the defendants, well knowing the premises and knowing that if they could send spoons, forks and knives into market bearing a stamp that would cause them to be called "Rogers' goods," or by any of the names whereof the word "Rogers" is the specially conspicuous part, they could sell them much more readily and for a higher price than if the stamp did not contain the word "Rogers;" and intending to cause their goods to be called by some name of which the word "Rogers" forms the conspicuous part and so obtain advantage of the reputation which attaches to goods bearing the plaintiff's trade-mark "C. Rogers & Bro. A 1," did, on or about the 15th day of June, 1883, begin the business of making and selling silver plated spoons, forks and knives, and stamping upon them marks resembling said trade-marks of the plaintiff, and in particular the following, to wit: "C. Rogers & Bros. A 1," and to send into the market and sell, spoons, forks and knives so stamped and have ever since continued to do so; that by reason of said facts the use by the defendants of the word "Rogers" as a stamp upon spoons, forks and knives will cause unwary purchasers to purchase the goods of the defendants so stamped, supposing them to be manufactured by the plaintiff, to the injury of the plaintiff; and that the plaintiff, on August 1, 1883, requested the defendants to cease using the stamp aforesaid, but they then refused and still refuse.

Of the material allegations, stated above, the defendants admit that in 1858 Asa H. and Simeon S. Rogers formed a partnership under the name of "Rogers & Brother," and under that name engaged in the manufacture of silver plated ware; that in 1859 the plaintiff corporation was organized under the name of "Rogers & Brother," purchased the property of said copartnership and succeeded to its business and has ever since been engaged in the manufacture of silver plated spoons, forks and knives, and has a large amount of capital engaged in the business; and that the partnership "Rogers & Brother" during its existence stamped the goods of its manufacture with the name of said copartnership, either in full or in the abbreviated form of "Rogers & Bro.," and that the plaintiff Corporation has, since it engaged in the business, stamped the goods of its manufacture with its corporate name, either in full or abbreviated, and that said copartnership and Corporation sometimes added to their mark "A 1." They also admit the use of the star, and that the plaintiff's goods while so stamped have had a good and valuable reputation in the public markets.

The defendants aver that they have been extensively engaged in business as manufacturers and sellers under their partnership name of "C. Rogers & Bros." since 1866; their manufacture being principally that of silver plated coffin trimmings, and that in that business their partnership name has acquired a high reputation and been of great value to them. And in reply to paragraphs eleven to sixteen of the complaint, they aver that they have been engaged in and are intending to carry on, in connection with their other silver plated manufacture, the manufacture and sale of electro silver plated

spoons, forks and knives, and have made a large investment therein; and that they have stamped upon the articles so manufactured their partnership name for the sole purpose of indicating that such articles are manufactured by them, and of availing themselves of the reputation which they, the defendants, have acquired in the public markets as before mentioned.

This the defendants "insist" that they have a lawful right to do, and that the doing thereof can afford no lawful ground of complaint to the plaintiff.

The court finds, among other things, that when the plaintiff Corporation was formed in 1859, both members of the partnership formed in 1858, Asa H. and Simeon S. Rogers, were associates in such formation and became stockholders and officers in such Corporation and that the Corporation so formed "acquired by purchase all the property and business of said firm, including its said stamp and good will, and has ever since used said stamp in its business, always stamping the same upon the back of the shank of the forks and spoons, and that the use of said stamp was never objected to by any of said brothers; that the goods made by the plaintiff and stamped as aforesaid, have always been equal to, or better than the goods made by said three Rogers brothers; and have always had a high reputation in the market; that the standard of quality has not only been maintained, but the amount of silver put upon the goods has been increased from time to time, and the quantity of silver now used by the plaintiff is 25 per cent in excess of that used by Rogers Brothers; that the plaintiff has also from time to time made improvements in the style and workmanship of the goods and has greatly improved the quality of its spoons by thickening the shanks; that the reputation of the plaintiff's goods is very much higher than was that of the goods made by said partnership; and that the plaintiff's knives, forks and spoons are of a quality much superior to those made by said partnership or by any other party prior to the organization of the plaintiff; that said stamp of the plaintiff has never been used except upon first quality goods, and the use of the same has been and is of great value to the plaintiff; that prior to the acts complained of, the spoons, knives and forks dealt in by the defendants were wholly of the manufacture of other parties than themselves, except as they were at one time connected with Chas. Parker, under an arrangement which appears in the case of *Meriden Britannia Co. v. Parker*, 39 Conn., 450; that the defendants have never stamped any of their goods with any mark, name or trade-mark except as the spoons, forks and knives made by them recently have been stamped as herein stated; and that their stamp "C. Rogers & Bros. A 1" is stamped upon the backs of the spoons and forks in the same manner and place as the plaintiff's goods are and have been stamped.

The majority of the court, in their opinion, after referring to various uses of the name "Rogers," by one or other of the brothers, most of which have been abandoned for many years and which do not seem to have any material bearing upon any question in this case, say: "Thus with reiteration the court below empha-

sizes the fact that the word 'Rogers' is the controlling word, the one thing that is the basis of all possible confusion or mistake in the use of the two stamps. * * * There is no finding or suggestion of that fact that any other part of the defendants' stamp is answerable in any degree for that liability to mistake. * * * If any other part of the stamp, in configuration, collocation or combination of words, figures or symbols, or in any other respect, contributed in any manner to deceive possible purchasers and enable the defendants to sell their goods as those of the plaintiff, it should so have been found by the trial court."

To this construction of the finding, that confines the resemblance between the stamps entirely to the word "Rogers," excluding every other possible misleading similarity, I do not assent, because it entirely ignores the distinct finding that "The general resemblance between the stamps is such that a person knowing that of the plaintiff and not knowing that of the defendants might, upon referring to it but not reading it attentively, mistake it for that of the plaintiff." This finding, and the construction I give it, are both emphasized by the fact that the trial court made the exhibits a part of the finding to be submitted for inspection and comparison by the Judges of this court, surely not for the futile and foolish purpose of enabling us to see that the word "Rogers" in one stamp was like the word "Rogers" in the other, but that we might see how striking was the resemblance between the two stamps in their entirety: "Rogers & Bro. A 1," and "C. Rogers & Bros. A 1," as actually impressed upon the metal in characters identical in style, size and space occupied; making the closeness of the resemblance and the probable effect in misleading purchasers more apparent than would appear from any mere verbal description.

In order to illustrate the use and benefit of exhibits in questions of this kind, it may be allowable to compare the impression actually made by the star prefix of the plaintiff's stamp with the "C." of the defendants' stamp. As they appear on the printed page, nothing could well be more dissimilar, and yet such is not the fact as seen in the exhibits, for both consist of very small circular indentations in the metal, and owing to the small size the distinguishing points are obscure, so that as addressed to the eye upon casual or ordinary examination there is great similarity, even where we would not expect to find it.

But it is not my purpose to supplement the finding by adding my own inferences of fact. The exhibits, however, being legitimately before us as a part of the case, it was our duty to examine them.

For the purposes of this discussion, however, I have no occasion to use the exhibits for any other purpose than to aid the interpretation and to make more clear the purpose and meaning of that part of the finding which in a measure seems to have escaped the attention of the majority of the court, notwithstanding the great thoroughness and ability of their argument. That the plaintiff has a good and very valuable trade-mark is beyond all question. As a property right it is as sacred as any other. The stamp adopted by the defendants to some extent operates to personate the plaintiffs and to

mislead at least incautious and unwary purchasers; so that profits of right belonging to the plaintiff may fall into the hands of the defendants to whom they do not belong. For such a state of things there ought to be a remedy, and I think there is one founded upon the authority of numerous decisions, some of which were referred to by this court, with approval, in the late cases of *Williams v. Brooks*, 50 Conn., 278, and *Meriden Britannia Co. v. Parker*, 89 Conn., 450.

In *Williams v. Brooks*, 283, this court, remarking upon the finding that those liable to be deceived "were only careless and unwary purchasers," says: "The purpose to be effected by this proceeding is not primarily to protect the consumer but to secure to the plaintiffs the profit to be derived from the sale of hairpins of their manufacture to all who desire and intend to purchase them. It is a matter of common knowledge that many persons are in a greater or less degree careless and unwary in the matter of purchasing articles for their own use; but their patronage is not for that reason less profitable to the manufacturer; and when such persons have knowledge of the good qualities of the plaintiffs' hairpins, and desire to purchase them, the law will not permit the defendants to mislead them." The court then quotes the following from the opinion of the court in *Singer v. Wilson*, L. R., 8 App. Cas., 376: "There are multitudes who are ignorant and unwary, and they should be regarded in considering the interests of traders who may be injured by their mistakes. If one man will use a name the use of which has been validly appropriated by another, he ought to use it under such circumstances and with such sufficient precaution that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs."

In *Meriden Britannia Co. v. Parker*, it was found "that the stamp of the defendant, 'C. Rogers & Bros. A 1,' resembled the petitioners' trade-mark '1847 Rogers Bros. A 1,' to that degree that it was calculated to deceive unwary purchasers and those who buy such goods hastily and with but little examination of the trade-mark; but purchasers who read the entire trade-mark on the respondent's goods and who know the petitioners' trade-mark cannot be deceived, nor can they mistake the respondent's goods for those of the petitioners." 89 Conn., 455.

Upon the finding in that case the court remarked that "the fact that careful buyers, who scrutinize trade-marks closely, are not deceived, does not materially affect the question. It only shows that the injury is less, not that there is no injury." *Id.*, 460.

But if the resemblance be found sufficient to mislead, as in the *Parker Case*, it is still contended that as the defendants here only use their own partnership name, they may, upon the pleadings and finding in this case, lawfully appropriate to themselves the entire advantage which, in that case, was to be divided between themselves and Parker, and that this plaintiff must continue to suffer, without relief, all the damage from which the plaintiffs in that case were protected by injunction.

But in deciding this question of infringement

the only difference between the case of one who uses a name not his own, as a stamp, and one who uses his own name, is that, in favor of the owner of the stamp claimed to have been imitated and infringed, the former is presumed to use it for a fraudulent purpose, while, as to the latter, such purpose must be proved.

Here it is found that "The defendants, in commencing the manufacture of such articles, had in view the popularity in the market of such goods bearing a stamp containing the word Rogers, and one inducement to commencing such manufacture was the advantage they might derive from having their goods so stamped."

This is clearly sufficient for the plaintiff, unless the fact that such "popularity" was not the sole property of the plaintiff prevents the maintenance of this suit without joinder as co-plaintiffs of the other parties interested in the reputation and popularity which the defendants intended to appropriate.

That question arose in the case of *William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.*, and was then disposed of by Judge Lowell as follows: "It is further argued that the Rogerses are so many that the court cannot find any intent to appropriate the reputation of one of them more than another, and that if any suit will lie, it must be by all those who use any trade-mark whose distinctive feature is the name 'Rogers.' I believe it to be true that the Greenfield Rogerses did not inquire, nor did the defendants care, whose reputation they were making available; but I am of opinion that any one of those who rightly use the name may enjoin the interfering use by others." 11 Fed. Rep., 500.

That the plaintiff has built up the reputation, and established the popularity in the markets of goods stamped with a stamp the conspicuous word of which is "Rogers," and is a principal, if not the sole owner of such reputation, is alleged and clearly found; also, that the defendants intended to appropriate the advantage to be derived from securing such reputation for their goods to their profit, and that this was an inducement to commencing the business.

As was said by Baggallay, L. J., in the *Thorley Cattle Food Case*, "I am satisfied on the whole transaction, as set forth in the finding, that the object was to obtain a large slice of the business previously [carried on by the plaintiffs]." L. R., 14 Ch. Div., 748. But in our reasoning we are confronted with the proposition that, notwithstanding the positive findings of the court to which we have referred, the case of the plaintiffs, as set forth in the complaint, is so met and controlled by the negations in the finding as to prevent the plaintiff from obtaining any relief. The pleadings are reviewed somewhat briefly in the majority opinion, and the claim is made that the trial court has wholly negatived the allegations that the defendants were actually and intentionally fraudulent in the use of their stamp, and that "in saying that the allegations of fraudulent design contained in article sixteen of the complaint are found not true, goes further and negatives also the constructive fraudulent design implied in that article." But upon careful examination the finding, when applied to the pleadings (the substance of which we have given) brings me to a different result.

The principal contention between the parties in their pleadings grows out of the allegations of positive fraudulent acts, or of constructive fraud, necessarily resulting from the acts set forth in paragraphs eleven to sixteen, inclusive, of the complaint. The defendants, without in terms denying the fraudulent intent and acts charged, aver that, as to those paragraphs, they have been engaged in and are intending to carry on the manufacture and sale, as set forth, "for the sole purpose of indicating that such articles are manufactured by them, and of availing themselves of the reputation which they (the defendants) have acquired in the markets, as before mentioned."

The affirmative allegations of the plaintiff are met by the affirmative counter and inconsistent averment of the defendants, thus creating an issue to be passed upon by the trier, who distinctly negatives the claim of the defendants by finding, in effect, that the "popularity which the defendants had in view," and from which they wished "to derive advantage," was not the "reputation which they, the defendants, had acquired in the markets in their business." The defendants' previous business expressly found not to have included the manufacture of silver plated spoons, forks and knives, stamped with the name "Rogers." On the contrary, this was the business found to have been established by the plaintiff and others under whom the defendants do not claim.

In dissenting from the views of the majority of the court I do not find it necessary to hold that the fair and honest use of a name can be enjoined when it is used in the ordinary course of business in the way and manner in which other manufacturers of similar goods are accustomed to use their own names in the preparation and sale of goods, for I do not regard this as such a case. It belongs rather to the class of cases referred to by Judge Lowell in the case before cited, 11 Fed. Rep., 495, where he says: "The books are full of cases in which defendants have been restrained from using their own names in a way to appropriate the good will of a business already established by others of that name."

I think there was error in the judgment complained of.

If any decree of injunction was to be passed, I would prefer to give it more careful consideration before fixing its precise terms. I will merely add that my impression is that the defendants should have been enjoined from such use of the combination of words, "C. Rogers & Bros.," on silver plated knives, spoons and forks, and from such use of the word "Rogers" as part of any stamp or mark on the shank of silver plated spoons and forks in connection with or without the suffix "A. 1," as that purchasers will be liable to believe that spoons, forks and knives, so marked and made by the defendants, were made by the plaintiff.

In this opinion **Park, Ch. J.**, concurred.

George BROWN,

v.

Town of SOUTHBURY, *Appt.*

1. The notice of an injury required by statute to be given to the selectmen before suit against a town, for injuries arising from a defective highway, need not be in technical terms, nor need the injury be accurately described in terms. A general description which will reasonably apprise the selectmen of the general character of the injury is all that is required.
2. When the notice described the injury as caused by a defective sluice across the highway between the residence of two persons, naming them, the notice is sufficient as to place. There being three sluiceways between the points named, proof that only one of them was defective was admissible.
3. Loss of the use of a horse while suffering from the injury, is a proper element of recoverable damages.

(New Haven—Decided December 16, 1885.)

A PPEAL by defendant from a judgment in favor of plaintiff, on a hearing as to damages, after demurrer to the complaint was overruled. *Affirmed.*

Action under the statutes relating to highways, to recover damages for injuries to the horse, carriage and harness of plaintiff, alleged to have been received upon a defective highway which defendant was bound to maintain.

The statutes relating to highways, as amended by Public Acts 1874, p. 196; (General Statutes, 1875, 282); Public Acts 1883, p. 283, require a notice to be given to the selectmen of the town, of the time and place of the occurrence of the injury and of the nature and cause thereof. The notice in this case was as follows:

"To the Selectmen of the Town of Southbury: I hereby give you notice that my horse, carriage and harness were injured, by my horse falling through a defective sluice across the highway in said Town at a point between the dwelling house of Elliott B. Bradley and the John Honahan place, so-called. That said horse was injured in the left leg and knee joint and otherwise bruised and injured. That said carriage was injured by breaking the right shaft and being wrenched and sprung. That said harness was much broken and injured. That said injuries were received on Tuesday, September 18, 1883. That I claim just damages for said injuries from the Town of Southbury.

Dated at Woodbury, this 21st day of September, 1883. George Brown."

Mr. A. N. Wheeler, for defendant:

The court erred in rendering judgment for more than nominal damages, as the notice given to the defendant does not meet the statutory requirement, in that it does not sufficiently specify the nature of the injury and the place of its occurrence. The plaintiff claimed and the court ruled that this objection, if valid, could not be interposed upon a hearing in damages after demurrer overruled. If it were possible that demurring to the complaint would have this effect, it could only occur when the

notice itself is set forth in the complaint. The allegation, that the notice required by statute was given, is a legal conclusion and not a fact, and is therefore not a proper or material allegation of the complaint. *Chapman v. Nobleboro*, 76 Me., 427; *Dickie v. B. & A. R. R. Co.*, 181 Mass., 516; *Shea v. Lowell*, 182 Mass., 187.

The giving of the notice required by the statute is a provision pertaining to the remedy, and is not a part of the cause of action. *Kent v. Lincoln*, 32 Vt., 591; *Doyan v. School Dist.*, 35 Vt., 520; *Matthie v. Barton*, 40 Vt., 286; *Bartlett v. Cabot*, 54 Vt., 242; *Low v. Windham*, 75 Me., 113; *Chapman v. Nobleboro*, *supra*; *Fanton v. Middlebrook*, 50 Conn., 44.

If in this case the allegation of notice is material, the plaintiff must prove it by legal and sufficient evidence, and if the notice offered in evidence is insufficient, he certainly fails so to do. An insufficient notice is no notice; and were it not for the rule of law and practice giving him nominal damages upon a hearing in damages, after demurrer overruled, or upon a default, the defendant would recover judgment. *Havens v. H. & N. H. R. R. Co.*, 28 Conn., 69; *Daily v. N. Y. & N. H. R. R. Co.*, 32 Conn., 356; *Lamphear v. Buckingham*, 38 Conn., 287; *Carey v. Day*, 36 Conn., 152; *Batchelder v. Bartholomew*, 44 Conn., 494; *Shepard v. N. H. & N. Co.*, 45 Conn., 58; *Crane v. East. Trans. Line*, 43 Conn., 361; *Matthie v. Barton*, 40 Vt., 286; *Low v. Windham*, 75 Me., 113.

The provision requiring the nature of the injury to be specified, was first introduced into our law in 1883 (Pub. Acts, 1883, p. 283), and the object evidently was to convey still more precise and definite information to towns and others liable for these injuries than was provided for under the former statute. A new element must now be incorporated in the notice. A reasonably certain description of the injury must be given. To say that he is injured in person or property by means of a defective highway does not describe the character of the injury nor give any information whatever of its nature. *Low v. Windham*, *supra*; *Perry v. Putney*, 52 Vt., 533; *Bartlett v. Cabot*, 54 Vt., 242; *Tuttle v. Winchester*, 50 Conn., 497.

The notice is sufficient as to place. *Cronin v. Boston*, 135 Mass., 110; *Post v. Foxborough*, 131 Mass., 202; *Larkin v. Boston*, 128 Mass., 521; *Reed v. Calais*, 48 Vt., 7; *Purinton v. Warren*, 49 Vt., 19; *Butts v. Stowe*, 53 Vt., 600; *Holcomb v. Danby*, 51 Vt., 428; *Shaw v. Waterbury*, 46 Conn., 266.

Damages for the loss of use of the horse while injured cannot be recovered in this action, as they are indirect and consequential and are not authorized by the statute. No change of the law was intended by the revision of the statutes; the revisors are presumed not to change it, but to collect, codify and condense it. *Burr v. Plymouth*, 48 Conn., 460; *Allen v. New Haven & Northampton R. R. Co.*, 50 Conn., 216; *Harral v. Leverty*, 50 Conn., 46; *McDonald v. Hovey*, 110 U. S. (bk. 28, L. ed., 269), 619; *Harwood v. Lowell*, 4 Cush., 810.

The question, what damages towns are liable for, arising from defective highways, has been decided by this court, and the precise language of the present statute construed. *Chidsey v. Canton*, 17 Conn., 475; *Wilson v. Granby*, 47

Conn., 59; *Harwood v. Lowell*, 4 Cush., 810; *Reed v. Belfast*, 20 Me., 246; *State v. Hewett*, 81 Me., 400; *Weeks v. Shirley*, 83 Me., 271; *McLaughlin v. Bangor*, 58 Me., 398.

Messrs. Doolittle & Bennett, for plaintiff:

The statutory notice is a condition precedent to the plaintiff's right to maintain his action. Inquiry as to its sufficiency is proper where the right to maintain the action is questioned. Here no such question arose since the defendant, by demurring, admitted the plaintiff's standing in court. *Crane v. East. Trans. Line*, 43 Conn., 361.

The plaintiff's right to maintain his action being admitted, there remains nothing for him to prove, except the extent of the wrong done to him by the defendant. Evidence is admissible on the part of the defendant to belittle the plaintiff's injury, and to prove the injury was not occasioned by the fault of the defendant, the burden of proof being upon plaintiff. *Daniels v. Saybrook*, 34 Conn., 877; *Lamphear v. Buckingham*, 38 Conn., 250; *Crane v. East. Trans. Line*, *supra*.

The notice given was sufficient. In determining its sufficiency in regard to place, it must be considered in connection with the circumstances. The notice shows that the horse fell through a defective sluice situated between two points upon the highway. The facts show one and only one defective sluice within those points, and the defect in it, a hole so apparent that the attention of a person who had received the notice must have been called to it at once. The notice was given within four days of the accident. See, *Tuttle v. Winchester*, 50 Conn., 497; *McCabe v. Cambridge*, 184 Mass., 434; *Love v. Clinton*, 133 Mass., 526; *Ranney v. Sheffield*, 49 Vt., 191.

The notice sufficiently specified the nature of the injury. *Blackington v. Rockland*, 66 Me., 332; *Bradbury v. Benton*, 69 Me., 194; *Pratt v. Sherburne*, 53 Vt., 370; *Weeks v. Lyndon*, 54 Vt., 647; *Tuttle v. Winchester*, *supra*.

The court ruled correctly that the plaintiff could recover damages in this action for the loss of the use of the horse. The action is brought to recover just damages for injury to the particular species of property of which the statute speaks. What shall be the measure of these damages? Certainly in this State the same rule applies as in actions for negligence at common law. *Beecher v. Derby Bridge Co.*, 24 Conn., 491; *Seger v. Barkhamsted*, 22 Conn., 290.

Direct consequences must necessarily be considered. There has never been doubt that with proper allegations in the complaint, special damages for loss of earnings may be recovered in an action on this statute. *Taylor v. Monroe*, 43 Conn., 86; *Tomlinson v. Derby*, 43 Conn., 562.

Even such remote consequential damages as the expenses of the suit may be recovered in certain cases. *Beecher v. Derby Bridge & Ferry Co.*, 24 Conn., 491; *Wilson v. Granby*, 47 Conn., 74.

The loss of the use is always considered at common law. *Gillett v. West. R. R. Corp.*, 8 Allen, 560.

The exact question here made has been decided in Massachusetts and Vermont on actions brought under the statutes of those States. *Johnson v. Holyoke*, 105 Mass., 80; *Wheeler v. Townshend*, 42 Vt., 15.

Interest was properly allowed as part of the whole sum awarded the plaintiff. After the damages were sustained, there was a time during which the defendants delayed satisfaction for them. The date when they ought to have paid and did not, is found to be Dec. 1, 1883. The plaintiff must be allowed interest during the delay, for in no other way can he receive complete indemnity. *Mailler v. Ez. Prop. Line*, 61 N. Y., 312; *Whitehall Trans. Co. v. New Jersey R. Steamboat Co.*, 51 N. Y., 369; *Duryee v. Mayor*, 96 N. Y., 477, 499; *Lindsey v. Danville*, 46 Vt., 144.

Carpenter, J., delivered the opinion of the court:

Action for injury to property by reason of a defective highway.

Hearing in damages, after demurrer overruled.

The defendant objected to the admission in evidence of the notice to the selectmen required by statute, Sess. Laws, 1888, p. 283, on the ground that it did not sufficiently describe the nature of the injury and the place of its occurrence. The court overruled the objection. Under the statute as it originally passed in 1874, the nature of the injury need not be stated in the notice but it is required by the Act as amended in 1883. We think the nature of the injury is sufficiently described. The injury was to a horse, wagon and harness, and it is thus described: "That said horse was injured in the left leg and knee joint and otherwise bruised and injured; that said carriage was injured by breaking the right shaft, and being wrenched and sprung; that said harness was much broken and injured."

This notice is required of plain men, and, in a majority of instances, of men of common or limited education, and must be given within sixty days after the injury. It is absurd to suppose that the Legislature intended that it should be given in technical terms, or that it should be accurately described in detail. A general description which will reasonably apprise the selectmen of the general character of the injury is all that is required. That was given in this case.

The place of its occurrence is thus described: "Through a defective sluice across the highway in said Town, at a point between the dwelling house of Elliott B. Bradley and the John Honahan Place, so-called." Between these points there are three sluiceways, and within twenty-five rods. Only one was defective, and that was the middle one. The defect was a hole "in the traveled track, about three feet deep and six inches wide, and extending across the sluiceway very nearly the width of a carriage." The defect was an obvious one. We think it is very clear that the selectmen had such notice of the place as that they could not have been misled and could not have mistaken its identity. We think the evidence was properly admitted.

Obviously the plaintiff had no occasion to prove the notice, for it was alleged in the complaint and admitted by the demurrer. Whether the defendant could have shown want of notice, for the purpose of affecting the question of damages, is a question we need not consider.

The claim that the loss of the use of the horse is too remote, and that damages therefor cannot be recovered in this action, cannot be sustained. The loss was the direct and natural consequence

of the injury. That it was a proper element of damage is too clear for argument.

It is not usual in this class of cases to allow interest as such or to allow it as damages for the detention of money due. It may be proper in some cases to take into consideration the lapse of time in assessing damages. Whether this is such a case is unimportant, because the amount thus allowed, \$10.59, is too insignificant to justify us in reversing the judgment and granting a new trial.

In this opinion the other Judges concurred.

TOWN OF VERNON

v.

TOWN OF ELLINGTON.

Where an alien who had been naturalized in a certain town and had become an inhabitant thereof, by subsequent residence, removed to another town in 1866, he came into the second town as a person of the third class under the statutes then in force, relating to paupers, and, therefore, gained a settlement therein by a continuous self-supporting and taxpaying residence for six years.

(Decided February 13, 1886.)

CASE reserved. From the Superior Court for Tolland County. Judgment for defendant. The case and facts are stated in the opinion. *Messrs. G. W. West and M. R. West*, for plaintiff:

It is admitted that Lizzie Dunn was born in Ellington, January 16, 1863. This is *prima facie* proof of her place of settlement. 1 Swift, Dig., 418; *Sterling v. Plainfield*, 4 Conn., 114; *Danbury v. New Haven*, 5 Conn., 584.

Her parents being aliens, Lizzie having been born in Ellington, that is her place of settlement. 1 Swift, Dig., 418; *Hebron v. Marlborough*, 2 Conn., 18.

Her father, John Dunn, and her mother, Catharine Dunn, were both aliens, and came to Ellington prior to April 4, 1859. Being an alien, the father could not gain a settlement in Ellington by commorancy. Stat. 1854, § 1; Stat. 1866, § 1; *Somers v. Barkhamstead*, 1 Root, 398; *Town of Bridgeport v. Town of Trumbull*, 37 Conn., 484.

The manner of naturalization is not material in this case. Naturalization of a foreigner simply makes him a citizen of the United States, nothing more. A naturalized citizen is made a citizen under an Act of Congress, but the Act does not proceed to give, to regulate or to prescribe his capabilities. The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it so far as respects the individual naturalized. 2 Swift, Dig., 1st ed. 819.

The words of a statute are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged. 3 Bl. Com., 432; *Martin v. Hunter's Lessee*, 1 Wheat. (14 U. S., bk. 4, L. ed.), 336.

But if the plain meaning of a provision is to be disregarded, when not contradicted by any other provision in the same instrument, because we believe the framers could not have intended what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would unite in rejecting the application. Baldwin, Const. Views, bk. 9, L. ed., U.S. Reps., 305.

In *U. S. v. Freeman*, 8 How. (44 U. S.), 557, the court holds the rule that to extend the meaning beyond the precise words used in the law, "the case must be shown to come within the same reason upon which the lawmaker proceeded, and not a like reason."

When an Act is expressed in clear and precise terms; when the same is manifest and leads to nothing absurd, there can be no reason for not adopting the sense which it naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to elude it. Potter, Dwar., 148, § 2.

Mr. Dwight Marcy, for defendant:

If we look to the origin and development of this branch of the law in England, we find that the first statute on the subject was that of 12 Ric. II., ch. 7, A.D., 1388. Subsequent statutes on the subject are, 11 Hen. VII., ch. 12, A.D., 1495; 19 Hen. VII., ch. 12, A.D., 1508; 27 Hen. VIII., ch. 25, A.D., 1535; 14 Eliz., ch. 5, A.D., 1572; 1 J. I., ch. 7, A.D., 1608; 14 C. II., ch. 12, A.D., 1673; 1 Ja. II., ch. 17, A.D., 1685.

In the case of *King v. Eastbourne*, 4 East, 108, the question was, whether a foreigner under the Statute of 14 C. 2, ch. 12, could gain a settlement, by occupying a tenement of £10 a year for forty days. *Lord Ellenborough, C. J.*, said: "This man was not an alien enemy, but a German by birth, and an alien may, and as such, though he may not take a lease of a dwelling-house or shop by reason of the Stat. 32 Hen. VIII., ch. 16, yet he may occupy a tenement of £10 a year, and carry on his trade there, like any other person. Then if he may do so, he has that interest which enables him to gain a settlement by the provisions of the Legislature. As to there being no obligations for maintaining foreigners, before the statutes ascertaining the different modes of settlement, the law of humanity, which is anterior to all positive law, obliges us to afford them relief, to save them from starving; and those laws were only passed to fix the obligation more certainly, and point out directly the manner it should be borne."

The word settlement, as applicable to the status of the poor, was not used in any statute of this Colony until 1752, long after this branch of the law had been pretty thoroughly developed and established in England. The first law in relation to the subject is found in Ludlow, Code, 1650. 1 Colonial Rec. Conn., 546; this is followed by statutes enacted in 1672, 1682, 1703, 1707, 1752, 1784.

In the case of *Bethany v. Oxford*, 15 Conn., 550, Waite, J., said: "It is very obvious that a person may be an inhabitant of one town and have a settlement of another. He may have his domicile in one town, have a right to vote there, to sue and be sued as an inhabitant of that town, and yet when he becomes poor another town may be liable for his support."

In the case of the *Town of Morris v. Ply-*
CONN.

mouth, 34 Conn., 270, McCurdy, J., said: "In a place where a man has a right to live and be maintained, and die and be buried, there he may well be said to be settled."

In the case of *Colchester v. Lyme*, 18 Conn., 274, Church, J., said: "It has been seriously urged in this case that the capacity or power of acquiring settlements is not a personal privilege, but that the laws regulating this subject are merely intended to fix the liabilities of towns, and not to affect the rights of the citizen. We can give no countenance to this suggestion. The poor even without their consent, may, by law, be removed to their places of settlement for support, and thus separated from relatives and friends and other objects of affection. The power of determining for themselves where to live and where to die, is certainly a privilege among the most valuable that can be enumerated."

Pardee, J., delivered the opinion of the court:

Complaint for repayment of money expended upon a pauper. Reserved.

John Dunn, an alien, came to Ellington, where he was naturalized and made an elector in 1859, and there he continued to reside, until 1866, when he removed to Vernon. In this last Town he was made a voter, and continued to reside, until his death in 1876. In both places he supported himself and family and paid the taxes assessed against him.

Lizzie Dunn, the pauper in question, is his daughter and was born in Ellington. She was ten years of age when her father died; she has never acquired a settlement in her own right. She came to want in Vernon in 1884; that Town furnished support to her, but claims that her settlement is in Ellington, and sues for repayment of the money expended.

For the purposes of this case we may say that formerly the statute divided persons into three classes for pauper purposes:

First: Aliens, or those not inhabitants of this or any other State or Territory or district of the United States, who may come to reside in any town in this State; these could gain a settlement only by vote of the inhabitants, or consent of the civil authority and selectmen.

Second: Inhabitants of some State, territory or district of the United States, other than this State, who may come to reside in any town in this State. These could gain a settlement only by admission, as provided for the previous class, after a year's residence in the town, or by the ownership in fee of real estate of the value of \$384, free from incumbrance, for the period of one year, the title, if by deed, being a matter of record during that time.

Third: Inhabitants of some other Town in this State. These could gain a settlement in one of three ways; by admission, as provided for the first class; by owning and possessing real estate for one year, of the value of \$100, free of incumbrance; or, by six years' residence, without becoming chargeable or neglecting to pay taxes.

John Dunn, the father, came to Ellington as a member of the first class; neither the inhabitants, by vote, nor the civil authority and selectmen, by consent, conferred a settlement upon him. But we are asked to say that naturalization, followed by six years of continuous self-

supporting and taxpaying residence there, is the legal equivalent of the statutory requisites for that class, and of its own force gave him a settlement there; that he went into Vernon as a person having a settlement in Ellington, a member of the third class, and consequently by his six years of continuous self-supporting and taxpaying residence in Vernon, there acquired a new settlement.

In *Bridgeport v. Trumbull*, 37 Conn., 486, and in *New Hartford v. Canaan*, 52 Conn., 158, this court approached the question whether, to the two statutory methods of acquiring a settlement, it would add a third, a judicial one; and in both cases refrained from an affirmative answer; and we refrain now, a decision not being necessary to the determination of this case.

But by his naturalization, John Dunn became a citizen of the United States and of this State, and by his subsequent residence in Ellington he became an inhabitant of that Town, and as such, went thence to Vernon as a member of the third class, and there had a continuous, self-supporting and taxpaying residence during six years; thus complying with the statutory requirements for a settlement, and this he imparted to his daughter, the pauper; and with her it remains.

The Superior Court is advised to render judgment for the defendant.

In this opinion the other Judges concurred.

Walsingham LEE'S APPEAL from Probate.

If A renders service for B, under an agreement which leaves to B the right to determine the amount of compensation A shall receive after the service shall be rendered and the manner of payment, and B, acting in good faith, determines the compensation and mode of payment, A is bound by the determination, and payment of the amount determined by B extinguishes A's claim. (This doctrine applied in the case of a son seeking compensation from his father's estate, for services rendered the testator.)

(Filed February 12, 1886.)

APPEAL by Eunice Lee, executrix of the estate of Mortimer F. Lee, deceased, from a judgment of the Superior Court in a cause appealed to that court from the Court of Probate. *Reversed.*

Walsingham Lee, son of Mortimer F. Lee, deceased, presented a claim for services, etc., amounting to \$3,718.18, against his father's estate, to the commissioners on the estate, who reported to the probate court an allowance of \$500 only in his favor. Walsingham Lee thereupon appealed to the Superior Court where there was a jury trial, resulting in a verdict in his favor for \$2,180.06. From the judgment on this verdict the executrix, the widow of said Mortimer F. Lee, now appeals.

The question presented by the present appeal is stated in the opinion.

Mr. F. L. Hungerford, for the present appellant, Eunice Lee, exrx.:

We are not sure, upon the whole case as presented, that we might not have fairly asked the court to say to the jury, that there was sufficient evidence to warrant their finding that the services were rendered voluntarily, or, at least, with such an expectation of being rewarded by a legacy as would bar the son from recovery in the action at law. *Osborn v. Gov. of Guy's Hoep.*, 2 Strange, 728.

Our request, however, as made, was simply to the effect that if the son had rendered his services intending to leave it to his father's judgment and to his sense of justice, as to how and to what extent he should be rewarded, he was bound by the exercise of that judgment, and this would seem to be a self-evident proposition. It was only saying that the law would carry into effect the agreement made by the parties themselves, and would not substitute for it any other agreement. *Zaleski v. Clark*, 44 Conn., 228.

The following cases, while not deciding the precise question raised by this appeal, have a bearing upon it, and may aid in its decision. *Martin v. Wright's Admr.*, 18 Wend., 460; *Patterson v. Patterson*, 18 Johns., 877; *Eaton v. Benton*, 2 Hill., 575; *Jacobson v. Exrs. of La Grange*, 8 Johns., 198.

Messrs. Newell & Jennings, and Hyde, Gross & Hyde, for Walsingham Lee, appellee in error:

The request for particular instructions to the jury must be taken as one and entire. If the whole is not correct, the judge need not regard it at all, for it is not his duty to dissect it and select what is right and reject what is wrong. *Malborough v. Sisson*, 23 Conn., 54; *Ind. & St. L. R. R. Co. v. Horst*, 98 U. S., 291 (bk. 23. L. ed., 898), and cases cited.

The rule as to when compensation for services rendered shall be recovered from estate of testator and when not is fully considered and all the cases cited in *Martin v. Wright's Admr.*, 18 Wend., 463.

And we find the same principle stated in Schouler, Dom. Rel., 872: "An implied contract for payment for such services, is proven by facts and circumstances which show that both parties, at the time the services were performed, contemplated or intended pecuniary recompense." And numerous cases are cited to support this view.

In Chit. Cont., 11th ed. 798, we find that the mere fact of services for testator having been performed in the expectation of receiving a legacy, will not take away the plaintiff's right of action.

Where services are rendered by one person to another in pursuance of a mutual understanding between the parties that compensation for them shall be made by will, and the party receiving the services dies without making the expected compensation, the party rendering the services is entitled to compensation out of the estate of the deceased, as a creditor, for the value of the services; and in case there is an understanding that compensation shall be made, it is not material whether the failure to make it arose from accident or design. *Robinson v. Raynor*, 28 N. Y., 494.

It is the well settled rule in New Jersey that action by a son for services rendered the father, after he has attained his majority, can be main-

tained when compensation was to be made at death of father by will or otherwise. *Updike v. Ten Broeck*, 32 N. J. L., 105; *Smith v. Smith*, 4 Dutch., 216; 2 *Zabrisckie*, 423; and see, *Guild v. Guild*, 15 Pick., 181.

Where the defendant, at the request of the plaintiff, performed the services mentioned, the services being performed by the defendant under an expectation and hope of reward and being worth the sum charged; held, that these facts clearly embraced all the essential elements of a legal obligation. *Clark v. Clark*, 46 Conn., 588.

An agreement whereby one undertakes to compensate another for services rendered him, out of his estate after his death by provision by will or otherwise, is binding on the estate of persons deceased, and the Statute of Limitations will not run until after the death of the person executing. *Sword v. Keith*, 81 Mich., 247.

Where the plaintiff remained with and labored for his father for several years after attaining his majority, receiving board and clothes and other slight remuneration; held, he might recover, providing he could show that it was the understanding of the parties that he should receive compensation for his services. *Fisher v. Fisher*, 5 Wis., 474.

The cases of parent and child, of uncle and nephew, and in general of near relatives come under the same rule. 1 Pars. Cont., 531, and note e, 6th ed. 2 Pars., 4th ed. 46, note k.

Where a young man, at the request of his uncle, went to live with him, and the uncle promised to treat him as his own child, and he lived with and worked for him above eleven years, and the uncle said that his nephew should be one of his heirs, etc., but died without devising anything to him, it was held that an action on an implied *assumpsit* would lie; that whether the services performed were rendered with a view to any other compensation than such as the testator should voluntarily make by his last will and testament was merely a question of fact for the jury; that the services having been performed for the testator with his knowledge and approbation, the law implies a promise to pay unless it can be shown that payment was never intended. *Jacobson v. La Grange*, 3 Johns., 199; and see, *Patterson v. Patterson*, 13 Johns., 379.

Where the father made an oral contract with his son, that in consideration of his living with him and caring for him and his wife during their lives, he would convey to the son his homestead tract of land, held, that the son had an equitable lien on the land for his services after his father's death. *Speers v. Sewell*, 4 Bush, 239; and see, *Gray v. James*, 4 Desauss., 185.

Where a parent lives with child, or child with parent, there is a presumption that no compensation is intended, but this may be rebutted by an express contract or by circumstances. This is the well settled rule in Indiana. *Smith v. Denman*, 43 Ind., 65, 71; see also: *House v. House*, 6 Ind., 60; *Adams v. Adams*, 23 Ind., 50; *Candle v. Ryman*, 26 Ind., 207; *King v. Kelly*, 28 Ind., 89; *Daubenspeck v. Powers*, 32 Ind., 42; *Hays v. McConnell*, 42 Ind., 285.

When a son remains with and performs services for his father after reaching his majority, a promise to pay for such services will be implied if the circumstances show that it must

have been the expectation of both parties that the son should receive a compensation. *Friermuth v. Friermuth*, 46 Cal., 45; *Watson v. Watson*, 1 Houst., 209; and see, *Fish v. Peckham*, 16 Vt., 157.

Park, Ch. J., delivered the opinion of the court:

On the trial of this case in the court below the plaintiff offered evidence to prove, and claimed that he had proved, that he lived at home with his father and mother till he became of age, when he desired some understanding regarding the wages he would receive on remaining at home; that his father told him that he was working for him, the son's, interest as well as his own; that it would be better for him to remain at home, and when he, the father died, the son would have everything; that relying upon this assurance he remained at home during most of the time for the eight years next following, laboring for his father upon his farm and assisting him about his business; that his father never made him any compensation in his lifetime and left him nothing of value by his will, and, therefore, his estate was indebted to him as appears by his bill of particulars.

On the other hand, the defendant offered evidence to prove, and claimed she had proved that the father was a man of moderate means, not worth more than \$5,000, when his son became of age, and at the time of his decease; that he was a hard working, industrious man; that both he and his wife were attached to the plaintiff as an only child; that the wife was wholly without means of support; that the son remained at home after his majority under an expectation that his father would make provision for him by will or otherwise; that there was no express agreement as to what such provision should be or how it should be made; that there was no expectation on the part of the son that his father would leave him his entire estate to the exclusion of his mother; that the son had confidence in the integrity and justice of his father, and was willing to leave it for him to do what was right to compensate him by his will or otherwise for his labor and services, and to reimburse him for the money expended and loaned as stated in the plaintiff's bill; that after the son became of age he worked in a factory for a considerable time for his own benefit, and also engaged in private business on his own account; that he went to school at the expense of his father, and finally married in 1878, and left home and from that time ceased to perform any services for his father; that, down to the time of his marriage, except when away at school, he lived in his father's family as a member of it without paying board and that the father just before his death gave him a deed of land worth about \$300, and also made valuable provision for him in his will.

Upon the case thus presented, the defendant asked the court to charge the jury as follows: "That if the son remained at home and performed services and expended money under a general expectation that his father would make it right by will or otherwise, when he died, and left to his father's judgment what would be right, and what provision should be made and how it should be made, and the father did

in fact make provision for his son, by will or otherwise, then the son was bound by the provision thus made, whether satisfactory or not, and could not recover in this appeal.

The court did not so charge, but charged as follows: "If it was understood between them that the son was to render those services and to receive compensation therefor, and there was also an understanding between them that said compensation was to be made him by provision in his father's will, or without it, by which he was to get this estate, and if you find that the father did make a will and paid him by the terms of the will, in the way in which it was understood by the son, at least, that he should be paid, then there can be no recovery in this case."

We think the court below erred in not charging the jury as requested by the defendant.

The request was adapted to the facts which the defendant had offered evidence to prove and claimed she had proved; and had these facts been submitted to the jury and the jury found them true, we think the law is so that the plaintiff could not recover, and the jury should have been so instructed.

If A renders service for B under an agreement which leaves to B the right to determine the amount of compensation A shall receive after the service shall be rendered and how it shall be paid; and B acting in good faith so determines the compensation and mode of payment, A is as much bound by the determination as he would be if there had been an express agreement between the parties that he should receive that compensation in that mode of payment, before the service was rendered; and if that payment should be made A's claim would be extinguished.

This is in substance the defendant's case, which she asked the court to present to the jury.

The plaintiff claims that the court substantially complied with the request.

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We do not so understand the charge. The charge applies to a contract, the terms of which in regard to the son's compensation were understood between the father and son, and comprehended the father's estate which should be conveyed to the son by his father's will or in some other manner.

The language is as follows: "And there was also an understanding between them (the father and son) that such compensation was to be made him (the son) by provision in his father's will or without it, by which he (the son) was to get this estate, and if you further find that the father did make a will, and paid him (the son) by the terms of the will in the way it was understood," etc.

Hence, it is obvious that there is a substantial difference between the request and the charge of the court.

In the request, the compensation of the son and the mode of payment of the same, are left wholly to the father to determine. In the charge they are both agreed upon between the father and son; surely there is an important distinction.

It is further claimed that the request is indefinite, uncertain and ambiguous, inasmuch as it states: "If the son performed services, etc., under a general expectation that his father would make it right," etc., and therefore, the defendant was not entitled to the charge requested.

It seems to us clear what was intended by the expression "general expectation." It was an expectation that arose from no express understanding between the father and son in relation to the son's compensation for his services, but grew out of all the circumstances of the case, and from no one in particular.

We think this objection is not well taken.

There is error in the judgment appealed from and a new trial is ordered.

In this opinion the other Judges concurred.

PREMIER COURT OF VERMONT.

W. A. BRIDGMAN *Admr., et al.*,
v.
JOHNSBURY & Lake Champlain R. R.
CO.

Bill in equity to recover land
by foreclosure of an equitable
land taken by a railroad for rail-
road purposes, a former company.
took the land and to whose rights
said company succeeded, is not
a necessary party.

rights and interest of B., one of
owners of the land when taken, have
been conveyed to P., who is also now
the owner of the right to
compensation; held, that B. is not a
necessary party, but that P. is.

held, that the administrator of
the estate of one of the former owners
and, who deceased without issue,
owing debts, and whose estate
has been administered upon, is not
a necessary party, all the heirs of such
person being parties; but if re-
quested the court would allow an ad-
ministrator to be appointed and come
into the case.

owner of land taken by a rail-
road for railroad purposes has a lien
on the land enforceable in equity for his
share; and the lien is not affected
by the bringing of a suit against a
company which took the land,
obtaining a judgment under the
—R. L., § 3371; and such judg-
ment is final as to the amount of dam-
ages recovered in a proceeding to
enforce the lien against a subsequent
company which succeeded to the rights
of the first company.

(Decided January 23, 1886.)

EQUITY to foreclose a lien on land
taken by a railroad company. Heard on
December Term, 1884, Caledonia
County. Bill dismissed. *Reversed.*

Orators were Daniel W. A. Bridgman,
administrator of Harriet W. Bridgman's estate,
Daniel W. A. Bridgman, Helen A. Holton, Ina
M. Bridgman, Ida E. Bridgman and Luke P.
Poland. The bill alleged, in substance, that
Daniel W. A. Bridgman, deceased, was at the
time of his death the owner of certain real estate
in South Hardwick; that he died intestate, leav-
ing no heirs; that he died intestate, leav-
ing no heirs to his estate:

Harriet W. Bridgman, who died on
the first of January, 1884, and upon
the estate of Daniel W. A. Bridgman was duly
appointed administrator; Frederick T. Bridg-
man, Helen A. Holton, Hattie W. Bridgman,
Ida E. Bridgman and D. W. A. Bridgman;
that the aforesaid heirs of said
Harriet W. Bridgman have been and are now the
owners of the aforesaid real estate, with
the exception of said Frederick T. Bridgman,
whose interest has been sold, conveyed and as-
signed to Luke P. Poland; that Hattie W.
Bridgman, deceased on the first day of Janu-

ary, 1880; that said Hattie died without issue
and upon whose estate no administration has
ever been had, she not being indebted to any
one at the time of her decease; that said Har-
riet W. Bridgman, Frederick T. Bridgman,
Daniel W. A. Bridgman, Ina M. Bridgman and
Ida E. Bridgman were her only heirs, and that
they as such became the sole owners of the es-
tate of the said Hattie; that said real estate con-
sisted of a valuable farm in the Village of
South Hardwick, Vt., with a pasture, meadow
of about thirty acres, a building lot on one of
the main streets of said village, building, etc.;
that a certain railroad corporation then having
a legal existence and known as the Lamoille
Valley Railroad Company, about the year 1871
laid out and built a railroad through the said
village; that in the construction of said rail-
road, said corporation, without right, title, per-
mission or license from any of the said heirs,
entered upon the said real estate and built a
railroad across said land; that ever since, the
said corporation or its successors have wrong-
fully occupied said land and kept the said heirs
from the use thereof; that said corporation con-
tinued to run and manage said railroad line till
about December 1, 1877, when said corpora-
tion became and was insolvent and unable to
pay its debts, and receivers were duly appointed;
that said receivers managed said railroad until
about July, 1880; that on the 2d of May, 1876
the said heirs commenced their action at law
against said corporation to recover their dam-
ages for the taking of said land; that said suit
was duly prosecuted, and such proceedings
were had thereon at the June Term, 1877, of
the Caledonia County Court. Judgment was
rendered against said corporation and the dam-
ages were assessed at the sum of \$908.60; that
said judgment has not been paid; that the said
Lamoille Valley Railroad Company was merged
with some other corporations about the first of
July, 1880, into a new corporation under the
name of the St. Johnsbury & Lake Champlain
R. R. Co., the defendant; that neither corpo-
ration ever had any right or title to said real es-
tate and that they have been occupying the
same in their own wrong and that neither have
ever paid or caused to be paid the said judg-
ment or in any way paid or offered to pay any
remuneration for said land; and that the same
was damaged at the time of the taking afore-
said to the amount of more than \$1,000. It
was alleged that the orators "Knew the said
Lamoille Valley Railroad was building its said
road over their said land, and that they took
no steps to prevent it from building its said rail-
road; and they knew that the defendant was
running its cars over said road on their said
land, and they have never forbidden them or
either of them so doing, or have never taken
any steps to prevent them from so doing, but
they have relied upon the lien upon the said
land for said damages."

The prayer was that the defendant be ordered
to pay the amount of said judgment as their
land damages, and in default thereof, that the
defendant be foreclosed from all right in said
land.

Mr. Harry Blodgett for the orators:

The orators had an equitable lien on the
land, which a court of chancery will enforce.
Kittell v. R. R. Co., 56 Vt., 96; *Kendall v. R.*

R. Cos., 55 Vt., 438; *Adams v. R. R. Cos.* 57 Vt., 240.

The judgment rendered against the Lamoille Valley R. R. Co., does not affect the orator's lien. *Root v. Lord*, 28 Vt., 508; *Buffalo, N. Y. & Phila. R. R. Co. v. Harvey*, 18 Reporter, 784; *Matthews v. Lucia*, 55 Vt., 808; *Child v. Allen*, 38 Vt., 476; *Williams v. R. R. Co.*, 60 Miss., 689.

The lien is enforceable against any party who claims under the party that made the entry. *Pierce, R. R.* 167; *Gilman v. R. R. Co.*, 40 Wis., 653; *W. P. R. R. Co. v. Johnston*, 59 Pa. St., 290; *Drury v. Midland R. R. Co.*, 127 Mass., 571.

The judgment rendered against the Lamoille V. R. R. Co. is conclusive as to the amount against the defendant. *Kittell v. R. R. Co.* *supra*; *Pfeifer v. S. & F. R. R. Co.*, 18 Wis., 155; *N. Y. & G. L. R. R. Co. v. Stanley*, 84 N. J. Eq., 55; *Gilman v. R. R. Co.*, 37 Wis., 817.

Messrs. Bates & May, for the defendant: The L. V. R. R. Co. should have been made defendant. That company is yet in existence; and the question of interest on the damages affects it. *Adams v. R. R. Cos.*, 57 Vt., 240.

Judge Poland is not properly joined; and the administrator of Hattie should have been made a party. *Eureka M. Co. v. Win. Mfg. Co.*, 47 Vt., 430; *Moore v. Boston*, 80 Cush., 274; *Hotchkiss v. R. R. Co.*, 36 Barb., 600.

The judgment against the L. V. R. R. Co., merged the claim for damages. *Langdon v. Paul*, 20 Vt., 220; *Palmer v. Preston*, 45 Vt., 154; *Green v. Starr*, 52 Vt., 426; *Conway v. Seamons*, 55 Vt., 8; *Freem. Judg.*, § 217; *Harrie v. Alcock*, 10 Gill & J., 226; *Pike v. McDonald*, 32 Me., 418; *Winston v. Westfeldt*, 22 Ala., 760.

The defendant had no existence when the judgment was rendered. The old company is still liable; hence, the defendant is not. *Quimby v. Hazen*, 54 Vt., 132; *Freem. Judg.*, § 162, 249; *Knapp v. McAuley*, 59 Vt., 275.

The Statute of Limitations is a bar. 72 Me., 95; *Pierce, R. R.*, 179, 220; see, *Buller, N. P.*, p. 232; *Adams v. Butts*, 9 Conn., 79; *McConnel v. Smith*, 28 Ill., 611; 18 Ill., 46; 85 Pa. St., 78.

An agreement by one company, to furnish culverts, cattle passes, depots, at certain points, does not bind its successor. *Pierce, R. R.* 140; *Wade v. R. R. Co.*, 55 Vt., 207.

Veasey, J., delivered the opinion of the court:

This is an appeal in chancery and stands on demurrer to the bill of complaint. Question is first made as to the parties.

I. The Lamoille Valley R. R. Co. is not a necessary party. Under the allegations of the bill the defendant Company is the successor of the right of the Lamoille Company in the railroad in question in all respects, and is now in possession of the land of the orators which was taken by the Lamoille Company when the road was built. The orators are seeking no personal decree or remedy of any kind against the Lamoille Company. They are only seeking to enforce their lien, by foreclosure or injunction, for their land damages against the railroad company now owning the road and occupying the orator's land for railroad purposes. *Miner v.*

Smith, 53 Vt., 551; *Soule v. Albee*, 31 Vt., 143.

II. By the averments of the bill the whole right and interest of Frederick T. Bridgman in the land in question, who was one of the owners thereof when it was taken for railroad purposes, have been regularly and duly conveyed to Judge Poland, and he is now the owner thereof and holds all the legal as well as equitable title, and Frederick T. has no title or interest. This removes all necessity of making Frederick T. a party, and constitutes Judge Poland a necessary party. The former has no interest to be affected by the decree. The right of the latter will be affected by it. He took not only a general conveyance of the land, but, by express stipulation, the right to the compensation for the taking of this land by the railroad company. This entitles the purchaser. *Pierce, R. R.*, 185.

III. The bill alleges in substance that Harriet W. Bridgman and her several children named, she being a widow, were the only owners of the farm through which the railroad extended, and from which the land in question was taken, but since it was taken, one of the children, viz.: Hattie W. has deceased without issue and upon whose estate no administration was ever had, she not being indebted to anyone at the time of her decease; and states who were her heirs, and that they as such heirs became the sole owners of her estate including her interest in the land in question. This being taken to be true under the demurrer, it was not necessary that an administrator upon her estate should be appointed and become a party to this suit. The demurrer admits a state of facts that precludes the possibility that the estate of Hattie W., deceased, can ever have an interest in this claim adverse to her heirs or for anybody's benefit except that of the heirs who are all orators. But it is claimed that the right to compensation for the land taken survives to the executor or administrator and must therefore be enforced by him. A suit at law would probably have to be in his name. But we think the averments of this bill bring the case within the ruling in *Babbitt v. Bowen*, 32 Vt., 437, where it was held that the heirs may, without the appointment of an administrator or any proceedings by the probate court in the settlement of a deceased person's estate, pay the debt and divide the surplus among themselves, and that by such division the interest in personal effects, as in a note and mortgage, passes to the heirs respectively as agreed among themselves. The grounds upon which that decision is put are fully stated by *Judge Aldis* and need not be repeated. It was there held that the heir holding the note and mortgage under such division could maintain a petition to foreclose. The lien in this case upon the land taken is in the nature of an equitable mortgage. This became the property of the heirs upon the decease of Hattie W. subject only to the demands of her estate by reason of debts, but none existed.

If those heirs could by agreement that one should have a mortgage debt thereby invest that one with title sufficient to maintain suit of foreclosure, then it would seem that together without transfer to anyone they could in like manner maintain such suit. An intestate's property passes to the heirs generally upon the death

of the ancestor by operation of law, not by force of a decree of distribution. The division among the heirs is established by the decree, or may be by agreement. *Babbitt v. Bowen, supra.*

Under the allegations of this bill there is and can be no occasion whatever for the appointment of an administrator of Hattie W. except to represent the orators in this suit as to that part which was the interest of Hattie W., but which is now the property of the orators. The court could now and would, if necessary, allow an administrator to be appointed and come in. For the reasons stated, this circumlocution is not necessary in this equity proceeding.

IV. The substantial point of difference in fact between this case, on the merits, and that of *Adams v. R. R. Co.*, 57 Vt., 240, is that in that case by no previous agreement or judicial proceeding had the amount of the land damages been determined; whereas, in this case the same was ascertained and adjudged in a suit under § 3371, R. L., by the land owner against the former railroad company, which wrongfully took the land, while occupying and using it for railroad purposes. That suit was brought and determined before the defendant Company was organized and had become the owner and occupant of said railroad. The defendant now claims that the effect of that suit and judgment, although never satisfied, was to destroy the land owner's lien upon the land taken for "its equivalent in money," which the Constitution of the State secured. Where land is taken for railroad purposes and the parties do not agree as to price, the statute provides first, R. L., § 3359, that the railroad company may have the damages appraised by commissioners. If the company neglect to do this for two years, then the statute further provides that the land owner may bring suit for his damages within six years after entry. R. L., § 3371.

We do not think these provisions were designed to have any effect upon the owner's lien on his land, or that proceedings thereunder should be held to affect such lien. It would be contrary to analogy in case of mortgage security whether real or personal. *Putnam v. Russell*, 17 Vt., 54; *Root v. Lord*, 23 Vt., 568; 2 Jones, Mort., § 936.

It is further claimed that the damages adjudged in the suit against the former company should not be adopted in this proceeding. The adjudication as to amount was pursuant to the statute and regular. The lien for a money equivalent existed under the Constitution of the State. The statute provided two methods for fixing the amounts; one available to the railroad company, the other to the land owner upon failure of the company to proceed. If regularly determined by either method we think it was the design of the statute that such determination should be permanent and controlling as against any party subject to the operation of the lien. Such is the holding in other jurisdictions. *Gilman v. S. & F. R. R. Co.*, 40 Wis., 653; *Western Penn. R. R. Co. v. Johnston*, 59 Pa. St., 290; *Drury v. Midland R. R. Co.*, 127 Mass., 571.

These decisions are not and could not be put on the ground that the subsequent owner of the railroad was bound as a party or privy to the former judgment. The statute having provided a judicial proceeding to determine the amount of the

land damages, when the land owner has once resorted to such proceeding and carried it to determination, it should be final as to a subsequent owner, and we think such was the intention of the legislative enactment. The statute supplemented the Constitution. The latter provided the security, and the former supplied the provision for finding the extent of damages. A subsequent owner of the railroad taking and using the same land should take it with the existing right of the land owner as judicially established under the statute. No claim is made for interest prior to the taking by the defendant company.

Pro forma decree reversed and cause remanded, with mandate pursuant to these views.

CORLIS & Way

v.

HILAS GROW.

Defendant was indebted to the plaintiffs, as partners, and owed an individual debt, \$9.44, to one of the plaintiffs, W., who, having both accounts in his possession, "asked the defendant for some money on the accounts;" and thereupon the defendant paid \$15, but gave no direction as to the application of the payment. When W. spoke to the defendant about the firm account, he always insisted that he would not pay it; but it did not appear that he denied his liability at the time of the payment. W. applied the excess, \$5.56, on the account with the firm about the time of the commencement of this suit. **Held, that the application was properly made;** that the law would imply from the part payment, a promise to pay the balance; and that it was incumbent on the defendant to prove that he denied his liability at the time he paid the money.

(Decided January 15, 1886.)

HEARD on a referee's report, December Term 1883. Judgment for the plaintiffs. *Affirmed.*

It was found, that the plaintiffs, from May, 1871, to March, 1872, were merchants and partners; that during this time the debt in question was contracted; that the payment was made January 17, 1879; that the writ in this suit was dated January 1, 1881; that when the plaintiffs' firm was dissolved, the said Way took the books and accounts into his hands for the purpose of collecting the debts due, and to pay the liabilities.

The referee found in part: "It appeared that the defendant had paid \$5 to the plaintiff, George M. Way, on three different occasions; and there was a conflict of testimony whether this was paid to be applied on the demands Way held against the defendant, or loaned by the defendant to Way. The plaintiffs' books showed that enough of said \$15 had been applied on said account of George Way to pay it, and the balance, amounting to said sum of \$5.56, was applied on the plaintiffs' accounts."

"No credit was given defendant on plaintiffs' books until about the time this suit was brought. Whether it was put on the book just before or just after this suit was brought, did not definitely appear."

The other facts are sufficiently stated in the opinion.

Mr. John H. Watson, for defendant:

The burden is on the plaintiffs to show that the statute bar is removed. *Wood, Lim.*, § 116; *Briggs v. Roberts*, 85 N. C., 151.

The payment, in order to remove the bar, must be made on account of the debt for which the action is brought. *Wood, Lim.*, § 97.

The question is: did the debtor intend to make a part payment on this particular debt? *Pond v. Williams*, 1 Gray, 680; *Nash v. Hodgson*, 6 DeG. M. & G., 474; *Wainman v. Kynman*, 1 Exch., 118; *Tippets v. Heane*, 1 C. M. & R., 252; *Wood, Lim.*, § 109; *McIntyre v. Corss*, 18 Vt., 451; *Phelps v. Stewart*, 12 Vt., 236; *Bouker v. Harris*, 30 Vt., 424.

Way had no right to apply the \$5.56 on the outlawed account. *Ayer v. Hawkins*, 19 Vt., 26; *Bancroft v. Dumas*, 21 Vt., 456; *Story, Eq.*, § 459; *Caldwell v. Wentworth*, 14 N. H., 431; *Rohan v. Hanson*, 11 Cush., 44.

The \$5.56 was not applied when it was paid. The plaintiffs have not shown that the application was made before suit was brought. This was necessary, if they could apply it all. *Robinson v. Doolittle*, 12 Vt., 248; *Pierce v. Knight*, 31 Id., 701; *Langdon v. Bowen*, 46 Id., 512; *Morgan v. Tarbell*, 28 Id., 498; *Ramsay v. Warner*, 97 Mass., 8.

No implication of new promise arises from an application made by law. *Wood, Lim.*, § 101; *Ramsay v. Warner*, *supra*.

Mr. J. K. Darling, for plaintiffs:

A part payment of an account barred by the statute, amounts to an admission that the account is unsettled, and removes the bar. *Hutchinson v. Pratt*, 2 Vt., 146; *Strong v. McConnel*, 5 Id., 338.

A promise to pay the residue will be implied from the payment, there being no protestation against further liability. *Ayer v. Hawkins*, 19 Vt., 26; *Goodwin v. Buzzell*, 35 Vt., 9.

Way had a right to make the application. *Chapman v. Goodrich*, 55 Vt., 354; *Davis v. Smith*, 48 Vt., 52; *Pierce v. Knight*, 31 Id., 701.

Royce, Ch. J., delivered the opinion of the court:

The only question presented by the report of the referee is as to the legal effect of the payment of the \$15 in July, 1879. At the time the payment was made, the plaintiff, Way, had an account of his own against the defendant amounting to \$9.44, and also the account of the plaintiffs' which this suit is brought to recover for, and asked the defendant for some money on the accounts. Thereupon the defendant paid Way \$15, which overpaid Way's account \$5.56, which sum was afterwards, and about the time this suit was brought, credited to the defendant by the plaintiffs.

No direction was given by the defendant as to the application of the money paid by him, and it does not appear that Way had any other accounts or claims at that time against the defendant than those above mentioned. It has long been settled in this State that part payment of a debt barred by the statute, if made without protestation against further liability, is a recognition and acknowledgment of such debt at the time of making the payment from which

a promise to pay the residue shall be implied, *Ayer v. Hawkins*, 19 Vt., 26.

And upon the neglect of the debtor to direct the application of a payment made by him, the right to make it generally devolves upon the creditor. In the absence of any specific directions as to the application of a payment, the intent of the party making it, as ascertained from the circumstances under which it was made, may control the right to make it. Here there is no fact found that tends to show that the debtor intended any different application than the one that was made; so Way had the right to apply the money to pay his own account, and what remained as part payment of the account of the plaintiffs.

Part payment is an implied acknowledgment of the existence of the claim upon which the payment is made, from which the law implies a promise to pay the balance, unless such implication is rebutted by something that transpired when the payment was made. It is found that the defendant, when spoken to by Way about the account of the plaintiffs, had always insisted that he would not pay it, and claimed that there was enough money in the plaintiff Corliss's hands to pay it. It is not found that those claims were made at the time of the payment, and it was incumbent on the defendant to show that they were, in order to rebut the implication arising from the payment. If any presumption is allowable, it would be that the defendant did not deny his liability at the time when he was paying the money.

The judgment is affirmed.

SAWYER & Manning

New York State CLOTHING CO.

A writ cannot be amended so as to substitute a partnership in place of a corporation, as defendant.

(Decided January 21, 1886.)

ASSUMPSIT. Plea, no such corporation. An amendment to the writ was allowed, and the cause continued to the September Term, 1885, Chittenden County, at which term judgment was rendered for the plaintiff. *Reversed.*

The action was brought against "The New York State Clothing Company, a Corporation created and existing under and by virtue of the laws of the State of New York," etc. The amended writ declared against "Henry W. Cane, Wm. Y. McCaffrey * * * three partners, under the style of The New York State Clothing Company."

Mr. W. L. Burnap, for plaintiff.

Messrs. Whittemore & Wheeler and E. R. Hard, for defendant.

Rowell, J., delivered the opinion of the court: As there was no such Corporation as The New York State Clothing Company, the suit was originally against nobody. *Halbert v. Soule*, 57 Vt., 358. Hence, delivering a copy of the writ to Cane, the supposed treasurer of such a corporation, brought nobody into court; and there being originally no defendant, it was not competent to make one by amendment.

Judgment reversed and cause dismissed.

SUPREME COURT OF MASSACHUSETTS.

William G. BASSETT, Judge of Probate,

v.

Sophronia GRANGER *et al.*, Admrs.

Where trustees under a will have rendered an account which has been allowed, charging themselves with moneys received from the estate, the account is conclusive between the *cestui que trust* and the trustees. Thus held, in a case where the executor of the estate was also one of the trustees.

(Decided October 28, 1885.)

ON defendants' exceptions. *Overruled.*

Action against the administrators of Lorenzo N. Granger upon a bond given to the Judge of Probate, executed by John W. Smith and George C. Smith as principals, and Granger as one of the sureties, the condition being that the principals should faithfully perform their duties as trustees under the will of Cotton Smith. In March, 1879, the trustees having been removed, John C. Hammond was appointed trustee in their stead, and demanded of them the trust fund in their hands, which was refused. Hammond thereupon brought this action, in the name of the Probate Judge, to prove his claim under the bond, against the estate of Granger.

Judgment was rendered for the penal sum of the bond, with execution for the amount which should be found due on reference to an assessor. (See, 136 Mass., 174). The questions now under review, arise upon the proceeding to ascertain that amount.

Mr. D. W. Bond, for defendants.

Mr. J. C. Hammond, for plaintiff.

Morton, Ch. J., delivered the opinion of the court:

This is an action on a probate bond. After the decision in this case, reported in 136 Mass., 174, the case was referred to an assessor to ascertain the amount for which the execution ought to issue. The assessor has found that the trustees under the fourth clause of the will of Cotton Smith have misappropriated a large part of the trust fund and of the income thereof, which, with interest to April 18, 1885, amounted to \$12,836.77; and that execution ought to issue for that sum. The defendants contend that there should be deducted from the amount found due by the assessor the sum of \$6,236.53.

To understand this claim it is necessary to refer to the will and to some of the facts which appeared before the assessor. The will made several specific devises and bequests and in the fourth clause gives to George C. Smith and John W. Smith the sum of \$10,500 to be held upon certain trusts therein defined for the benefit of children and grandchildren of the testator. The tenth clause gives to George C. Smith and John W. Smith "all the rest, residue and remainder of my estate, both real and personal, which may remain after paying all previous bequests and legacies" upon certain trusts therein named, different from those created by

the fourth clause. The eleventh and last clause appoints George C. Smith executor. The will creates two independent trusts. The trust under the fourth clause must be established by the payment by the executor of the sum of \$10,500 before the rest and residue which is to form the body of the trust under the tenth clause can be ascertained. The will was proved on August 7, 1860.

The executor rendered a first and second account, both of which were approved on July 2, 1867, in which he credited himself with having paid to the trustees under the fourth clause the trust fund of \$10,500. The said trustees rendered an account, allowed on July 24, 1871, in which they charged themselves with \$10,500 received as the body of the trust, and with yearly interest thereon for nine years, and credited themselves with the payment of such interest to the *cestuis que trust*. We think this account is conclusive, as between the *cestuis que trust* and the trustees, and estops the trustees from denying that they have received the trust fund. This would be clear if the trustees under each clause and the executor had been different persons. But the defendants contend that the rule does not apply in this case, because the second account of the executor shows that there was a balance due him of \$6,236.53; that is, that, in order to establish this trust fund, he had paid, to that amount, more than he had received from the estate. Their argument is that the two clauses of the will are to be regarded as creating one trust, to be administered by the same trustees; that the executor has a claim against the estate which he ought to be entitled to enforce against the residue devised in trust by the tenth clause, and that if the sureties are obliged to pay the amount found by the assessor, the result will be that the trust estate is actually increased by the amount due the executor.

If all the facts assumed in the argument were true, it would be inequitable for the sureties of the former trustees to be compelled to pay this amount.

If there is a balance due the executor which he can enforce out of the residue, to the diminution of the *corpus* of the trust fund held under the tenth clause, it would seem to be just that in some form of remedy the trustees should be required to transfer to the fund under the fourth clause the sum due the executor, and thus reduce the amount which the sureties upon the bond of the trustees should reimburse to the trust estate; but, even then, it is difficult to see how all the equities between the parties could be adjusted in this action, which is an action at law upon the bond to which the executor, as such, is not a party. But the difficulty of the defendants' argument is, that it has no foundation in the facts proved.

It appears that when the executor filed his second account in July, 1867, there was a balance due him of \$6,236.53. This was not a final account. The estate was unsettled and he has continued to act as executor to this day. If there is a balance now due him, it is susceptible of proof.

Upon the facts as they stand, the case is that the trustees have appropriated to their own use the trust funds to the amount found by the assessor, and they show no reason why in equity

and good conscience they should not repay this amount. The result is that execution should issue for the amount found due by the assessor, with the interest to the date of the execution.
Exceptions overruled.

C. Allen and Gardner, JJ., absent.

Anthony KING
v.
Michael MURPHY.

1. Where a deed reserves a designated strip of land "for an open passage way to be used in common by grantor and grantee and their heirs and assigns forever," and the description in the deed covers the strip, the reservation does not have the effect of excepting the strip from the land conveyed; it is merely a reservation of a right of way.
2. Where the owner of the dominant estate closes his access to a way over adjoining private premises, with the intention of abandoning the way, such act operates as a present abandonment of the easement, which thereby ceases to be appurtenant to the estate and does not pass to a subsequent grantee of the estate under a deed which does not mention such way.

(Worcester—Decided October 23, 1885.)

ON defendant's exceptions. *Sustained.*

The facts are stated in the opinion.

Mr. W. S. B. Hopkins, for defendant.
Messrs. F. W. Blackmar and E. H. Vaughan, for plaintiff.

Morton, Ch. J., delivered the opinion of the court:

It is true as a general rule, that an interest in real estate cannot be conveyed, except by deed; but it is well settled that an owner of a right of way or other easement may, without deed, abandon his right so as to relieve the servient estate of the incumbrance. *Dyer v. Sanford*, 9 Met., 395. Mere non-user, even for twenty years, will not conclusively show an abandonment of a right of way; but when the owner of the dominant estate, to which a right of way over a servient estate is appurtenant, does some acts, inconsistent with the continued existence of the way, with the intention to abandon and extinguish his easement, it operates as a present abandonment, and it is a question for the jury to determine whether such intention existed.

In *Pope v. Devereux*, 5 Gray, 409, it was held that evidence of an executed oral agreement to abandon a way and substitute for it another way, was rightly admitted to show an abandonment.

In *Warshaw v. Randall*, 109 Mass., 586, it was held that testimony of the plaintiff's grantor, that more than twenty years previously, when he owned the easement, he orally relinquished to the defendant's grantor his right to the way and ceased to use it, was admissible upon the question of abandonment and of adverse possession by the defendant's grantor.

In *Jamaica Pond Aqueduct v. Chandler*, 121 Mass., 3, the plaintiff owned a private way, and a highway was laid out between the same termini which was equally convenient for the plaintiff. The court held that these facts, if accompanied with the fact of an entire non-user of the way by the plaintiff, would be strong but not conclusive evidence of an abandonment; and that the question of abandonment depended upon the intention of the plaintiff.

In the case at bar one Davis, being the owner of a large tract of land, sold a part of it to the defendant, reserving a strip of land on the westerly side of the lot conveyed, ten feet wide and fifty feet long "For an open passage way to be used in common by the said Davis and Murphy and their heirs and assigns forever." The description in the deed to the defendant covers the strip ten feet wide; and we agree with both counsel, that the clause of reservation cannot be construed as an exception of this strip, the fee being retained in Davis, but is merely a reservation to him of a right of way over the strip. If we assume that this easement was for the benefit of and was appurtenant to the adjoining lot retained by Davis and subsequently sold to the plaintiff, yet, while he remained the owner of the dominant estate, he could extinguish or abandon the easement, if he saw fit.

It appeared in evidence that the deed from Davis to the plaintiff contained no reference to the passage way in question; and that it did provide for another passage way which gave the grantee access to the rear of his lot. It also appeared that, before the deed to the plaintiff was made, the rear end of the passage way in question had been closed up by a substantial board fence, so that it no longer furnished access to the lot now owned by the plaintiff.

The defendant offered to show that Davis, while the owner, had said that he should relinquish this right of way when he sold the adjoining property, and that the fence was erected by him in order to abandon and extinguish the passage way. We think this evidence should have been admitted.

The facts, that the deed to the plaintiff provides another passage way and makes no mention of this and that Davis had in fact closed up this passage way giving access to his lot, are strong evidence of an abandonment of his right. If he closed up this way with the intention of abandoning it, this operated as a present abandonment, and it ceased to be a way appurtenant to the plaintiff's lot and did not pass to him under his deed.

Exceptions sustained.

Horace T. ROBBINS

v.
Anna E. ROBBINS.

To constitute connivance on the part of the libellant in a suit for divorce on the ground of adultery, it must appear that he either desired or intended or, at least, was willing that the libelee should commit adultery. Knowledge of the fact, acquired in procuring evidence against the libelee, is not, of itself, sufficient.

(Middlesex—Decided January 2, 1886.)

ON report from a single Justice of the Supreme Judicial Court. Decree for libellant, granting a divorce. *Affirmed.*

The facts found by the Justice on the question of connivance, and by him reported to the full bench with his findings of law thereon are as follows:

"On the day before the adultery was committed, the libellant, having begun to suspect his wife in connection with a man then lodging in his house, requested his son in Boston to telegraph to him to come to Boston the next day if he did not come to town in the morning; the next day the telegram arrived; the libellant informed the libelee of its arrival, that he must go to Boston and that he should probably not return that night; that if he did, he should not return until late; but, in pursuance of an interview with counsel, secretly made arrangements to be driven to his house about half past eight that evening. By reason of the libellant's necessary visits to Boston, and otherwise, frequent opportunities for adultery existed; but this particular one would not have done so except for the scheme as stated herein. The usual hour of going to bed was about nine; between half past eight and nine the libellant drove with a witness to his house, as he had arranged; arrived before the lights down stairs were put out and waited outside to see what happened; at about nine the lights down stairs were put out; shortly after, that in the libelee's room was extinguished, and from what was seen in the lodger's room the libellant was led to suppose that the libelee had entered it; he then at once entered the house, secretly, with the witness, went up stairs and found the libelee and above mentioned lodger in bed.

The foregoing conduct of the libellant constituted a scheme to detect the libelee if she was guilty, but there was no corrupt intent that adultery should be committed or any assent to or connivance at it, unless the foregoing conduct amounted to connivance as a matter of law, which I ruled it did not, and ordered a decree of divorce to be entered.

At the request of the libelee I report the case for the determination of the above question to the full court. The decree is to stand or the libel to be dismissed according to the decision of the court upon that point."

Mr. Charles Cowley, for libelee:

"The husband is expected, by law, to pay a due attention to the behavior of his wife and to give her the benefit of some superintendence, where she is placed in dangerous situations." *Forster v. Forster*, 1 Hag. Con. R., 146; *Shelford, Mar. & Div.*, 450; *State v. Craton*, 6 Ired. Law, 164.

In the case at bar, the libellant virtually caused the committal of the only offense proved, by willfully depriving the libelee of his protection when he saw her in a dangerous situation, and by purposely refraining from exercising "The authority of a master of a family, which has more actual influence than all civil authority put together." Paley's Moral Philosophy, book 3, ch. 1, par. 4.

In *Lovering v. Lovering*, 3 Hag., 86, the husband saw improper familiarities in his house between his wife and his apprentice and, instead of promptly eliminating the amorous apprentice, permitted him to remain in the

house. The adultery, for which he sued for a divorce, was committed long after his wife's flirtations with the apprentice, and with another man. But Lord Stowell denied *Lovering* a divorce, saying that it was "impossible to reconcile" his conduct in connection with the apprentice "with a due regard to his own honor."

Cane v. Cane, 39 N. J. Eq., 148, holds that a husband who sees his wife in a situation of temptation and does nothing to rescue her, and she yields, will be understood as having consented to her adultery.

In *Pierce v. Pierce*, 3 Pick., 299, this court said: "It would be a dangerous principle to establish, that a husband who has suspicions of the infidelity of his wife, shall be allowed to lay a train which may lead her to the commission of adultery."

In *Gipps v. Gipps*, 11 H. L. 1, conniving is defined to mean "not merely refusing to see an act of adultery, but also willfully abstaining from taking any step to prevent adulterous intercourse, which, from what passes before the husband's eyes, he must reasonably expect to occur." Lord Chancellor Westbury, p. 181, lays it down as a general principle "that a husband should have no divorce, if he has been guilty of any neglect or misconduct which has conduced to the adultery of his wife."

In *Rogers v. Rogers*, 3 Hag., 59, active corruption was held not to be necessary to constitute connivance; passive acquiescence being sufficient. See also, *Allen v. Allen*, 2 Swaby & T., 107; *Moorsom v. Moorsom*, 3 Hag., 87; *Glennie v. Glennie*, 8 Jurist, N. S., 1158; *Marris v. Marris*, 2 S. & T., 530; *Dillon v. Dillon*, 3 Curt., 86; *Myers v. Myers*, 41 Barb., 114; *Hedden v. Hedden*, 21 N. J. Eq., 61.

In *Michelson v. Michelson*, 3 Hag., 147, mere neglect was held to amount to connivance.

So in *Gilpin v. Gilpin*, Id., 150, where Sir William Wynne says: "If there has been such extreme negligence to the conduct of his wife, such an encouragement of acquaintance and familiar intimacy, as was likely to lead to the consequence that ensued, an adulterous intercourse, it would subject him deservedly to a refusal of the sentence he prayed for."

The principle here contended for has been recognized in the purest systems of morals: Case of Judah and Tamar, Genesis, XXXVIII., 13-26; Case of Glaucus, 4 Rawlinson's Herodotus, 390-392; Rule of Carneades, Cicero, De Finibus, lib. 2, n. 59; Christian Law of Divorce, Matthew, XVIII., 7; Scavini, Theologia, Moralis, Vol. 2, p. 500, citing Cajetan, Roncini, Tournely and Salmanticenses; Rule of the canon law and civil law: *Qui alios cum potest ab errore non revocat, se ipsum errore demonstrat*; Scavini, *ubi supra*, 493; Taylor's Rule of Conscience, p. 462, 611; Sanchez, Disputations, Libro X., disp. 5, No. 5, and dis. 12, No. 52.

Messrs. J. N. Marshall and M. L. Hamblet, for libellant:

Connivance is the corrupt consenting of a married party to the conduct in the other of which he complains. It cannot exist without corrupt intent. 2 Bish. Mar. & Div., §§ 5, 6 and 14.

Connivance is a fact to be proved. The burden is on the party setting it up. The testi-

mony must be strongly inculpatory, admitting of no dispute. If the combined attendant facts are equivocal, not necessarily showing a guilty intent to connive, whatever other error or weakness they indicate, they are insufficient, for such intent must be proved, not left to conjecture. *Phillips v. Phillips*, 1 Robt. Ec., 144, 163, 164; *Boulting v. Boulting*, 3 Swa. & Tr., 329; *Croft v. Croft*, 3 Hag. Ec., 810; *Turton v. Turton*, 3 Hag. Ec., 333, 351.

"Corrupt intention must be proved, to bar the husband, and of this there is no doubt whatever." *Phillips v. Phillips*, 4 Notes of Cas., 527.

The libelee set up connivance. The court found for the libelant on this issue. The finding of facts by the court is conclusive. *Sparhawk v. Sparhawk*, 120 Mass., 390; *Morrison v. Morrison*, 138 Mass., 310.

The conduct of the libelant could not as matter of law amount to connivance, when as matter of fact "There was no corrupt intent that adultery should be committed, or any assent to or connivance at it," on the part of the libelant, because there can be no connivance in law, unless there be corrupt intent in fact. *Phillips v. Phillips*, 10 Jur. part 1, p. 829; *Hoar v. Hoar*, 3 Hag. Ec., 140; *Rogers v. Rogers*, 3 Hag. Ec., 57.

The court finds that "The conduct of the libelant constituted a scheme to detect the libelee, if she was guilty." A man suspecting his wife of infidelity to his bed has a right to watch her with a witness and satisfy himself whether his suspicions are well founded or not, and, if she is guilty, to obtain proof of her guilt. He may even leave opportunities open for her, in order to obtain such proof. *Sanchez De Matrim*, Lib. X Disp. 12, No. 52; *Timmings v. Timmings*, 3 Hag. Ec., 76, 81; *Reeves v. Reeves*, 2 Phillim., 117; *Clowes v. Clowes*, 9 Jur., 356; 2 Bish. Mar. & Div., § 9.

The presumption of law is against connivance, and if the facts can be accounted for without the supposition of intention, the court will incline to that construction. *Moorson v. Moorson*, 3 Hag. Ec., 87, 107; *Phillips v. Phillips*, 4 Notes of Cas., 525.

"Mere imprudence and error of judgment are not connivance; and, in determining whether the husband's behavior has barred him from relief on proof of his wife's adultery, the honesty of his intentions, not the wisdom of his conduct, is to be considered." "The court must look *quo animo* the step is taken." "Conduct to bar must be directed by corrupt intention." "There must be intentional concurrence." *Hoar v. Hoar*, *supra*; *Moorson v. Moorson*, *supra*, and cases before cited.

Field, J., delivered the opinion of the court:

The Justice who heard the case found as a fact that the conduct of the libelant described in the report "constituted a scheme to detect the libelee if she was guilty, but that there was no corrupt intent that adultery should be committed, or any assent to or connivance at it, unless the foregoing conduct amounted to connivance as a matter of law, which I ruled it did not." It is not found by whom the man who lodged in the house was invited to lodge there; or whether he was of good reputation; or that he was introduced by the husband to the wife; or that lodging there under the circum-

stances made him a member of the family; or what the conduct of the wife with him was which excited the suspicions of the husband; and it is impossible to hold that, on the facts found, it was so far the duty of the husband to expel the lodger that, by not doing this, he must be held, as matter of law, to have connived at the adultery.

This court has assumed that the Legislature, in conferring upon it jurisdiction to grant divorces from the bonds of matrimony, although the statutes make no provision respecting connivance, collusion, condonation or recrimination, intended to adopt the general principles which had governed the ecclesiastical courts of England in granting divorces from bed and board, so far as these principles were applicable and were found to be reasonable. Although the procedure may be "according to the course of proceeding in ecclesiastical courts," (Pub. Sta., ch. 146, § 38); yet it is not clear that the decisions of those courts upon questions of substantive law are of the same weight here as are the decisions of the English courts of law and chancery. One reason is, that the ecclesiastical courts proceeded according to the canon law as followed and adopted in England, but the canon law was never adopted by the colonists of Massachusetts; it was not suited to their opinions or condition. Marriage and divorce here have been regulated wholly by statute. *Commonwealth v. Munson*, 127 Mass., 459; *Sparhawk v. Sparhawk*, 116 Mass., 815.

By the Stat. 20 & 21 Vict., ch. 85, a court for divorce and matrimonial causes was established in England and jurisdiction given it to decree a dissolution of marriage, and it was expressly provided that if the court should find that the petitioner had, during the marriage, been accessory to or conniving at the adultery or had condoned the adultery complained of, or that the petition was presented or prosecuted in collusion with either of the respondents, the petition should be dismissed. § 88.

By § 81 it was also provided that if the court found that the case of the petitioner was proved and did not find either connivance, collusion or condonation, the court should not be bound to pronounce a decree if it should find certain other facts concerning the libelant of which one was "such willful neglect or misconduct as has conduced to the adultery." It is obvious that decisions under this statute may turn upon its provisions and not upon general principles applicable to the law of divorce. It was partially at least upon the construction of this statute that *Gipps v. Gipps*, 11 H. L. Cas., 1, was decided.

It is not easy to reconcile all the decisions of the ecclesiastical courts upon connivance; the law and facts are not always separated; and those courts have considered questions of morals somewhat more freely than we, under our statutes, feel at liberty to do. Many of the cases are collected in *Phillips v. Phillips*, 1 Rob. Ec., 144; 3 Notes of Cases, 444; 4 Notes of Cases, 523; 5 Notes of Cases, 435; and it is there held that a corrupt intention is necessary to constitute connivance. The reasonable foundation of the rule that connivance prevents the libelant from maintaining his libel for adultery is, that he has consented to the adultery, although it may be consent unexpressed and

unknown to the libelee. This consent must necessarily often be inferred from circumstances, but the fact must be found that the libellant either desired and intended, or at least was willing that the libelee should commit adultery before the libellant can be said to have connived at it.

There is a manifest distinction between the desire and intent of a husband that his wife whom he believes to be chaste should commit adultery, and the desire and intent to obtain evidence against his wife whom he believes already to have committed adultery, and to persist in her adulterous practices whenever she has opportunity. It was argued that it was the duty of the husband to protect his wife and to control her conduct if it excited suspicions; and undoubtedly husband and wife ought mutually to aid each other in doing right and to guard each other from doing wrong. But the legal duty of the husband to control the conduct of his wife cannot be greater than his legal right; and by modern law and usage the right of a husband to control the conduct of his wife has largely if not wholly disappeared. A husband cannot imprison his wife in order to protect her against seduction, nor is he compelled always to attend her or to remain at home with her. A chaste husband ought, if he desires it, to have a wife who will remain chaste when exposed to the temptations which are incident to the ordinary conditions of modern social life; and if she commits adultery against his wishes and without his procurement, he ought to be permitted to obtain evidence of it.

Morrison v. Morrison, 136 Mass., 810, was decided upon the ground that the justice who heard the cause found as a fact that the husband, from the time that his suspicions were first excited, was in his mind willing that his wife should commit adultery, provided that he could thereby obtain a divorce; and that this finding, together with the evidence of his conduct toward his wife and suspected paramour, was sufficient to warrant the finding of connivance. The only cases there cited are those which hold that a corrupt intent is necessary to constitute connivance.

Decree affirmed.

John JOYCE

v.

City of WORCESTER.

In an action by employe against employer for damages for injury received in the course of the employment, the plaintiff is not entitled to an instruction that "knowledge of the danger was not conclusive evidence of neglect in failing to avoid it," where previous instructions had fully covered the law of the case and there was no evidence that the plaintiff had been negligent.

(Decided October 26, 1885.)

ON plaintiffs' exceptions, taken on a trial in the Superior Court for Worcester County.
Overruled.

MASB.

This was an action of tort, for damages for a personal injury alleged to have been received through the negligence of defendant.

The plaintiff offered evidence tending to show that he came to Worcester in the summer of 1882 and that he let himself to the defendant to work on a sewer; that as the sewer was excavated it became necessary to drive plank on the sides of the trench and the particular work which the plaintiff was to do was to drive these plank down, as the excavation went on, with a heavy wooden mallet. After the brick sewer was built at the bottom of the trench, the trench was filled with earth to the top leaving these planks, which were about eighteen feet long and ten inches wide and two inches thick, imbedded in the earth and projecting above the surface above one foot.

The City had an appliance to draw these planks up out of the earth, consisting of a derrick made of four pieces of timber about sixteen feet long and in size four by six inches fastened together loosely at the top by an iron pin which ran through the timbers at the upper end.

The fastening was made loose, to facilitate spreading or contracting the legs of the derrick.

The derrick was set up over the plank to be drawn, each foot resting on a plank laid flat. A chain was attached to the top of the plank to be drawn and from the chain a rope passed up to a tackle hanging from the apex of the derrick, went through a pulley and then down to a guide pulley fastened to the top of another of the planks near the two fore legs of the derrick; and thence the rope run on along the ground about seventy or seventy-five feet where it was wound on to a drum or spool by a steam engine.

The derrick could be set at will exactly over the plank to be drawn so that the plank would be lifted exactly vertically and the guide block could be placed within the lines of the legs of the derrick. The plaintiff's evidence showed that the derrick when it fell was not placed directly over the plank being lifted, but the plank was nearer the engine than the center of the derrick, and also that the guide block was outside the line of the legs of the derrick.

The placing of the derrick and guide block was wholly within the control of the workmen managing it.

The plaintiff's evidence also showed that no part of the derrick or apparatus was broken, and that every part of the derrick and appliances for drawing the planks were in full view and could be seen by the plaintiff and his fellow servants. In order to steady the derrick when the power was applied, a man was stationed at each leg to hold it firmly down to the plank on which it stood.

The accident occurred May 4, 1883, by the upsetting of the derrick when the power was applied to draw up one of these planks. The plaintiff was set to hold and was holding one of the legs at the time of the accident. The derrick was pulled over, and the plaintiff received his injury by being thrown upward and backward by the action of the leg of the derrick he was holding.

The engineer had had many years experience in running a stationary engine and had drawn planks in the manner and by a similar contrivance in 1875 or 1876, as he was doing it at the time of the accident, but not since, until he

began to work for the defendant in drawing plank as above.

A foreman was placed over the derrick to attach the chain to the plank and give the signal to the engineer; and he was also one of the men to hold the legs.

The plaintiff offered no evidence tending to show that the instrument used was not a suitable appliance for the purpose, except what the jury might infer from a description and model of the derrick. The plaintiff claimed that the whole contrivance from its very nature and construction was unsafe and unsuitable, and offered evidence to show that said plank could be drawn by hand power, which would be much safer than the machine used.

The defendant claimed that the accident was caused by the negligence of a fellow servant.

The court instructed the jury to the following effect: "An employer of workmen is required by law to use due and reasonable care in the selection of competent and trusty servants, and in providing and maintaining suitable engines, machinery and other appliances for doing the work for which he employs them; and he is liable to any of his servants for injuries suffered by them by reason of his negligence or want of due care in any of these respects.

But a person capable of contracting takes upon himself the ordinary risks of the employment upon which he voluntarily enters, including the negligent acts of his fellow servants, who have been selected with due care by their common employer; and if the employment is attended with extraordinary dangers or risks which are fully known to the workman when he enters upon the employment, he assumes these risks also; the employer is, however, liable to his servants for injuries resulting from defective machinery or apparatus, although the negligence of a fellow servant contributes to cause the injuries; an employer does not warrant the absolute safety and sufficiency of the machinery, apparatus and structures used in his business, but in selecting his workmen and in providing and maintaining the machinery, apparatus and structures for their use, he must consider the kind, character and extent of the work in which they are to be employed and used, and he is bound to provide such as are reasonably safe and suitable for the particular work to be done.

In the case now on trial, if the jury find upon the evidence that the City used due and reasonable care in the selection of the plaintiff's fellow servants, and in providing and maintaining suitable machinery and other appliances for performing the work in which they and he were engaged, and the plaintiff received his injuries by reason of the negligent acts of a fellow servant, he cannot recover; but if the jury find that the City failed to use due and reasonable care in the selection of competent servants or in providing and maintaining suitable machinery and other appliances for the work and the plaintiff suffered the injuries he complains of, by reason of such failure on the part of the City, he can recover a fair compensation for these injuries although it should appear that the negligent acts of a fellow servant contributed to cause the injuries."

And the court also instructed the jury that if

the work in which the plaintiff was employed by the City was attended with extraordinary dangers or risks unknown to the plaintiff, and his injuries were caused thereby he could maintain his action and recover compensation for the injuries so caused and suffered.

The plaintiff asked the court to instruct the jury that the defendant had no right to adopt this system of drawing planks unless it was reasonably safe as compared with other methods. If some other contrivance would reasonably accomplish the work and is of much less risk, it should be adopted if known or ought to have been known to the defendant.

The court declined to give this instruction in the words of the request.

But the court did instruct the jury that in determining whether the machinery, apparatus and power used in this case were suitable and fit, the element of safety was important but not the only one to be considered; that it might have been safer to employ hand power instead of steam; but the question of the fitness or suitability of the whole apparatus including the power used, was to be decided upon a view of all the facts disclosed by the evidence, as to the character of the work, its extent or amount and the efficiency of the means employed to do it; that simply because it might have been safer to draw the planks by hand power rather than by steam power, the City would not be liable to the plaintiff, for not using the former power, unless the jury upon the whole evidence find that in the exercise of due and reasonable care in providing and maintaining the machinery, apparatus and power for doing the work in which the plaintiff was employed, it ought, upon the principles of law before stated, to have used hand power and not steam.

No evidence was offered of any other safer or more suitable contrivance for drawing the planks, except that it would have been safer to draw them by hand rather than by steam power.

The plaintiff also asked the court to instruct the jury that the plaintiff's knowledge of the danger of drawing the plank was not conclusive evidence of neglect in failing to avoid it. This request was made in writing but it was not read aloud in the presence of the jury and they had no knowledge that the request was made. The court did not give this instruction except so far as it may be included in substance in the instructions actually given as above stated.

The plaintiff excepted to the refusal of the court to give the specific instructions asked for and to the instructions given instead of the first of the foregoing requests.

The jury returned a verdict for the defendant.

Messrs. Kent & Dewey, for plaintiff:

In *Lawless v. U. R. R. Co.*, 186 Mass., 1, the court says: "The fact that a person takes some risk is not conclusive evidence under all circumstances that he is not using due care." Again; "The question of his due care depended to some extent upon the view the jury might take of his necessity for immediate action; the knowledge he had that the engineer knew the danger, the confidence he was entitled to have that the engineer would so manage the engine as not to injure him," etc.

The plaintiff insists that the rule laid down

by the court in this case, without the modification requested, was too rigid. The character of the machinery, the confidence that the engineer in this case would stop the engine if the machine commenced to fall, the belief that by holding on to the leg he could prevent the accident, were elements that should have been submitted to the jury on the question of his carelessness. See also, to same point, *Coombs v. N. B. C. Co.*, 102 Mass., 585, and cases cited; *Ford v. Fitchburg R. R. Co.*, 110 Mass., 261; *Hough v. Tex. Pac. R. Co.*, 100 U. S., 225 (Lawyer's ed., bk. 25, 617); *Thomas v. W. U. Tel. Co.*, 100 Mass., 156; *Mahoney v. Met. R. R. Co.*, 104 Mass., 73.

Mr. Frank P. Goulding, for defendant.

Devens, J., delivered the opinion of the court:

We cannot perceive that the plaintiff was entitled to the ruling, that his "knowledge of the danger of drawing the plank was not conclusive evidence of neglect in failing to avoid it;" or that such ruling was in any way applicable to the facts of the case. By the instructions, which were extremely full and clear, the defendant had been held responsible for all injuries resulting from defective machinery or apparatus, although the negligence of a fellow-servant had contributed to cause the injury. Having instructed the jury, in substance, that any person entering into any employment takes on himself the ordinary risks of the employment, the presiding Judge added that "If the employment is attended with extraordinary danger or risks, which are fully known to the workman when he enters on the employment, he assumes those risks also." This is in accordance with a settled principle. *Pingree v. Leyland*, 135 Mass., 398, and cases cited; *Yeaton v. Boston & Lowell R. R. Co.*, 35 Mass., 418.

There being no evidence that the plaintiff had been in any way negligent in the conduct of his employment, the instruction did not require the modification which the plaintiff sought to give it. The legitimate tendency of such a modification would have been to divert the jury from the true issues, which were whether the plaintiff had knowingly assumed the dangers of the employment, and whether the injury was in any degree caused by defect in machinery or apparatus furnished by the defendant.

Exceptions overruled.

Weaver OSBORN, Appt.,

v.

City of FALL RIVER.

A claim against a municipal corporation for damages arising from a change in the grade of a street cannot form the subject of arbitration under the statute.

(Decided January 9, 1886.)

APPEAL by plaintiff from a decree of the Superior Court for Bristol County, rejecting an award of arbitrators. *Affirmed.*

The facts are stated in the opinion

MARR.

Messrs. Braley & Swift, for plaintiff.

Mr. James F. Jackson, for defendant.

The order passed August 4, 1882, establishing a grade for Broadway, is an order for specific repairs and the plaintiff, not having filed his petition within one year thereafter, has no legal claim against the defendant for damages by reason of the working of Broadway to that grade in 1884. *Sisson v. New Bedford*, 137 Mass., 259.

The statute does not require notice. P. S., ch. 49, §§ 67, 68.

There is no constitutional right to notice upon the question of the necessity of taking private property for public use. *Holt v. Somerville*, 127 Mass., 410.

Defects in the record of proceedings or in the giving of notice, if notice was necessary, can only be raised upon writ of *certiorari*. *Sisson v. New Bedford*, *supra*; *Taber v. New Bedford*, 135 Mass., 162.

The plaintiff has no legal claim for damages under P. S., ch. 52, since the acts done were not "done for the purpose of repairing" such way. The plaintiff does not claim it in his petition to the board of aldermen and the report of the arbitrators finds the acts complained of to be working to the grade defined in the order, a different and distinct thing, a permanent alteration of the way. *Thurston v. Lynn*, 116 Mass., 546; Stat. 1854, ch. 257.

A surveyor of highways has no power by virtue of his office to make such a change in a street. *Bemis v. Springfield*, 122 Mass., 116.

It is a power properly given to a higher authority. P. S., ch. 49, § 65.

The work is still unfinished and therefore the plaintiff could not under this chapter be entitled as yet to damages. *Brown v. Lowell*, 8 Met., 172; *Barker v. Taunton*, 119 Mass., 396.

The matter of this controversy is not one which might be the subject of a personal action at law or of a suit in equity and, therefore, the award of the arbitrators could not be legally accepted but was rightfully rejected by the Superior Court. *Henderson v. Adams*, 5 Cush., 610; *Perry v. Worcester*, 6 Gray, 546.

The statutes define personal actions and how they shall be commenced. P., S. ch. 167, §§ 1, 2; P. S. ch. 161, § 18.

Provision for arbitration is especially made for such cases as these. P. S., ch. 52, § 16.

Devens, J., delivered the opinion of the court:

The proceeding is upon an award rendered by arbitrators upon a submission under the statute, of the claims of the petitioner against the respondent for damages done to his estate on Broadway in the City of Fall River by lowering the grade of the street and injuring his shade trees thereon and also for damages to the same estate by changing the grade of Rockland Street. P. S., ch. 188. For compensation for both of these injuries the petitioner had previously filed his several petitions for damages to the board of aldermen of said City who had declined to make him any award and the agreement for submission to arbitrators was thereafter made.

As the power of arbitrators thus selected to make an award upon which a judgment can be rendered depends wholly upon the statute, it

is necessary to inquire whether the claims submitted are within the class of controversies which may properly form the subject of such a submission. The jurisdiction, of the arbitrators is a special jurisdiction, created entirely by statute and can be sustained only when the proceedings are within its provisions. *Henderson v. Adams*, 5 Cush., 610.

All controversies which may be "the subject of a personal action at law or of a suit in equity" may be submitted to such an arbitration. The petitioner contends that the proceeding by which he was entitled to assert his claim for damages when the City, exercising a lawful authority, changed the grade of the streets near his premises might properly be termed a personal action at law.

Personal actions are those which are brought for the recovery of a debt, or damages for a breach of contract for a specific personal chattel, or for satisfaction in damages because of some injury to the person or personal or real property. Chit. Pl., 110. They are divided by the statute into three classes, actions of contract, of tort and of replevin. Within neither can the right which the petitioner had to proceed for damages, if injury was occasioned to his premises by change of the grade of the streets upon which his estate abutted, be included.

Although the City might be compelled to pay damages upon a proper proceeding, it had made no contract that it would do so, nor had it committed any wrong to the petitioner in doing that which had been done. The obligation which the City was under to compensate the petitioner for injury to his estate, if any had been caused, was one imposed by the statute and to be sought only in the manner therein provided. It is to be observed, also, that by the statute, which provides for an appeal to a jury by any party aggrieved by the assessment of his damages by reason of the change in the grade of a way or of specific repairs thereon, upon proper application therefor, if the parties agree, the matter of such complaint may be referred to a committee to assess the same, which committee is to be appointed by the tribunal to which such application is made. P. S., ch. 49, §§ 32, 79, 91. So that a proceeding analogous to arbitration is actually provided for in such cases.

It was held in *Henderson v. Adams*, that a claim under the Mill Acts for damage to land occasioned by flooding it by a mill dam is not "a controversy which might be the subject of a personal action at law or of a suit in equity" within the meaning of Revised Statutes, ch. 114, and that it could not, therefore, be the subject of a submission to arbitration before a justice of the peace. This appears to be quite decisive of the case at bar. It is true that a jury under the Mill Acts may regulate the height and character of the dam; the times when the dam shall be kept open; the annual or gross damages, etc.; while the question before the arbitrators in the case before us was one of damages solely. But the decision in *Henderson v. Adams* is not placed upon any reasoning derived from the variety of duties which were placed upon a jury proceeding under the Mill Acts, but upon the simple ground that the damages sought for flowing land by a mill dam could be recovered

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only in the way provided by statute and that a claim for them was not the subject of a suit at law or in equity, but of a particular statutory mode of redress which must be pursued.

It is not necessary now to decide whether a city or town has power to refer to an arbitration at common law the determination of damages sustained by a land owner or whether such an act would be on its part *ultra vires*. *Boston v. Brazer*, 11 Mass., 447; *Somerville v. Dickerman*, 127 Mass., 272. It could not form the subject of submission to arbitration under ch. 188, P. S.

As the award must be rejected, the other questions presented for discussion cannot be deemed properly before us.

Decree affirmed.

James GROGAN

v.

City of WORCESTER.

Notice to the city of the proximate cause of the injury complained of is sufficient under the statute; hence, notice that the drain across the sidewalk caused plaintiff to stumble and fall into the sewer is sufficient.

(Worcester—Decided October 24, 1885.)

ON defendant's exceptions. Overruled.
Action for damages brought against a City for injuries sustained by reason of a defect in the sidewalk.

Mr. Frank P. Goulding, for defendant:

It was a condition precedent to maintaining the plaintiff's case that he should give the defendant a substantially accurate description in writing, of the cause of his injury. Stat., 1877, ch. 284, § 8; Stat., 1881, ch. 286; *Gay v. Cambridge*, 128 Mass., 387; *Shea v. Lowell*, 132 Mass., 187; *Larkin v. Boston*, 128 Mass., 521; *Lyon v. Cambridge*, 186 Mass., 419; *Madden v. Springfield*, 181 Mass., 441; *Dickie v. B. & A. R. R. Co.*, 131 Mass., 516; *Noonan v. Lawrence*, 130 Mass., 161; *Dalton v. Salem*, 131 Mass., 551; *Miles v. Lynn*, 130 Mass., 898; *Crönnin v. Boston*, 135 Mass., 110.

To state a wrong cause is of less use than a general notice which does not specify the cause, is positively misleading and injurious to the defendant, and is equally fatal to recovery as the omission of all notice of the cause. *McDougall v. Boston*, 134 Mass., 149; *Taylor v. Woburn*, 130 Mass., 494, 498, 499; *Dalton v. Salem*, 131 Mass., 551; *Bailey v. Ewerett*, 132 Mass., 441, 442.

Railings are required only when some steep bank or other dangerous object or place exists so near to the traveled road as to expose persons traveling thereon to injury, through some of the mischances incident to such use of the road or reasonably to be expected from it. *Commonwealth v. Wilmington*, 105 Mass., 599, 601.

Messrs. D. F. O'Connell and W. A. Gile, for plaintiff:

Notice is sufficient if it gives to the officers of the town information with substantial certainty, as to the time and place of the injury, and as to the character and nature of the defect

which caused it, so as to be of aid to them in investigating the question of the liability of the town. *Spelman v. Chicopee*, 181 Mass., 444; *Noonan v. Lawrence*, 130 Mass., 161; *Miles v. Lynn*, 130 Mass., 398; *Madden v. Springfield*, 181 Mass., 441.

In *Welch v. Gardner*, 133 Mass., 529-531, the court quotes the above language and says that the notice having those requisites is sufficient. And the court cites the same language in the same volume, in the case of *Lowe v. Clinton*, 133 Mass., 526-528.

It is true that the court has said in *McDougall v. Boston*, 134 Mass., 149, that where a notice gives a wrong cause which tends to mislead the town or city; or to state that the cause was a defect, without stating what the cause was, would be insufficient, as in *Miles v. Lynn*, 130 Mass., 398.

But in *McCabe v. Cambridge*, 134 Mass., 487, it is said that if the facts taken together show or identify the defect, it is sufficient; and if it be of substantial assistance to the proper authorities in investigating the liability, it is sufficient; and it is also stated again in *Cronin v. Boston*, 135 Mass., 110, by Mr. Justice Field, who also cites *Noonan v. Lawrence*, 130 Mass., 161.

Legislation has also sustained this construction of the court of the effect of notices, although the Act was too late to be availed of in this suit. Ch. 36, Acts of 1882, approved Feb. 24, 1882, amending Pub. Stat., ch. 52, § 19, and the Statute of 1877, in relation to notices.

In *Stevens v. Boxford*, 10 Allen, 25, the plaintiff voluntarily turned out of the road, and the horse under the "impetus derived from going down an embankment," fell upon ice in the field adjoining.

This court in sustaining the ruling below says that the defect, which was the want of railing, must be regarded as the proximate cause of the injury, and supports the view with the case of *Palmer v. Andover*, 2 Cush., 600, which is the basis of road law proximate and sole cause, and cause and effect connected with the defect known as "the want of a sufficient railing," "on or upon a highway, townway, causeway or bridge."

In *Palmer v. Andover*, *supra*, it is said: "If the injury is sustained by the combined result of an accident and of the defect, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident; yet if there be no fault or negligence on the part of the plaintiff, and if the accident be one which common prudence and sagacity would not have foreseen and provided against, the town is liable." This is our case again.

Holmes, J., delivered the opinion of the court:

The defendant argues that the cause of the injury to the plaintiff was the drain across the sidewalk which made him stumble; that the want of a fence, which would have prevented his falling into the sewer, was merely an aggravation of the damage ensuing upon an already accomplished wrong and, therefore, that the notice stating the lack of railing as the cause was bad. But the cause of which the statute requires notice to be given to the city is that one among the conditions for the effect of

which the City is answerable. It is admitted that the notice was good unless the drain was a defect. It would be a sufficient answer to the defendant's argument, therefore, to say that it does not appear with certainty that the drain was a defect for which the City was responsible, however probable it may be. Furthermore, it does not appear that the plaintiff would have been hurt if he had not fallen into the sewer; and, even if we were to assume that the drain across the sidewalk was a defect, as well as a necessary condition of the injury, we think it would be interpreting the statute with too great strictness and excessive refinement, to say that it was not satisfied by stating the proximate cause of the injury complained of. See, *Stevens v. Boxford*, 10 Allen, 25.

Exceptions overruled.

George A. WASHBURN

c.

Alden WHITE.

A child adopted under Statutes 1871, ch. 310, acquires, at the time of adoption, the settlement of its adopting father, if he has a settlement within this State.

(Decided January 11, 1886.)

ON complainant's exceptions. *Sustained.*
The case and facts are stated in the opinion.

Mr. Fred V. Fuller, for complainant:

It is a necessary condition precedent to future proceedings upon this complaint that the settlement of Dora E. Shores, the mother of the bastard child, be established in the City of Taunton. Pub. Stat., ch. 85, § 2; P. S., ch. 83, § 1, ¶ 2.

The proposition is, that such settlement was derived from her adoption in 1875 by Thomas Shores, whose settlement is conceded to be in Taunton. *Vid.* Gen. Stat., ch. 110, § 7; Stat. 1871, ch. 310, § 8; P. S., ch. 148, § 6, St. 1876, ch. 213, §§ 7, 10.

Adoption formed no part of the English common law. A parental relation was constituted by adoption at the civil law, and is still a recognized branch of French and German jurisprudence, of the State of Louisiana, and by statute in some other American States. *Ross v. Ross*, 129 Mass., 262; Schoul. Dom. Rel., 314; *Fuselier v. Masse*, 4 La., 423.

From the legislation upon the adoption of minor children prior to 1876 (Gen. Stat., ch. 110, and Stat., 1871, ch. 310), it appears to have been the intent of the Legislature in both statutes, and they are substantially the same in this respect, to recognize this portion of the civil law and to make the child so adopted, to every legal intent and consequence, identical with the child of lawful wedlock. *Sewall v. Roberts*, 115 Mass., 262.

The express limitations in the statute only affirm the conclusion deducible from words so comprehensive and complete in their significance. When a statute is general, and its exceptions enumerated, the court cannot by construction enlarge or limit its language, unless required by its plain intent. *Currier v. Phillips*, 12

Pick., 226; *Kilpatrick v. Byrne*, 25 Miss., 571; *Tyman v. Walker*, 35 Cal., 634.

This court, interpreting Stat., 1853, ch. 253, which enacted that "When, after the birth of an illegitimate child, his parents have intermarried or shall intermarry, and his father has acknowledged or shall after the marriage acknowledge him as his child, such child shall be considered legitimate to all intents and purposes," decided that the child acquired the settlement of its father, and the settlement was one of the consequences contemplated by the statute. *Inhab. of Monson v. Inhab. of Palmer*, 8 Allen, 551; *Ross v. Ross*, *supra*.

If Dora E. Shores had no settlement in Taunton by virtue of the Statute of 1871, the Statute of 1876, ch. 213, §§ 7, 10, although passed after the adoption, gives her a settlement in Taunton, existing from the time said Statute of 1876 went into operation. It is the evident intent of the statute to change existing settlements. *Endicott v. Hopkinton*, 125 Mass., 521; *Inhab. Goshen v. Inhab. Richmond*, 4 Allen, 458; *Monson v. Palmer*, *supra*; *Worcester v. Springfield*, 127 Mass., 540; *Westport v. Dartmouth*, 10 Mass., 341; *Bridgewater v. Plymouth*, 97 Mass., 382; *Fitchburg v. Ashby*, 132 Mass., 495.

An obligation on the parent to support is not a necessary incident of a settlement. *Brookfield v. Warren*, 128 Mass., 287.

Mr. J. Brown, for defendant.

Gardner, J., delivered the opinion of the court:

The complainant was duly elected and qualified overseer of the poor of the City of Taunton and by virtue of his office made this complaint under P. S., ch. 85, § 2.

Among other things the complaint alleged that Dora E. Shores, the woman pregnant, had a settlement in Taunton and that she resided at Berkley. As the statute above cited provides that an overseer of the poor, of the place where the woman entitled to make a complaint under the Bastardy Act has her settlement, may under certain conditions make the complaint and prosecute the same, it became material at the trial to determine whether the woman, Dora E. Shores, the mother, of the alleged bastard child, had a settlement in Taunton. The respondent contended that she had no such settlement and that therefore the complainant Washburn had no authority to make and prosecute the complaint.

The fact as stated in the bill of exceptions is that Dora E. Shores whose name was formerly LaDora I. Howland had no settlement in Taunton. She was adopted by Thomas Shores and Lizzie B. his wife, by decree of the probate court made August 6, 1875. At the time of the adoption, Thomas Shores had a settlement in Taunton and has had ever since.

The Legislature has by various enactments provided for the legal adoption by one person of the child of another. *Ross v. Ross*, 129 Mass., 243.

The adoption of Dora E. Shores was under the Stat., 1871, ch. 810, the 8th section of which provided that "A child or person so adopted shall be deemed for the purpose of inheritance and all other legal consequences of the natural relation of parent and child, to be the child of

the parent or parents by adoption as if born to them in lawful wedlock, except," etc. The language is broad and unconditional, not only for the purpose of inheritance but "for all other legal consequences of the natural relation of parent and child." The child so adopted shall be deemed, *i. e.*, shall be adjudged to be the child of the parents by adoption, to the full extent as if born to them in lawful wedlock. Whether legal consequences flow from the natural relations of parent and child, such consequences by this statute are adjudged to appertain to the child of the parent by adoption. The adoptive relation is coextensive in all its legal consequences with the natural relation of parent and child, saving the exceptions mentioned in the statute, none of which relate to settlement.

At the time of the adoption of Dora E., the law regulating the settlement of children was as follows: "Legitimate children shall follow and have the settlement of their father, if he has any within the State, until they gain a settlement of their own," etc. Gen. Stat., ch. 69, § 1, cl. 3.

Thus one of the legal consequences of the natural relation of a child born to parents in lawful wedlock is that it shall have the settlement of its father, if he has any within the State. *Monson v. Palmer*, 8 Allen, 551.

To this legal consequence the adopted child Dora became subject, immediately upon her adoption. The legal settlement of the adopted father, in Taunton, became her legal settlement August 6, 1875, the date of her adoption. Having once acquired her settlement it remains until she acquires another. By the Statute of 1876, ch. 213, it was provided: "That all rights duties and responsibilities and other legal consequences, including settlement, of the natural relation of the child and parent, shall thenceforth exist," etc. Settlement is mentioned for the first time in this Act and it is agreed that this is significant. The construction we have given to the Act of 1871 renders it immaterial, that the words including settlement appear in the Act of 1876 for the first time. The Legislature may have inserted these words for the purpose of making the language of the statute clearer, more certain and beyond doubt, and thus to carry out its intention in unequivocal phraseology.

As Dora E. Shores at the time of making the complaint had a settlement in the City of Taunton, it follows that the complainant was authorized to make and prosecute the complaint.

Exceptions sustained.

Town of MIDDLEBOROUGH

Town of PLYMPTON.

A married woman whose husband has no settlement in this State, but who has herself acquired a residence through her father, is not an "unsettled woman" within the retroactive provision of Statutes of 1879, ch. 242, § 2, and does not gain a settlement by five years' residence.

(Decided November 6, 1886.)

ON report from the Superior Court for Plymouth County. *Judgment for defendant.*

Action to recover pauper charges, heard on the following agreed statement of facts:

Emma J. Haley, the alleged pauper, was born in Hanover, in the County of Plymouth, about January 9, 1845; her maiden name was Emma Jane Bonney; she lived in Hanover with her father, and in his family, until January 9, 1867, when she went to Plympton and worked in a factory one year, eleven months and sixteen days; she then returned to her home in Hanover, and was there married to Benjamin F. Haley, January 6, 1869, when she was in her twenty-fourth year. She and her husband returned to Plympton in June, 1869, and they continued to reside there until April 12, 1882, when they removed to Middleborough, in said county, where she died November 20, 1882. Her two minor children, Eliza J. Haley and Herbert B. Haley, also alleged paupers, were born in Plympton; her husband, the said Benjamin F. Haley, never had any settlement in this Commonwealth; her father was Hiram B. Bonney, and he, after he was twenty-one years of age, resided in said Hanover, had there an estate of inheritance, and lived on the same from 1849 to 1860, and during the whole time, from 1849 to 1860 inclusive, was twenty-one years of age and more, resided in said Hanover, and paid each year state, county and town taxes, which were each year duly assessed on his poll and estate.

It is also agreed that said Emma J. Haley and her two children did in said Middleborough fall into distress, and stand in need of immediate relief and assistance, and that relief was furnished them by the overseers of the poor of said Town of Middleborough to the amount of \$151.97, as set forth in plaintiff's declaration; that the amount charged is a fair price for the relief furnished; that due notice was given by the overseers of the poor of said Town of Middleborough to the overseers of the poor of said Town of Plympton that said Emma J. Haley and her said children had fallen into distress, and were being relieved by the overseers of the poor of said Town of Middleborough; that the overseers of the poor of the Town of Plympton, within two months after receiving such notice, did make written answer, duly signed, stating their objections to the removal of said alleged paupers, and denying that they or either of them had any settlement in the Town of Plympton; that said amounts so expended by the Town of Middleborough have never been paid by said Town of Plympton, or by anyone else, to said Town.

If upon this statement of facts, the court is of opinion that said Emma J. Haley had a legal settlement in the Town of Plympton, judgment is to be entered for the plaintiff; otherwise for the defendant.

Mr. Everett Robinson, for plaintiff.

Mr. H. Kingman, for defendant:

By Stat. 1870, ch. 892, § 1: "Any unmarried woman at the age of twenty-one years who shall hereafter reside in any place within this State for ten years together without receiving relief as a pauper or being convicted of a crime shall thereby gain a settlement in such place." This statute was repealed by Stat., 1874, ch.

274, § 2, which provided that: "Any woman of the age of twenty-one years who resides in any place within this State for five years together without receiving relief as a pauper shall thereby gain a settlement in such place."

By § 3, Stat., 1874: "No existing settlement shall be changed by any provision of this Act, unless the entire residence and taxation herein required accrues after its passage; but any unsettled person shall be deemed to have gained a settlement upon the completion of the residence and taxation herein required, though a whole or a part of the same accrues before the passage of this Act."

By Stat., 1878, ch. 190, § 1, cl. 6: "Any woman of the age of twenty-one years who resides in any place within this State for five years together without receiving relief as a pauper shall thereby gain a settlement in such place." By § 8, same Stat.: "Except as hereafter provided, every legal settlement shall continue until lost or defeated by acquiring a new one within this State," etc.

By Stat. 1879, ch. 242, § 1 of ch. 190, Acts, 1878, was amended by striking out the words in the 6th clause, "without receiving relief as a pauper," and by adding at the end of the section, "provided, however," etc.

And by § 2, Act of 1879, "The provisions of the 6th clause shall be held to apply to married women who have not a settlement derived by marriage under the provisions of the first clause, and to widows; and a settlement thereunder shall be deemed to have been gained by an unsettled woman upon the completion of the term of residence therein mentioned, although the whole or a part of the same accrues before the passage of this Act." This Act was approved April 22, 1879.

By Pub. Stat., ch. 88, § 1, cl. 6, 7, cl. 6, § 1, Acts, 1878, as amended by Act, 1879, and the § 2, Act, 1879, were reenacted by § 5, ch. 88, Pub. Stat., § 3, ch. 190, Acts, 1878 was reenacted. Until the passage of ch. 242, Acts, 1879, no married woman could acquire a settlement for herself, *Somerville v. Boston*, 130 Mass., 574, but might have derivative settlement by marriage, from her husband or from her parents.

The defendant Town claims in this case that Emma J. Haley and through her each of her children, at the time of ch. 242, Acts, 1879, became a law, had a legal settlement in the town of Hanover derived from her father, Hiram B. Bonney; that she was therefore not an "unsettled woman" within the meaning of that term as used in § 2 of said chapter, and could not acquire a settlement except upon the completion of a term of residence of five years, the whole of which term must accrue after that chapter became law; that by § 3 of ch. 190, Acts, 1878, and by § 5, ch. 88, Pub. Stat., it was evidently the intention of the Legislature that no settlement existing at the time of the passage of either Act should be lost until a new one was acquired, and that by § 2, ch. 242, Acts, 1879, and by cl. 7, § 1, ch. 88, Pub. Stat., no married woman who had a settlement at the time either Act became a law should acquire a settlement under either Act, except the term of residence therein required should wholly accrue after such Act became law.

Morton, Ch. J., delivered the opinion of the court:

The alleged pauper, Emma J. Haley, did not gain a settlement in Plympton under the provisions of the Statute of 1878, ch. 190, as amended by the Statute of 1879, ch. 242, which was reenacted by the Pub. Stats., ch. 83, § 1, clauses 6 and 7.

She did not reside in that Town for five years after these statutes went into effect, and when they went into effect she had a settlement in Hanover, derived from her father, which was not lost or suspended by her marriage.

The question is not whether a married woman, whose husband has no settlement, could by five years' residence after the statute took effect, gain a settlement which would defeat a settlement derived from her father.

The question is: whether the retroactive provision of the statute applies to this case. This provision is, that a settlement by five years' residence "Shall be deemed to have been gained by any unsettled woman" upon the completion of five years' residence "although the whole or a part of the same accrues before the passage of this Act." Stats., 1879, ch. 242, § 2.

It has been held that by "any unsettled woman," in this provision, is meant any woman who had no settlement at the time the statute went into effect.

Worcester v. Great Barrington, recently decided, 140 Mass. [post], not yet published.

At the time Emma J. Haley had by derivation from her father a settlement in Hanover, Gen. Stat., ch. 69, § 1, clause 1; Stat., 1878, ch. 190, § 1, clause 1, she was not an "unsettled woman" within the retroactive provision of the Statute of 1879 above cited, and it follows that upon the facts agreed she gained no settlement in the defendant town.

Judgment for defendant.

Nelson RUSSELL

v.

William E. TILLOTSON *et al.*

An employer is not liable for an injury received by an employé in the course of his employment, where the employe neglected to avail himself of the protections afforded for the performance of the act directed and which were known to him.

(Hampden—Decided October 24, 1885.)

ON plaintiff's exceptions. *Overruled.*

The facts are stated in the opinion.

Mr. George M. Stearns, for plaintiff:

The plaintiff claims, his was a work involving unusual peril; that plaintiff was ignorant and inexperienced in that kind of work; that the appliance to do the work was so arranged and placed as to mislead the plaintiff; that while so placed he was ordered to do this work without instruction and without warning; that the room was obscured by steam; that there was a "right and safe way" to do this work unknown to the plaintiff; and that it was the duty of the master to give him such instructions and warnings as the situation and dangers demanded. *O'Connor v. Adams*, 120 Mass., 427; *Wheeler v. Wason Mfg. Co.*, 135 Mass., 294.

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The court cannot say that plaintiff, not appreciating the danger, and "knowing no other way to do this work" undertaking to do it in his usual working costume and acting upon an order to be instantly complied with, was not in the exercise of due care. *Lawless v. U. R. R. Co.*, 136 Mass., 1.

Mr. E. M. Wood, for defendants:

When a servant enters into the employ of another, he assumes all the risks ordinarily incident to the business. He is presumed to have contracted with reference to all the hazards and risks ordinarily incident to the employment. The servant is bound to see for himself such risks and hazards as are patent to observation, and is bound to exercise his own skill and judgment in a measure, and cannot blindly rely upon the skill and care of his master. *Wood, Mast. & Serv.*, 678-682, and cases cited; *Nashville & Chattanooga R. R. Co. v. Elliott*, 1 Cold. (Tenn.), 612; *Yeaton v. R. R. Corp.*, 135 Mass., 418; *Huddleston v. Machine Shop*, 106 Mass., 282; *Williams v. Clough*, 3 Hurl. & N., 258; *Clarke v. Holmes*, 7 Hurl. & N., 937; *Gibson v. R. Co.*, 63 N. Y., 449; *Farnell v. R. R. Corp.*, 4 Met., 57; *Bartonshill Coal Co. v. Reid*, 3 Macq., 275-284; *Seymour v. Maddox*, 16 Ad. & El. N. S., 326.

On this principle the servant assumes the risks of negligence of a fellow servant, because "these are perils which the servant is as likely to know and against which he can as effectually guard as the master." *Shaw, Ch. J., Farnell v. R. R. Corp.*, 4 Met., 57.

The boss, McLaughlin, was the fellow servant of the plaintiff, and for his negligence, if any, the defendants are not liable. *O'Connor v. Roberts*, 120 Mass., 227; *Albro v. Canal Co.*, 6 Cush., 75; *Sumner v. Fish*, 117 Mass., 812; *Johnson v. Tow Boat Co.*, 135 Mass., 211.

The question whether McLaughlin was the fellow servant of the plaintiff, was a question of law and not of fact, and there was nothing for the jury in that. *Ryan v. Tarbox*, 135 Mass., 207; *Johnson v. Tow Boat Co.*, 135 Mass., 209.

A master cannot be held liable for an accident to his servant while using machinery in his employment, simply because the master knows such machinery is unsafe, if the servant has the same means of knowledge as his master.

Williams v. Clough, Bramwell, B., 2 Hurl. & N., 258; *Balt. & Ohio R. R. Co. v. State*, 41 Md., 268, 298; *Laning v. R. R. Co.*, 49 N. Y., 521, 534; *Gibson v. R. Co.*, *supra*; *I. B. & W. R. R. Co. v. Flanagan*, 77 Ill., 365; *Davis v. R. R. Co.*, 20 Mich., 105.

We submit, the rule is the same where the servant has been put to work in an unusual and dangerous place, even although plaintiff is of tender years. *Wheeler v. Wason Mfg. Co.*, 135 Mass., 294; *Sullivan v. India Mfg. Co.*, 118 Mass., 396; *Curran v. Merchants Mfg. Co.*, 130 Mass., 874.

And it is true generally that the plaintiff's knowledge of the risk is an assumption of it. *Holly v. Boston Gas-Light Co.*, 8 Gray, 123; *Horton v. Ipswich*, 12 Cush., 491; *Wilson v. Charlestown*, 8 Allen, 187; 2 Thomp. Neg., 976, 977.

The boss, McLaughlin, was not the agent of the defendants, in the legal sense which renders the principal liable to another for omissions,

negligence and malfeasance of the servant. *Priesley v. Fowler*, 3 Mees. & W., 1; *Wigmore v. Jay*, 5 Welsby, H. & G. Exch., 334; *Farwell v. R. R. Corp.*, 4 Met., 49; *Hayes v. R. R. Corp.*, 3 Cush., 270; *Albro v. Canal Co.*, 6 Cush., 75.

Although the servant guilty of negligence is superior to the servant injured, and the latter is subject to the control of the former, so that he could not guard against his negligence, their common master is not liable. *Sherman v. R. R. Co.*, 17 N. Y., 153; *Degg v. R. Co.*, 1 Hurl. & N., 773; *Seymour v. Maddox*, 16 Ad. & El. N. S., 326; *King v. R. R. Corp.*, 9 Cush., 112; *Keegan v. R. R. Co.*, 8 N. Y., 175; *Gillshannon v. R. R. Corp.*, 10 Cush., 228; *Ormond v. Holland*, 1 El., Bl. & El., 102.

Actual notice to defendants of the defect must be alleged and proved. *Story, Agen.*, § 453, h; *Keegan v. R. R. Co.*, *supra*.

The burden is on the plaintiff to show due care on his part; if the whole evidence introduced fails to show this, it is the duty of the court to direct a verdict for defendants. *Lucas v. R. R. Co.*, 6 Gray, 64; *Hinckley v. R. R. Co.*, 120 Mass., 257; *Wilson v. Charlestown*, 8 Allen, 137; *Williams v. Churchill*, 137 Mass., 243.

The law requires the plaintiff to prove by positive evidence that he was in the exercise of due care and caution; and also to prove that his want of due care did not in any way contribute to that injury. *Chaffee v. R. R. Corp.*, 104 Mass., 115; *Alyn v. R. R. Co.*, 105 Mass., 78; *Wheelock v. R. R. Co.*, 105 Mass., 206; *Hinckley v. R. R. Co.*, 120 Mass., 262.

It is true that when, all the circumstances under which the injury was received being proved, they show nothing in the conduct of the plaintiff, either of acts or neglect to which the injury may be attributed, in whole or in part, the inference of due care may be drawn, from the absence of all appearance of fault; *Mayo v. R. R.*, 104 Mass., 137, 140; but such inference can only be warranted when circumstances are shown which fairly indicate care, or exclude the idea of negligence on his part. *Hinckley v. R. R. Co.*, 120 Mass., 257-262.

There is no affirmative evidence that the plaintiff was using due care; the circumstances shown, we submit, do not indicate care, but do show negligence on his part. *Wheelwright v. R. R. Co.*, 135 Mass., 225.

When the danger arose by his going near the shaft with his apron on, the plaintiff was the only one who knew it. He continued his work and assumed the risk. *Lovejoy v. R. R. Corp.*, 125 Mass., 79; *Ince v. E. Boston Ferry Co.*, 106 Mass., 149; *Naylor v. R. Co.*, 53 Wis., 661.

The plaintiff should have exercised such care and caution as men of common prudence usually exercise in positions of like exposure and danger. *Ramaden v. R. R. Co.*, 104 Mass., 117.

The degree of caution and diligence must rise with the emergency and be proportioned to it. *Rockwood v. Wilson*, 11 Cush., 227.

It has been held in cases of this kind "Even if the defendant was guilty of gross negligence in causing damage, and the plaintiff was also guilty of want of ordinary care contributing to the injury, he cannot recover." *Neal v. Gillett*, 23 Conn., 487; 1 Hill, Torts, 142.

If the injury was caused by the concurrent

negligence of plaintiff and defendant, he cannot recover. *Hinckley v. R. R. Co.*, 120 Mass., 261, 262; *Murphy v. Deane*, 101 Mass., 455.

He should have used his senses; failing to do so, he is guilty of culpable negligence and cannot recover. *Butterfield v. R. R. Corp.*, 10 Allen, 532.

If the law is that plaintiff must use and not abandon the use of his senses, or bear the possible consequences of failure so to do, as was held in *R. R. Co. v. Houston*, 95 U. S., 702 (bk. 24, L. ed., 543), then the plaintiff must fail. It was negligent in plaintiff not to ask instructions; not to think; not to use his faculties. *Ince v. E. B. Ferry Co.*, 106 Mass., 152.

This being so, the boss had a right to assume that plaintiff knew how to do the work, and to order him to do it without special warning or instruction. *Williams v. Churchill*, 137 Mass., 244.

If there was danger in doing the work, it was negligence in plaintiff not to inform the defendants of the danger. *Patterson v. R. R. Co.*, 76 Pa. St., 389.

He should have used and not abandoned the use of his faculties. *R. R. Co. v. Houston*, *supra*.

If the undisputed facts show that the plaintiff was negligent, the court should direct the jury to return a verdict for the defendants. *Brooks v. R. R.*, 135 Mass., 22; *Butterfield v. R. R. Corp.*, 10 Allen, 533; *McDonough v. R. R. Co.*, 137 Mass., 212; *Hackett v. Mfg. Co.*, 101 Mass., 108; *Randall v. B. & O. R. R. Co.*, 109 U. S., 478 (bk. 27, L. ed., 1003); *Wilds v. R. R. Co.*, 24 N. Y., 430; *L. S. & M. S. R. R. Co. v. Miller*, 25 Mich., 274.

There was no danger until his apron caught around the revolving shaft, and the plaintiff was the one and the only one who had any knowledge of the danger. He kept on at his work and assumed the risk. *Ince v. E. Boston Ferry Co.*, *supra*; *Lovejoy v. R. R. Corp.*, 125 Mass., 79; *Wheeler v. Wason Mfg. Co.*, 135 Mass., 294; *Naylor v. R. Co.*, *supra*.

If defendants could have prevented the injury after the danger arose, it was very negligent in the plaintiff not to have let the defendants know in some way of his danger. *Patterson v. R. R. Co.*, *supra*; *Williams v. Churchill*, 137 Mass., 243.

A master is responsible to his servant for an injury received in the course of his service, if it is shown to have been occasioned by the personal negligence of the master; but in the absence of this "the master is not liable for an accident not proved to have been occasioned by his personal negligence." *Ormond v. Holland*, 1 El. Bl. & El., 102; 96 Eng. C. L. R., 102; *Ashworth v. Stanvix*, 3 El. & El., 701; *Ryan v. Turboz*, 135 Mass., 208.

If the servant voluntarily and unnecessarily puts himself in a place of danger and is thereby injured, the master is not liable. *Felch v. Allen*, 98 Mass., 572; *Sprong v. R. R. Co.*, 60 Barb., 30; *Corbin v. Am. Mills*, 27 Conn., 274.

He knew or ought to have known all the attendant dangers, as well as anyone; certainly as well as defendants, who were not there at all. *Williams v. Churchill*, *supra*.

The order, "Hadh't you better nail the boards on, boys?" a general order, or even conceding that McLaughlin "ordered him to nail the

boards on," was a proper order to give, and that, too, without special instructions, as was held in *Williams v. Churchill*, *supra*.

This is not a case of a young, inexperienced person, put to a dangerous employment, without caution or instruction, when the danger is known to the master but unknown and unappreciated by the servant. *Coombs v. N. B. Cordage Co.*, 102 Mass., 572; *Walsh v. Peet Valve Co.*, 110 Mass., 28; *O'Connor v. Adams*, 120 Mass., 427; *Ryan v. Tarbox*, 135 Mass., 207.

The servant must be young and inexperienced. *Sullivan v. India Mfg. Co.*, 118 Mass., 396; *Coombs v. N. B. Cordage Co.*, *supra*.

The employment must be dangerous. *O'Connor v. Adams*, *supra*.

The danger must be unknown to the servant. *Wheeler v. Wason Mfg. Co.*, *supra*.

In order to hold the master, three things are necessary. (1) That the method is unsafe or defective, and injury is caused thereby. (2) That defendants knew or ought to have known the defect. (3) That plaintiff did not know it or had no means of knowing it. *Malone v. Hawley*, 46 Cal., 409.

The uncontradicted evidence shows that the plaintiff fails in all of the three requisites to his recovery. The plaintiff knew the perils. The method and appliances were safe. The defendants knew of no defects. There were no defects.

It was the duty of the court to direct the jury to return a verdict for the defendants. *Wheeler v. R. R. Co.*, 105 Mass., 206; *Wheeler v. R. R. Co.*, 135 Mass., 229; *Chaffee v. R. R. Corp.*, 104 Mass., 115; *Brooks v. R. R.*, 135 Mass., 22; *Hackett v. Mfg. Co.*, 101 Mass., 103; *Randall v. R. R. Co.*, *supra*; *McDonough v. R. R. Co.*, 137 Mass., 212; *Met. R. Co. v. Jackson*, 3 L. R. App. Cas., 198; *Butterfield v. R. R. Corp.*, 10 Allen, 538; *Pleasants v. Fant*, 22 Wall., 121, 122 (89 U. S., bk. 22, L. ed., 783); *Herbert v. Butler*, 97 U. S., 320 (bk. 24, L. ed., 958); *Bowditch v. Boston*, 101 U. S., 18 (bk. 25, L. ed., 980); *Griggs v. Houston*, 104 U. S., 554 (bk. 26, L. ed., 841); *R. R. Co. v. Jones*, 95 U. S., 443 (bk. 24, L. ed., 507); *Gazett v. R. R. Co.*, 16 Gray, 501.

It is for the Judge to say whether the facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred. *Met. R. Co. v. Jackson*, 3 L. R. App. Cas., 198.

Holmes, J., delivered the opinion of the court:

The plaintiff seeks to recover for damage to his person, caused while employed in the defendants' mill, by his apron and jacket catching on a revolving shaft while he was standing on a ladder and replacing a board upon a belt box into which the shaft ran at right angles. The shaft was plainly visible and was seen by the plaintiff. If the ladder had been placed on the opposite side of the box there would have been no danger. The plaintiff could have moved the ladder; but, according to his testimony, it was standing where he mounted it at the time when he was ordered by the "boss" to go up and nail the board on, and the plaintiff, although he had worked in mills for a long time and was acting within the scope of the duties which he had undertaken, did not know any better way to do the work than that which he took. The court

below directed a verdict for the defendants. The plaintiff excepts and contends that he was sent into a concealed danger without due warning or instruction.

The exception must be overruled. The plaintiff does not pretend that he was ignorant of the danger of a revolving shaft, nor that the order to him carried any prohibition to put the ladder in such position as he might deem best, nor that there was anything in the form of it to hurry him or disturb his judgment, but simply that he had not sufficient intelligence, for that is what it comes to, to see that he was less likely to come in contact with the shaft if he had the barrier of the belt box between him and the shaft; or, if he took a worse place, to keep away from the danger which he knew. As it is not suggested that he was a man of manifest imbecility, we think that the foreman was entitled to assume that the plaintiff would protect himself by whatever precautions were necessary. *Williams v. Churchill*, 187 Mass., 243; see, *Leary v. Boston & A. R. R. Co.*, 139 Mass., 580. *Exceptions overruled.*

Hannah P. WILLET

v.

Simeon WHITE, Admr.

Tender of a deed of certain real estate by the defendant on the trial of an action on a promissory note given by defendant's intestate, is **properly rejected** in the absence of proof that the plaintiff had agreed with the intestate to surrender the note on receipt of such deed and of an allegation to that effect in the answer.

(Norfolk—Decided January 14, 1886.)

ON defendant's exceptions. *Overruled.*

This was an action of contract upon a promissory note for \$500, purporting to be signed by Lois P. B. White, the defendant's intestate, payable on demand to the order of the plaintiff.

It was admitted that Lois P. B. White was the wife of the defendant; that she died on May 25, 1883, and that the defendant was duly appointed her administrator, on May 28, 1883; that plaintiff put in evidence the note declared upon, with evidence tending to prove the signature and delivery; and no question was made at the trial as to the due proof of the signature and the delivery of the note.

It appeared in evidence that Lois P. B. White conveyed certain real estate to the plaintiff by deed dated September 29, 1876, which was put in evidence by the plaintiff's counsel during his cross examination of the defendant, which deed the defendant for reasons given by him had refused to sign.

The defendant testified that a short time after his wife's death he called at the plaintiff's house and had a conversation with her, which was in substance as follows: "Hannah, how about that deed which you once wanted me and my wife to sign?" That the plaintiff told him that his wife had signed the deed, and that it had been recorded in Dedham long ago; and upon further conversation she also told him

that his wife had given her a note for \$500, which she now held against his wife's estate, which afterwards appeared to be the note sued upon in this case, and that when asked what this note was given for, she replied that she didn't know but that he might get her land away from her, and that his wife gave her the note for this reason, so that he might not get her land away from her. The defendant then said to her, "Then if I will sign the deed, you will give up the note?" to which the plaintiff replied, "If you will sign the deed I will not press payment of the note."

Not long after the above conversation, the defendant again called upon the plaintiff for the purpose of talking with her about the deed and note, when the plaintiff declined to have anything to say to him about the matter and referred him to her counsel.

On the cross examination of the defendant by the plaintiff's counsel, the defendant testified that subsequently to the above conversation the defendant consulted counsel on the matter, and his counsel advised him that the best way to bring about a settlement was to bring proceedings for possession. Accordingly, a writ of entry was brought September 6, 1882, and is now pending.

On further cross examination of the defendant by the plaintiff's counsel, the defendant was asked whether he had not signed and executed a deed conveying to the plaintiff his right, title and interest in the real estate conveyed to the plaintiff by Lois P. B. White, the maker of the note, to which the defendant replied, "Yes, I have."

The defendant then produced a deed of release, without offering to amend his pleadings, the same being a release of all his right, title and interest in the premises conveyed by said deed of Lois P. B. White to the plaintiff, the due execution and sufficiency of which release in matter of form was admitted, and the same was then and there at the trial offered and tendered to the plaintiff and her counsel; and after tendering the same as aforesaid, said release was offered in evidence.

The presiding Judge, on the plaintiff's objection, ruled that said release was inadmissible, to which ruling the counsel for the defendant excepted. The defendant then rested his case.

In this situation the plaintiff's counsel asked the court to rule that the plaintiff was entitled to a verdict for the whole note as matter of law, which the presiding Judge did, and so ordered a verdict, which was rendered accordingly.

Mr. John V. Beal, for defendant:

If the giving of the note was for indemnity on account of the defendant not joining in the deed of his intestate, it was without consideration, because the giving of the note, April 11, 1881, was not contemporaneous with the giving of the deed from White to Willett, April 29, 1876. The note was, therefore, given upon a past consideration, if any, which will not support an express promise, unless such consideration was executed at the precedent request of the promisor. In other words, an executed or past consideration will only support such a promise as the law will imply. The law will imply a promise when the executed consideration inures directly to the defendant's benefit, so as to create an indebtedness; but when it in-

ures directly to the benefit of a third person, and the liability of the defendant, if any, would be merely collateral, no promise will be implied by law. Metcalf on Contracts and cases therein cited, commencing with page 193; Chitty on Contracts and cases therein cited, commencing with page 69.

A note of a promisor as a gift or legacy is without consideration. *Parish v. Stone*, 14 Pick., 198; *Copp v. Sawyer*, 6 N.H., 886.

The deed of release tendered to the plaintiff and then offered in evidence was admissible because it would tend to prove that if the purpose of giving the note was as stated by the plaintiff in her conversation with the defendant, and if such a purpose should be considered sufficient to create a consideration for the note, then the defendant's deed of release to the plaintiff as offered, would cause such a consideration to entirely fail, and failure of consideration constitutes a good defense. *Rice v. Goddard*, 14 Pick., 293; *Dickinson v. Hall*, 14 Pick., 217; *Basford v. Pearson*, 9 Allen 389; *Hodgkins v. Moulton*, 100 Mass., 310.

It was also admissible because if the note was given as collateral or indemnity, in either case, the defendant's intestate, Lois P. B. White, during her life, would have been entitled to the note on removing the cause for the collateral or indemnity, and the giving of the deed of release of the defendant to the plaintiff would have removed that cause. In this respect, the act of the defendant, in his relation and capacity as administrator, is entitled to the same effect as the act of his intestate. *Crofts v. Beale*, 11 C. B., 172.

Under the provisions of the Practice Act, a general denial in the answer of the allegations in the plaintiff's declaration is sufficient to put in issue all the facts necessary to be proved by the plaintiff in order to make out a *prima facie* case. *Davis v. Travis*, 98 Mass., 222.

The deed of the defendant to the plaintiff was admissible under the general issue. *Gardner v. Webber*, 17 Pick., 407; *Warren v. Ferdinand*, 9 Allen, 357; *Davis v. Travis*, *supra*.

Substantive facts, which only amount to evidence tending to prove the facts in issue, need not be specified in the answer, for the parties are not bound to set forth their evidence in their pleadings. *Snow v. Lang*, 2 Allen, 19.

The rule, that the excepting party must show on his bill of exceptions that the questions relied on were raised at the trial, can be departed from when it appears that there has been a mistake or misapprehension or misapplication of legal principles, to such an extent as clearly to show that a case has resulted in a mistrial. *Bond v. Bond*, 7 Allen, 6.

Where facts stated in a report of the evidence at the trial of a cause, and conceded by both parties, show an objection to the plaintiff's recovery which cannot be removed by further proof, the court will consider such an objection open, although it was not raised at the trial. *Slater v. Rawson*, 1 Met., 450.

Where a case is submitted to the jury under instructions which permit them to find a verdict for a party who has not offered evidence sufficient in law to sustain a verdict in his favor, the other party is entitled to a new trial. *Brightman v. Eddy*, 97 Mass., 478; *King v. Nichols*, 188 Mass., 23.

Mr. Frank W. Lewis, for plaintiff.

By the Court:

The only question presented by this bill of exceptions is, whether the Superior Court was right in rejecting the offer of the defendant to give to the plaintiff a release of his interest in the real estate conveyed by his wife to the plaintiff. This was not admissible under any of the issues in the case. The bill of exceptions does not show what the consideration of the note was. But if it was given to her, because at the time of the conveyance by his wife, the defendant refused to sign the deed, as the defendant claims, the plaintiff was not obliged to accept his offer, unless she had agreed with the defendant's intestate to do so. No such agreement is set up in the answer, and under the pleadings as they stand, the court rightly excluded the offer and the deed of release.

Exceptions overruled.

Albert L. FLANDERS

Town of NORWOOD.

1. A town is liable for an injury caused by a defect in a highway, only when the defect might have been removed or the injury might have been prevented by reasonable care and diligence on the part of the town.
2. Where a railroad bridge over a highway was destroyed and a temporary structure was erected by the railroad company, which obstructed the highway, the selectmen of the town, having no power to remove the same, have done all that they are required to do when they have complained of the structure to the county commissioners and railroad commissioners; and the town is not liable for an injury subsequently sustained by reason thereof.

(Norfolk—Decided January 11, 1886.)

ON plaintiff's exceptions. *Overruled.*

Action of tort, to recover damages for an injury received on a highway which the defendant Town was bound to keep in repair. The trial court ruled that upon the evidence the plaintiff could not recover, and directed a verdict for the defendant.

The nature of the evidence bearing upon the question of defendant's liability is stated in the opinion.

Mr. J. O. Burdette, for plaintiff.

Mr. John C. Lane, for defendant:

A town is not liable for a defect in a bridge over a railroad which the railroad was obliged to repair. *Sawyer v. Northfield*, 7 Cush., 490.

Towns are only responsible for the repair of highways "when other provision is not made therefor." Pub. Stat., ch. 52, § 1.

Railroad companies are obliged to keep in repair all bridges which they have to construct in crossing over or under any highway, with their approaches and abutments. *Id.*, ch. 112, § 128.

And that the Town had made repairs is im-

material. *Wilson v. Boston*, 117 Mass., 509; see also, *White v. Quincy*, 97 Mass., 430; *Carter v. B. & Prov. R. R. Corp.*, 139 Mass., 525.

The Town is not liable even although it had agreed with the railroad to keep the approaches to a bridge in repair and had done so, and the defect was there. *Rouse v. Somerville*, 190 Mass., 364.

So far as a railroad company is obliged by law to keep the surface of the highway in repair, the Town is not liable for a defect therein. *Scanlan v. Boston*, 140 Mass., 84 (*ante*, 92).

The plaintiff's remedy should have been sought against the railroad company. *Gillett v. W. R. R. Corp.*, 8 Allen, 562.

The town officers had no right to take down or alter the temporary bridge. They would have been liable to penalties for willfully obstructing the passage over any part of the railroad. Pub. Stat., ch. 112, §§ 201-204.

The obligation of a town to keep the highway in repair at railroad crossings it seems continues, except so far as necessary use for the railroad prevents and "deprives the town of the power to discharge the duty imposed upon it by law." See, *Davis v. Leominster*, 1 Allen, 182; see also, *Commonwealth v. H. & N. H. R. R. Co.*, 14 Gray, 380.

The town is only liable for a defect which might have been remedied, or when the damage "might have been prevented by reasonable care and diligence on the part of the town." Pub. Stat., ch. 52, § 18.

Nor was it the duty of the town officers to institute legal proceedings in behalf of the Town to have the temporary bridge removed. See, *Walpole v. Gray*, 11 Allen, 150.

This court has decided in several reported cases that an object, within the limits of a highway, which may frighten horses and is likely to do so but is not otherwise an obstruction to travel, is not a defect in the way within the statutes. *Cook v. Charlestown*, 98 Mass., 81.

Not although a horse is actually caused to run away and damages are received in consequence. *Cook v. Charlestown*, *ubi supra*; *Kingsbury v. Dedham*, 18 Allen, 186; *Cook v. Charlestown*, *note*, 18 Allen, 190; see also, *Keith v. Easton*, 2 Allen, 552; *Cook v. Montague*, 115 Mass., 571; *Bemis v. Arlington*, 114 Mass., 507; *Cushing v. Bedford*, 125 Mass., 526.

Morton, Ch. J., delivered the opinion of the court:

The Statute of 1877, ch. 234, reenacted in the Pub. Stat., ch. 52, § 18, made a material change in the rules of law as to the liability of towns for injuries caused by defects in highways. Before that statute, towns were liable, if the defect which caused injury had existed for twenty-four hours, without regard to the question whether the town was negligent in permitting or not removing the defect. As the law is now, a town is liable only for an injury caused by a defect which might have been removed, or which in injury might have been prevented by reasonable care and diligence on the part of the town.

In the case before us the injury to the plaintiff was caused by a defect in a highway which the defendant was bound to keep in repair, at a point where the New York & New England Railroad crossed the highway by a bridge built

over it. The bridge was destroyed by fire in July, 1882, and the railroad company built a temporary bridge supported by timbers and trestle work which obstructed a point over the highway, leaving a narrow passageway in the center for the public travel. The plaintiff's horse being frightened by a stone, which the said railroad company had placed in the road to be used in building the bridge, ran against those timbers, causing the injury for which this suit is brought. The accident happened in June, 1883.

The undisputed evidence found that one of the selectmen of the defendant Town was present when the timber bridge was put up and tried to have the agents of the said road make the passageway in the center as wide as they could; that the railroad company a few days after the fire petitioned the county commissioners for authority to build a bridge differing from the old one, which petition was passed upon in October, 1882, and the company was authorized to make some changes in the bridge; that before the accident the selectmen called on the officers of the railroad a number of times, urging them to hasten the construction of the new bridge and to remove the timber bridge; that they consulted counsel as to their right to remove the timber bridge; that they wrote to the county commissioners, and to the district attorney in regard to it; finally they filed a formal complaint to the railroad commissioners. If the selectmen were required to do anything, these facts show that they used reasonable care and diligence to remedy the defect, unless we hold that it was their right and duty to act independently of the railroad company and the county commissioners to remove the temporary bridge; to thus hold would be to invite a conflict between the selectmen and the said railroad company in all cases where they are constructing or repairing a railroad. Railroads and highways are equally parts of the system which provides for the public travel; whenever they cross each other and jointly use the ground, it is necessary that reasonable rules should be adopted to this joint use. It was the right and duty of the railroad to rebuild its bridge and it was necessary to its operation to build a temporary bridge; probably it would be impossible to do this without obstructing the highway to some extent. If the selectmen had the right to remove such obstructions it might make it impossible in some cases to repair the railroad, and it would be a source of danger to the public travel.

The law gives to the county commissioners original jurisdiction over questions touching obstructions to highways caused by the construction or operation of railroads. Pub. Stat., ch. 112, § 135. On application to them they could require the railroad company to build its temporary bridge so as not to obstruct the highway; or if it was impracticable to do this, so as to cause the least possible inconvenience to the travel on the highway.

The selectmen of the defendant Town did all that they were required to do when they applied to the county commissioners. They had no right, possibly, to remove the temporary bridge. The suggestion as to the liability of the railroad company for the injury to the plaintiff is not before us.

We are of the opinion that the Superior Court rightly ruled that upon the evidence in this case the Town was not liable.

Exceptions overruled.

Quartus J. SMITH

Ferdinand A. LANGEWALD.

While a person having the right of flowage through another's land is not exercising his right, the owner of the servient land may maintain the ordinary farm fences required for the protection of his land, and the person entitled to flowage has no right to interfere with such fences.

(Decided October 24, 1885.)

ON defendant's exceptions. *Overruled.*
Mr. W. W. McClench, for plaintiff.
Mr. R. O. Dwight, for defendant:

The fence wrongfully interfered or tended to interfere with defendant's easement. Although the space occupied was but a small portion of the bed of the pond, the fence, to that extent, prevented the flowage of the area to which defendant was entitled. However slight this interference, the law authorized defendant to seek a remedy, whether actual damage ensued or not. *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick., 241, 247.

If plaintiff had erected such a fence in the pond while the mill was in operation, there would be no dispute as to defendant's right of removal. None the less, under present circumstances, is plaintiff's act an immediate injury by putting defendant's right to hazard and preventing the full enjoyment of his right, whenever he thinks fit to resume it. *Bower v. Hill*, 1 Bing. N. C., 549.

To have left the fence undisturbed would have worked an abandonment of defendant's easement. Plaintiff's occupation was not consistent with defendant's right, as in *Morse v. Marshall*, 97 Mass., 519.

Devens, J., delivered the opinion of the court:

It is the contention of the defendant, that if he had left the plaintiff's fence undisturbed, its existence would in time have worked the destruction of the easement of flowage which he had over the plaintiff's land. While a mere non-user of an easement even for more than twenty years will not be conclusive evidence of abandonment, such non-user united with an adverse use of the servient estate inconsistent with the existence of the easement will extinguish it. *Jennison v. Walker*, 11 Gray, 423; *Owen v. Field*, 102 Mass., 90; *Barnes v. Lloyd*, 112 Mass., 224; *Chandler v. Jamaica Pond Aqueduct*, 125 Mass., 544.

The owner of the soil over which the defendant claimed an easement had all the rights and benefits of ownership consistent therewith. He was entitled to the herbage growing thereon and could use it for raising crops or for pasturing his cattle. *Perley v. Chandler*, 6 Mass., 454; *Adams v. Emerson*, 6 Pick., 57; *Atkins v. Bordman*, 2 Met., 457.

To construct such fences as would restrain cattle pasturing thereon, or exclude therefrom cattle straying from other fields, if of the character of ordinary farm fences, would not certainly, when the owner of the easement of flowage was making no use thereof, indicate any intention to use the land in any way inconsistent with the easement. Such fences would readily permit the passage of the water, even if they slightly interfered therewith, and would be, in some cases, necessary to the owner's rightful use of the land. They would not be permanent obstructions, as would be a solid wall prepared so as to exclude water from the owner's premises. This, even if erected while there was no actual user, might furnish just ground of objection, as putting the right to an easement of flowage in danger, in being distinctly adverse to it.

The defendant urges that if the plaintiff had erected these fences while his mill was in operation and while he was asserting his right of flowage, there could be no dispute as to his right to remove them. We are not prepared to assent to this. Even if such structures would have some tendency to check the flow of water, it might well be contended that such slight obstructions, if necessary to the enjoyment by the plaintiff, of his land, for agricultural purposes, could not be held an interference with the defendant's easement. It is enough, however, for the case at bar to say that, while the defendant was not exercising his right of flowage the plaintiff might properly maintain the ordinary farm fences required for the protection of his land, and the defendant would have no right to interfere with them. Indeed, the very failure to flow might render such fences necessary by withdrawing the barrier afforded by the water.

Exceptions overruled.

William S. SHURTLEFF, Judge of Probate,
v.
Edmund RILE *et al.*

1. A guardian is liable upon his bond for the loss to the ward of the value of real estate sold for taxes, where the guardian had received money from the estate with which he could have paid the taxes and where the time to redeem expired before the ward came of age; otherwise, when the ward comes of age after the tax was assessed, but before the sale for non-payment.
2. A guardian is liable for rents of the ward's real estate, which he has received or which he might have received by the use of reasonable diligence.
3. Under the facts of the case, the guardian, an elder brother, was not guilty of a breach of duty in permitting one of his wards approaching maturity, to receive his own wages and apply the same towards the common support of the family, and the guardian is not liable for the wages of the ward so used.

(Decided October 26, 1885.)

ON report of a single Judge, upon questions reserved.

Action upon a guardian's bond.

The facts are stated in the opinion.

Messrs. Maynard & Spellman, for Margaret Rile, and *Mr. Allen Webster*, for Dennis Rile:

In accordance with the well settled law of this Commonwealth, that a guardian should be charged with interest with annual rests for the funds of a ward that he has used in his own business, this guardian should be charged with interest with annual rests for all the rents collected and that ought to have been collected, the same not having been used for the benefit of the wards; and for all the property of the wards, including earnings, that ought to have been collected; and all property lost to the wards through the default or neglect of the guardian from the date of such loss. *Boynston v. Dyer*, 18 Pick., 1.

A guardian is liable, if he negligently permits others to collect rents or suffers others to occupy the premises or occupies them himself. *Hughes' Minors' App.*, 53 Pa. St., 500; *Clark v. Burnside*, 15 Ill., 62; *Hannen v. Ewalt*, 18 Pa. St., 9.

A guardian is liable for waste. *Williams v. Barrett*, 2 Cranch, C. C., 673.

Whatever tends to the destruction of the inheritance is waste. 1 Washb. Real Prop., 108.

A guardian is bound to use ordinary prudence and diligence in the management of his ward's estate, and is liable for losses incurred through culpable indifference and negligence. *Potter v. Hiscox*, 30 Conn., 508; *Royer's App.*, 11 Pa. St., 36.

Courts will presume strongly against the guardian in favor of the ward, if he has been negligent. *Jennings v. Kee*, 5 Ind., 257.

If a guardian take a mortgage on property estimated to be worth \$3,500, to secure a debt due the ward of \$2,000, and permit it to be sold at public sale for \$540, he is guilty of such negligence as will make him responsible to his ward for the loss. *McLean v. Hosea*, 14 Ala., 194.

A guardian will be guilty for his lack in enforcing his ward's rights; see, *Scott v. Corruith*, 9 Yerg., 418; and proof that the infant ward requested the guardian to abstain from recovering a demand against a debtor is no defense to an action for the omission to make collection. *Commonwealth v. Miller*, 5 T. B. Mon. (Ky.), 205.

Interest beyond the penalty of a bond may be recovered in the shape of damages, even against a surety. *Harris v. Clap*, 1 Mass., 308; *Pitts v. Tilden*, 2 Mass., 118; *Warner v. Thurio*, 15 Mass., 154; *Bank of Brighton v. Smith*, 12 Allen, 243; *Inhabitants of Cheshire v. Howland*, 13 Gray, 321; *White v. French*, 15 Gray, 339.

An account may be rendered and settled by a surety on a bond. *Curtis v. Bailey*, 1 Pick., 198; approved, 3 Allen, 559; 18 Gray, 563.

Mr. Chas. L. Long, for defendant Owens:

The damages which Dennis is to recover are to be determined in equity. P. S., ch. 148, § 20; G. S., ch. 101, § 28; R. S., ch. 70, § 10; Stats. 1786, ch. 55. The relation of debtor and creditor did not exist between the guardian and Margaret; such a relation is not to be implied from the circumstances under which they lived.

Guild v. Guild, 15 Pick., 129; *Williams v. Williams*, 132 Mass., 304.

"To the orphan he," the guardian, "stands in the place of a parent, and supplies that watchfulness, care and discipline which are essential to the young in the formation of their habits, and of which being deprived altogether, they would better die than live." Schoul. Dom. Rel., p. 455.

He must protect his wards from improper associates, and the importance of this is so great as to warrant his removing such associates from their company. *Wood v. Gale*, 10 N. H., 247.

In *Mulhern v. McDavitt*, 16 Gray, 404, where a husband received into his family the children of his wife by a former marriage, this court refused to charge the guardian, in his account, with the services of his ward or to allow him for his board. It recognized the doctrine "That the policy of the law is to encourage an extension of the circle and influence of the domestic fireside, and its presumptions are in favor of the existence of this relation, unless a different arrangement is proved to have been made." The court there held that for the guardian to receive his ward into his family as a member, must, in that case, have tended to promote the happiness of the mother and the welfare of the children; that such a policy was a wise one.

All right and power in the guardian to deal with the property and rights of Margaret ceased September 7, 1877; she was then of age. P. S., ch. 139, § 4.

At that time the tax upon the whole property was \$29.16; by paying this sum she would have saved the property and the other owners would have been under a liability to pay her their share of it. *Smith v. Carney*, 127 Mass., 179.

After the sale she elected not to redeem during the two years of redemption open to her. This was her own business, and as to it her former guardian had no power. He could not redeem as her guardian if he desired to do so. P. S., ch. 12, § 49.

Judgment for the penalty of the bond was properly entered. *Choate v. Arrington*, 116 Mass., 552; *Chapin v. Waters*, 110 Mass., 195.

Execution is to issue to each party for the sum due. If the aggregate amount exceeds the penalty of the bond, each party must share *pro rata*. P. S., ch. 143, § 20, cl. 4.

Should the court find a liability of the guardian, in excess of the penalty of the bond, still, as against the sureties, interest could not be computed on any sum in excess of the penalty of the bond. That penalty limits the liability of the sureties, and interest, if recoverable, is allowed against them as damages for the detention of that which they should have paid; as they should not have paid more than the penalty of the bond, interest cannot be allowed on a larger sum. *Bank of Brighton v. Smith*, 12 Allen, 243.

But in determining the amount due each party, for the purpose of ascertaining for how much of the penalty the sureties are liable, interest should not be allowed, prior to the date of the verdict, except in those cases where money actually came into the hands of the guardian. *Daves v. Winslip*, 5 Pick., 97, note.

Morton, Ch. J., delivered the opinion of the court:

MASS.

James Rile died in 1871, leaving a widow and four children, Edmund, Hannah, Margaret and Dennis. He left a lot of land and house in Springfield, incumbered by a mortgage. One half of the house was let to tenants, and the other half was continuously occupied by the family until it was sold as hereinafter stated. The widow died in 1874. In Feb., 1875, Edmund, the oldest son, was appointed guardian of Margaret and Dennis. Hannah was of age, an invalid and unable to support herself. Margaret became of age in September, 1877, and Dennis in September, 1880. In Dec., 1877, the said real estate was sold by the collector of taxes of Springfield, for the non-payment of the tax assessed thereon for the year 1876, amounting to \$29.16.

Judgment had been rendered for the penal sum of the bond; and at the hearing upon the question as to the amount for which execution should issue, the presiding Justice reserved for the consideration of the full court several questions which we will proceed to consider, so far as is necessary to settle the rights of the parties.

1. It is too clear to admit of any doubt, that the guardian is liable both to Margaret and Dennis for the rents of the half of the house let to tenants, which he received or which he might have received by the use of reasonable diligence. The finding of the auditor and of the presiding Justice upon these points, is therefore affirmed.

2. We are of opinion that the guardian is liable to Dennis for the loss to him of the value of the real estate sold for taxes. It is the duty of a guardian to use reasonable care and prudence in managing and protecting the estate of his ward. When the estate was sold and for more than two years thereafter, Dennis was a minor, having no control over his property. It was the duty of his guardian to pay the taxes, and it appears in the case that he had the means of paying them, derived from the rents of the part which was occupied by tenants. He is therefore liable upon his bond for the loss to Dennis caused by this neglect of duty.

3. The question whether he is liable to Margaret for the loss of her share, is a different one. She became of age in Sep., 1877. The guardian's power over her estate, and his duty in regard to it, then ceased. She might have paid the taxes before the sale, or have redeemed the estate within two years after the sale; and it was her duty to do so. It is not just that the sureties on her guardian's bond should be held liable for a loss caused by her neglect.

4. It is contended that the defendants are liable to Dennis for his wages which were devoted to the support of the family, over and above the value of his own support. The facts bearing upon this question are as follows: after the death of the parents, the four children continued to occupy the house, forming one family. Edmund contributed to the support of the family, but a larger part of the household expenses were paid by Dennis out of wages earned by him. No accounts were kept of the amounts expended by either of them. Margaret did the housework, and Hannah was an invalid, unable to work. Dennis was an industrious man, of good character, and his guardian permitted him to receive and retain to his own use the wages earned by him. He voluntarily applied a large

portion of his wages to the support of the united family, as before stated. It is not contended that there was any agreement that the guardian should repay Dennis any money paid by him, though it might be more than the fair value of his own support. There seems to have been a mutual arrangement, made without fraud or imposition, that the family should be kept together, each contributing to its support according to his ability, with the praiseworthy purpose of furnishing to the children a home, with the ties and associations of domestic life. It was not contemplated by either that the guardian was to repay any part of the money advanced by Dennis, and the law will not imply a promise to do so. He can be held, if at all, only upon the ground that it was a breach of his duty, as guardian, to permit Dennis to receive his wages and to apply them to the purpose to which they were applied. It may be that, under some circumstances, a guardian would be guilty of a breach of duty, if he allowed his ward to receive all his wages or income, and apply them to vicious or improper uses; but here was the case of a ward approaching maturity, competent to understand his rights and to take care of his expenditures, of steady and industrious habits and earning moderate wages. We think his guardian was not guilty of any breach of his duty towards the ward when he allowed him to receive his wages, and to apply them towards the support of an invalid sister and maintaining a home for the family. This claim of the plaintiff cannot be allowed.

5. The same considerations dispose of the claim of Margaret, that she is entitled to wages for her services over and above what her support was fairly worth. There was no contract that she should be paid any wages, express or implied; there was no fraud or imposition practiced upon her, and her claim cannot be allowed.

6. As the amounts which both wards are entitled to recover do not reach the penal sum of the bond, it is unnecessary to discuss the question whether, if necessary, interest could be added so as to enlarge the liability of the sureties beyond the penal sum.

The result is, that Dennis is entitled to execution for the amount found to be due him as his loss of the real estate and the amount found due him for the rents; and Margaret is entitled to execution for the amount found to be due her for the rents.

Ordered accordingly.

— — —
SAMUEL OSBORN *et al.*

MARTHA'S VINEYARD R. R. CO.

A release, by one of several joint vendors, of the joint claim for payment for personal property sold, binds all the vendors; and each of the other vendors is thereafter debarred from maintaining suit against the vendee for his share of the claim.

(Decided January 11, 1886.)

ON report from the Superior Court for Dukes County. *Judgment for defendant.*

This was an action of contract, commenced May 4, 1882, by Samuel Osborn, Jr., against the defendant, in which Shubael L. Norton and Nathaniel M. Jernegan were joined as plaintiffs by amendment allowed October 13, 1884.

The following facts appear from the report: In June, 1876, the three plaintiffs with other persons were directors of the defendant Corporation, which then wished to extend its railroad, but had neither money nor credit in market to enable it to purchase the necessary rails.

The plaintiffs, to enable the defendant to make the extension of its road, bought in market twenty tons of rails at \$30 per ton, in their private capacity, giving a promissory note signed by all three of them to the vendor therefor, and which note they duly paid, and, upon receipt of the rails, sold and delivered the same to the defendant for the same price of \$600, and took from the defendant no note for the debt so created. The plaintiffs bought the rails, intending to sell them to the defendant for the same price which they paid for them, and not intending to make any profit in the transaction, and not contemplating any loss. The \$600 was a fair price for the rails, and the rails were laid by the defendant on the extension of its road, and would have been since in use by it. The payment of the said price of \$600 was demanded of defendant as early as July 1, 1876.

After July 1, 1876, the defendant Corporation got into financial distress, was wholly unable to pay its debts and was threatened with proceedings in bankruptcy; and a plan for the settlement of its debts was devised and urged, by which its stock was to be surrendered to trustees and new certificates of stock to be issued at par to the creditors for their claims. And, in pursuance of this plan, two agreements were drafted, the first of which was to be signed by stockholders and the other by creditors.

Osborn and Jernegan were both stockholders, Osborn holding five shares and Jernegan a larger number. Osborn was not a creditor of the defendant except as to the claim for the price of the rails so furnished as aforesaid and interest; while Jernegan was not only equally interested in that claim, but was also a large creditor of the Corporation in other ways. Osborn knew of the proposed plan of settlement, but refused to accede to the same in any way, and never signed or promised to sign either of said agreements, or to accept any shares of stock in payment or part payment of said debt for rails.

After all the stockholders but Osborn had surrendered their stock, Jernegan, in order to carry out the proposed settlement, on April 6, 1877, bought of Osborn his five shares of said stock at the agreed price of \$375, giving therefor his note for that sum on demand, with interest, and at the same time entering into the written agreement with Osborn, which, after reciting said sale of stock and the giving of said note, stipulated "That if the said railroad shall be sold under execution as now attached and levied upon, or if the surrender of stock as now proposed and the settlement with the creditors according thereto as now proposed and agreed, shall not be made within sixty days from the date hereof, then the said sale is to be considered null and void; the certificates of said five shares of stock are to be returned to said Os-

born, and the note above named is to be returned to said Jernegan;" and thereupon said five shares of stock were transferred by said Osborn to said Jernegan, and by him to the trustees, and the original certificates thereof were surrendered to the Corporation; and the said stockholders' agreement was then signed again by said Jernegan in respect of said five shares, thus completing the same.

Thereafter, Jernegan and Norton, knowing that Osborn wholly refused to accept anything but money in payment for the debt for the price of the rails and interest, and that he wholly refused to sign or accede in any way to said creditors' agreement, and the defendant Corporation also knowing that Osborn so refused, and that he claimed that Jernegan and Norton had no right to bind him to any settlement of said claim except a payment of the same in money, undertook to settle said claim in consideration of six shares of said stock which purported to be issued in pursuance of said plan of settlement and of \$11.80 in cash; and a certificate for two shares of said stock was issued to and accepted by Jernegan, and another certificate for two shares was issued to and accepted by Norton, and a third certificate of two shares was made out in the name of Osborn and tendered to him, and he refused to accept it, and thereupon it was taken and accepted by Jernegan and Norton, and it still stands on the books of the Corporation in the name of Osborn, and the certificate thereof has ever since been in the hands of Jernegan ready to deliver to him if he would accept it, Jernegan having signed a receipt for said certificate.

Upon the payment of said \$11.80 in cash, and the issuing and delivery of said three certificates of stock to Jernegan and Norton, they gave to the defendant a receipted bill of the demand for the price of the rails and interest, and a receipt for the said certificate, as follows:

Martha's Vineyard Rail Road,		
To S. L. Norton, N. M. Jernegan, S. Osborn, Jr.,		
1876.		Dr.
June—	To 20 tons rails at \$30,	\$600
" 21	5 mo. 27 ds. int. from Nov.	
	4 to May 1,	17.70
		<hr/>
		\$617.70

Settled by 6 sh. stock,	\$600
Cash paid,	11.80
	S. L. Norton,
	Nathl. M. Jernegan.

Received of M. V. Rail Road Co. two shares of stock in name of S. Osborn, Jr., which I am to give to him.

Nathl. M. Jernegan.

This bill was offered to Osborn for his signature, which he refused to give and denied the right of Jernegan and Norton to bind him by the same.

The proposed settlement of the Company's indebtedness was acceded to as contemplated by all the creditors except Osborn. Afterwards Osborn brought suit upon said note of April 6, 1877, against Jernegan, and obtained judgment for the amount of the note and interest and costs, which judgment was satisfied.

In the action Jernegan contended that the settlement mentioned in his agreement of April 6, 1877, had not been made; but it was not found as a fact that the recovery against him in

that action was upon the ground that said settlement had been made according to the terms of that agreement.

Before the allowance of the amendment by which said Jernegan and Norton were joined as plaintiffs, this suit was tried by jury in this court, and a verdict for the defendant ordered on the ground of their non-joinder as plaintiffs, which verdict was set aside on the allowance of the amendment, and a new trial ordered.

The court ruled that upon the foregoing facts it was not required to find for the defendant, and found for the plaintiffs, and assessed damages in the sum of \$296.50, and with the consent of the parties reported the case for the determination of the Supreme Judicial Court.

Mr. C. G. M. Dunham, for plaintiffs:

Tenants in common must join in an action for an entire injury done to the common property. And this principle is equally applicable to an action of *assumpsit* when the tort is waived. *Gilmore v. Wilbur*, 12 Pick., 120.

Tenants in common may maintain a joint action for rent under a sealed lease of the estate, although by an agreement annexed to the lease and made part thereof it is stipulated that half the rent shall be paid to each. *Wall v. Hinde*, 4 Gray, 256.

The essential element of a partnership is an agreement to share in profits and loss. *Sikes v. Work*, 6 Gray, 488.

Where two or more persons own property together, without any agreement to share profit and loss, as in this case, they are not partners, but only tenants in common. *Merrill v. Bartlett*, 6 Pick., 46; *Sikes v. Work*, *supra*; *Thorn-dike v. De Wolf*, 6 Pick., 120; *French v. Price*, 24 Pick., 18.

If two persons enter into an arrangement by which one is to furnish a yard and put it in order for manufacturing bricks, and the other is to furnish materials and labor for making the bricks, which are to be divided between them when made, but there is no agreement to share the profits and losses of the business, they do not become partners even as to third persons. *LaMont v. Fullam*, 183 Mass., 588.

A party cannot plead a former judgment as an estoppel to a present action, unless the same point is put in issue on the record and directly found by the jury. *Eastman v. Cooper*, 15 Pick., 276.

The law is well settled that judgment in a former action is conclusive only when the same cause of action has been adjudicated between the same parties, or the same point has been put in issue upon the record, and directly found by the verdict of the jury. *Gilbert v. Thompson*, 9 Cush., 348.

Mr. Geo. A. Torrey, for defendant:

The settlement made by the defendant with Jernegan and Norton, purporting to settle the whole claim of \$600, was valid and binding upon all the parties; upon Osborn as well as the others. Their claim was a joint one. That has already been decided in this action, and the plaintiff Osborn has acquiesced in the decision by amending the action, and is estopped from denying that the claim is joint. If he did deny, it would be true in spite of his denial. "Whenever an obligation is undertaken by two or more, or a right given by two or more, it is the general presumption of law that it is a

joint obligation or right." 1 Pars. Cont., 11.

"As a contract with several persons for the payment to them of a sum of money, is a joint contract with all, all the payees have therein a joint interest so that no one can sue alone for his proportion. So the designating of the share of each will not create such a severance of interest as to sustain a several action, but all must join in an action for the whole." *Id.*, 18.

So if a sum *in solido* is advanced to one by many persons, the promise of repayment is a promise to all jointly. And if the several persons raise the sum by separate and distinct contributions, but when raised it is put together and advanced as one sum, then the promise of repayment is to all jointly. *Id.*, 20.

These principles are elementary, and are laid down in the following, among numerous cases: *Hill v. Tucker*, 1 Taunt., 7; *May v. May*, 1 Carr. & P., 44.

The very essence of a joint interest is that each owner may control the whole claim. This is about the only distinction between joint and several ownership. In personal actions, one joint tenant may release the whole. *Bac. Abr.*, div. *Release*.

If several plaintiffs sue for a joint demand, and the defendant pleads in bar an accord and satisfaction with one of the plaintiffs, but without any allegation that the others had authorized the accord and satisfaction, the plea is, nevertheless, good. For a release of a debt, or of a claim to damages by one of many who hold this debt or claim jointly, is a full discharge of it. 1 Pars. Cont., 25.

A joint tenant, it is said, may lawfully dispose of the whole property. 2 Kent, Com., 350.

In *Austin v. Hall*, 18 Johns., 286, the principle is laid down, or rather considered as an unquestioned rule of law, that when several plaintiffs must join in bringing a personal action, a release by one joint plaintiff is a bar to the action.

There can be no doubt that when there is such a unity of interest as to require a joinder of all the parties interested in a matter of personal nature, the release of one is as effectual as the release of all. *Spencer, J.*, in *Decker v. Livingston*, 15 Johns., 479.

Osborn is clearly bound by the settlement between his co-owners and the defendant, but he has his remedy against his partners in the enterprise, if he can show any damage. *Shepard v. Richards*, 2 Gray, 424.

Gardner, J., delivered the opinion of the court:

This action was originally commenced by Samuel Osborn, Jr., one of the plaintiffs. After trial of the case, the original plaintiff, Osborn, moved to amend his writ by adding as joint plaintiffs with him, Norton and Jernegan, which motion was allowed. The action then proceeded upon the allegation in their declaration that the defendant owed the three plaintiffs \$200 according to the account annexed, which was for six and two thirds tons of iron rails at \$30 per ton.

The first question which arises is, whether the contract made by the plaintiffs with defendants was joint or several. The report finds that the three plaintiffs purchased twenty tons

of iron rails in their own names, giving a promissory note signed by the three, to the vendor, therefor. In this purchase there was no reference to any separate interest of the purchasers in the iron rails, and they became joint owners thereof. They then sold the rails to the defendant, making no reservation of any single interest in any one of the vendors. The defendant promised to pay the three plaintiffs therefor, jointly not separately, the price. This contract was joint, the several payees having therein a joint interest, so that no one could sue for his proportion. When they jointly undertook to sell the rails in one mass to the defendant, they held themselves out to be joint owners, voluntarily assuming that relation to the property sold, to the defendant. The contract became a joint contract, the plaintiffs being joint creditors, not several, of the defendant. 2 Chit. Cont., 1840, 11th Am. ed.

The three owners represented in effect that they had a common interest in the property, without any difference in their respective interests and possessions, and that payment was to be made of the entire sum.

The two plaintiffs, Norton and Jernegan, in behalf of themselves and of Osborn, settled with the defendant for the amount due, in full payment and satisfaction of their demand, receiving as payment, in part money, and in part shares of stock in the defendant Corporation.

The plaintiff, Osborn, insists that he is not bound by this settlement, and that in the name of the three vendors he can recover in money that portion of the original indebtedness to which, as between himself and his associates, he was entitled.

The interest of the three plaintiffs in their joint claim against the defendant was such that each had an interest in the entire claim. One of them had not only an interest in the third which might be his share, but also in the two thirds belonging to the others. It has been settled in this action that one cannot maintain an action for his share; the three must join in the suit, because each one has a joint interest in the entire amount due them, and in every part thereof. Osborn is debarred from bringing suit for his third part, because Norton and Jernegan own that third as fully as does Osborn. Each having such an interest in the debt due, one being unable to sue for the whole or his share thereof, it follows that each one being interested in the entire claim can settle it with the defendant. Each of the three, by the manner of his dealing with the defendant and with the property, has effectually authorized his partners in the contract to dispose of his interest by payment, settlement or accord and satisfaction, and to release the defendant from its obligation under the contract. 1 Pars. Cont., 25.

In this case there was no formal release by writing under seal. The plaintiffs, Norton and Jernegan, upon the settlement, "gave to the defendant a receipted bill of the demand for the price of the rails and interest." The delivery of the shares of stock by the defendant to the plaintiffs, and the payment of the money, were accepted in satisfaction and payment of the debt. It was an accord and satisfaction unconditional, actually executed and accepted. This operated to release the defendant from

further liability upon the contract. No particular form of words is necessary to constitute a valid release. "Any words which show an evident intention to renounce the claim upon, or to discharge the debtor are sufficient." 2 Chit. Cont., 11th Am. ed. 1146.

The plaintiff in his argument has not urged that this settlement was not in effect a release. If this transaction between the parties, if assented to by all who participated in it, was such as to release the defendant from all liability to Norton and Jernegar, of which there is no contention, then it follows that the release of two was the release of all. When there is such a unity of interest as to require a joinder of all the parties interested in a personal action, the release of one is as effectual as the release of all. *Austin v. Hall*, 13 Johns., 286; *Decker v. Livingston*, 15 Johns., 479.

In this case fraud is not set up, nor is there any suggestion of fraud in the transaction. The settlement was in effect an accord and satisfaction, which operates as a release. *Wallace v. Kelsall*, 7 Mees. & W., 272.

The settlement made by Norton and Jernegan with the defendant released the defendant from further liability upon its contract with the plaintiffs, and the action cannot be maintained. By the terms of the report, there must be judgment for defendant.

Hattie A. KNEIL, *Admr.*,

v.

Francis S. EGLESTON, *Admr.*

1. The incapacity of husband and wife to make contracts, the one with the other, remains in this State as at common law.
2. Hence, a loan made by a wife to her husband is not recoverable in an action at law by the personal representative of the wife against the personal representative of the husband. The case is not affected by the fact that the wife survived her husband.
3. The inference that if one contract is repudiated another must be inferred as against the party who has profited by the first, cannot arise where the parties were not competent to make any contract.

(Hampden—Decided October 24, 1886.)

ON plaintiff's exceptions taken in the Superior Court of Hampden County. *Oversruled.*

This is an action of contract by the administratrix of the estate of Waitey Ann Noble, deceased, against the administrator *de bonis non* of the estate of Augustus Noble, deceased, to recover the sum of \$1,100.

Upon the reading of the papers, and it appearing from the statements of counsel that Augustus Noble and Waitey Ann Noble, in their lifetime, were husband and wife, and that this suit was brought to recover from the husband's estate the above named sum of money which he received from his wife being her separate property, a few months before his death, upon his promise to return it or a like sum, to her in

a short time, the trial court, without hearing any evidence in the case, ruled that the action could not be maintained either in the count for money loaned, nor on the count for money had and received, and rendered judgment for defendant, it being a jury-waived case; to which ruling the plaintiff excepted.

Mr. A. M. Copeland, for plaintiff :

The money which is sought to be recovered by this suit was the separate property of Mrs. Noble, over which her husband had no control. Pub. Stat., ch. 147, § 1.

She could have made a contract touching this property with anyone except her husband, without his consent. *Id.*, § 2.

She could not have transferred it, either by loan or gift, to her husband. *Id.*, § 3; *Edgerly v. Whalan*, 106 Mass., 307.

No lawful title to this money passed to Mr. Noble, whether it came into his hands with or without Mrs. Noble's consent. It still remained her separate property, and, he dying before her, it can be recovered from his estate by an action for money had and received. At the death of her husband, Mrs. Noble was in a position similar to the wife under the common law, where the husband had not reduced her personal property to possession in his lifetime. See, *Stanwood v. Stanwood*, 17 Mass., 57; *Hayward v. Hayward*, 20 Pick., 517; *Phelps v. Phelps*, 20 Pick., 556.

Our statutes have so changed the rule of common law as to the rights of husband and wife, that the husband cannot become the owner of his wife's property during her lifetime, without the intervention of a third party. A husband cannot deprive his wife of her right to her separate property. *Thomson v. O'Sullivan*, 6 Allen, 808; Pub. Stat., ch. 147, § 8.

An action for money had and received will lie to recover this money of the estate of Augustus Noble. It is not necessary that there should have been a contract between the husband and wife. 2 Greenl. Ev., § 117; *Hall v. Marston*, 17 Mass., 579; *Mason v. Waite*, 17 Mass., 563; *Skinner v. Bank*, 4 Allen, 290.

The count for money had and received is in the nature of a bill in equity, where nothing remains to be done but the payment of money. *Buttrick v. King*, 7 Met., 28; 2 Greenl. Ev., § 117; *Wiseman v. Lyman*, 7 Mass., 238; *Sevall v. Patch*, 132 Mass., 326, 328.

After a divorce *a vinculo* had been decreed to the wife, she was permitted to recover of the husband in this form of action, the proceeds of certain promissory notes given to her before marriage, which were received by him after the divorce. *Legg v. Legg*, 8 Mass., 99.

The statutes removing the restrictions upon the right of married women to hold and deal with their separate property in the same manner as though they were sole, were made for the purpose of securing to married women substantial rights, and it was intended that those rights should be protected and enforced by the courts. The principal, perhaps the only restrictions upon the complete enjoyment of these rights, are as to contracts and gifts and as to suits between husband and wife. But the cases are numerous where wives have recovered money, and where they have sustained their rights in courts, where the right to recover does not involve the question of a direct contract between

husband and wife, or a suit against the husband. *Savage v. Winchester*, 15 Gray, 453; *Stearns v. Bullens*, 8 Allen, 581; *Bemis v. Call*, 10 Allen, 512; *Degnan v. Farr*, 126 Mass., 297.

This distinction is discussed in *Jackson v. Parks*, 10 Cush., 550.

The rights of the wives in some bankruptcy cases reported, to wit: *Re Blandin*, 1 Low. Dec., 543; *In re Bigelow*, 2 Nat. Bank., Reg. 2d ed., 556, were no greater than the right of plaintiff in the case at bar.

Foule v. Torrey, 185 Mass., 87, seems to have been decided upon two grounds: first, that no contract can be made between husband and wife; second, that no action, either at law or equity, can be maintained to recover money where the husband must necessarily be made a party. This case avoids both those objections.

But in *Ayer v. Ayer*, 16 Pick., 327, a wife maintained a bill in equity against her husband and a trustee to enforce the execution of the trust, and he was compelled to account for the rents and profits of the trust estate.

This court recognizes the obligation of the husband to restore to the wife her money used by him, so that a repayment to her of money borrowed of her by her husband is good, even as against his creditors. *Atlantic Nat. Bank v. Tatener*, 180 Mass., 407; *Draper v. Buggee*, 133 Mass., 258.

We claim there was an implied trust, in that it does not appear that the wife consented of her own free will, to the husband receiving this money; the fair presumption is that she acted under his coercion, and that he wrongfully appropriated the money to his own use. See, *Turner v. Nye*, 7 Allen, 181.

Mr. Henry Fuller, for defendant :

Husband and wife are one person in law ; neither can maintain an action at common law against the other. 2 Kent, Com., 6th ed. 129; *Jacobs v. Helsler*, 113 Mass., 157.

The common law in relation to husband and wife has been modified and altered by statute, but not in relation to the matter of suits between each other. Pub. Stat., ch. 147, §§ 2, 7.

If the plaintiff seeks to recover in this case, because the action is not brought by the wife against the husband, but by the administratrix of the wife against the administrator of the husband, she must be equally unsuccessful. *Jackson v. Parke*, 10 Cush., 550; *Ingham v. White*, 4 Allen, 412; *Abbott v. Winchester*, 105 Mass., 115.

A contract between husband and wife has no validity in law; is a mere nullity. The death of one or both the parties and the appointment of an administrator, cannot give to a nullity validity. *Ingham v. White*, 4 Allen, 412; *Bassett v. Bassett*, 112 Mass., 99.

The case does not find that the money was delivered to the husband, in trust; or that the husband, wrongfully and against the consent of the wife, received and appropriated the money to his own use. *Turner v. Nye*, 7 Allen, 181.

When a wife, with her own hand, pays money of her separate property to her husband, there is no presumption in law that he received it in trust for her; the burden of proof is upon her to show the fact. *Jacobs v. Helsler*, 113 Mass., 160.

When there is any remedy between husband

and wife, it is exclusively in equity. Story, Eq. Jur., §§ 1867, 1868.

Devens, J., delivered the opinion of the court :

We do not perceive how, consistently with well settled principles, the plaintiff in this case can recover. While by statute the wife may make contracts in the same manner as if she were sole, no authority has been given by which husband and wife may make contracts each with the other. Stats. 1874, ch. 184, § 1; Pub. Stat., ch. 147, § 2.

Their legal incapacity thus to contract remains at common law. At law it has been repeatedly decided in this Commonwealth that a promissory note or any other personal contract between the husband and wife is absolutely void. *Ingham v. White*, 4 Allen, 412; *Foule v. Torrey*, 185 Mass., 87.

A contract with the wife for payment of money by the husband is a nullity, and his retention of the money is not a conversion. *Bassett v. Bassett*, 112 Mass., 99.

Even when the wife transferred a promissory note to a third person, which had been made to her by her husband so that the mere disability to sue, arising out of the marital relation, was removed, such person could not maintain the action. *Ingham v. White*, *ubi supra*.

In the case at bar, the fact that the wife survived the husband could not make that a good contract which was originally a nullity. *Butler v. Ives*, 189 Mass., 202, is quite distinguishable, the contract there considered being valid at its inception.

The plaintiff contends that under her declaration which contained two counts, one for the loan of money and the other for money had and received, the latter permitted the court to deal with the transaction on equitable principles, and that the presiding Judge erred in declining to receive evidence as to the transaction. But the presiding Judge did not decline to receive evidence; he ruled simply upon the statement of counsel that the husband received the money sued for "a few months before his death, upon his promise to return it or a like sum, to her in a short time." The plaintiff did not express any wish to prove any case under the second count, except as it might be sustained by proof of this statement, which was applicable to each count. By this no evidence was shown upon which any trust could have been raised in the plaintiff's favor, if a trust could properly have been dealt with under the count for money had and received. No property of hers had passed into her husband's hands under any circumstances which would authorize any inference that it was to be held or kept as her separate property. The relation which they had established with each other was that of borrower and lender simply, and the contract they had thus assumed to make was a nullity. *Foule v. Torrey*, *ubi supra*.

It has, indeed, been held that where one renders service or conveys property, as the stipulated consideration of a contract, within the Statute of Frauds, if the other party refuses to perform and sets up the Statute, the value of such service or property may be recovered. The obligation which would arise from the receipt or retention of value to return or pay for

the same is not overridden, because the words of a form of contract which did not bind the party repudiating it were uttered at the time. *Bacon v. Parker*, 137 Mass., 309.

Between parties competent to contract, it is reasonable to infer that the party failing to perform that which he had agreed to do, and yet which he might lawfully do, promised that if he availed himself of his right of rescission, he would return that which he received, and that the value received or retained by him was so received only on these terms. In *Bacon v. Parker*, the parties were competent to contract with each other, but the inference that if one contract was repudiated another must be inferred could not arise, where parties were not competent to make any contract.

Exceptions overruled.

George BOWKER, Trustee,

v.

Henrietta BRADFORD.

A married woman is not liable on a contract made by her husband for a partnership consisting of himself and his wife. Husband and wife cannot enter into a contract of co-partnership.

(Decided January 9, 1886.)

ON report from the Superior Court, Essex County, upon a verdict directed for defendant. *Judgment on verdict.*

This was an action of contract to recover for rent of a store.

Against the defendant, Amos C. Bradford, who had filed a suggestion of insolvency since the suit, judgment was entered in the suit, with stay of execution. The trial then proceeded solely against the defendant Henrietta, who was the wife of Amos.

The plaintiff offered evidence tending to show that the defendant, Amos C. Bradford, called upon him with reference to hiring the store in question, and agreed as to price. The plaintiff then offered to prove the following facts, viz.: that at the time of the hiring, the plaintiff asked the defendant, Amos C. Bradford, who was to occupy the store; and he replied that it was for himself and wife, and passed the plaintiff a card with the name of "Mr. & Mrs. A. C. Bradford" printed thereon, saying that was the style under which they were going to do business; that they had been doing business at Barre, Vt., under the same style. Mrs. Bradford was not present when this conversation took place; and witness never had any talk with her about the rent or as to responsibility. The terms of the hiring were agreed on at this interview. The plaintiff then offered evidence, which was admitted *de bene*, that after the goods came to the store, Mrs. Bradford was there most of the time arranging the goods, marking them and giving directions about the same to a clerk employed; that the goods which the defendants had left at Barre, Vt., were brought to Salem, and those salable at that season of the year were put into the store; that the rest were stored at their residence; that Mrs. Bradford was at the store frequently and making sales to customers when her husband was not there; that he was not

often seen there; that while arranging the goods in the store, Mrs. Bradford gave directions about some whitewashing, and afterwards the plaintiff had some alterations of stucco work and gas-light made under her directions, during neither of which times was her husband present; that the books which they kept at Barre, Vt., were the same kept in Salem, with continuous charges and no change, but the witness saw no name there, either of Mr. or Mrs. Bradford.

The plaintiff further offered evidence that at a former trial of this case, Mrs. Bradford testified that she purchased most of the goods that were purchased for the store in Salem; that sometimes her husband accompanied her to Boston to make purchases, when she was not well; and further offered evidence to show that the husband had made three several purchases of goods of a firm in Boston, and gave directions to have them sent to Salem; that bills were sent to Salem in the name of Mr. & Mrs. A. C. Bradford, and all but the last bill was paid, but there was no evidence as to payment by Mrs. Bradford; that in a tray upon the counter in the store, were cards with the name of "Mr. & Mrs. Bradford, Fashionable Millinery and Fancy Goods, Main Street, Jackson Block, Barre, Vermont," printed thereon; also a package of wrapping paper with the same printing thereon in large letters, which was used to do up bundles of goods sold from the store.

The plaintiff asked the court to rule that the defendants under our statutes could carry on business as partners; that upon the evidence offered and admitted *de bene* the plaintiff could recover against both defendants as tenants in common. The court declined so to rule, but ruled that, upon the offer of proof and evidence put in, there was no competent evidence upon which this action could be maintained, and directed a verdict for the defendant, Henrietta Bradford.

Mr. C. Sewall, for plaintiff:

The court should have allowed the case to go to the jury with proper instructions, to say whether the wife adopted and ratified the arrangements made by the husband for their joint occupation of the store. *Heves v. Parkman*, 20 Pick., 90; *Clement v. Jones*, 12 Mass., 60; *Conrad v. Abbott*, 132 Mass., 390, and cases cited.

In *Thayer v. White*, 12 Met., 844, the court held, when "goods were sold the defendant's son without authority and a notice sent defendant, that the silence of the defendant in not replying to the notice was a ratification."

In *Foster v. Rockwell*, 104 Mass., 170, it was held that a notice sent to the principal of the purchase of goods, which had not been authorized, silence on his part after receiving notice was a ratification.

Messrs. Gaston & Whitney, for defendant:

So far as the evidence offered tended to show that Mr. and Mrs. A. C. Bradford were partners, and that the store was hired for partnership uses, it was incompetent. In this Commonwealth a wife cannot be the partner of her husband, and she is not liable for debts contracted in the name of herself and husband as partners. *Lord v. Parker*, 3 Allen, 127; *Plummer v. Lord*, 7 Allen, 481; Pub. Stat., ch. 147, § 2.

The Judge below was right in ruling that

there was no evidence offered on which the plaintiff could recover against Mrs. Bradford as tenant in common. In such cases it is competent for the Judge to take the case from the jury. *Kendall v. Boston*, 118 Mass., 284; *Cotton v. Wood*, 8 C. B. N. S., 566; *Hammack v. White*, 11 C. B. N. S., 588; *Manzoni v. Douglass*, 6 L. R. Q. B. Div., 145.

Morton, Ch. J., delivered the opinion of the court:

The ruling of the court directing a verdict for the defendant, Henrietta Bradford, was right. There was no evidence which would support a verdict against her. The contract was made with her husband. If the evidence tended to prove anything against Mrs. Bradford, it showed that he [her husband] undertook to hire the store for a partnership consisting of himself and his wife. It has no tendency to prove any other ground of liability of his wife.

But a husband and wife cannot enter into a contract of co-partnership. Pub. Stat., ch. 147, § 2; *Plumer v. Lord*, 7 Allen, 481.

She is, therefore, not liable as co-partner for the rent of the store.

Judgment on the verdict.

George F. STONE
v.

Inhabitants of ATTLEBOROUGH.

An action is not maintainable against a town for a personal injury which was not received within the limits of a highway which the town was bound to keep in repair.

(Decided November 4, 1885.)

THIS is an action of tort for injuries claimed to have been received by plaintiff while traveling along a public way in the Town of Attleborough, through an alleged defect in said way. *Exceptions overruled.*

The notice which was given to the Town within thirty days after the injury was as follows: "I hereby notify you, that upon Sunday, March 11, 1883, at or about three o'clock in the morning, while passing over the sidewalk upon the westerly side of Washington Street in said Attleborough, North Village, abutting Guild's Block, so called, and directly adjoining the store of Burton & Williams, druggists, I fell and received severe bodily injuries; said fall and the consequent injury was caused by a defect in the construction of said sidewalk, for which defect and resulting injury I hold said Town of Attleborough responsible."

No evidence was offered tending to show the intention with which the notice was given, or its effect.

Upon the conclusion of the plaintiff's evidence, the defendants asked the court to rule that the plaintiff had failed to make out his case and that the defendants were entitled to a verdict; first, because the plaintiff had not shown any defect in the way; second, because the notice to the Town was insufficient; and third, because the place where the injury occurred was outside the limits of the public way.

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The counsel for the plaintiff then stated to the court that the plaintiff was unable to prove that the place where the accident occurred was within five feet of the curbstone.

The court ruled as requested by the defendants and directed a verdict for the defendants, and plaintiff excepted.

Messrs. Wm. H. Fox and F. B. Byram, for plaintiff.

Messrs. Walter Clifford, C. W. Clifford and Geo. A. Adams, for defendants:

There was no defect proved. The notice is insufficient. It is clearly so under the Statute of 1877, ch. 294; Pub. Stats., ch. 52, § 19.

No cause is stated. *Noonan v. Lawrence*, 180 Mass., 161; *Miles v. Lynn*, 180 Mass., 398; *Madden v. Springfield*, 181 Mass., 441; *Dalton v. Salem*, 181 Mass., 551; *Shea v. Lowell*, 182 Mass., 187.

The Statute of 1882, ch. 86, does not remove this insufficiency. The notice is not "insufficient solely by reason of any inaccuracy in stating the cause." It is not inaccurate; it is indefinite and therefore wholly bad under the Statute of 1877. The Statute of 1882 was intended to cure a misstatement, not to excuse the want of a statement.

The purpose of the Statute of 1877 was to "render substantial assistance to the proper authorities in investigating their liability;" 180 Mass., 161; and to "repair the defect if it exists." 181 Mass., 441.

That the Legislature still intended the notice to be of "substantial assistance" to the Town, is shown by the proviso in the Statute of 1882, to the effect that it must be shown that the notice was not intended to mislead, and did not in fact mislead. A notice which simply says the defect complained of was "a defect in the construction of said sidewalk," can be of no assistance whatever to the Town.

A notice which fails to state a particular cause, or which states a false cause, *McDougall v. Boston*, 184 Mass., 149, cannot be said to be "inaccurate" in statement.

A notice which states a particular cause in such a way as to leave no reasonable doubt as to the exact defect complained of, and no possibility of mistake as to its identity on the part of the Town, but which in some of its statements is not entirely in accordance with the facts, would be "inaccurate." But a notice which completely fails to identify the cause complained of, and thus fails to accomplish the only purpose for which the notice was intended, cannot be said to be "inaccurate."

The plaintiff slipped and fell entirely outside the location of the highway. He therefore fails "to show that when he came upon the defect complained of, he was traveling upon any way in which the defendants were under obligation to provide for his safety." *Stockwell v. Fitchburg*, 110 Mass., 305.

It is sufficient to negative the liability of the Town if the cause only of the accident existed without the limits of the highway. "A city or town is not liable to an action for damages for injuries sustained on the highway, unless the accident is occasioned by causes which occurred entirely within the highway." *Rowell v. Lowell*, 7 Gray, 100; *Richards v. Enfield*, 18 Gray, 344.

A fortiori, if both cause and result occurred without the limits of the highway; the de-

fendants cannot be held liable under Pub. Stats., ch. 49, §§ 94, 95.

The portion of the sidewalk outside the highway is not "a way open and dedicated to the public use, which has not become a public way." *Oliver v. Worcester*, 102 Mass., 489; *Sullivan v. Boston*, 126 Mass., 540.

That this is so is shown by a special provision in regard to those portions of sidewalks outside of highways, and limited in its application to cities. Pub. Stats., ch. 49, § 96.

The rulings upon the admission of the testimony offered were correct, but become immaterial. *Kidler v. Dunstable*, 11 Gray, 342; *George v. Haverhill*, 110 Mass., 513.

Morton, Ch. J., delivered the opinion of the court:

The accident to the plaintiff did not happen within the limits of a highway which the defendant was bound to keep in repair. The Public Statutes, ch. 47, § 95, have no application to the case. The cases of *Stockwell v. Fitchburg*, 110 Mass., 305 and *Sullivan v. Boston*, 126 Mass., 540, conclusively show that for these reasons the plaintiff cannot maintain this action. It is not necessary to consider the other objections to his right to recover.

Exceptions overruled.

Phoebe A. I. BUFFINGTON

Harriet MAXAM, *Appt.*

Where personal property is bequeathed to one for the support of another, a trust is imposed upon the property, and the taker holds it in trust for the purpose named.

(Bristol—Decided January 11, 1886.)

APPPEAL from a decree of the Probate Court for Bristol County. *Affirmed.*

This proceeding was commenced by a petition to the Probate Court, made by Phoebe A. I. Buffington, praying that a trustee be appointed of the property given by the will of Borden C. Tallman, to her sister, Caroline E. Tallman. The Probate Court appointed Harriet Maxam such trustee and ordered her to give bonds for the due performance of the trust, and from that order she now appeals.

The following facts were agreed upon: "Borden C. Tallman, deceased, testate on or about February 27, 1882, leaving as his only heirs at law his three children, Phoebe A. I. Buffington, the complainant, Harriet Maxam, the respondent, and Caroline E. Tallman. A copy of his last will and testament which was duly proved and allowed in May, 1882, is hereto annexed. Daniel Wilbur was duly appointed administrator with the will annexed. At the time of his death, Borden Tallman was eighty years of age and upwards. His daughter Caroline was and had been for many years and is now insane. After the probate of the will, Elijah Chace was duly appointed her guardian. She had a little property, about six to eight hundred dollars and is now about fifty-eight years of age. Up to her marriage, which was about 1870,

Mrs. Buffington lived with her father; the family consisted of father and three daughters; Phoebe and Harriet both helped to take care of Caroline up to the time of Phoebe's marriage, although Phoebe may have done more than Harriet. Harriet lived with her father up to the time of his decease. She was married about four years before his death. Phoebe did not live with her father after her marriage. She was there frequently, and her father visited her, and she assisted in taking care of him during his last illness. His relations to all his children were friendly. One half of the farm on which Borden Tallman lived belonged to him and one half to his brother, William Tallman, who died after Phoebe's marriage and before Borden's death, and devised his half to Harriet. After Phoebe's marriage and up to the time of Harriet's marriage, Harriet, Caroline and their father continued to live together on the farm and elsewhere, and Harriet had the care of Caroline. After Harriet's marriage, she, her husband, and father and Caroline, continued to live on the farm until the father's death; Harriet having the care of Caroline, and her husband running the farm. The revenue from all sources except Caroline's property was used for the common benefit. After the father's death, Caroline continued to live with and is still living with Harriet on the farm, and taken care of by her, either at her own expense or out of the property paid over to her. Borden Tallman had no real estate except the half of the farm devised to Harriet. The rest of his estate consisted of about \$12,000 in personal property which has been paid over, by the administrator with the will annexed, to Harriet."

The will in question is as follows: "In the name of God, Amen: I, Borden C. Tallman, of Swansea, County of Bristol and State of Massachusetts, being weak in body but of sound and disposing mind and memory, do make this my last will and testament.

1. To my Harriet I give my half of the farm together with produce, stock and farming implements thereon, and the rest and residue of all my property, whether real or personal, of whatever name or nature, for the support of my daughter Caroline E., except the following legacies.

2. To my daughter Phoebe Ann, I give \$5.

3. To my daughter Caroline E., I give \$5.

Lastly, I hereby constitute and appoint William Mitchell my executor of this my last will and testament, and, hereby revoking all my former wills and codicils, do hereby declare, publish and pronounce this and this only as my last will and testament in the presence of the subscribing witnesses hereto, this 10th day of January, 1872."

Mr. J. M. Wood, for petitioner:

In the construction of wills, the first and great object is to give effect to the intent of the testator, if it can be done without violating any rules of the law; and it is a rule that the heir at law is not to be disinherited, unless such appears clearly to be the intention of the deviser. *Hayden v. Stoughton*, 5 Pick., 586.

And where there appears to be an omission on the part of the father to provide for his child, the law will protect that child's interest. Pub. Stat., ch. 127, §§ 21, 22.

And there is no reason appearing in the agreed

facts why the testator should disinherit his daughter Phebe, or of any intention to do so. There is no presumption in favor of Harriet. "Legacies by implication are not to be supported unless the testator's intention is clear, so that no other reasonable inference can be made." *Grout v. Hapgood*, 13 Pick., 164.

The gift of \$5 to Phebe, and \$5 to Caroline, would not be for the purpose of preventing them or either of them from breaking the will, but would guard against any claim that might be set up against the estate by either of them, under the statute in force at the time of execution of the will, as to a child not named by the father. Gen. Stat., ch. 92, § 25.

Anything left after the death of Caroline was intended to go where the law would carry it, as undisposed of by will. Harriet would be a trustee by necessary implication of law, and hold the personal property in trust for the heirs of testator. *Whiting v. Whiting*, 4 Gray, 240; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Perry, Tr.*, § 117.

The position taken by the appellant is a different one from that taken by her when this case, in different form, was before this court before. *Wilbur v. Mazam*, 138 Mass., 542.

Messrs. Morton & Jennings, for appellant:

It is plain from the facts, that the testator expected that Caroline would continue to live with and be cared for by Harriet, and he gave the property to Harriet, confiding in her sisterly affection, liberality, discretion and good judgment, in all things relating to Caroline, to do that. *Spooner v. Lovejoy*, 108 Mass., 529.

The case is not a trust, but is a devise of the property to Harriet, subject to a charge in favor of Caroline. The words "for the support," are equivalent to "subject to the support of," and if Harriet should refuse or neglect to support Caroline, the guardian of the latter could maintain an action therefor against Harriet or her estate. *Pinkerton v. Sargent*, 112 Mass., 110; *Brampton v. Blume*, 129 Mass., 152; *Henry v. Barrett*, 6 Allen, 500; *Seasey v. Little*, 7 Pick., 296.

Such devises have not been regarded as trusts. *Bamforth v. Bamforth*, 128 Mass., 280; *Spooner v. Lovejoy*, 108 Mass., 529; *Hess v. Singler*, 114 Mass., 56; *Gibbins v. Shepard*, 125 Mass., 541; *Proud v. Proud*, 32 Beav., 234.

Morton, Ch. J., delivered the opinion of the court:

The will of the testator is inartificial and obscure. He gives to his daughter Harriet one half of the farm, together with produce, stock, and farming implements thereon. The words used import the gift of a fee or absolute estate to Harriet. By the same words he bequeaths "the rest and residue of all my property, whether real or personal of whatever name or nature, for the support of my daughter Caroline E., except the following legacies." The residue consists wholly of personal property.

If we assume in favor of the appellant that, upon the death of Caroline, she would take an absolute estate in the residue bequeathed to her, yet we think that, during Caroline's life, Harriet holds the residue charged with the duty or trust of applying such part of it as may be necessary to the support of Caroline.

The testator intended, not merely that there should be a personal obligation on the part of Harriet to support her insane sister, but that the property should be held for the support of Caroline. Where personal property is bequeathed to one for the support of another, a trust is imposed upon the property, and the taker holds it in trust for the purpose named.

We are therefore of opinion that it was competent for the Probate Court to appoint Harriet trustee under the will, and to require her to give bonds.

Decree affirmed.

COMMONWEALTH of Massachusetts

v.

Michael KEEFE.

1. A complaint for obstructing the view of premises on which liquor is sold under license is sufficient if it alleges that the defendant, having a license to sell in the room named, maintained there curtains or shutters, against the law.
2. If the license produced proves the allegation of the complaint, the fact that it proves also that the defendant was licensed to sell in another room is not a variance.

(Decided November 23, 1885.)

ON defendant's exceptions. *Overruled.*

The case is stated in the opinion.

Mr. John L. Eldridge, for defendant:

The necessity of having an accurate and full description of the licensed premises in a complaint of this kind, is apparent. Pub. Stat., ch. 100, §§ 12, 18.

Messrs. E. J. Sherman, Atty-Gen., and H. N. Shepard, Asst. Atty-Gen., for the Commonwealth.

By the Court:

The offense charged is that the defendant, being licensed to sell intoxicating liquors in a room described in the complaint, used by him for the sale of such liquors, placed and maintained upon the said premises, a curtain and shutter in such way as to interfere with a view of the business conducted upon the premises.

The evidence proved all the allegations of the complaint. The fact that the defendant's license included the cellar under the room is immaterial. The complaint need not and does not set out the exact form and extent of the defendant's license, so as to make it a part of the description of the offense; it is enough that it alleges that the defendant having a license to sell in the room named, maintained there curtains or shutters against the law. If the license produced proves the allegations of the government, the fact that it proves more, namely: that the defendant is also licensed to sell in another room, does not constitute a variance.

Exceptions overruled.

SUPREME COURT OF CONNECTICUT.

HEWITT'S APPEAL.

1. A court of probate, in the settlement of an estate or otherwise, is not vested with equity powers to administer an estoppel in a controversy between the widow, regarding her right of dower in her deceased husband's estate, and strangers to the estate, having no interest in the same except as purchasers of land belonging to the estate.
2. On appeal from the probate court to the Superior Court, the Superior Court takes the case as it stood in the probate court and can do no more than could have been done in that court. This rule is not changed by the Practice Act.

(Decided December 15, 1885.)

ON questions reserved by the Superior Court in a case appealed by Lucy M. Hewitt and others from the Probate Court for the Hartford District. *Reversed.*

The case and facts are stated in the opinion. *Messrs. Lewis E. Stanton and H. S. Barbour*, for appellants:

The right of dower does not depend upon the assignment of dower, which is a mere severance of the common estate. *Stedman v. Fortune*, 5 Conn., 462; *Wooster v. Hunt's Iron Co.*, 88 Conn., 256; *Greathead's App.*, 42 Conn., 375.

The assignment of dower is a process of distribution of real estate. If the widow had a right of dower upon the decease of her husband, proceedings of distribution are to be had without reference to what may have occurred since. Even if she had deeded away her right, the distribution would be made the same as if she had not. *Griswold v. Bigelow*, 6 Conn., 266; *Holcomb v. Sherwood*, 29 Conn., 419; *Greathead's App.*, 42 Conn., 374; *Way v. Way*, 42 Conn., 52.

This case comes to the Superior Court sitting for the trial of it as a court of probate; "for in all probate appeals the appellate court takes the place of the court of probate." *Davis' App.*, 39 Conn., 401; *Strong v. Strong*, 8 Conn., 408.

Courts of probate are of limited, inferior and special jurisdiction, and have no powers but such as are conferred by statute. *Sears v. Terry*, 26 Conn., 273; *Parsons v. Lyman*, 32 Conn., 570, 571; *First Nat. Bank v. Balcom*, 85 Conn., 359.

Courts of probate cannot try titles to property, no such power being conferred upon them by statute. *Gold's Case*, Kirby, 100; *Homer's App.*, 35 Conn., 113; *Parsons v. Lyman*, 32 Conn., 570.

"Appeals from orders of the probate court differ from what may be called common-law appeals. * * * In these last the appeal vacates the judgment; the inferior court is emptied of jurisdiction; the entire cause is lifted into the appellate court, and there full and final disposition is made, as if it had been originally commenced therein; there is no turning or looking backward. But the appeal from the probate court is only from a particular order or decree; that being disposed of, the cause proceeds in the

probate court. The Superior Court determines principles; the probate court embodies them in orders." *Lancaster's App.*, 47 Conn., 259; *Curtiss v. Beardley*, 15 Conn., 523.

In *Way v. Way*, 42 Conn., 53, the court held that "The court of probate alone has jurisdiction of the matter of assigning dower to the widow."

In *Beach v. Norton*, 9 Conn., 182, the court says: "The Superior Court will not take cognizance of a matter properly cognizable by the court of probate."

A plea of estoppel presents for trial an issue of fact, which parties have a right to try to a jury. This is not a case for a jury. The only appeals from probate which can be entered on the jury docket are those involving the validity of a will, and appeals from commissioners on insolvent estates. Practice Act, § 22.

The decision of the court of probate in refusing to set out dower to Mrs. Hewitt cannot be sustained because of its chancery powers. *Vail's App. from Prob.*, 37 Conn., 195.

The cases of the proper exercise of chancery powers by the courts of probate, like *Ashmead's App.*, 27 Conn., 241, and *Peck v. Harrison*, 28 Conn., 118, or any others which can be cited, do not sustain the decision of the probate court in this case, which was in effect an attempt to determine a question of title as between the widow and purchasers from the heirs of her husband.

In *Treat's App.*, 35 Conn., 210, it is held that probate courts have no power "to decree a forfeiture under the conditions of a will." They cannot decree a forfeiture of a right of dower except as provided by the statute.

The Practice Act does not apply to proceedings in probate courts, and gives to those courts no additional powers; hence it does not affect this case, which is to be tried as if it was in the probate court. *Haral v. Levery*, 50 Conn., 46.

The allegations in the cross complaint are of promises said to have been made by Mrs. Hewitt, and, if proved, do not work an estoppel. *Allen v. Rundell*, 50 Conn., 29; *Ins. Co. v. Mowry*, 96 U. S., 544 (bk. 24, L. ed., 674); *Bigelow, Estop.*, 438; *Brightman v. Hicks*, 108 Mass., 246; *Stilson v. Stilson*, 46 Conn., 21; *Hayes v. Livingston*, 34 Mich., 384.

In *Kelso's App.*, 102 Pa. St., 7, it is held that "Assertions made by a bankrupt's wife to an intending purchaser, just prior to the sale, that she has no claim of dower and will make none, followed by purchase on the faith of such assertions, do not estop her from subsequently claiming dower of the lands in said purchaser's possession."

The authorities are against granting an injunction in cases like this. It is claimed that there is a legal defense by estoppel, and there are no allegations of inability to establish it. Chancery will not, therefore, interfere by injunction. *Hilliard, Inj.*, 256; *Hood v. N. Y. & N. H. R. R. Co.*, 23 Conn., 622.

Messrs. Henry C. Robinson and William F. Henney, for appellees:

The facts in the cross complaint stated would, if proven, constitute an estoppel in equity against appellant's claim of dower. This position will hardly be disputed by counsel for appellants and is sustained by numerous authori-

ties, among which are the following: *Bigelow, Estop.*, 492, 513; *Connolly v. Branstler*, 3 Bush, 702; *Talbot v. Hill*, 68 Ill., 106; *Dougrey v. Topping*, 4 Paige, 94; *Smiley v. Wright*, 2 Ohio, 506; *Ellis v. Diddy*, 1 Cart. (Ind.), 561; *Sweeney v. Mallory*, Sup. Ct., Mo. May T., 1876, 2 Rep., 323; 62 Mo., 485; *Taggart's App.*, 99 Pa. St., 627.

The court of probate may take cognizance of such an estoppel and enforce it, when proven, in bar of a motion for assignment of dower. *Holcomb v. Sherwood*, 29 Conn., 420.

Having once acquired jurisdiction to determine the right of the party to such an assignment, the probate court becomes, as to that matter, vested with the amplest chancery powers to do full justice between all the parties before it. *Way v. Way*, 42 Conn., 53; *Husted's App.*, 34 Conn., 495; *Greathhead's App.*, 42 Conn., 376.

In *Bailey v. Strong*, 8 Conn., 281, the court says: "The settlement and the entire settlement of estates, appertains to the several courts of probate; and from their decision an appeal lies to the superior court. *Pitkin v. Pitkin*, 7 Conn., 807.

These courts are vested with chancery powers on all subjects within their jurisdiction, and can so mold and form their decrees as to do entire justice between all parties in interest."

And so in *Mix's App.*, 35 Conn., 128: "Courts of probate, as to all matters within their jurisdiction, are clothed with chancery powers so far as may be necessary to enable them to do full justice between the parties."

In *Beach v. Norton*, 9 Conn., 198: "These courts have all the powers of a court of chancery, and in some respects much greater, in relation to the trial of questions within their jurisdiction." *Ashmead's App.*, 27 Conn., 248; *Am. Bible Soc., v. Wetmore*, 17 Conn., 187; *Vail's App.*, 37 Conn., 195; *Lawrence's App.*, 49 Conn., 419; *Evan's App.*, 51 Conn., pt. 3, 488-9; *Farrow v. Farrow*, 1 Del. Ch., 457.

The Practice Act, 8, § 6, provides: "All courts which are vested with jurisdiction both at law and in equity, may hereafter, to the full extent of their respective jurisdictions, administer legal and equitable rights, and apply legal and equitable remedies, in favor of either party in one and the same suit, so that legal and equitable rights of the parties may be enforced and protected in one action." An appeal from probate is an action. *Stiles' App.*, 41 Conn., 330.

The answer of appellees to appellant's reasons of appeal are sufficient, because: 1. It is not necessary that the estoppel claimed should be pleaded, much less that the specific facts relied on should be set out at length. 6 Wait, Act. & Def., 715; *Hawley v. Middlebrook*, 28 Conn., 536.

2. If the answer is not particular enough in its statements, demurrer is not the remedy. The Practice Act has specifically provided that in such case, on motion, "the court may order fuller and more particular statements." Pr. Act, 4, § 9.

3. The facts stated in the answer are sufficient to constitute an equitable estoppel in bar of the widow's dower. 1 Wash. Real Prop., 3d ed., 237; *Bigelow, Estop.*, 513; *Simpson's App.*, 8 Pa. St., 199; *Hawley v. Middlebrook*, 28 Conn., 536

The cross complaint should not be stricken out. Pr. Act, 15, § 8; 18, § 1; 2, § 5.

The facts stated in the counterclaim, if proven, would constitute an estoppel. See, *Connolly v. Branstler*, *supra*, and authorities cited.

Park, Ch. J., delivered the opinion of the court:

Lucy M. Hewitt was the wife of one Welles, and was living with him as such at the time of his death. He died seised and possessed of real estate in his own right. No provision, by way of jointure, for the support of his wife had been made by Welles before their marriage. No settlement in lieu of dower had been made in her favor in contemplation of marriage. These facts are undisputed in the case. In these circumstances the appellants brought their application to the Probate Court for the District of Hartford to have dower assigned and set out to Mrs. Hewitt in the real estate of her late husband. The probate court refused the application, and an appeal was taken to the Superior Court. In that court the appellees filed a cross complaint, by way of counterclaim and equitable relief, setting forth such facts as would, in a court of chancery, having independent equity powers, estop Mrs. Hewitt from claiming dower in her late husband's estate. And they likewise offered to prove the same facts on the trial of the cause to accomplish that result. The appellants moved the court to strike the cross complaint from the record; and they further objected to the appellees proving the facts claimed for the purposes sought to be accomplished. The court reserved the questions for the advice of this court.

The principal facts stated in the appellees' cross complaint, and which they offered to prove, are the following: that an application was made to the probate court for the sale of the lands in which the appellants claim the right of dower; that the application was made at the request of Mrs. Hewitt, one of the appellants; that the court refused to grant the order unless Mrs. H. would relinquish her claim for dower; that she agreed so to do, and the order was thereupon granted; that the lands were sold to the appellees, Mrs. H. receiving a portion of the purchase money in payment of her right of dower; that Mrs. H. was present at the sale and authorized and directed the auctioneer to state before the sale, in her behalf, that the purchasers would receive a title free from all claim of dower on her part; that such statement was made to the appellees before the sale; that, relying on such representations, the appellees purchased the lands, paying full value for the same and paying a much larger price than they otherwise would have done.

These are the principal facts of the case; and the question is whether a court of probate, in the settlement of an estate or otherwise, is vested with equity powers to administer an estoppel in a controversy between the widow, on the one part, regarding her right of dower in her deceased husband's estate, and strangers to the estate, on the other, having no interest whatever in the same except as purchasers of land belonging to the estate.

It is certainly true in this case, if the Superior Court can entertain the cross complaint filed in

that court and grant the prayer thereof, that the same could have been done by the probate court, when the cause was before that court, if a similar complaint had there been filed; for the Superior Court takes the case as it stood before the probate court, and simply determines whether that court erred in its decision or not. If this was not so, this absurdity would exist in many cases; that the probate court erred, and committed no error, at the same time and upon the same question. It committed no error, taking into consideration all the powers and considerations it could possibly exercise and consider; it erred, taking into consideration other powers and considerations beyond its jurisdiction. This would be a state of things which the law would never tolerate, for it would compel the probate court to commit errors in many cases, leaving the parties to get justice through the delay and expense of an appeal to the Superior Court. But it is unnecessary to consider this question further, for the cases of *Davis' App.*, 39 Conn., 395, and *Strong v. Strong*, 8 Conn., 408, and many other cases that might be cited, fully establish the doctrine that the Superior Court, sitting for the trial of this case, takes the place of the probate court, from whence it came, and can do no more than could have been done by that court.

But it is claimed that the Practice Act authorizes the Superior Court to entertain jurisdiction of the cross complaint in this case. But the section of that Act relied upon simply allows courts that have law and equity powers to administer both in the same case. This court, in *Harral v. Levery*, 50 Conn., 46, says: "It was not the intention of the Practice Act to give any wider range to equitable defenses and cross suits than was before allowed by the settled chancery practice." The other sections of the Practice Act referred to clearly do not apply to appeals from probate courts.

It is further said by the appellees that courts of probate have equity powers, to be administered in all cases where equity is connected with the transactions they are required to perform; that if application is made for the assignment of dower, the court must be first satisfied that the applicant possesses the statutory requisites, without which no right of dower exists; that this power of inquiry is not "Exhausted, nor is this duty discharged, until the court has satisfied itself that there is no objection, equitable or legal, to the assignment of dower. For having once acquired jurisdiction to determine the right of the party to such assignment, it becomes, as to that matter, vested with the amplest chancery powers to do full justice between all the parties before it."

No doubt courts of probate should be reasonably satisfied that an applicant for the assignment of dower possesses the statutory requisites of the right to dower before it becomes its duty to make the assignment. But the assignment of dower does not establish the title in the applicant to dower in the lands assigned, any more than the setting off lands on execution establishes the title to the lands in the execution creditor. All that is done in either case is simply to designate the lands in which dower exists in one case, if it exists at all, and satisfaction of the debt in the other, if title by the levy is acquired, which depends upon the execution

debtor being the owner of the lands set off. If the title in either case is disputed, further proceedings before another court would be necessary to determine the fact.

No question is made in this case but that Mrs. Hewitt was once entitled to dower in the lands of her late husband. Suppose, while she was thus entitled, dower had been assigned and set out to her, and afterwards the transactions claimed to have accrued in this case had transpired, could any proceeding be brought by the appellees to the probate court to set aside or destroy her right of dower? And if not, how can it be done here? A widow's right and title to dower exists as perfectly before dower is assigned to her as it does afterwards; the only difference being that before the assignment it is attached to all the land, and afterwards to a particular portion. The effort here is to set aside by the probate court Mrs. Hewitt's right to dower which once existed; which would be doing the same in effect as in the case supposed.

Again; instead of the transactions which are claimed to have occurred in this case, suppose that the claim was that Mrs. H. had deeded her right of dower to the appellees, and therefore dower should not be assigned to her. Suppose Mrs. H. should claim that what purported to be a deed was obtained from her by fraud, was obtained by duress, was executed by mistake, supposing she was executing one instrument when in fact she was executing another, must a probate court determine all these questions before lands can be designated in which she has dower, if she has it at all? If so, is not the court of probate called upon to determine her title to dower, which *Gold's Case*, Kirby, 100, and *Home's App.*, 85 Conn., 113, declare cannot be done?

But the appellees insist that the probate court can try and determine the equitable title of Mrs. H. to dower, as it exists between her and third parties, and should do so before the court assigns her dower, on the ground that such courts administer equity in some cases, and this is one. But the equity which a court of probate can administer must grow out of and be inseparably connected with the business the court is called upon to transact. The court was called upon to assign and set out dower to Mrs. H. It is admitted she had the statutory requisites. Setting out dower does not affect in the least her right or title to dower in the lands designated. If she has performed acts which in equity estop her from claiming dower, the equity does not grow out of, neither is it connected with the business which that court is called upon to transact. It grew out of a purchase of the dower lands after her dower had attached. The case of *Selleck v. Selleck*, which appears in a note to *Andrews v. Andrews*, 8 Conn., 86, is decisive of this question.

Again; courts of probate settle estates. They settle them among the persons originally interested in them. If an heir sells his interest in the estate before distribution, distribution is made to him the same as though no sale had been made. If a widow sells her right of dower before it is assigned and set out to her, it is set out to her notwithstanding. Setting out dower is an act pertaining to the distribution of the estate. The appellees are outside parties. They have no interest in the estate except as

purchasers. They bring this controversy before the court, and object to the setting out of dower to the widow, on the ground of equity pertaining to them in their purchase. Such equity does not grow out of the distribution of the estate, neither does it arise between the persons originally entitled to it, but grows out of a purchase by strangers to the estate, and cannot be administered by the Probate Court.

We advise the Superior Court to dismiss the cross complaint; that the evidence offered by the appellees is inadmissible; that the answer is insufficient; and to reverse the decree of the Court of Probate.

Hubert B. GATES, *Appt.*,

BOSTON & N. Y. AIR LINE R. R. CO. *et al.*

1. Where a **railroad corporation**, by partly constructing its road, has exercised the public right of eminent domain delegated to it and has obtained subscriptions upon the implied promise to construct and operate its road, a **contract arises to carry into effect the object of its charter, and the capital stock, franchises and property stand charged primarily with this public trust.**
2. The State has a right to enforce the continuous exercise of the corporate powers and franchises for public use, to the exhaustion of the value of the corporate property and franchises, no matter what private right may be embraced in the title of the property.
3. When a mortgage upon the property and franchises of a railroad corporation is foreclosed, the title of the mortgagor is vested in the trustee in trust for the mortgage bondholders, and the trustee and cestuis que trust are invested with the same powers as the mortgagor possessed, and continue to hold the property subject to the same limitations and obligations, including the obligation to execute the public trust cast upon the mortgaged property by devoting it to the public use for which the corporation was created.
4. When a new corporation is created on the reorganization of the old corporation, by the action of a majority of the stockholders to carry into effect the original design, a part of the scheme being the issuance of new preferred stock to take the place of mortgage bonds of the old corporation, the rights of an individual bondholder of the original corporation are not impaired and he is bound by the foreclosure and reorganization proceedings.
5. The trustee being a state officer designated by the legislative action of the State, the laws in relation to his acts form part of the contract with the bondholders; and the mortgage having provided that the bonds might be considered due by any bondholder on default in payment of interest and that

foreclosure might then be enforced, the contract with each bondholder is **impressed with this condition**, and a majority having availed themselves of it, a **small minority should not be allowed to thwart their action.**

6. Each bondholder is, through the trustee and a majority of his co-bondholders, a party to the legislative and judicial proceedings accompanying the foreclosure and reorganization, and actual individual notice thereof is not requisite.

(Hartford—Decided January, 1886.)

A PPEAL from a judgment of the Superior Court, in favor of the defendants. *Affirmed.*

Suit for an injunction against the ratification by the Boston & New York Air Line R. R. Co. of a lease of its road for ninety-nine years to the New York, New Haven & Hartford R. R. Co., and for a receiver, an accounting, etc.

The complaint sets up the first mortgage of the New Haven, Middletown & Willimantic R. R. Co. to the State Treasurer; a default on the coupons of the bonds; the taking of possession by the State Treasurer as mortgage trustee; an alleged fraudulent and unlawful conveyance by him to the Boston & New York Air Line R. R. Co.; ownership in the plaintiff, of some of the mortgage bonds and coupons; an alleged fraudulent denial of his interest in the property by the Air Line Company; an alleged fraudulent conspiracy between it and the consolidated road to cheat the plaintiff; and the unconstitutionality of the Air Line charter.

The defendants answered, and the court found the issues both of law and fact in their favor, and refused the injunction.

The facts are stated at length in the opinion.

Messrs. Warner and Robinson, for appellants.

Mr. Simeon E. Baldwin, for appellees:

In many States, reorganizations are provided for by general laws. Great Britain, in her "Railway Companies Act, 1867" has adopted this plan. Such a law in Maine was held applicable to mortgages executed before the statute was enacted, on the ground that it was a remedial statute. *Kennebec & P. R. R. Co. v. Portland & K. R. R. Co.*, 59 Me., 9, 24, 82, 88.

In our State our practice has been to pass a special law of this character, for each case; of which the following are instances: *New London & N. R. R. Co.* 5 P. L., 263; *Boston, H. & E. R. R. Co.*, 6 P. L., 1; *Shepaug, R. R. Co.*, 7 P. L., 463; *Hartford & Conn. Valley R. R. Co.*, 8 P. L., 348; *Hartford & Conn. West. R. R. Co.*, P. Acts of 1881, 169; *New Canaan R. R. Co.*, P. Acts, 1882, 682.

The Connecticut decisions treat coupons as mere incidents of the bonds, differing from most other States in not allowing interest on them, if in default. *Crowby v. New Lond., W. & P. R. R. Co.*, 26 Conn., 126, 127.

The mortgage was to secure the bonds, and on its foreclosure the amount of the bonds, exclusive of interest accrued, would naturally govern in fixing the amount of capital for the new Company. *Child v. N. Y. & N. Eng. R. R. Co.*, 129 Mass., 173.

Although the bonds would not mature until 1889, a foreclosure for a default on the interest would be final, and terminate the trust. *Howell v. Western R. R. Co.*, 94 U. S., 463; (bk. 24, L. ed., 254.)

It was a resumption of the franchise granted to the N. H., M. & W. R. R. Co., and a grant of it to the new corporation. *Rockwell v. N. Y. & N. Eng. R. R. Co.*, 51 Conn., 408.

Such a resumption was competent under the reserved power to alter or repeal the *N. H., M. & W. R. R. Co.* charter. *Greenwood v. Freight Co.*, 105 U. S., 13; (bk. 26, L. ed., 961); *Young v. Rollins*, 85 N. C., 485; 12 Am. & Eng. R. R. Cas., 455.

It rarely happens in the United States that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect, and a reorganization of the affairs of the corporation, under a new plan brought about. Unless parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances, the true spirit of national comity requires that schemes of this character, legalized at home, should be recognized in other countries. *Canada South. R. R. Co. v. Gebhard*, 109 U. S., 527, 539 (bk. 27, L. ed., 1020, 1025).

"The mortgage, with the issue and distribution of bonds under it, creates a trust, of which the selected mortgagee or his duly constituted successor is the trustee, and the bondholders primarily and the stockholders ultimately the beneficiaries." *Gillfillan v. Union Canal Co.*, 109 U. S., 401, 403 (bk. 27, L. ed., 977); *Mempis & Little Rock R. R. Co. v. Dow*, 22 Blatchf., 48.

The plaintiff claims that his position is supported by the cases of *Knapp v. R. R. Co.*, 20 Wall. 117 (87 U. S., bk. 22, L. ed., 328); *Fletcher v. R. & B. R. Co.*, 39 Vt., 638, 650.

The reorganization statute in the first of these cases was a very different one from the charter here in question. The trustees under the original mortgage were private persons, selected for their personal fitness for the trust. They foreclosed the mortgage by a strict foreclosure, and then, under the Vermont Statute, sold it for a price to a new corporation, formed by a majority of the bondholders, as they might to any other purchaser. The new corporation was not to hold for the equal benefit of all the original bondholders; it bought for itself and was authorized to buy out the unconverted bonds on the best terms it could. Until such purchase it was to be a trustee for the outstanding bondholders, and accountable to them as such.

Neither the statute nor the foreclosure decree purported to discharge the trust; they simply substituted the corporation for the original trustees, under a trust expressly recognized as continuing. This was, of course, unconstitutional.

In the second case referred to, *Fletcher v. R. & B. R. Co.*, the Legislature authorized a majority of the bondholders, prior to any foreclosure and while the trust was an active one, to change the trustees, contrary to the

terms of the mortgage under which they had been selected.

The foreclosure decree did not assume to declare any bonds due and payable, except those whose holders had duly made their election to that effect. But in the contingency of the non-payment of the bonds as to which such election was declared, and of the overdue interest on all, within the term fixed for redemption, the decree did provide for an absolute foreclosure. In this it followed the usual and necessary practice in all mortgage foreclosures for default in interest payments, and was fully justified by the statute. Gen. Stat. Rev., 1866, 195, §§ 511-515.

The charter simply refers to and rests on this decree, to which the plaintiff was a party by his representatives, the mortgage trustee and a majority of the bondholders. If the decree was erroneous, the plaintiff should have intervened and brought a writ of error. *Credit Co. v. Ark. Cent. R. R. Co.*, 5 McCrary, 28, 30; *S. C.*, 15 Fed. Rep., 46.

The Legislature of Connecticut, being originally the only court of chancery, and constituted under a charter giving practically unlimited powers, has always given relief in cases of trust and in private matters generally, to an extent unknown in most of the other States. *Wheeler's App.*, 45 Conn., 806; *Stanley v. Colt*, 5 Wall., 119, 124 (72 U. S., bk. 18, Lawyers' ed., 502); *Proprs. White School House v. Post*, 31 Conn., 240; *State v. Lewis*, 51 Conn., 126.

In fact, this very mode of reorganization prescribed in the defendant's charter has been already twice before this court, in cases where its validity has been assumed as unquestionable, and has been the foundation of the judgment rendered. *Boston & N. Y. A. L. R. R. Co. v. Coffin*, 50 Conn., 150, 158, 160; *Bishop v. Clay Ins. Co.*, 45 Conn., 430, 451, 452.

The presumption, of course, is that this charter and every part of it is in accordance with the Constitution. A statute can be declared unconstitutional only when there is no escape from such a conclusion. *White v. Stamford*, 37 Conn., 587; *Comstock v. Gay*, 51 Conn., 45, 62.

The charter in question was plainly an equitable scheme of reorganization. None more so is suggested, unless it be in the tenth reason of appeal, in which the plaintiff complains that his coupons ought to have been paid before his bonds. But there was nothing with which to pay either, in cash. The whole mortgaged property was to be taken at once and forever. *Da Ponte v. Nor. Pac. R. R. Co.*, 21 Blatchf., 534, 539.

It was not a case where a partial distribution of a fund was to be made. Nor was it a case where some coupons of a certain class had been paid before the default, and some not, so that unless the latter were paid after the default, there would be an inequality between creditors of the same date. *Stevens v. N. Y. & O. M. R. R. Co.*, 18 Blatchf., 418, 416.

The mortgage lien was for the equal protection of any claim for principal or interest in default. In some railroad mortgages, a preference as respects interest is expressly declared, but where this is not the case, none is implied when the whole fund is the subject of foreclosure. *Howell v. Western R. R. Co.*, 94 U. S., 463, 466 (bk. 24, L. ed., 256).

The foreclosure dealt with the entire property mortgaged, the entire property of the company. In event of a failure to redeem, it appropriated this entire property for the benefit of the bondholders. It was not a case of a partial distribution, where more is left to which to resort in the future. The whole fund was seized, and was to be disposed of. *Miller v. R. R. Co.*, 40 Vt., 408; *Dunham v. R. Co.*, 1 Wall., 254, 268 (bk. 17, L. ed., 528).

The plaintiff has no coupons except such as belong to his bonds. He comes into equity, not for equality, which our charter gives him, but for a preference. Let him first show that the converting bondholders have received dividends equal to 7 per cent, and that he has not been excluded from equal participation in the profits. *Poland v. Lamoille V. R. R. Co.*, 52 Vt., 144, 170.

This action is an equitable one, and the court will not disturb an equitable plan of reorganization. *Hancock v. R. R. Co.*, 9 Fed. Rep., 738; *Shaw v. R. R. Co.*, 100 U. S., 612 (bk. 25, L. ed., 759); *Guyllan v. Union Canal Co.*, 109 U. S., 401 (bk. 27, L. ed., 977).

Our general laws authorize any railroad company to lease its road to any connecting road by a two thirds stock vote. Gen. Stat., § 27; Pub. Acts, 1878, ch. 65, 802.

The rule of chancery pleading, which allows some parties to sue or be sued in behalf of all, where their right is the same, is especially applicable in all suits for the foreclosure of railroad mortgages. Such mortgages are almost invariably made to trustees; and ordinarily the trustees represent the bondholders in all matters of litigation respecting their common and general rights. The bondholders are in such cases *quasi* parties to the suit and have the right at any time to intervene and become actual parties. They may come in under the decree and take the benefit of it or, so long as the proceedings are not definitely closed, they may obtain a hearing and show the proceedings to be erroneous. *Jones, R. R. Secu.*, § 361.

If the court erred in exercising its jurisdiction by sanctioning an objectionable plan of reorganization, the plaintiff's remedy was by writ of error, only. Unless the decree was *coram non iudice* in this particular, he cannot attack it collaterally, when pressed in a suit brought by his trustee for his benefit. *Campbell v. R. R. Co.*, 1 Wood, 368, 376; *Kerrison v. Stewart*, 93 U. S., 155, 160 (bk. 28, L. ed., 843); *Shaw v. R. R. Co.*, 100 U. S., 605, 611 (bk. 25, L. ed., 727); *Cost v. Haven*, 30 Conn., 190; *Cost v. Colt*, 111 U. S., 566, 578 (bk. 28, L. ed., 520).

The court had full jurisdiction of the subject matter of the trust. It was presented with the scheme expressed in the new Air Line charter, and it was then and there "agreed on by all the parties interested and approved by said court in said cause," and the demurrer also admits that not only did the state treasurer bring the foreclosure suit "as trustee under said mortgage and in behalf of all the bondholders thereunder," but that "all parties to and interveners in said cause were fully heard," and consented to the approval of the reorganization scheme. The plaintiff was therefore fully represented in the foreclosure suit by his trustee; and a majority of his co-bondholders, certainly a reasonable representation of all, were in court also

and assented to the decree. He is clearly bound by what was thus adjudicated. *Emerson v. N. Y. & N. Eng. R. R. Co.*, 14 R. L., 555; 16 Am. & Eng. R. R. Cas., 404; *Wetmore v. St. P. & Pac. R. R. Co.*, 5 Dill., 531.

The foreclosure satisfied the plaintiff's bonds and coupons. It is nowhere alleged that the security was insufficient. *Prima facie*, a foreclosure satisfies the debt. *Swift v. Edison*, 5 Conn., 581.

The statutes gave him a right to sue on his bonds or coupons, if the security, estimated at what it was worth, when foreclosed in June, 1875, was shown to be insufficient. Gen. Stat., § 58, § 2.

Any trust for him, except after he should convert his bonds into stock, has been always and openly disavowed. If he meant to claim any, he should have sued in 1875, before the numerous transfers of stock in the new company to third parties, ignorant of its origin, which have been made since. *Badger v. Badger*, 2 Wall., 87 (69 U. S. (bk. 17, L. ed., 836); *Sullivan v. R. R. Co.*, 94 U. S., 806 (bk. 24, L. ed., 324).

The plaintiff could have appeared and made his claim in the foreclosure suit in 1875. *Stern v. Wis. Cent. R. Co.*, 1 Fed. Rep., 555, 562; *Graham v. Boston, H. & E. R. Co.*, 14 Fed. Rep., 758.

He cannot lie by, to speculate on the results of the enterprise of his fellow bondholders, and then be heard to complain in a court of equity after so many changes of value and property, induced by his apparent acquiescence. *Pac. R. R. Co. v. Mo. Pac. R. Co.*, 12 Fed. Rep., 641.

Stoddard, J. delivered the opinion of the court:

The New Haven, Middletown and Willimantic Railroad Company was chartered by the General Assembly of the State of Connecticut in the year 1867, for the purpose of constructing and operating a railroad from the City of New Haven to the Village of Willimantic, and wholly within the territorial limits of this State. By its charter that corporation was invested with all the usual franchises and powers conferred upon railroad companies, including, of course, the right to take private property by the exercise of the right of eminent domain.

The capital stock was \$3,000,000, with the privilege of increasing the same to an amount not more than \$6,000,000.

The company was authorized to borrow money to an amount not exceeding at any one time one half of the amount actually expended for the construction and equipment of its road, and to secure repayment of the same by its bonds, with or without coupons. Provision is made in the charter for securing said bonds by the execution of a mortgage of the "railroad and all its property, rights and franchises" to the treasurer of the State and his successors in office, "in trust for the holders of said bonds."

In pursuance of its chartered powers the company proceeded to build its railroad, and in 1869, having obtained stock subscriptions and partially completed the road, issued coupon bonds, either negotiable or not at the option of the holder, to the amount of \$3,000,000, and secured the payment thereof by a mortgage, as

provided by the charter. In that mortgage it is recited that the company desired to borrow money "for the purpose of constructing and equipping said railroad," and proposes to make and issue such bonds, "pursuant to the power and authority to that effect in said charter contained."

The bond itself states that it is secured by a "first mortgage to the Treasurer of the State of Connecticut upon the railroad of said company and all its property, rights and franchises under its charter," and stipulates that "Should any of said interest coupons remain unpaid for six months after presentation and default, the principal sum secured hereby shall, at the option of the holder thereof, become due immediately."

The granting clause of the mortgage also conveyed the railroad, its appurtenances, rolling stock and all other real and personal property, particularized at length, "which may now belong, or may at any time hereafter belong to said company and be used as a part of said railroad or be appurtenant thereto, or necessary for the construction, operation or security thereof; and also all the property, rights, and franchises of the said company under its charter, and every part thereof, together with the tolls, income, issues and profits thereof, and all rights to receive the same and everything necessary for the completion and operation of the road."

In the *habendum* clause of the mortgage deed it is provided that said treasurer, in his official capacity, is "to have and to hold the said property etc., subject to the terms and stipulations of said bonds, and the provisions of said charter under which the said company derives its powers."

Default was made in the payment of the interest, and under the terms of the bond and mortgage more than a majority in value of said bondholders elected that the principal sum should be then due, and at their instance the then treasurer of the State brought his petition in equity to the May Term, 1875, of the Superior Court to obtain a decree of strict foreclosure of said mortgage. Such decree was had, a majority in value of said bondholders and the creditors being parties thereto. A plan of reorganization of said railroad had been proposed by a majority in value of such bondholders, which resulted in said foreclosure, and the passage by the General Assembly of the Act incorporating the "Boston and New York Air Line Railroad Company."

A scheme for the reorganization of the management and ownership of said railroad having been assented to by the parties in interest, was referred to in the foreclosure decree. The time for redemption expired in June, 1875, and the foreclosure thereby became absolute.

On the 8th day of June, 1875, the General Assembly incorporated said Boston and New York Air Line Railroad Company. Said Act of incorporation recites that the interest of said bonds remains unpaid since November 1, 1872; that foreclosure proceedings in behalf of the holders of said bonds are pending, etc., and that public convenience and necessity require a considerable further expenditure to complete and equip said road.

The capital stock consisted of 40,000 shares of \$100 each, 30,000 of which is preferred

common.

stock, and 10,000 common stock. The preferred stock is to be issued "only in exchange for the first mortgage bonds of said Company, at the rate of five shares for every bond of \$500, and ten shares for each bond of \$1,000."

The common stock is to be issued: first, for over due and unpaid coupons detached from the bonds; and second, in satisfaction of certain legal and equitable claims existing against said road prior to the time the decree of foreclosure became absolute. The charter then provided that when a majority of said bonds had been exchanged for said preferred stock, and upon some other conditions, that the trustee should convey to said new Corporation all his title and interest in said trust property in fee simple; and then provided that such conveyance "shall be effectual to discharge him forever from said trust, and to vest said premises with all the rights and privileges of the old corporation."

The charter then provided that no dividends shall be declared upon said common stock until dividends have been declared out of the net earnings of said railroad upon all of said 30,000 shares of preferred stock equal to 7 per cent. a year thereon from the date of the last coupons on said first mortgage bonds, default on which was made prior to the time when the title of the trustee under said mortgage to the mortgaged premises became absolute by foreclosure. Then it is provided that the new Corporation may issue mortgage bonds upon its property, under certain conditions and stipulations, by a vote of three fourths of all the stockholders.

The plaintiff owned, prior to the reorganization scheme, bonds to the value of \$2,500, and "has never personally been a party to or participated in any of said proceedings, nor authorized anyone to act for him or represent him, or been personally served with notice, nor has assented to them, and has not elected to have his bonds due, and still claims them as valid subsisting securities under said original first mortgage. He was not aware that said charter had been granted to the Boston & New York Air Line R. R. Co., or that said foreclosure decree had been made." The broad claim is now made by the plaintiff that as he was not personally a party to the reorganization scheme, had no actual notice of it and has not assented that his bonds should mature and the trustee be discharged, therefore, his said bonds with their coupons are outstanding subsisting obligations of the old corporation, charged upon this railroad property, and that either by an absolute sale, or by operation of said railroad by said trustee, said property and franchises must be appropriated to the discharge of the obligations held by him, notwithstanding that a different mode of appropriating said property in liquidation of said bonds has been agreed upon by a majority of his co-bondholders, and has been sanctioned by the State and by a court of equity having jurisdiction of the subject matter.

The plaintiff's contention in this behalf rests upon his assumption that he has a constitutional property right to have the property appropriated in the manner claimed by him.

In making this claim the plaintiff ignores or subordinates to his own claim both the private rights of his co-bondholders and public rights vested in trust in the State, while upon

every true theory and exposition of his contract, the rights of the public are superior to his private right, and the rights and interests of his bondholders are equally with his own to be protected by the law.

The plaintiff's argument treats this matter as a matter of strict legal private right of an individual creditor against or to private property of an individual debtor, instead of a claim of exceptional character upon property of a peculiar nature in which private rights of others and the rights of the public exist, which must be regarded and protected.

One public right consists in the continuous uses of the railroad, its franchises and corporate property, in the manner and for the purposes contemplated by the terms of the charter. All these corporate franchises and this property are held subject to and charged with this obligation.

It is true that the charter is permissive in its terms, and probably no obligation rests upon the Corporation to construct the railroad. The option to exercise the right of eminent domain and other public rights is granted. And when that option has been made, and the Corporation has located and constructed its line of track, exercising the power of the State in taking property of others and, in so locating and constructing its road, has invited and obtained subscriptions upon the implied promise to construct and operate its road; has commenced to operate the road under the granted powers; thereby inducing the public to rely, in their personal and business relations, upon that state of affairs; by so accepting and acting upon the chartered powers a contract exists to carry into full effect the objects of the charter; and the capital stock, franchises and property of the Corporation stand charged primarily with this trust.

The large sovereign powers given by the State to railroad corporations are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare. Having exercised those powers the Corporation has no right against the will of the State to abandon the enterprise, tear up its track and sell its rolling stock and other property, and divide the proceeds among the stockholders.

The possible effects of the exercise of such a claimed power are utter disaster to the great interests of the State, certain destruction of private property in which whole communities created and existing upon the faith of the continuous use of the chartered powers are interested and, indeed, the life of the citizen as well as his property rights are thus jeopardized. Upon principle it would seem plain that railroad property once devoted and essential to public use must remain pledged to that use, so as to carry to full completion the purpose of its creation, and that this public right existing by reason of the public exigency demanded by the occasion and created by the exercise by a private person of the powers of a State is superior to the property rights of corporations, stockholders and bondholders.

To this effect, also, is the weight of authority. In the following cases are illustrations of the general principle: *State v. H. & N. H. R. R. Co.*, 29 Conn., 538; *R. R. Comrs. v. P. & O. C. R. R. Co.*, 63 Me., 278; *Y. & N. M. R. Co. v. Queen*, 1 El. & Bl., 858, 874; *Atty-Gen. v. W.*

W. R. Co., 86 Wis., 466; *People v. A. & V. R. R. Co.*, 24 N. Y., 261; *High, Mandamus*, §§ 315, 316, 317; *State v. S. M. R. R. Co.*, 18 Minn., 40; *People v. L. J. R. R. Co.*, 31 Hun, N. Y., 127; *Re N. B. & C. R. Co.*, 1 Pugsley & Burbridge (N. B.), 667.

The American and English cases which seemingly doubt these propositions place their conclusion upon the construction of the particular chartered powers and obligations.

In the case at bar, there are special provisions of the charter and of the bond and mortgage which indicate an intent to impose this trust characteristic upon the franchise and property of this Corporation. By the charter the Corporation was given power to construct and operate the whole intended line of railway, to obtain subscriptions to the capital stock and to borrow money and issue its bonds and mortgage its property therefor, for that special object and purpose. The bond on its face purports to be part of an issue secured by mortgage on this railway property and franchises. The mortgage securing the bond recites that the Corporation has obtained capital stock subscriptions "for the purpose of constructing and equipping said railroad," and states that the Corporation desires to borrow money and issue bonds therefor, etc., "pursuant to the power and authority to that effect in said charter," covers not only the visible property but the franchise to operate the road, and conveys the said property and franchises, "subject to the terms and stipulations of said bonds, and the provisions of the said charter under which the Company derives its power."

It is apparent that the bondholders loaned the money and took their bonds with the security with full notice that the security for the loan was first pledged to the performance of a public trust.

The necessary conclusion is: the State has a right to enforce the continuous exercise of the corporate powers and franchises for public use, to the exhaustion of the value of such property and franchises; and this is true, no matter what private right may embrace the title of the property.

In this State, irrespective of legislative or judicial authority in the special instance, the effect of a foreclosure is to vest absolutely the property of the mortgagor in the mortgagee.

It simply cuts off the right of redemption existing in the mortgagor, and thereafter the mortgagee stands with reference to the mortgaged property in the same relation as did the mortgagor. He has the title of the former owner of the equity and nothing more. He holds the property subject to all charges, duties, pledges and equities existing prior to the execution of the mortgage deed.

We have not adopted the practice of selling the property upon foreclosure. Necessarily, therefore, if the trust mortgage was rightfully foreclosed, and the title vested in the trustee in trust for the first mortgage bondholders, the trustee and the beneficiaries of the trust continue to hold the property, subject to the same limitations, duties and obligations resting upon the original corporation, including, of course, the obligation to execute the public trust cast upon the mortgaged property, by devoting it to the public use for which it was created.

This property could not be relieved from this trust without the acquiescence of the State. But the State has explicitly declared the public intent that the franchises and property vested in these bondholders should continue to be devoted to the public use declared in the original charter, and has created a new Corporation for that purpose. In the organization, control and management of this new Corporation, and in its property and franchises, the plaintiff is, by the incorporating Act, entitled to share proportionally with all the other bondholders. The new Corporation is a method adopted by the State, with the acquiescence of a majority of the bondholders, to carry into effect the original design, to devote the property to the only use which the law of its creation permits; and in thus applying the trust property to the object and purposes of the trust, no right of the plaintiff is impaired, so long as he retains his original *pro rata* share in the trust property, subject to the execution of that trust and the expenses necessarily incident thereto.

So, too, in relation to the other bondholders; it is manifest that each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose is modified by the same existent right in every other holder. His absolute right of control is limited not only by the express provisions of the bond and mortgage, but also in great measure by the peculiar nature and character of the security. See, *Canada S. R. Co. v. Gebhard*, 109 U. S., 534, 537 [bk. 27, L. ed., 1028].

To allow a small minority of bondholders representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense, even, of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders secured by a railroad mortgage bear to each other.

"Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority acting in good faith, and without collusion, if what they ask is not inconsistent with the provisions of his trust." *Shaw v. R. R. Co.*, 100 U. S., 611, 612 [bk. 25, L. ed., 759].

This mortgage security is an entirety. It is indivisible and there can be but one foreclosure of that mortgage. The bond on its face provides that "Should any of the said interest coupons remain unpaid for six months after presentation and default, the principal sum secured hereby shall, at the option of the holder hereof, become due immediately;" and the mortgage has substantially the same provision. A majority of the bondholders exercised such option, and their bonds matured.

A statute authorized the trustee to foreclose the mortgage; that power probably resided in the trustee irrespective of the statute. The law of the place where a contract is made is as much

a part of the contract as if incorporated in terms therein. The holders of these bonds hold them subject to that law.

When it was provided in the bond and mortgage that the bonds were payable in twenty years from date, it was also provided by the bond, mortgage and the law, that, under certain circumstances, at the option of the bondholders and the trustee, the bonds should mature and the mortgage be foreclosed before that time, thus preventing the contemplated running for twenty years. The provision that the bond should continue for twenty years an outstanding subsisting security if any existed was with reference to the Corporation. The provision that the bonds by the action of the bondholders might mature before that time was in reference to the co-bondholders. And while it would impair the obligation of a contract, if said contract existed, so far as the Corporation is concerned, to change the time of maturity, it does not have that effect when the co-bondholders proceed upon their common and undisputed right to cause the bonds to mature, and by foreclosure to discharge the bonds by taking the property in a legal way.

Prima facie, the foreclosure of the mortgage security operated to discharge the mortgage indebtedness. The equitable title of the property was in the beneficiaries of the trust. The trustee was not selected because of his personal fitness or qualities; he was a state official and his successors in office designated by law, as matter of convenience and public policy, and not selected by contract or the parties to the mortgage. He had no active duties in relation to the trust except those imposed by statute and the charter, and this charter was open to repeal.

In these particulars the rights of the beneficiaries under the trust, to the continuance thereof, are very different from the rights existing under an ordinary active trust created by act and contract of the parties.

When the legislative power, which upon grounds of public policy created the trust, upon like grounds willed that such trust should cease, and vested the property, absolutely denuded of the trust, in the beneficiaries, at the instance of a majority in value of them, no right of a dissentient beneficiary is affected. The trust does not rest upon contract and was created with the express reservation that the State might at will terminate it.

The purposes of the trust had been accomplished. The property had been appropriated by the foreclosure, so far as it could be by the parties, to the discharge of the bonds, and the scheme of reorganization provided for the distribution of the trust property among those entitled to it, subject to the duties and obligations to the public originally fixed upon it. This distribution was sanctioned by the judgment of a court of equity having jurisdiction. The effect of these proceedings vested in the bondholders all the property and the franchises of the original corporation that could be transferred by judicial proceedings. But the then owners of the corporate property were not a corporation; they were simply an aggregation of common owners; but as it is obviously impossible for a numerous body of part owners widely scattered in many jurisdictions and varying from time to time in

the personal composition of that body, to operate a railroad, so it is equally inadmissible as a question of public policy that the attempt should be made. The General Assembly, therefore, provided for the new Corporation, the stock of which represented the interest of the owners of the property. This or some similar course must be pursued and seems to be suggested in the case of *Sturges v. Knapp*, 31 Vt., 57, cited by the defendants.

This was a case where the court regarded the trustees as "Selected, doubtless, with reference to their capacity and responsibility, for this very contingency, both by the Corporation and the *cestuis que trust*, and neither of these parties had stipulated to deal directly with the other; but only with the trustees, as the responsible party." Page 55.

"The trustees seem to have been selected for this very office, among others, of controlling and managing the property in case of forfeiture and surrender, as trustees, for the benefit of the *cestuis que trust* in order to make it available for the payment of the bonds, both interest and principal.

This must be so until some organization of the bondholders, and the acquiring of some capacity to act by a majority, or in some such way as to enable them to discharge this new class of duties thrown upon them by the forfeiture of the condition of the mortgage, and the surrender of the road with its incidents and fixtures." Pages 56-7.

To these legislative and judicial proceedings, enactments and decrees, the plaintiff was a party represented by the trustee and a majority of his co-bondholders. The interests of all persons are bound by a public Act of the Legislature acting within the scope of its jurisdiction. And it is manifestly impracticable that provision should be made for actual personal notice to all the bondholders under railroad mortgages, of judicial action in reference thereto. The bonds are negotiable, passing by delivery from hand to hand, and scattered, in many instances, to all parts of the civilized world. Power is, therefore, lodged with the trustee to exercise a wide discretion in reference to the administration of his trust, to apply to the courts for judicial action when deemed for the best interest of the *cestuis que trust*, and to bind them in relation thereto. And the familiar practice in chancery proceedings, where it is practically impossible to bring by personal notice all individuals of a numerous class into court, is to proceed with a sufficient number in that interest to properly represent it.

The designation of a state official as the trustee provides a person uninfluenced by personal considerations, independent of the action or control of any portion of the bondholders, and who may be relied upon to carry into full effect the original design of his trust.

A trust of the character in question can be determined by the decree of a court of equity upon proper occasion; certainly at the request

of a majority in interest of the *cestuis que trust*; and, at all events, when fortified by the concurring sovereign will of the State and when the proportionate interests of all the owners of the property are preserved and the estate is applied to the use for which it was created, and subject to which it is held at all times and by all persons.

A mortgage is provided for in the scheme of reorganization, to be issued by the new Corporation, in the first place to pay or secure the payment of certain sums contracted in operating the road while held in trust and, in the second, to provide for the future operation of the road by the new Corporation.

It results from the view that we have taken of the contract with the bondholders that these are objects within the scope of their contract, and that the property is lawfully subjected to this prior mortgage to accomplish these ends.

So far as the common stock is concerned, it is provided by the charter that no right to a dividend upon this stock is acquired "Until dividends have been declared out of the net earnings of said Railroad upon all of said thirty thousand shares of preferred stock equal to seven per cent a year thereon from the date of the last coupons on said first mortgage bonds, default on which was made prior to the time when the title of the trustee under said mortgage to the mortgaged premises became absolute by foreclosure." Thus is secured to the holders of the bonds the rate of interest originally contracted for, if the property should earn enough to pay that amount.

A question is made as to the power to lease. It is not necessary to dwell on this subject here; the substance of the matter is disposed of in the case of *Middletown v. R. R.*, a companion case to and argued in connection with this.

This additional suggestion may be made in this case that the charter of the first corporation gave the same power to lease this property that is given to the new Corporation; and, as has been already stated, upon the foreclosure the franchises and property of the old corporation were taken and held by the plaintiff and his associates, subject to their limitations, restrictions and chartered powers and regulations as to the performance of public duties that were imposed upon the first corporation; and there are no facts in this case to indicate that the lease in question was not for the best interests of all concerned, both private persons and the public generally. There is no reason why, subject to legislative and judicial control and direction, the majority in interest in common property of indivisible nature, consecrated to public use, should not so use that property as to advance the private interests in that property, and secure the public welfare.

There is no error in the judgment of the Superior Court.

In this opinion the other Judges concurred.

SUPREME COURT OF MAINE.

Samuel ROUNDS, *Plff. in Err.*,
v.

STATE of Maine.

1. An indictment for forgery may properly allege that the intent of the forger was to defraud the person whose name is forged where the instrument was an order on a savings bank.
2. A general verdict of guilty was rendered on the trial of an indictment for forgery of an order upon a savings bank, one count of which alleged the intent to be to defraud the bank, and other counts alleged the intent to be to defraud the person whose name was forged. Held, that it was immaterial upon which count the verdict was based, as the offense was the same under each count; that there was no repugnancy between them, and that an entry after verdict of *nolle prosequi* as to the first named count did not render the record erroneous.

(Cumberland—Decided December 22, 1885.)

ERROR to the Superior Court for Cumberland County. *Affirmed.*

The facts are stated in the opinion.

Mr. Harvey D. Hadlock (Portland), for plaintiff in error:

It is a settled principle in law that an instrument must be adapted to deceive. The instrument should have an adaptation to accomplish some legal wrong, and failing in this the false making is not forgery. 2 Bish. Cr. L. 7th ed. § 595.

Some person must exist who can be defrauded. *Id.*, § 599.

Forgery is an offense involving to a great extent the obscure doctrine of attempt. Thus, to constitute an attempt, the act done with the criminal intent must have some real or apparent adaptation to accomplish the ulterior mischief. The false writing, to be indictable as a forgery, must be such as in the language of the foregoing definition would, if genuine, be apparently of some legal efficacy. If it is not, the making of it cannot be deemed in law an attempt to cheat. *Id.*, § 524; *Crofts v. People*, 2 Scam., 442; *Hendrick v. Commonwealth*, 5 Leigh., 707.

The common form of an indictment for forgery sets out an intent to defraud a particular person, and this intent must always be proved as laid. 1 Stark. Cr. Pl., 2d ed. 112-180; 3 Chit. Cr. L., 1042.

And if for any reason the person could not, as the case appears in proof, be defrauded by the writing, the defendant is to be acquitted. 2 Bish. Cr. L., 7th ed. § 543.

Everything which is the natural consequence of the act must be taken to be the intention of the person. *Reg. v. Cooke*, 8 Carr. & P., 582.

A jury ought to infer an intent to defraud the person who would have to pay a forged instrument if it was genuine, although from the manner of executing the forgery or from the person's ordinary caution it would not be likely to impose on him, and although the object was

generally to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument if genuine, did not enter into the person's consideration. *Rex v. Masagora*, Russ. & Ryland, C. C., 291; *Reg. v. Marcus*, 2 C. & K., 856.

The intent to defraud is an indispensable ingredient in forgery and is of the very gist of the offense. *Commonwealth v. Ladd*, 15 Mass., 525; 2 Whart., §§ 1492-1495.

The false making of an instrument without such an intent, will not suffice. *Fbz v. People*, 1 N. W. Rep., 702.

There must be an intent to defraud some particular person, and the indictment must specify such person. 2 Whart., § 1499; *Barnum v. State*, 15 Ohio, 717; *Williams v. State*, 51 Ga., 585.

That the order does not show an intent to defraud Frank E. Snow is apparent. On the face of the indictment the instrument must be one by which the party whom it was alleged to have been intended to defraud could have been injured. *People v. Stearns*, 21 Wend., 409; *Clarke v. State*, 8 Ohio St., 680.

Who would have to pay the instrument is the test to determine who the forger intended to defraud. 2 Whart. Cr. L., § 1458.

The law presumes an intent to defraud the person who would have to pay the instrument if it were genuine. 2 Arch. Crim. Prac., 1604; *Commonwealth v. Stephenson*, 11 Cush., 481; *U. S. v. Shellmire*, 1 Bald., 871.

The offense charged in the first and second counts is not distinct from that charged in the last, and it cannot be held that a general verdict covered all the counts. It only covered such counts as could be sustained on the order set out in the indictment. But the forging and uttering constituted only one offense. *State v. Rounds*, 76 Me., 127; *State v. Egglest*, 20 Am. Rep., 612; 1 Archb. Cr. Pr., 568; *O'Connell v. Queen*, 11 Clark & F., 155.

It is irregular where there are several counts for the same offense to take a verdict of guilty on more than one count. *Commonwealth v. Fitchburg R. R. Co.*, 120 Mass., 872.

The *nolle prosequi* did not change the record nor make the verdict which the jury rendered any less inconsistent with itself nor any more certain in law than it was before such entry. *Commonwealth v. Haskins*, 128 Mass., 60.

The crime perpetrated was a single act, *State v. Rounds*, 76 Me., 127, and therefore two distinct offenses could not be created out of it.

The presiding Judge, without directing a verdict of acquittal upon the fourth count, submitted to the determination of the jury the question of the defendant's guilt upon that count. The fact that he instructed the jury not to take that count into consideration was not sufficient. *Commonwealth v. Haskins*, 128 Mass., 61.

The defendant may move in arrest of judgment at any time before the sentence is actually pronounced upon him. 1 Archb. Cr. Pr., 574.

Mr. O. D. Baker, *Atty-Gen.*, for the State.

Peters, Ch. J., delivered the opinion of the court:

In this writ an error assigned is that the counts upon which judgment was rendered cannot stand, because they allege that the forger's in-

tent was to defraud Frank E. Snow. The forged order was in Snow's name as maker, and of the following tenor:

"West Scarboro, Jan'y. 19, 1882.

To the Treasurer of the Maine Savings Bank.

Pay to Samuel Rounds the full amount of deposit and interest on my account.

Frank E. Snow."

It is contended that the counts should have alleged that the forger intended to defraud the bank or some person other than Snow; and that there is an impropriety in alleging an intent to defraud Snow because such a thing is an impossibility. We think otherwise.

It would not be unnatural to suppose that the intention of the forger, Rounds, was to defraud Snow, even if another purpose was coupled with it. If we recollect aright, the defense upon the trial of the indictment was, not that Snow signed the order with his own hand but that Rounds signed it with the consent of Snow. Endeavoring to substantiate such an agency, when none existed, certainly makes it evident that the prime and particular intent was to defraud Snow.

In most cases of forging commercial paper, perhaps the most obvious intent is to defraud some party upon whom the paper is passed. But may not circumstances exist in any case, rendering it possible that the purpose was to injure the person whose name is forged? Does not the forger oftentimes intend to succeed in establishing the feigned, as a real signature?

Are not deeds and wills falsely made, with the idea that the papers will be effectual for the purposes intended by the fabricators? Are not forgeries sometimes so artfully executed that the persons whose names are simulated are sufferers from the act? It is certainly not an extreme idea to say that, in all cases of forging, there is in the mind of the perpetrator of the crime an expectation, often of course not of any very definite character, that he is inflicting an injury upon the person whose name is wrongfully used. The criminal must be aware that such person may be in some peril of loss, and that he will be put to some expense or trouble to protect himself against the forgery.

The plaintiff in error supports his position with no authorities which are pertinent to the point. The authority of the cases and of the book writers is the other way. Mr. Bishop says that the law presumes that the forger intended to defraud the person whose name is forged, and that the indictment may lay the intent accordingly, whatever the real fact may be. He further says of the forger: "He meant also to defraud the person to whom he passed or attempted to pass the forged writing for value; and the pleader may so lay the intent, if he pleases." 2 Bish. Cr. Proc., § 422. The doctrine is well supported by the cases cited by Mr. Bishop in the notes to his text. Other writers on criminal law are fully in accord with him. The old common law assumed that the person whose name was forged was interested in procuring a conviction and he could not be a witness against the forger. Some American cases have followed the foreign precedents in this respect. See, 2 Bish. Cr. Proc., § 429.

A further point of objection to the record is incidentally taken in the argument. It is said that the general verdict finds that the intent was

either to defraud the bank or Snow, and removing by *nolle prosequi* the counts alleging fraud upon the bank, leaves an uncertainty whether there was a finding of an intent to defraud Snow. This question was carefully considered and definitely settled when the case was up before. *State v. Rounds*, 76 Me., 123.

It was there held immaterial whether the finding was that the respondent intended to defraud the bank or Snow. The offense was one and the same, whatever the intent. And the proof would be precisely the same, whether to show the one or the other intent. The allegation might be either way, and the result would be the same. It would not have been inconsistent to allege both intents in the same count. There is no inconsistency between them. Both may exist in the same mind at the same time. In fact, the allegation needed no proof.

The respondent would not have been allowed to swear that his motive was to injure the bank and not Snow. Mr. Bishop says (2 Cr. Proc., § 427): "Where the intent alleged is to defraud the person whose name is forged, it should be presumed from the forgery without further proof."

The case of *Commonwealth v. Huskins*, 128 Mass., 60, cited by the plaintiff in error, is not relevant. In that case there was a general verdict on different counts setting forth, not the same offense but distinctly different offenses, two distinct crimes entirely inconsistent with each other. Nor is *Commonwealth v. Fitchburg R. R. Co.*, 120 Mass., 872, also cited by plaintiff, a supporting authority, although rather a radical decision and differing somewhat from previous cases. In that case there were separate verdicts on counts setting out one offense in several different ways totally repugnant to one another.

It required different and contradictory evidence to support the counts. A person cannot be killed in several different ways, as there alleged.

The cases cited in the former opinion clearly justify the conclusion there reached. *State v. Whittier*, 21 Me., 341, covers the ground of the case. And *Reg. v. Cooke*, 8 Carr. & P., 582, is a pertinent authority.

Judgment affirmed.

Walton, Virgin, Libbey, Foster and Haskell, JJ., concurred.

STATE of Maine

r.

Reuben C. HALL *et al.*, *Appts.*

The direction to the officer in a warrant of search and seizure under the Maine Liquor Law is a matter of form and **may be amended** at any time before final judgment, by inserting such direction, when it was actually served by an officer authorized to serve such process.

(Kennebec—Decided December 22, 1885.)

ON defendants' exceptions. *Overruled.*

The facts are stated in the opinion.

Mr. H. M. Heath, for defendants:

The constable who served and returned the

warrant was appointed under R. S., ch. 27, § 62. By that section it was provided "Such constables shall have like powers and duties as sheriffs and deputies."

This was a warrant issued under R. S., ch. 27, § 40. That section provides, line six, "Such magistrate shall issue his warrant directed to any officer having power to serve criminal process," etc. But this warrant was not directed to a constable for the county, merely to town and city constables.

Some decisions have held that civil writs may be served by constables if otherwise within their powers, though not directed to them. But the powers of town constables and sheriffs are differently defined. For constables, see, R. S., ch. 80, § 50. The section contains no requirement that the precept shall be directed to the constable serving it.

For powers of sheriffs, see, R. S., ch. 80, § 10.

Section 55 of the same chapter recognizes the same principle by providing that all criminal precepts required by the laws providing for work jails shall be served by the proper officers, "and such processes shall be issued and directed accordingly."

In *State v. Kenniston*, 67 Me., 558, the return was made by an officer to whom the search warrant was directed. It was held that the State could not show that the seizure was in fact made by another officer.

In *State v. Longfellow*, argued at May Term, 1883, but not reported, the same question was before the court, and *State v. Kenniston*, affirmed. We submit that both these cases rest upon the principle that the return must be made, not only by the officer in fact serving the precept but also by the officer to whom the process is directed.

The officer's return is a part of the allegations to be proved. *State v. Howley*, 65 Me., 100.

But such return cannot be made by an officer who is a stranger to the process.

Mr. W. T. Haines, County Attorney, for the prosecution :

Irregularity in a warrant, provided the magistrate has jurisdiction and the proceedings are otherwise correct, in a case originally tried before a magistrate, must be taken advantage of before said magistrate, and it is too late to raise such point on appeal. *Commonwealth v. Henry*, 7 Cush., 512.

Should the court think the motion properly before it, I will call attention to ch. 27, § 62, R. S.

In *O'Malia v. Wentworth*, 65 Me., 129, the court held it legal for a truant officer to serve a warrant, which, although the case does not state it, must have been directed to some other officer, on the ground that by the statute (R. S., ch. 11, § 14, of 1871) said truant officer had authority to serve it.

In *Tubbs v. Tukey*, 3 Cush., 438, it was held that while a warrant should direct an officer to make a return of it, the fact that such direction is omitted will not excuse the officer from making such return.

In the case of *Hearsey v. Bradbury*, 9 Mass., 95, where a motion was made to evade a writ because it was served by a constable, although not directed to him, such omission was held to be a matter of form and amendable.

MR.

In *Morrell v. Cook*, 35 Me., 207, the court says: "No objection is perceived to the service of a writ by a constable duly empowered, although it is not directed to him. He may not be obliged to make the service, unless the precept be directed to him, but he may do the act, without such direction, which being a mere matter of form cannot be necessary to give it validity." An attachment of real estate, made by the constable, was held in this case to be valid.

No constable or private person is compellable to serve a warrant not directed to him; but I do not understand the authorities to say that when the constable has full authority, he may not serve the warrant not directed to him, if he chooses so to do. 2 Hawkins, P. C., ch. 13; 1 Hale, P. C., 581.

Foster, J., delivered the opinion of the court :

This was a complaint and warrant for search and seizure under § 40, ch. 27, R. S., relating to intoxicating liquors. The warrant was issued from the municipal court of the City of Gardiner, and directed to the sheriff of the County of Kennebec, or either of his deputies, or either of the constables of the City of Gardiner, or either of the towns within said county. Service of said warrant and return thereon was made by a constable of the county appointed in accordance with § 62 of said chapter. The case having been appealed to the superior court a motion was made to dismiss the proceedings, on the ground that the officer whose name was signed to the return upon the warrant had no lawful authority to serve the same. The court overruled the motion, and the case is before this court on exceptions. The warrant was served by an officer who had legal authority to serve the same, had it been directed to him. Such authority is specially conferred by statute; and, in this particular class of cases, the powers and duties of such constables are co-ordinate with those of the sheriff of the county and his deputies.

Was the want of such direction in the warrant such as to render the proceedings of the officer in executing it null and void? Our opinion is that it was not.

To be sure, it has been held that a constable has no authority to serve process in a civil action unless it is directed to him. *Wood v. Ross*, 11 Mass., 271; *Brier v. Woodbury*, 1 Pick., 365; *Hearsey v. Bradbury*, 9 Mass., 95.

And yet in the case last cited, where a motion was made to abate the writ, and in numerous other cases where the same doctrine is affirmed, it has been decided that where a constable had served a writ which was not directed to him, it might be amended by inserting such direction and thereby the same would be made good. *Converse v. Damariscotta Bank*, 15 Me., 433.

The omission of such direction in civil processes is held to be but matter of form and amendable even after service has been made. *Hearsey v. Bradbury*, *supra*; *Wood v. Ross*, 11 Mass., 276; *Rollins v. Rich*, 27 Me., 561; *Morrell v. Cook*, 35 Me., 211; *Brown v. Dudley*, 33 N. H., 514; *Aldrich v. Aldrich*, 8 Met., 106.

In *Parker v. Barker*, 43 N. H., 36, the writ was served by a constable to whom no direction

had been given in the process; motion was made, overruled and exceptions taken as in the case at bar, and the court say: "But an omission to insert the proper direction, if the writ is served by the proper officer, is not fatal. It may be amended on motion, and leave granted to insert the proper direction, and the objection will be thus obviated." A question somewhat analogous to that we are now considering arose in the case of *Bassett v. Howorth*, 104 Mass., 224, where, in a bastardy process, the warrant upon which the defendant was arrested was served by an officer to whom it was not directed. The same objection was interposed by motion to dismiss the complaint, on the ground of insufficient service of the warrant, and the court say: "If the incapacity of the officer to serve this warrant consisted merely in the omission of the words appropriate to show that he was the proper officer to serve it, and that the case was one in which, with proper words of direction, he could lawfully have acted, the objection would be merely to the form of the process."

Our own court, while fully recognizing the doctrine laid down in *Hearey v. Bradbury*, *supra*, has given expression upon this subject in the following language: "No objection is perceived to the service of a writ by a constable duly empowered, though it is not directed to him. He might not be obliged to make it, unless the precept was directed to him, but he may do the act without such direction, which being a mere matter of form cannot be necessary to give it validity." *Morrell v. Cook*, 85 Me., 211.

The cases to which we have referred relate more particularly to processes in civil actions, in which the omission of the proper direction is held to be only matter of form and amendable. Whether the analogy might or might not hold good in the general domain of criminal proceedings, it does not now become necessary to determine, inasmuch as the statute under which these proceedings are instituted, § 57, specially provides that "Any process, civil or criminal, legally amendable, may in any stage of the proceedings be amended in any matter of form, without costs, on motion, at any time before final judgment."

Hence it may be seen that virtually the same authority exists in regard to amendments in matters of form in proceedings legally amendable under this statute, as in relation to actions of a civil nature. The statute is broad in its terms, allowing amendments at any time before final judgment.

Whatever distinction there may be existing between civil and criminal processes, as to amendments even in matters of form, this statute has abrogated in this particular class of cases. Such amendments are within the discretion of the court and authorized by positive enactment. Here, as we have remarked, the warrant was served by an officer whose authority to serve the same is unquestioned, had it been directed to him. An amendment inserting such direction, being but matter of form, was within the power as well as the discretion of the court until final judgment. *Bolster v. China*, 67 Me., 553; *Harvey v. Cutts*, 51 Me., 607.

Exceptions overruled.

John K. CARLTON *et al.*

ROCKPORT ICE CO.

1. The owner of real estate worth about \$1,000 sold and conveyed it for \$50, on the representations of the purchaser's agent that the property had been sold for taxes and he thought it could not be regained; that there were no buildings on it and that it was valueless. There were buildings upon it, although not belonging to the land; there was a tax title upon it which was defeated by the purchaser at an expense of about half the value of the land and the purchaser had to pay for the betterments. The seller brought a bill in equity to cancel the deed because of the alleged fraudulent representations. Held, that the representations, excepting the statement that there were no buildings upon the land, being unaccompanied by any corroborating circumstance or fact, were merely expressions of opinion about the property.
2. The full court will not set aside a finding in equity because of the improper admission or rejection of evidence, if the court decides upon all the facts that the verdict or decree below is satisfactory.

(Decided December 21, 1885.)

BILL in equity, for the cancellation of a deed. Decree dismissing the bill affirmed. The facts are stated in the opinion. Messrs. Baker, Baker & Cornish and G. H. M. Barrett, for plaintiffs. Mr. A. P. Gould, for defendant.

Peters, Ch. J., delivered the opinion of the court:

The complainants seek to have a deed canceled which they gave to the defendant, conveying an ice house privilege in Camden; averring that the conveyance was obtained from them for an inadequate price by fraudulent representations. Three points are presented: first, to what extent were these fraudulent representations? second, did such representations induce the trade? third, how great was the inadequacy of price?

The first and last points are not, at most, very conspicuously sustained by the evidence; and the weakness of these ingredients of the complainants' case naturally affects the weight of the evidence bearing on the point, which we think is not sufficient to uphold the bill.

The untrue representations, alleged to have been made by an agent of the defendant, are that the property had been sold for taxes and could not be regained; that there were no buildings on the same; that it was a poor location, in a bad condition and of no value in itself. How much of this was untrue and actionable, if said? Defendant denies that it was said. The land had been sold for taxes, as represented.

Whether it could be regained or not was largely a matter of opinion or of law; not a fact was stated why it could not be regained. The representations of poor location, bad con-

dition and of no value, when spoken of merely the land, were of the nature of expressions of opinion, with no argument, explanation or fact adduced at the time to support them. See, *State v. Paul*, 69 Me., 217.

The statement that there were no buildings, was not literally true; there were none which belonged to the complainants. The remark, although perhaps not very harmful, had some importance. The land would probably be worth more with buildings on than with buildings off, even though not belonging to the land owner. The trade was no doubt an improvident one for the complainants.

But were they, while exercising a fair degree of care for themselves, deceived into the trade by such assurances of the defendant's agent? Upon this branch of the case the proof is not sufficient. The burden is upon the complainants. They were sellers and not purchasers. The consideration offered was small and not tempting. They are intelligent persons and of mature years, six in all. What one could not see, another would suggest. They knew where and substantially what the property was. A half day's time and a small expense would have afforded personal examination.

They were several days engaged in the negotiation, and the deed was not completed and forwarded for several days afterwards, giving ample time for written or telegraphic communication. It is idle to say that they placed reliance on a statement that the property was utterly valueless, when the agent was willing to pay something for it and was urgent to buy. They knew also that another party had previously applied to them to sell.

What did induce them to sell? Was it not their own knowledge of the history of the property? They had often heard John K. Carlton, under whom they were owners as heirs and widow, speak of the property, he not forgetting it on his death bed. They were aware that for many years it had been virtually abandoned by him, that no rents were received or taxes paid. They were informed in relation to the ill success of prior experiments with the privilege. They neglected all care of the property after the decease of the senior Carlton, who died in Boston March, 1878, not even including it in the inventory of his estate, conveying to the defendant in September, 1877. They knew that they could sue to recover the property from its illegal possessors as well as the defendant could, and one of them as much as said so to the purchaser. They knew that the persons in possession claimed to own the land, and that it would be an expensive thing to attempt to recover it. Their conduct after the deed was given indicates satisfaction on their part.

For two years no objection appears, although evidently informed about the property fully soon after giving the deed.

During that period they, in several ways, assisted the defendant in its former suit instituted to recover the property, one of them writing what they had done and would do, in that behalf, and expressing a hope that their grantee would "come out victorious."

After victory came, however, they were induced by a person associated in the defense of the former litigation to commence this suit, ME.

without any risk or expense to themselves whatever. Their only interest in the speculation will be the sum of \$300, one hundred having been already paid to them. Shall this bill be sustained to produce \$300 to them, and to give the balance of the value of the property to one who seeks to obtain it through litigation tainted by champerty?

As bearing further on that question, a word or two should not be omitted upon the point of inadequacy of consideration. Call the land worth \$1,000, and defendant's witnesses intimate it is worth less. The price paid was \$50.

The defendant found that the deed under which the sellers claimed was not recorded. It gave \$100 for another title, afterwards obtaining the unrecorded deed at some expense. It waged a suit against the person in possession, who claimed in several ways to represent the title. It gained the land by paying for the betterments. But for the superior opportunities which it had of discovering ancient facts pertaining to the property, perhaps the defendant in that action would have prevailed on his plea of title by disseisin.

A facetious writer says of a lawsuit, nothing is certain but the expense. The expenses there, to this defendant were six or seven hundred dollars; it estimates them more. A lawsuit was indispensable to remove a cloud from the title.

A bill of exceptions was allowed to rulings admitting and rejecting evidence. The briefs of counsel make no allusion to the questions reserved. If not waived, they are immaterial. In equity, a finding is not set aside for the improper reception or rejection of testimony, if the full court decides upon the whole facts that the verdict or decree below is satisfactory. *Larabee v. Grant*, 70 Me., 79.

Decree below affirmed with costs.

Walton, Virgin, Libbey, Foster and Haskell, JJ., concurred.

PORTLAND & ROCHESTER R. R. CO.

v.

Inhabitants of DEERING.

1. A railroad company is entitled to damages for land taken in locating ways across its track. In assessing such damages the use which the railroad company may reasonably be expected in the near future to make of its located limits at the crossings may be taken into consideration, in order to ascertain present value. But the interference and inconvenience occasioned to the business of the company, as well as the increased risk and expense in running its trains, do not constitute elements of such damage.
2. A statute requiring that a railroad company shall build and maintain the crossings where ways are laid out across the track is constitutional and applies to a railroad built before the enactment of the statute, when the charter of the company made it subject to the

general laws then in existence and to such as should thereafter be passed.

8. **Witnesses** who have competent judgment and understand the elements of the question **may give their opinion of the damages** sustained by a railroad corporation in having a highway located over its track.

(Cumberland—Decided December 22, 1885.)

ON petitioner's exceptions. *Sustained.*

The selectmen of the Town of Deering, exercising the authority conferred upon them by the laws of the State, laid out a town way across the location of the Portland & Rochester Railroad. The way was duly accepted by the Town, and the Railroad Company, petitioner, feeling aggrieved by the award of damages, appealed to the county commissioners. A hearing was had before a sheriff's jury, and an award of \$50 was made against the Town.

The questions presented by the exceptions are stated in the opinion.

Mr. William L. Putnam, for the Railroad Company, petitioner.

Messrs. Nathan & Henry B. Cleaves, for the Town, defendant:

There can be no question as to the authority of the Town to lay out its ways across the location of a railroad. By the provisions of ch. 214, Pub. Laws, 1874, "Town ways and highways may be laid out, across, over or under any railroad track, in the manner provided by law for laying out such ways; and the expense of building and maintaining so much of such way so laid out as is within the limits of such railroad shall be borne by the railroad company whose track is so crossed."

This provision of law continued in force unchanged, until 1878, when it was re-enacted with the additional provision that when such way is laid out under or over such track and not at grade, the expense of building and maintaining so much thereof as is within the limits of such railroad, shall be borne by such railroad company, or by the city or town in which such way is located, or be apportioned between such railroad company and such city or town, as may be determined by the railroad commissioners, and from their decision the right of appeal was given to either party. P. L., 1878, ch. 48.

The petitioner was entitled to the actual, necessary damages to the property taken. The fair value was what it was worth, as between one who wanted to purchase and one who wanted to sell; not what could be obtained for it under peculiar circumstances nor its speculative value nor the speculative value of other land adjoining, based upon prospective use. *Drury v. Midland R. R. Co.*, 127 Mass., 571; *Presbrey v. Old Colony & N. R. Co.*, 103 Mass., 1; *Moulton v. Newburyport Water Co.*, 187 Mass., 167.

No rule has ever been recognized in law that a party can recover damages for being deprived of the use of his real estate, so that he cannot appropriate it for a certain imagined purpose. Damages may be recovered for the injury actually sustained, as a compensation for something the owner has lost, not for that which he might have lost had he devoted the property to

some other purpose. *Bangor & Piscataquis R. R. Co. v. McComb*, 60 Me., 290.

The Lake Shore & Michigan Southern R. Co. condemned a right of way across the Chicago & Indiana R. R. Co. and it was held that the damages recoverable should not be limited to the actual and direct damage alone, but that the obstruction to the use of the land not condemned might be considered. 100 Ill., 21.

In the present case the requested instruction was not limited to damages for the natural use of this land nor to incidental loss or inconvenience, but embraced loss and damage for "prospective necessary sidings or tracks." In this form it was properly refused. *Cobb v. Boston*, 109 Mass., 488.

The opinion of the Supreme Court of Massachusetts, in *Mass. Cent. R. R. Co. v. Boston, Clinton & F. R. R. Co.*, 121 Mass., 124, sustains the instructions as given.

Old Colony & Fall River R. R. Co. v. Plymouth Co., 14 Gray, 155, was a case where the railroad company claimed damages for taking its land for the purposes of a highway. The court held that the railroad company was entitled to recover damages for making and maintaining cattle guards at the crossing if necessary, and for the expense of flooring the crossing and keeping the planks in repair, but this was in the absence of statutory regulation placing the duty upon the railroad company.

The railroad "Is not entitled to damages for the interruption and inconvenience occasioned to its business, nor for the increased liability to damages from accidents, nor for increased expense for ringing the bell, nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad." *Mass. C. R. R. Co. v. B. C. & F. R. R. Co.*, 121 Mass., 124.

In a proceeding for the condemnation of a right of way for a railroad across another railroad, no damage may be allowed on account of the statutory requirement to stop trains at such crossings and the consequent impairment of the hauling capacity of engines; such requirement being a police regulation, subject to legislative repeal, and such damages being too vague and indefinite for computation. *Chicago & A. R. R. Co. v. Joliet, L. & A. R. R. Co.*, 44 Am. Rep., 799; *S. C.*, 105 Ill., 388.

The State has reserved to itself the legal power to establish all proper and necessary police regulations to protect life and property and all corporations are amenable to such regulations. *State v. Noyes*, 47 Me., 211; *Thorpe v. R. & B. R. Co.*, 27 Vt., 142; *State v. New Haven & N. Co.*, 43 Conn., 351; *Richmond, F. & P. R. R. Co. v. Richmond*, 96 U. S., 521 (bk. 24, L. ed., 784); *P. S. & P. R. R. Co. v. B. & M. R. R. Co.*, 65 Me., 122; *Wilder v. M. C. R. R. Co.*, 65 Me., 332.

Under the power reserved to the Legislature, it may impose upon railroad corporations created by it such additional restrictions and burdens as the public good may require. *People v. Boston & A. R. R. Co.*, *Appt.*, 70 N. Y., 569; *Boston & A. R. R. Co. v. Greenbush, Appt.*, 52 N. Y., 510.

As to the question of the sufficiency of the knowledge of the witness, much must be left

to the discretion of the judge or officer presiding at the trial. It is well settled that where the amount of damage done to property is in controversy, persons acquainted with it may state their opinion. The court says this is permitted as an exception to the general rule, and not strictly on the ground that such persons are experts. *Shattuck v. Stoneham B. R. R.*, 6 Allen, 115; *Snow v. Boston & M. R. R.*, 65 Me., 290; *Swan v. Middlesex Co.*, 101 Mass., 178.

The question is whether the opportunities for ascertaining the value of land and easements connected therewith may not enable a witness to testify to it, although he may not be the owner of the land or have personally bought and sold land. The true inquiry is, whether the witness is sufficiently informed on the subject to give evidence of the value of the property. *Whitman v. Boston & M. R. R.*, 7 Allen, 313.

Peters, Ch. J., delivered the opinion of the court:

The Town of Deering laid out two of its new ways over the track of a Railroad Company, and the question before a sheriff's jury was as to the damages sustained by the Company for the easements taken. The commissioner presiding at the hearing instructed the jury that they were simply to estimate the natural and the actual direct damages sustained by reason of the crossings, regard being had to the use which the crossings were put to, namely: town ways; but that in estimating such damages they should not consider the mere probable use in the future to which the land taken might be put by the Railroad.

We think the latter branch of the instruction was erroneous. It too closely qualifies or construes the general rule. The jury, in order to decide what the damages were, should have been allowed to take into consideration, not only the use which the Railroad was then making of its land, but that which in all probability it would thereafter make of it. The error, no doubt, occurred from the commissioner having another principle in mind, which he was endeavoring to inculcate correctly to the jury, and that is that prospective and speculative damages are not recoverable. But a distinction is to be observed between what land may be worth in the future and what it is now worth in view of the future. And as no man can foresee the future with any certainty, we are allowed to base calculations to some extent on the reasonable probabilities of the future.

There is a vast amount of land which is useless, unproductive and costly to keep, and valuable only for the use which the future is quite sure to bring to it. If the railroad is not likely to make any more extended use of the land than it now does, the damages would be one sum; while if it be sure or in a high degree probable that it will soon make a greater and more beneficial use of the land, the damages may be another sum.

And so it is a general principle affecting such questions that if the future use of land will in all probability be greater and more valuable than its present use, such probability may be an element to be received into the calculation to establish present value. Property is more valuable on a rising than on a stationary market.

ME.

The principle, however, has not expansive tendencies. It is not what use the railroad may possibly make of the land in the future, nor even what need it may probably have for it at some uncertain and far off day. It is the near, immediate future that may influence; the uncertain, indefinite, doubtful future cannot. The doctrine is to be carefully applied. The subject itself does not admit of exact limits. Supposed future value is by no means to be taken as present value. It is an element only, among other considerations, which may afford light upon the question. *Moulton v. Newburyport Water Co.*, 187 Mass., 163, 167.

The general idea is safely expressed in *Boom Co. v. Patterson*, 98 U.S., 403 [bk. 25, L. ed. 206]; where it is said: "The compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the near future." And the authorities are generally to the same effect, the one most fitting the question of the present case being *Bangor & P. R. R. Co. v. McComb*, 60 Me., 290.

We think all other matters were delivered by the commissioner to the jury correctly and clearly. One point taken by the Company, however, deserves especial consideration. The jury were instructed not to allow to the Company, in the assessment of damages, any of the expense which will be incurred by it in building and maintaining so much of the new ways as are within the limits of its own location. The statute R. S., ch. 51, § 88, lays that burden on the Railroad Corporation.

The Railroad is obliged to build and maintain those crossings at its own expense. But the Company contends that, inasmuch as the statute was passed after its charter was granted, it would be unconstitutional to apply its provisions to highways not in existence when its road was built.

By an amendment of the Company's charter, accepted by it, it was provided that "The Company shall be subject to the general laws existing in the State or which may be hereafter passed by the State." Pr. Laws, 1853, ch. 180; Webb's Railroad Laws Me., 497. See, Const. Maine, art. 4, p. 8, § 14. One of those laws is that a railroad charter, such as this, may be amended or altered by the Legislature.

The question therefore is whether, in view of the power thus reserved to the Legislature, the statute relating to railroad crossings, as affecting this Railroad in this instance, is or is not constitutional. It is impossible to lay down any exact rule as to the lawful extent of the exercise of this reserved legislative power, and each case depends largely on its peculiar facts. But it is universally admitted that the power of alteration and amendment is not without limit. The alterations must be just and reasonable. The vested rights of property of corporations must be respected. The power should be confined to reasonable amendments regulating the mode of using and enjoying the franchise granted, which do not defeat or essentially impair the object of the grant. *Pierce, R. R.*, 459 and cases cited; *Cool. Const. Lim.*, * 710, and cases cited.

Under any of the current definitions of this

power of amendment, we think the statutory provision under discussion should not be regarded as an unreasonable exercise of such power. Railroad corporations, especially under present laws, receive many compensations for all the burdens imposed upon them. The company pays nothing for its franchise; pays no tax upon it; may take a grant under general laws without recourse to the Legislature; its road crosses public ways and runs in places along such ways, without compensation to the town which paid for its easement to the original owner; may cross canals and navigable streams under some conditions, and this imposes burdens on other public interests; highways may be raised or lowered for its accommodation thus affecting the grade of highways and often the convenience and safety of travelers; railroads, to a reasonable extent, may occupy highways with their trains; and other privileges and accommodations are accorded.

By building and maintaining the town crossing within its own located limits, the railroad company has a control of it, as it should have, and can shape it as best for its own needs, and that is some compensation. Instead of the Legislature allowing, as it no doubt might, the right of passing over a railroad in all places where a passage could be effected without injury to the road, it confines the right to a few places—to the public roads. The law even forbids a person walking or standing on a track.

Another reason why the statutory requirement cannot be deemed unjust is, that it could not have been in the mind of the Legislature or of the Company, when the charter was granted, that so much of the public power was to be surrendered as the argument for the Company assumes. Had the present statute been then in existence it would not have been complained of as unreasonable. Railroad law was at that date in its infancy. Neither party knew what provisions for the preservation of all public rights and interests were needed.

They were not inserted in the charter, nor were they then to be found in the statutes of the State. The charter was general, and the location of the line most indefinitely stated. While details were largely omitted there must have been an unwritten, unexpressed understanding, an implication that the charter should be subject to all reasonable legislative control. Since then the law has become better defined. The powers and privileges of rail-

roads have been both curtailed and increased. Upon the whole, the legislative treatment of them has been reasonable and just. While the reserved power in this instance may not be deemed strictly a part of the police power of the State, it is something at least akin to it. The tendency of the authorities sustains these views, and in some of the cases precisely the same question as arises here has been discussed and decided adversely to the railroad. *Cool. Const. Lim.*, * 577 and discussion in *note*; *Pierce, R. R.* 457 and cases in *note*; *Chapman v. R. R. Co.*, 37 Me., 92; *Norris v. R. R. Co.*, 89 Id., 278; *Bangor O. & M. R. R. Co. v. Smith*, 47 Id., 34; *R. R. Comrs. v. R. R. Co.*, 63 Id., 269; *Albany Northern R. R. Co. v. Brownell*, 24 N. Y., 345; *People v. B. & A. R. R. Co.*, 70 N. Y., 569; *English v. New Haven & N. Co.*, 32 Conn., 240.

A contrary decision, however, was made in *Detroit v. Plank Road Co.*, 43 Mich., 140. If this result is possibly in some degree inconsistent with the case of *State v. Noyes*, 47 Me., 189, decided in 1859, it is because that was a strict decision and the law has made some advancement since that time.

It is not questioned by the Town that some damages are recoverable by the Railroad; and such must be the law. But damages are not assessable for the interruption and inconvenience occasioned to the business of the Railroad by the opening of the new highways, nor for increased expenses nor increased risks in running its trains, occasioned thereby.

Those are matters clearly of police regulation, damages for which would be too vague and uncertain for calculation. The claim is illogical if not unjust. *Mass. Cent. R. R. Co. v. B., C. & F. R. R. Co.*, 121 Mass., 124.

It was ruled that witnesses could testify to their opinion of the amount of damages that are sustained by the easements taken.

It is presumed that the witnesses were, from their experience and observation, competent to express their judgments upon the question, and that they understood the elements upon which the question was based. We think the testimony comes within the limits which render opinion evidence admissible.

Exceptions sustained.

Virgin, Libbey, Foster and Haskell, JJ., concurred.

Walton, J., did not sit.

SUPREME COURT OF MASSACHUSETTS.

Adelaide PIERCE,

v.

Joseph B. LAMPER, Exr.

1. When a cause is dismissed during a term of the Superior Court, under Rule 54 of that court, and a general order is made on the last day of term that judgment be entered in all cases ripe for judgment, judgment is deemed to have been entered on the last day of term and is a final disposition of the cause.
2. During term, the court may vacate the order of dismissal; but after entry of judgment at the end of term, the remedy, if any, is by writ of review or petition filed within one year after judgment.

(Decided January 11, 1886.)

ON defendant's exceptions. *Sustained.*

At the trial without a jury the following facts were agreed: Otis H. Pierce in his lifetime was indebted to the plaintiff in the amount claimed in her writ. He died and, on the twenty-second day of July, 1878, Joseph B. Lamper was appointed executor of his will and gave bonds for the due performance of his trust as the law directs, and gave due notice of his appointment, and on the second day of October, 1878, filed in the probate court an affidavit of having given such notice. On the nineteenth day of July, 1880, the plaintiff sued out this writ, which was entered at the September Term of the Superior Court. At the December Term, 1882, the action was dismissed upon calling the docket, under Rule 54 of the Superior Court, because no proceedings had been taken in it during the year immediately preceding, and at the end of the term a general order was entered "That judgment be entered in all cases ripe for judgment, and that all matters pending and not passed upon be continued to the next term of court."

In January, 1885, a motion was made to restore the case to the docket and to bring it forward for further proceedings, and the motion was allowed and the case restored and brought forward. A suggestion was then made of the death of the defendant, Joseph B. Lamper, executor, and a motion for an order to summon in Joseph H. Cotton, who had been appointed administrator *de bonis non* with the will annexed of the estate of the said Otis H. Pierce. Said administrator appeared specially and filed a motion to dismiss the action, setting out the prior proceedings, alleging that the order of the December Term, 1882, was a final judgment of dismissal and was a bar to any further proceedings in the suit, and that the court had no further jurisdiction in the case. This motion was overruled, and the defendant filed a bill of exceptions to the ruling of the court upon the motion, and it was allowed. By order of court an answer was filed, and the case was put on the trial list. On the 19th day of January, 1885, the said Cotton represented the estate of Otis H. Pierce insolvent, and the probate court appointed commissioners to receive and pass upon

the claims against it. The plaintiff requested a trial for the purpose of determining the amount due, and the hearing was had for that purpose.

The defendant requested the following rulings among others:

1. That the dismissal of this action at the December Term, 1882, and the general order for judgment passed on the last day of said term, constituted a rendition by the court of a judgment in the case.

2. That said dismissal and said general order for judgment constitute a defense and are a bar to plaintiff's recovery against the administrator *de bonis non*.

The trial Justice was of opinion that all the matters to which these requests related had been considered and passed upon by the Justice who made the order restoring the case to the docket and who overruled the subsequent motion to dismiss it, and that the defendant's rights relating thereto were protected by his bill of exceptions; and he ruled that the trial must proceed under said order as if the action had never been dismissed but had been pending all the time since it was originally entered, and found for the plaintiff in the sum of \$14,830.

Mr. Henry W. B. Cotton, for defendant:

The dismissal of this action and the general order of judgment constituted a rendition by the Superior Court of a final judgment in this cause. *Blanchard v. Ferdinand*, 182 Mass., 389.

The entry of "dismissed on call" is similar to an entry of "neither party" and therefore an appropriate final disposition of this action and in accordance with an order of the court. *Id.*, 391.

It is immaterial whether or not the clerk formally entered up the judgment. *Herring v. Polley*, 8 Mass., 118;

Where final judgment had been entered, without any error or mistake, in accordance with an order of the court, when all parties were before it, the court had no power prior to the Statutes of 1875, ch. 38, after the term of such judgment, to vacate it. *Mason v. Pearson*, 118 Mass., 61.

This is not a case in which the necessary parties had not been summoned in before the judgment was rendered as in *Ex parte Crenshaw*, 15 Pet. (40 U. S.), 119; *Stickney v. Davis*, 17 Pick., 169.

Or in which by misprision of the clerk or other mistake, the judgment entered was not such as was intended, as in *Capen v. Stoughton*, 16 Gray, 364; *Lucy v. Dowling*, 114 Mass., 92.

Nor where there had been a mere omission to enter the proper continuances, and the motion to bring the case forward was made before final judgment, as in cases cited in *Marshall v. Merritt*, 108 Mass., 45.

Mr. Samuel C. Darling, for plaintiff:

If there was no judgment, such as required by law, then the Superior Court had power to bring the cause forward on its docket, and its exercise of the power being within its own discretion, will not be revised in this court. *Lucy v. Dowling*, 114 Mass., 92; *Conley v. McLaughlin*, 137 Mass., 223.

A dismissal on the calling of the general docket under Rule Fifty-Four of the Superior Court, in the absence of both parties and their counsel, is not a judgment. If it is, then for which party is it a judgment? It can be but for one party upon the declaration disclosed in this case. There is no answer or declaration in set-

off. "At common law the judgment is yea or nay, for one party and against the other." *Kramer v. Rebman*, 9 Iowa, 114.

It is difficult to see how the legal status of the parties to this action, after the dismissal, differed from that of parties after the entry of "neither party" or of nonsuit and default. *Blanchard v. Ferdinand*, 132 Mass., 391.

After either of the last named entries, no judgment can be rendered by the court. *Marsh v. Hammond*, 11 Allen, 484.

At common law there is no form of an entry in the books of a judgment dismissing an action. *Bond v. McNider*, 3 Ired., 440.

According to the present English practice, established by statute, the party entitled to sign judgment may in general postpone doing so as long as he pleases, unless the opposite party takes steps to compel the signing of the judgment. Archb. Pr. (Chitty), 524; *Baker v. Saunders*, 29 L. J. N. S. C. L. C. P., 158.

Morton, Ch. J., delivered the opinion of the court:

At the calling of the docket at the beginning of the December Term, 1882, in the Superior Court, this action was dismissed under the Fifty-Fourth Rule of that court.

On the last day of said term the usual general order was passed "That judgment be entered in all cases ripe for judgment, and that all matters pending and not passed upon be continued to the next term of this court."

Under this order it was the duty of the court to enter judgment in this case at the end of the term according to the order of the court under the calling of the docket.

Such judgment is deemed in law to have been entered on the last day of the term and was a final disposition of the case.

During the term the court might have vacated the order dismissing the action, but after the entry of judgment at the end of the term the plaintiff's remedy, if any, was by a writ of review or by a petition to vacate the judgment, which must be filed within a year after the judgment. Pub. Stat., ch. 187, § 16-25.

The Superior Court had no power in this case upon petition filed more than a year after the judgment to vacate the judgment and bring the case forward upon the docket. *Mason v. Pearson*, 118 Mass., 61; *Blanchard v. Ferdinand*, 132 Mass., 389.

It follows that the Superior Court had no jurisdiction of the action and that it should be dismissed.

Exceptions sustained.

John F. DENNAN

v.

Charles E. GOULD.

A letter relied upon to create a new obligation to pay a debt after discharge in insolvency must clearly show that the writer intended to waive his discharge or to create a new obligation.

(Suffolk—Decided January 11, 1886.)

ON plaintiff's exceptions. *Overruled.*
This is an action of contract to recover

upon two counts: the first upon a promissory note for \$280, dated January 13, 1882, made by defendant to plaintiff; the second for \$64, money lent by plaintiff to defendant. Writ dated July 5, 1884.

The defendant relied upon his discharge in insolvency, proceedings having been begun in the Insolvent Court for the County of Suffolk on May 13, 1882, and the discharge having been granted on December 29, 1882.

To show a new promise since May 13, 1882, plaintiff introduced the following letter:

"Boston, December 14, 1882.

Friend John: Yours received. If you had sent it here at the distillery, I should received it before. My last meeting of insolvency comes off the last of this month, when I intend to receive my discharge. You can say to Mr. Allen after that I will pay his bill. I wish I could give you some money, John, as you ask; but cannot at present. I shall not take any notice of your abuse of me till I have paid you the amount I owe you, which I shall surely due, and after that we will have another settlement.

I remain as ever your friend,
C. E. G."

The trial Judge held that this letter was not sufficient to constitute a new promise and that the plaintiff could not maintain his action.

Messrs. Prince & Alexander, for plaintiff:

The question involved in this cause arises under the Pub. Stats., ch. 78, § 8. "No promise for the payment of a debt made by an insolvent debtor who has obtained his discharge from such debt * * * shall be evidence, unless in writing, etc."

It is admitted that plaintiff has no other claim against the defendant, and that defendant wrote to plaintiff the letter in question. The statute requires to be in writing that which previously might have been verbally expressed. An instance of verbal promise is, *Pratt v. Russell*, 7 Cush., 462.

The letter of defendant dated Dec. 14, 1882, is a compliance with the statute. The new promise must be subsequent to the commencement of insolvency proceedings, but need not be subsequent to a discharge in insolvency. *Lerow v. Wilmarth*, 7 Allen, 463.

As to nature of promise: "Must be clear, distinct and unequivocal." *Allen v. Ferguson*, 18 Wall., 1 (85 U. S., bk. 21, L. ed., 854).

The words used must be such as are "capable of meaning, or expressing a promise." *Pratt v. Russell*, *supra*.

In *Way v. Sperry*, 6 Cush., 241, defendant said: "Would pay as soon as possibly could; was not then in condition to pay, but that Watson, payee, need not give himself any uneasiness, notes should be paid as soon as possible." Later, defendant said: "Was then engaged upon a job of stone work, and that if Watson would come down or send, then he would pay half, etc." By Metcalf, J.: "It is well settled that a distinct and unequivocal promise to pay a debt discharged in bankruptcy, is binding on the promisor and may be enforced by action. It must be taken that a binding promise by defendant was proved at the trial."

In *Pratt v. Russell*, *supra*, it was testified that "Defendant said he was not willing to put principal and interest into a new note, but said

that he had always said and still said that she, plaintiff, should have her pay."

Byington, *J.*, was of opinion that, "The words used were capable of meaning or expressing a promise," and left it to the jury to say whether defendant intended by the words used to promise to pay the debt. In delivering the opinion of this court, Shaw, *Ch. J.*, said: "We cannot perceive any objections to the instructions given to the jury."

In *Lerow v. Wilmarth*, *supra*, defendants used words as follows: "The interest on your demand is, as usual, ready, and the principal will be forthcoming as soon as possible. It was my intention and expectation to pay the whole now or before, but you know how money matters now are, and I need not enlarge upon this point. I have lost a large amount of money since I made the purchase of you, but will pay your demand, and you know it is all safe, but I have been greatly disappointed in the receipt of money." Here there was no question but that the words used constituted a valid promise, exceptions being taken to a ruling upon another point, viz.: whether the new promise need be made since granting of discharge in insolvency or merely since commencement of insolvency proceedings. The court held the latter.

In *Cook v. Shearman*, 108 Mass., 21, words used by defendant were as follows: "Called twice at your store to pay you something, as I said I would, on account." "Cannot pay you anything now until next November, when, unless something unforeseen should happen, I expect to pay you all there is due you with interest to the time of payment, and I will certainly see to it that you are no loser by me." "I hope to be situated in a few weeks so that I can send you the whole amount due you, possibly sooner. Shall certainly do so as soon as possible."

Gray, *J.*: "The statements in those letters that the defendant expects to pay to the plaintiff all that is due to him, and hopes to be so situated as to send him the full amount of his bill with interest, coupled with the assertion that he will see to it that the plaintiff is no loser by him, amounts to a distinct and unequivocal promise, not to be controlled by the defendant's testimony as to the meaning of the expressions contained in the letters."

In *United Society v. Winkley*, 7 Gray, 460, the words used were, according to testimony, "always meant to pay," "pay notes if he got anything out of the old Locke and Winkley partnership."

Mr. H. J. Edwards, for defendant:

The single question in this case is: does the letter set forth in plaintiff's bill of exceptions constitute a new promise sufficient to revive the original debt which was bound by defendant's discharge in insolvency?

1. In order to revive a debt barred by a discharge in bankruptcy or insolvency, there must be a clear, distinct and unequivocal promise to pay it. *Elwell v. Cumner*, 136 Mass., 102; *Bigelow v. Norris*, 139 Mass., 12; *Kenney v. Brown*, 189 Mass., 345 and cases there cited.

The letter relied on by plaintiff must be taken as a whole and clearly shows that the defendant did not intend to make a new promise sufficient to revive the original debt.

Morton, Ch. J., delivered the opinion of the court:

The letter of the defendant expresses his intention of procuring his discharge in insolvency, his regret that he has no money to pay the plaintiff and his intention to pay him in the future, but it does not contain a distinct promise to waive his discharge and to pay the debt. The last sentence is not in the words naturally used to import a promise. It expresses an expectation and intention of paying the plaintiff, but does not clearly show that the defendant intended to waive his discharge or to create a new obligation. *Elwell v. Cumner*, 136 Mass., 102; *Bigelow v. Norris*, 139 Mass., 12.

Exceptions overruled.

Sarah J. ALTER

v.
Nathan D. DODGE.

1. A license to operate a stationary steam engine at the licensee's "shoe manufactory" on a certain street, sufficiently prescribes the place for its use, and the building having then been erected, its designation renders unnecessary any other description of the materials and construction thereof.
2. Such license is not violated by the licensee's connecting the engine with an engine house added to his manufactory and of the same materials.
3. The omission from the license of any regulation as to height of flues does not make the license void.

(Essex—Decided January 11, 1886.)

EQUITY. Heard on bill and answer. *Bill dismissed.*

The bill alleges that plaintiff is the owner of a certain lot of land in Newburyport, bounded on three sides by land of the defendant; that on said lot of land is the wooden dwelling house in which she has lived for more than thirty years as her home, with her family; that the said defendant has recently erected a large brick factory upon his lot, close to the line of plaintiff and in some places encroaching upon said line and within a few inches of her dwelling house, in which factory he is engaged in carrying on the business of manufacturing shoes; that the defendant purposes to erect a brick engine house, and a chimney to be sixty feet high and, as the plaintiff is informed and believes, of insufficient strength and proportions, and to set and connect in said engine house two steam boilers and a stationary steam engine to be propelled by steam, and other machinery; that said engine house and chimney are to be erected and are now being erected in close and dangerous proximity to the plaintiff's dwelling house, viz.: less than ten feet and in part within three inches of the line of her lot; that the defendant intends the said engine and boilers to be used and maintained to furnish power to said factory; that the City of Newburyport, on November 9, 1874, adopted §§ 83-40 of ch. 88 of the Gen. Statutes, and also ch. 74 of the Statutes of 1862, and no license

has been granted under said statutes or either of them by the mayor and aldermen of Newburyport to the defendant, nor has he applied for any such license; that the noise of said engine, boilers and machinery will be a great annoyance to the plaintiff and those occupying her said house and buildings; that her house is greatly endangered, and her property will be decreased in value by said nuisance so purposed to be erected and maintained by the defendant; wherefore she prays that a writ of injunction may issue against the defendant, restraining him from erecting and using said stationary steam engine, boilers, engine house, chimney and other erections on his premises.

The answer sets up the license mentioned in the opinion.

Messrs. Withington & Jones (Newburyport), for plaintiff.

Mr. John C. M. Bayley, for defendant:

A more liberal interpretation of the statute would be intended in the case of an ordinary stationary engine, with a boiler designed and constructed to use coal for fuel and used solely for ordinary manufacturing purposes, than where "furnaces for melting iron or glass, and stationary engines designed for use in a mill for planing or sawing boards or turning wood are used," the former being of such a character as to cause no danger or inconvenience to the public, the latter being dangerous *per se*. *Call v. Allen*, 1 Allen, 141.

As to the allegation of nuisance, the fact appears that at the time when the bill was filed, the defendant had not only not operated his engine or boilers, but he had not even constructed them; the injury or damage, therefore, to the plaintiff's health, comfort or property is entirely prospective and imaginary, and her apprehension not well grounded nor reasonable. "Equity will not interfere against a nuisance that is only contingent." *Ross v. Butler*, 19 N. J. Eq., 294; and see, *Barnes v. Calloun*, 2 Ired. (N. C.) Eq., 199; *Ellison v. Comrs.*, 5 Jones (N. C.), 57; *Beveridge v. Lacey*, 3 Rand. (Va.), 68.

An injunction will not be granted to restrain the erection of what may possibly prove a nuisance. *Ramsay v. Riddle*, 1 Cranch, C. C., 899; and see, *St. James Ch. v. Arrington*, 36 Ala., 546; *Lake View v. Letz*, 44 Ill., 81; *Butler v. Rogers*, 9 N. J. Eq., 487; *Kirkman v. Handy*, 11 Humph. (Tenn.), 406.

The criterion of determining whether a court of equity will restrain by injunction a threatened nuisance is, whether the nuisance will produce such a condition of things as, in the judgment of reasonable men, is actually productive of physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits. *Dittman v. Repp*, 50 Md., 516; and see, *Commonwealth v. Smith*, 6 Cush., 80; *Same v. Brown*, 18 Met., 365.

Morton, Ch. J., delivered the opinion of the court:

This cause was set down for hearing and was heard upon the bill and answer. All the allegations of the answer must be taken to be true, and the plaintiff therefore concedes that the only ground upon which she can maintain the bill is that the license granted to the defendant by the board of aldermen of the City of Newburyport is insufficient and invalid.

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The defendant is the owner of a brick building used as a manufactory of shoes, situated within 500 feet of the plaintiff's dwelling house. After due hearing, the board of aldermen granted him a license in the following terms:

"City of Newburyport, steam engine license. This is to certify that Nathan D. Dodge has been licensed by the board of aldermen of the City of Newburyport to erect for use a stationary engine to be propelled by steam power at his shoe manufactory on Prince Street."

This license was duly recorded.

The Public Statutes, ch. 102, § 47, provide that no stationary engine propelled by steam or other motive power shall be put up within 500 feet of a dwelling house "unless a license therefor has been first granted and recorded in the manner herein provided." The manner of granting such license is found in the 40th section of the same chapter which provides for the granting of licenses by the mayor and aldermen of cities and the selectmen of towns "Prescribing the place where the building shall be erected in which the steam engine or furnace is to be used, and the materials and construction thereof, with such regulations as to the height of flues and protection against fire as they deem necessary for the safety of the neighborhood." Pub. Stat., ch. 102, § 40.

The defendant's license sufficiently prescribes the place where the steam engine was to be used, viz.: in his shoe manufactory on Prince Street, and as the building in connection with which it was to be used was already erected, the designation of the building rendered unnecessary any other description of the materials and construction thereof. 189 Mass.

The license contemplates that the defendant should erect the engine at and as a part of his shoe manufactory; and it would be too narrow a construction to hold that he violated or exceeded his license by connecting it with an engine house added to his building and of the same materials. If it is essential as a condition precedent to the validity of the license that it should prescribe the materials and construction of the building, which we need not decide, we think the defendant's license does this sufficiently. The plaintiff objects that the license does not make any "regulations as to the height of flues." This was a matter within the discretion of the aldermen. By the statute they may make "such regulations as to the height of flues and protection against fire as they deem necessary for the protection of the neighborhood." As in this license they made no such regulations, it must be assumed that they did not deem any to be necessary for the safety of the neighborhood. The omission to do so does not make the license void.

Bill dismissed.

Mary E. MATTEY

WHITTIER MACHINE CO.

Where the evidence as to **contributory negligence** is conflicting, it is for the jury to say, upon the circumstances which they find to exist, whether the plaintiff used such care as is reasonably to be expected of one of his years.

olk—Decided November 28, 1885.)

ndant's exceptions. *Overruled.*

n for damages for an injury received plaintiff, a girl six years and seven id through being run over by a team driven by an *employé* of defendant. dence on the question of negligence mainly by the plaintiff herself, who hat, before crossing the street, she saw ming down the street on a trot; that started to cross the street with her nder her arm and, when half way opped one of her bundles; that she then woman cry out to the driver of the ook out for a child; that she then and saw the horses still trotting to- r and not more than thirty feet off, ot notice which way the driver was that she then stopped, with her back es, to pick up the bundle, and was y by the team.

hn C. Ropes, for defendant :

ar, from the plaintiff's testimony that ot sustained the burden of showing exercised ordinary care.

is burden is, is well stated by Merrick, *Man v. Deerfield*, 15 Gray, 580, 581: ports attention, heedfulness, caution; or take any degree of care, there must gillance, some exertion of the faculties e what it is desirable to save, or to avoid r or avert the peril to which a person xposed. Where there is no thought of y happen as the consequence of the d no vigilance or circumspection is concerning it, there is no care; none e taken under such circumstances, n its very nature and signification, at to its existence there must be some activity and caution."

not one of those cases where "One y puts himself in a place of exposure without some reason of necessity or to justify him in so doing," to use the of Wells, J., in *Mayo v. Boston & Me. Mass.*, 141. Such cases are: *Todd v. y & Fall River R. R. Co.*, 7 Allen, 207; v. B. & Lowell R. R. Co., 1 Allen, 187; N. B. & Taunton R. R. Co., 6 Gray, t v. Manchester & L. R. R. Co., 16 e, we claim, is a case where a per- g in one of the ordinary situations of he is exposed to danger, fails to show care. It is such a case as *Gilman v. 15 Gray*, 580, where the plaintiff's ence showed that he did not exercise care in driving his horses when he dangerous part of the road, and it was he could not recover.

v. E. Boston Ferry Co., 106 Mass., plaintiff was sailing a boat in the usual ferryboats; his companion, who was m, had seen the ferry boat which aft- struck them, at the time of its leaving at least an eighth of a mile off; from until the collision there was nothing et their view of this boat, and yet f them saw or looked at it after it left This omission was held to be "negli- ch contributed to the accident;" and g of the court below, that the action e maintained, was sustained.

The rule in cases of this sort is perfectly well settled. Where "the general knowledge and judgment of mankind at once condemn his conduct as careless," the plaintiff ought not to be suffered to submit his case to the jury. Per Colt, J., in *Gaynor v. Old Colony & Newport R. Co.*, 100 Mass., 208, 212.

So where "The whole evidence on which the plaintiff's case rests shows conclusively that he was careless." Per Wells, J., in *Mayo v. B. & M. R. R.*, 104 Mass., 187, 142.

So where there are "Some undisputed facts so obviously inconsistent with ordinary care on his part that the court can say that no reasonable question was presented for the jury to pass upon." Per W. Allen, J., in *Tyler v. N. Y. & N. E. R. R. Co.*, 187 Mass., 238, 241.

So where "The act, as proved by undisputed testimony, is seen to be such that the common judgment of men immediately pronounces it to be neglect." Per W. Allen, J., in *McDonough v. Met. R. R. Co.*, 187 Mass., 210, 212.

We are dealing here with the conduct of a grown person, for such we assume, at this stage of the argument, the plaintiff to be, in one of the ordinary perils of life. The precise acts, which in the cases cited above are held to constitute contributory negligence as matter of law, may not furnish us with any very close analogies to the facts in the case before us. Nevertheless, the rule is the same in all those acts. The "measure of ordinary care" is "such care as men of common prudence usually exercise in positions of like exposure and danger," to quote from the opinion of Mr. Justice Colt, in *Gaynor v. Old Colony & Newport R. Co.*, *supra*.

It is true that the courts decline to rule that a person who crosses a street without looking to see if any carriages are coming is, as a matter of law, guilty of contributory negligence. *Williams v. Grealy*, 112 Mass., 79; *Bowser v. Wellington*, 126 Mass., 391; *Shapleigh v. Wyman*, 134 Mass., 118. But in none of these cases was there any evidence whatever of such an act as stopping in front of an approaching team and stooping with one's back to it to pick up a bundle from the ground.

In *Murley v. Roche*, 180 Mass., 380, it is clearly implied that, if it had been admitted that the plaintiff had been sitting in the traveled part of the highway she would not have been allowed to recover. But it being disputed whether the part of the highway where she was sitting was the traveled part for teams or a sidewalk for foot passengers, the case was necessarily left to the jury. Otherwise, this case would have much resembled the case at bar.

In *Lynam v. Union R. Co.*, 114 Mass., 83; *Schlenfeldt v. Norris*, 115 Mass., 17, and *Carland v. Young*, 119 Mass., 150, there was direct evidence that the plaintiff used care, and the question was of course for the jury.

Where, however, there is serious danger to be apprehended on a highway, as on railroad crossings at grade, the mere omission to look out constitutes contributory negligence. *Butterfield v. Western R. R. Corp.*, 10 Allen, 532; *Wright v. B. & M. Railroad*, 129 Mass., 440.

Although the case of *Ince v. E. Boston Ferry Co.*, 106 Mass., 149, was the case of an accident of an entirely different description, it illustrates perfectly the principle contended for.

There was a person sailing a boat, who neglected to look out for another boat, a steam ferry boat, which he knew was approaching. It was taken from the jury as being a clear case of negligence, although not belonging to any special class of acts of negligence.

That there are certain street dangers to which children are particularly exposed is admitted. Such are those incurred in riding on sleighs; *Messenger v. Dennie*, 187 Mass., 197; or from coasting or playing in the streets. But in these cases the children are not using the streets for the purpose of ordinary travel. Nor does this case come under this category.

Again: there are cases where the ignorance or thoughtlessness of a child of the danger involved in a certain course will allow of the recovery of damages by it for an injury for which an older person could not maintain an action. Such was *Plumley v. Birge*, 124 Mass., 57. But here nothing of this sort can be alleged.

Messrs. L. M. Child and Thos. E. Barry, for plaintiff.

Morton, Ch. J., delivered the opinion of the court:

We cannot say, as a matter of law, that the plaintiff, by stopping to pick up her bundle, was guilty of contributory negligence which prevents her recovering in this action.

In some cases, when all the circumstances attending the act and the situation of the plaintiff are settled and undisputed, and these circumstances show, according to the common experience of all men, that the plaintiff was careless, the court has held, as a matter of law, that he could not recover.

But such is not this case. There was conflicting evidence at the trial as to the speed with which the defendant's servant was driving and as to the distance of his horse and wagon at the time the plaintiff stopped to pick up her bundle. It was the province of the jury to determine these facts, and the law leaves to their judgment and experience the inference whether or not upon the circumstances which they found to exist, the plaintiff was using such care as is reasonably to be expected of one of her years.

The case was properly submitted to the jury.
Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

Minnie BROWN.

A criminal complaint for being an idle and disorderly person examined and found sufficient.

(Suffolk—Decided January 30, 1886.)]

ON defendant's exceptions. *Overruled.*

This was a complaint for being an idle and disorderly person, in the words following:

"To the Justices of the Municipal Court of the City of Boston, holden at said Boston for the transaction of criminal business, within the County of Suffolk, Edward F. Gaskin, of the City of Boston in the County of Suffolk, police officer, in behalf of the Commonwealth of Massachusetts, on oath complains that Minnie Brown of said Boston, on the 6th day of March,

1885, and on divers other days and times between that day and the day of making this complaint, at said Boston, and within the judicial district of said court, was and is an idle and disorderly person, and on said days and times, at said Boston and within said district, has neglected all lawful business and habitually mispent her time by frequenting houses of ill-fame, gaming houses and tippling shops, against the peace of said Commonwealth and the form of the statute in such case made and provided.

Edw. F. Gaskin."

The defendant filed in the municipal court a motion to quash, on the following grounds:

1. There is no legal offense formally or substantially set forth.

2. The same is uncertain, indefinite and insufficient.

3. There is no averment that the defendant was under any necessity or duty of laboring or supporting herself or following any business or vocation.

4. That the same is in other respects uncertain, indefinite and insufficient.

That court overruled the motion. The defendant appealed to the superior court, and in that court renewed the same motion. The court overruled the same. The defendant duly excepted. Thereupon the defendant, not waiving, but insisting upon her motion to quash, pleaded that she would not contend with the Commonwealth on the facts and merits, but filed a motion in arrest of judgment.

The court overruled the motion and the defendant excepted.

Messrs. C. R. Morse and Geo. W. Searle, for defendant:

This complaint is fatally faulty as to the "idle" charge, by reason of omitting any averment of necessity, duty, obligation, etc.

In *Commonwealth v. Sullivan*, 5 Allen, 513, such an averment was contained in the complaint, and the Chief Justice of the superior court expressly instructed the jury that it was necessary for the Government to prove that the defendant being under a necessity to work for the support of himself or other persons dependent upon him, having opportunity to work in some lawful business, neglected, etc.; and the opinion of Hoar, J., indorses this charge as correct saying: "If the defendant being under a necessity to work for the support of himself or person dependent upon him," etc.

Mr. Edgar J. Sherman, Atty-Gen., for the Commonwealth:

The motion to quash the complaint was properly overruled, as was the motion in arrest of judgment. The complaint substantially follows the language of the statute and is sufficient; the averment which the defendant claims should have been in the complaint is not necessary to the crime charged therein. *Pub. Stat. ch., 207, § 29; Commonwealth v. Doherty*, 187 Mass., 245; *Commonwealth v. Hart*, 187 Mass., 247, note.

By the Court:

The only question in this case is whether the complaint should have been quashed as insufficient. It follows the words of the statute, is in the form which is uniformly used and which has been recognized as sufficient in this Commonwealth in numerous adjudged cases.

The motion to quash was rightly overruled. Pub. Stats., 207, § 29. *Commonwealth v. Sullivan*, 5 Allen, 511; *Same v. Doherty*, 137 Mass., 245, note.

Exceptions overruled.

George WHITE, Judge of Probate,

Oliver DITSON *et al.*

1. A **devise** of the residue of testator's estate to one "to be disposed of by him for such charitable purposes as he shall think proper" is a devise **in trust**, in which the devisee takes no beneficial interest. It is not essential that the words "in trust" should be expressed.
2. The **trustee** of such a trust is **not exempt from giving bond**.
3. Where the **same person is designated** in a will as **executor and trustee**, the capacities are distinct, and when his duties as executor have been fully performed, in order to relieve the **sureties on his bond as executor** and to effect the transfer of the estate from him as executor to him as trustee, there **must be some action in the Probate Court** indicating his discharge as executor and his acceptance of the trust.
4. Where no settlement of account and discharge as executor has taken place, the **sureties on the executor's bond are liable** for the residue of the personal estate after payment of debts and legacies, received by the executor and not disposed of for charitable purposes, with simple interest thereon, no willful breach of duty on the part of the executor being shown, with a deduction for executor's commissions.
5. The **sureties on an executor's bond** conditioned, in accordance with the statutes in force at the time of its execution, for the due administration of "the proceeds of all testator's real estate that may be sold for the payment of his debts and legacies," are **liable only for the proceeds of land sold by the executor as such**, and not for the proceeds of land sold under a trust power given by the will and going into the *residuum* of the estate.
6. **Nor are the sureties liable** under a provision of their bond conditioned for the due administration "of the goods, chattels, rights and credits" of the estate, for the proceeds of **lands sold under a power** in the will, in excess of the amount required for the payment of debts and legacies.
7. **Entries made by the executor**, now deceased, of items paid for charities, etc., in a family expense book, but not designated as payments on account of the trust or made for the purpose of charging the persons to whom the payments were made, are mere declarations and **not admissible** in evidence in favor of the sureties of the executor.

(Decided November 28, 1885.)

RESERVATION of questions of law raised upon facts stated in the report of an assessor, in an action upon an executor's bond.

The facts are stated in the opinion.

Mr. E. M. Johnson, for plaintiff:

The will must be construed according to the intent of the testator; and the language of the two bequests, one "in such way and manner as the legatee shall think fit and proper," the other in a different way, distinctly pointed out by the testator, showing an intent that it should not be received as an outright gift but that it should be applied for the benefit of others than himself, such charities as Healy shall think proper. The general direction is to charity, the selection of the objects being delegated to the legatee. Such legacy is a trust. *Nichols v. Allen*, 180 Mass., 211; *Schouler, Petr.*, 184 Mass., 426.

The testator has used language in effect the same as that construed as a trust in *Moggridge v. Thackwell*, 7 Ves. Jr., 86.

Healy's first duty was to make actual payments of such residue to some person duly qualified and assuming to act as trustee. *Newcomb v. Williams*, 9 Met., 525.

Since his duties as executor and trustee are separate, he should have applied for the appointment as trustee and given bonds as such trustee. *Daggett v. White*, 128 Mass., 398; Gen. Stat., ch. 100, § 14.

The residue could not be transferred so as to discharge the executor until such trustee had been appointed and such bond had been given. *Newcomb v. Williams, supra*; *Hall v. Cushing*, 9 Pick., 396; *Dorr v. Wainwright*, 18 Pick., 328.

What is the liability of the sureties on Healy's bond for his default in the discharge of such trust? Precisely the same as Healy would be under if living. *Choate v. Arrington*, 116 Mass., 552; *Newcomb v. Williams, supra*; *White v. Weatherbee*, 128 Mass., 450; *Brooks v. Tobin*, 185 Mass., 69.

The question of interest upon the balance is for the court. *Choate v. Arrington, supra*.

In cases of willful breach of duty, interest is allowed with annual rests. *Fay v. Howe*, 1 Pick., 523; *Jennison v. Hapgood*, 10 Pick., 104.

Where the trustee fails to distribute or pay over money when he ought to do so, he will be liable to pay simple interest. *Perry, Trusts*, § 468, and cases cited.

What commissions shall Healy be allowed for his services as executor? This question is affected by the view the court may take of the previous question of interest. His compensation is fixed by the court in which his accounts are settled. Ch. 144, § 7, Pub. Stat.

It must be reasonable, under all the circumstances of the case. *Urann v. Coates*, 117 Mass., 41, 44.

The court has power to disallow all compensation. *Brooks v. Jackson*, 125 Mass., 307.

Is the executor accountable for the proceeds of the real estate? If he is so accountable, then his sureties are chargeable for the proceeds and must account for them. *Choate v. Arrington, supra*.

Land directed to be sold and turned into money is to be considered as money and is to be accounted for as personal estate. 1 Jarm. Wills, ch. 19, § 1; *Stagg v. Jackson*, 1 N. Y., 206.

Messrs. W. G. Russell and Jabez Fox, for Oliver Ditson.

Mr. R. Lund, for Robert I. Burbank:

In the following cases, although the testator indicated in unmistakable language that the gift was not intended for the personal enjoyment of the legatee, the court held that the gift was absolute, and that it could not control the legatee's discretion. *Gibbs v. Rumsey*, 2 Ves. & B., 294; *Byns v. Blackburn*, 28 Beav., 41; *M'Alinden v. M'Alinden*, Ir. Rep. 11 Eq., 219; *Paisley's App.*, 70 Pa. St., 153; *Reeves v. Baker*, 18 Beav., 372; *Lambe v. Eames*, L. R. 6 Ch. App. Cases, 597; *Re Hutchinson and tenant*, 8 Ch. D., 540; *Re Adams and the Kensington Vestry*, 27 Ch. D., 394; *Spooner v. Lovejoy*, 108 Mass., 529.

In *Gibbs v. Rumsey*, *supra*, the testator gave the residue unto "My said trustees and executors, the said Henry Rumsey and James Rumsey, to be disposed of unto such person and persons and in such manner and form and in such sum or sums of money as they in their discretion shall think proper and expedient."

In *Nichols v. Allen*, 180 Mass., 211, the bequest was "To my executors and the survivor of them or their successors, to be by them distributed to such persons, societies or institutions as they may consider most deserving."

The court held: the bequest is not to the executors by name, but is to them and to the survivor of them and to their successors in the administration of the estate. All the property given to them is to be by them distributed; the direction to distribute is as broad as the gift. The property is not to be disposed of at the unqualified discretion of the executors, but is to be distributed according to their judgment of the deserts of the beneficiaries. *Id.*, 213.

In the case of *Schouler, Petitioner*, 184 Mass., 426, there was no gift to the legatee. He was simply authorized to take for the purposes specified and no other.

The sureties on Healy's bond are not responsible for his conduct as trustee.

It is apparent that Healy's powers and duties as residuary legatee had no connection whatever with his duties as executor; and that if he had declined to act as executor he would still have been entitled under the residuary clause. *Daggett v. White*, 128 Mass., 398.

Healy fully discharged his duties as executor, as to such residue. When the same person is made executor and trustee, and a bond is required in both capacities, the sureties on the executor's bond are not exonerated until a new bond is given by the trustee. *Newcomb v. Williams*, 9 Met., 525; *Prior v. Talbot*, 10 Cush., 1; *Miller v. Congdon*, 14 Gray, 114.

But this is true only where such new bond is required by law; and a trust for public charities, uncertain in its objects and indefinite in its duration, requires no bond under our laws. *Lovell, Appt.*, 22 Pick., 215; *Drury v. Natick*, 10 Allen, 169; *Bradstreet v. Butterfield*, 129 Mass., 339, 343; Pub. Stats., ch. 141, §§ 12, 16.

It was held that the sureties on the executor's bond were not liable for the failure of the devisees to apply the property to the purposes of the trust, although there was no accounting and no other evidence of transmutation of property from executors to trustees. *Simms v. Lively*, 14 B. Mon., 433.

Taylor v. Deblois, 4 Mason, 131, was a suit upon the bond of an administratrix who had been appointed guardian of one of the distributees and, having filed a certificate in the Probate Court that she held in her hands as guardian the distributive share of the minor, had been discharged as administratrix by order of the Probate Court.

Independent of the certificate and of the order of the Probate Court, there had been a transmutation of property by mere act and operation of law, arising from the fact that it was the duty of the administratrix to retain the distributive share in satisfaction of her claim as guardian, and that therefore the sureties on the administration bond were discharged. *Taylor v. Deblois*, *supra*. To the same effect are: *State v. Hearst*, 12 Mo., 365; *Coleman v. Smith*, 14 S. C., 511; *Carroll v. Bosley*, 6 Yerger, 220.

In 2 Williams' Executors, 1399, it is said that "When an executor, who happens also to be named a trustee of a legacy to be laid out in stock, has fully administered the estate and assented to the legacy and retains the legacy in his hands, not as assets of the testator but as trustee of the legacy, the principles that would apply to another trustee must apply to him."

In *Dix v. Burford*, 19 Beav., 409, a bequest was given to the persons named as executors, to be held in trust, and Romilly, M. R., said: "The moment the executors assented to the bequest they became trustees for their *cestuis que trustent*."

Healy opened an account of the residue to be devoted to charity, and made payments under it, which is conclusive evidence of assent. Williams' Exrs., 1381. An illustration of the effect of the assent, when established, is found in the case of *Paramour v. Yardley*, 2 Plow., 539.

In cases of sureties upon successive bonds of the same official, holding in the same capacity, it is held that the sureties for that term in which the liability actually occurred are liable; that it is to be presumed, in the absence of proof, that the officer had the funds in his hands at the end of the term before that in which his delinquency is discovered, and that having them in hand is equivalent to paying them over to himself as his own successor. *Kelly v. State*, 25 Ohio St., 567; *Kagay v. Trustees*, 68 Ill., 75; *Vaughan v. Evans*, 1 Hill, Eq. (S. C.), 414; *Justices v. Woods*, 1 Kelly (Ga.), 84; *Rochester v. Randall*, 105 Mass., 295.

Before there could be any transmutation of property, the executor must have settled his final account of administration in the court of probate, in which the balance due from him as executor should be allowed to his credit as being retained by him in his capacity as trustee for the minor children. *Hall v. Crashing*, 9 Pick., 395, 408.

If a legacy is given by will, and the same person is executor and trustee or guardian for the legatee, he is bound to account for the legacy as executor, if he has sufficient assets, unless he has rendered an account in the probate office charging himself as trustee or guardian, and the account has been allowed by the probate court. *Conkey v. Dickinson*, 13 Met., 58.

It was not any part of Healy's duty as executor to file an account showing what disposition he had made of the residue. In such a

case an account allowed by the Probate Court showing the amount of the residue would not have affected the right of any person interested in the estate; and because it would not have bound anybody, it would have been simply a piece of unnecessary and improper accounting. *Coudin v. Perry*, 11 Pick., 503; *Granger v. Bassett*, 98 Mass., 462.

In the last case Wells, J., says, p. 469: "The Probate Court had no authority over the distribution of the residuary legacies. The relative rights of the legatees and other questions affecting such distribution cannot properly be heard upon a settlement of an executor's account."

McKim v. Bartlett, 129 Mass., 226, was a suit against administrator's sureties who had been discharged upon the filing of a new bond. There had been no actual waste of the estate before the discharge; but the administrator had filed no account, and it was held that the sureties were liable only for nominal damages.

In *McKim v. Hurwood*, 129 Mass., 75, the executrix was sole legatee, and, there being no creditors, it was held in a suit upon the bond that maladministration could not be shown, although no account had been rendered in the Probate Court.

The ecclesiastical courts had no jurisdiction to enforce the payment of legacies out of the proceeds of land devised to be sold, that not being a testamentary subject. *Edwards v. Graves*, Hob. 265 a; *Re Desbunnet & Ferbanke*, Palm., 120; Wms. Exrs., 657, 1681.

The power of selling real estate is no part of the business of an executor or administrator, unless he obtains a license under the statute; he has no interest in the land and no authority to sell it, except the authority which may be derived from the statute. *Tainter v. Clark*, 18 Met., 220.

Probate Court v. Hazard, 18 R. I., 3, was a suit upon administrator's bond conditioned to administer all the "goods, chattels, rights and credits" of the deceased, and it was held that the sureties were not liable for proceeds of real estate sold by the executor under a power in the will. Further authorities to the same point are: *Jones v. Hobson*, 2 Rand., 493; *Moore v. Waller's Heirs*, 1 A. K. Marsh. 498.

Before that time the statutes had required a special bond in case of a license to sell more than enough to satisfy debts and legacies, but it had been held that this bond protected only the surplus. Stat., 1783, ch. 32, § 2; *Baylies v. Chace*, 1 Pick., 230.

In *Quincy v. Rogers*, 9 Cush., 297, Shaw, C. J., said: "In common parlance, as well as in a more precise use of language, a legacy is distinguishable from the gift of a residue or of a share in a residue."

Williams on Executors, 1051, defines a legacy to be "Some particular thing or things given or left by a testator to be paid or performed by his executor."

In *Robinson v. Millard*, 138 Mass., 286, it was held that the sureties of the general bond of an executor were not liable for neglect of the executor, to pay over to the residuary legatees named the surplus-proceeds arising from a sale under license of court.

It is a well settled rule that where a trustee does an act which he may in the execution of

a trust, "It shall be taken to have been done by him with intent of doing that which he was bound to do." *Souden v. Souden*, 1 Bro. Ch., 582.

Where a man is under an obligation to lay out £30,000 in lands, and lays out part as he can find purchases which are allowed with all material circumstances, it is more natural to suppose these purchases made with regard to the covenant than without it * * * more natural to ascribe it to the obligation he lies under than to a voluntary act, independent of the obligation. *Lechmere v. Lechmere*, 2 Sudg. V. & P., app. No. 25, 11th ed.

The general principle is that administrators are not chargeable with interest for money remaining in their hands, unless they loan it and receive interest, or make some profitable use of it, or unreasonably detain it. *Stearns v. Brown*, 1 Pick., 581.

If the heirs of Percival who have instituted this suit disapproved Healy's delay in winding up the estate, they should have called him to account. For twenty years they have remained silent. If there was neglect on his part there was equal neglect on theirs, which should, at least defeat their claim for interest against these innocent defendants. *Forward v. Forward*, 6 Allen, 494, 499.

Devens, J., delivered the opinion of the court:

The defendants, who are the sureties on the bond of the late John P. Healy, as executor of the will of John Percival, having admitted a breach thereof, the case at bar has been referred to an assessor to report the facts, and is now before us upon a reservation of the questions of law raised upon the facts stated in his report and in the subsequent agreement of additional facts by the parties.

It is not denied that Healy, as executor, paid all the debts, specific legacies and funeral expenses of the testator. The first and most important inquiry is as to the responsibility of the sureties, for that which came into his hands under the residuary clause of the will.

This is in the words following: "All the rest and residue of my property and estate, real, personal and mixed, of which I shall die seized or to which I may be entitled at the time of my decease, I give, devise and bequeath to the said John P. Healy, to be disposed of by him for such charitable purposes as he shall think proper." This clause is preceded by one which gave to Healy a sword and portrait of the testator, to be disposed of "in such a way and manner" as he may think "fit and proper." The earlier clause differs from that we are considering in the important respect that no restraint is placed upon the disposition Healy might make of the articles therein bequeathed, while the property bequeathed by the latter clause is "to be disposed of" by him for "charitable purposes," although the selection of the objects of the charity which should receive the bounty was left to Healy.

The word "charitable" has a distinct legal meaning, derived from the Statute of 43 Eliz. ch. 4, from the construction given to it in the definition of the objects of charity, and from the application of the statute to other uses which are not included in those there enumerated, but which

come within its spirit by analogy. While the gift to Healy is not, in terms, in trust, the object for which it is confided to the donee distinctly appears to be its distribution to charitable purposes. For this only it is intrusted to him. He took the gift for no purpose personal to himself nor in any manner for his own use, and had no beneficial interest therein. It is not material, therefore, that the words, "in trust" are not found in the terms of the bequest. *Nichols v. Allen*, 130 Mass., 211; *Schouler, Petitioner*, 184 Mass., 426.

While a bequest which could be applied to purposes other than charitable might be held too indefinite to be carried out, the limitation of its distribution to purposes well defined and deemed worthy of particular protection, even if various, would enable the court, were the fund still in the hands of the trustee, to compel him to execute this clause of the will by the selection of the charitable purposes to which the fund should be devoted. The testator has shown his intention to dispose of this gift for charitable purposes generally, and a confidence has been reposed in the trustee to make a selection of the objects of charity. If, therefore, the trustee proceeds in good faith and with reasonable diligence to divide and distribute such a legacy for purposes which could properly be called charitable, either by directly applying it to objects thereof or transferring it to responsible societies or associations formed for such purposes, a court of chancery would not interfere with the exercise of his discretion. Should he refuse to do this, there would be no serious difficulty in compelling, by the proper agencies of such a court, the execution of the trust, and in preventing the fund from being misappropriated to selfish uses. *Suttonsall v. Sanders*, 11 Allen, 446; *Loring v. Marsh*, 2 Cliff, 469; 8 U. S. 6 Wall. [78 U. S., bk. 18, L. ed., 802]; *Marsh v. Renton*, 99 Mass., 132; *Atty-Gen. v. Gleg*, 1 Atk., 356.

Whether the power to select charitable objects was strictly limited to Healy, on account of the personal confidence reposed in him, so that if he had declined to accept the trust or if he had deceased without completing the execution of it, it could not be executed by the intervention of the court, and, the trust thus failing, the fund should go to the next of kin; or whether, the testator having distinctly shown his intention that it should be devoted to charitable purposes generally, it should be held that the power of selection was attached to the trust, so that it might be executed through a trustee, who should carry into effect the controlling purpose of the testator under the supervision of this court, is a question not necessary now to be discussed. *Loring v. Marsh*, *ubi supra*; *Fontain v. Ravenel*, 17 How., 369 [58 U. S., bk. 15, L. ed., 80].

The first inquiry is as to the liability of the sureties. While Healy fully completed the administration of the estate, by the payment of all debts, legacies and expenses, he settled no final account as executor, and did not by any open and notorious act discharge himself as such in the Probate Court, by assuming to transfer the residue of the property to himself as trustee, or by any other act, indicating an intention thereafter to hold the same for the purposes of the trust. The will gave to him two

characters, those of executor and trustee, and the duties of the latter character were distinct from and independent of the former. As actual payment cannot be made by one to himself, it has been held that the same person is executor and trustee, and must give a bond in his character as trustee, though he can exonerate himself from his duties as executor. *Hall v. Cushing*, 9 Pick., 328; *Newcomb v. Wainwright*, 13 Pick., 328; *Newcomb v. Wainwright*, 9 Met., 525-534; *Conkey v. D. Met.*, 5; *Daggett v. White*, 128 Mass. Stats., ch. 100, § 14.

While it is not controverted by the parties, that if a case were presented in which a trustee was legally compelled to give a bond, it would be necessary to show, by the facts, that with this requirement, that a transfer of property was made by the executor, and that a principal contention is, that such is not the case; and that if it can be shown that the trustee fully completed his duties as executor, it may be held that the residue of the property lawfully retained by him as trustee. This contention will be of less interest hereafter, as the Statute of 1873, ch. 122 (Pub. Stats., ch. 122), requires every trustee to give a personal bond, which certainly covers the case that where the same person is executor and trustee there shall be a distinct transfer of property to him in the latter capacity. *Park v. Park*, 117 Mass., 513.

Even if this were a case where a bond might be and was by the will executor, giving bond, we should not be prepared to say that the facts that Healy ceased to act as executor at the time to do any acts as executor, and that it was necessary in that capacity being terminated, and thereafter did certain acts as trustee, and intention to execute the trust were sufficient, without any settlement of his account as executor in the Probate Court, to bind him and the sureties on his bond as trustee. There should, in that case, be some act which could only take place in the Probate Court, indicating a discharge of himself in one capacity and the acceptance of the trust in the other before this transfer could take place. *Newcomb v. Williams*, 13 Pick., 328. This might perhaps be by any deed presented to by that court, as where a person who had been appointed trustee, having been notified as such, charged himself in his capacity as executor with money paid to himself, which account had been allowed. *Dillon*, 133 Mass., 91.

In *Taylor v. Debois*, 4 Mason, 133, the defendants, an administratrix, and the decree of the Probate Court ascertaining the distributive shares of the intestate and the guardianship of one of the persons to a share who was a minor; it was held, by operation of law, she held the amount as a retainer, as guardian and not as administratrix, and that no suit lay against her on the administration bond for the amount retained. But in that case by a process of the Island known as *quictus* an administratrix be fully discharged by the Probate Court, which was a decree rendered by the court, stated in substance that the administratrix had fully administered the

ordered that "she be and hereby is from henceforth acquitted and discharged of the same." Before this *quietus* she had signed a certificate to the Probate Court, which had been recognized by it, that she had in "her possession and control" as guardian, the shares of the minor whose property was afterwards wasted.

State v. Hearst, 12 Mo., 885; *Coleman v. Smith*, 14 S. C., 511, and *Carroll v. Bosley*, 6 Yerg., 220, also relied on by the defendants, are all cases where the question of responsibility arose between sureties, on the bond of the principal defendant as administrator, and the sureties on his bond as guardian. In these it was held that when the time for the settlement of the estate as administrator had fully expired and the distributive share of the minors had been ascertained, it must be deemed that thereafter the funds were held by the principal defendant as guardian, as that was the capacity in which he had the right then to hold; and that the property was thus by operation of law vested in him as guardian. But we are referred to no case where the same person was administrator and guardian and had failed to qualify in the latter capacity, in which it has been held that the sureties on his bond as administrator were discharged. The ground upon which the transfer of the property is presumed to take place, namely, that one shall be deemed to hold in that capacity in which he ought to hold, has no existence where the principal has not qualified as guardian.

The will by which Healy was appointed a trustee for the distribution of the residue of the estate for "charitable purposes" did not exempt him from giving a bond; but the defendants contend that Healy was, from the character of the trust, so situated that he could not properly have been required to give bond; and that therefore, as it is shown by a variety of facts that after 1885 he held the property as trustee, he must be deemed to have discharged his sureties on his bond as executor. If it were true that he was entitled to enter upon his duties as trustee without giving bond for their faithful performance, there would be force in this position, especially if, the debts and legacies having been paid, the residue had been ascertained by a proper decree of the Probate Court settling his account. But no such decree was ever made, nor was the trustee entitled to enter on his duties without giving bond.

The defendants upon this point rely on the case of *Lowell, Appellant*, 22 Pick, 215, which is followed in *Drury v. Natick*, 10 Allen, 169. It is decided in *Lowell, Appellant*, that, where property is given to trustees for the purpose of a general charity, such as the gift there in question, which was for the promotion of education and the advancement of science by a permanent institution, and where the testator had provided for the perpetuation of the trusts and for a continuous succession of trustees, without reference to the probate law, and where he also had appointed perpetual visitors of his charity, it was not a gift in trust for any person or persons within the true intent and meaning of the statute; and that in such case the trustee was not required by law to give bond before entering upon the duties of his trust.

The distinction between this case and that at bar is obvious. There is here no public char-

ity, indefinite in duration, to be permanently established, where a perpetual succession of trustees is to take, hold and administer the property, provision being made for the rendering and auditing of its accounts and for the supervision of a permanent board of visitors. The administration of a sum of money bestowed under such circumstances and for such a purpose may well be deemed to be beyond the control of the Probate Court. That which is here bequeathed is a sum of money, to be distributed by a trustee for charitable purposes, which consists of the residue of an estate. No institution of public charity is to be founded, although the trustee may undoubtedly transfer the sum bequeathed to institutions formed for that purpose, and no fund is to be permanently held. Within such reasonable time as shall enable the trustee to make proper inquiry, in order to ascertain what individuals or societies coming within the terms of the trust may, in the just exercise of his discretion as trustee, be made the immediate recipients of the testator's bounty, the fund is to be distributed. The ground upon which it was held in *Lowell, Appellant, ubi supra*, that the provisions of the Rev. Stats., ch. 69, § 1, and in *Drury v. Natick, ubi supra*, that the provisions of the Gen. Stats., ch. 100, § 1, requiring a bond to be given in all cases by testamentary trustees, except where there was a special exemption by will, or where all persons interested consented that it should not be required, had no application to a public charity established in a perpetual succession of trustees, cannot be so extended as to exempt individuals charged with the distribution of sums of money "for charitable purposes" from giving bond to perform their trust.

It is suggested that, in the latter case, those who are to receive the benefit of this sum are entirely indefinite; that the only provision for putting in suit such a trustee's bond is "for the use and benefit of any person interested in the trust estate;" Gen. Stats., ch. 100, § 12; Pub. Stats., ch. 148, § 18; that no person or institution could thus describe itself; and, therefore, that it cannot have been intended that any such bond should have been given. We cannot assent to this. All persons who are themselves objects of charity, within the legal meaning of the term, and any institutions founded for charitable purposes might become interested. If the court should be compelled to select another trustee, in order to carry out the purpose of the testator, each of those who might become entitled by this selection, as made under the direction of the court, would be interested in the bond given by the original trustee, and might be empowered to bring suit thereon. Gen. Stats., ch. 100, § 12. After the decease of the original, if any of the trust fund remained undisposed of, whether it were held that the power of selection was attached to the trust so that it could still be executed, or that it was personal so that the residue undisposed of would go to the next of kin, there would in either event be persons directly interested in the trust estate.

We are, therefore, of opinion that the sureties on the executor's bond of Healy are liable for the residue of the personal property received by him and not disposed of "for charitable purposes." In considering to what extent they

are liable, it is necessary to determine whether they are responsible for the proceeds of the real estate sold by Healy. The will not only authorized but directed him to convert the whole real estate of the testator into money as soon after the testator's decease as it should seem expedient, and provided that any deed executed by him should convey as perfect a title as if made by the testator. He was authorized to sell at public or private sale, and did so by authority of the will and not of the Probate Court, within a reasonable time after the death of the testator, receiving therefor the sum of \$4,700. This sum was not needed for the payment of expenses, debts or any specific legacies.

The condition of the bond, according to the statutes in force when it was executed, was in its second clause, which is the only one necessary to be considered: "To administer according to law and the will of the testator all his goods, chattels, rights and credits and the proceeds of all his real estate that may be sold for the payment of his debts and legacies, which shall come to the possession of said executor, or of any other person for him."

By the Stat. of 1880, ch. 152, (Pub. Stats., ch. 129, § 5), the condition of a bond given under such circumstances was altered by striking out the words "for the payment of his debts and legacies," and inserting the words "or mortgaged." The same Statute of 1880 provided that where license or authority was given to an executor, etc., to sell real estate, no special bond to account for the proceeds need be given unless the bond given on his appointment was insufficient. Of course the liability of the defendants is to be determined by the law as it existed when the bond into which they entered was made, and by its terms. The clause, "proceeds of his real estate that may be sold for the payment of his debts and legacies," cannot cover a responsibility for a sale which was not necessary for the payment of debts or any definite legacy. Such proceeds would form a part of the residuum of the estate; but as remarked by Chief Justice Shaw, "In common parlance, as well as in a more precise use of language, a 'legacy' is distinguishable from the gift of a residue or share in a residue." *Quincy v. Rogers*, 9 Cush., 291, 297.

Had the executor applied to the Probate Court for leave to sell real estate for the payment of legacies, assuming that there was no provision in the will in relation to the subject, it could not have been granted, if there was no existing unpaid legacy, but only a gift of the residuum. The only legacies for the payment of which the real estate could be sold by authority of the Probate Court, were such as were definite, and that which was received from such a sale was the only money for which the sureties on the bond would be responsible. *Robinson v. Millard*, 133 Mass., 286.

It has been held in *Alley v. Lawrence*, 12 Gray, 373, that a devise to executors in trust for the support of the testator's children, with power to sell and convey any portion of the land, gives them a right to sell and convey in their own names, without giving other bonds than as executors. It was not necessary there to consider what was the responsibility of the sureties for the money received from such a sale. Whether a power to sell given by will

was to be treated as a personal trust and confidence only in executors named, so that it could only be executed by them, or whether, as prescribing the mode of administration of an estate, it would pass to survivors or to an administrator with the will annexed, has also been a question several times discussed in our decisions. *Warden v. Richards*, 11 Gray, 277; *Greenough v. Welles*, 10 Cush., 571; *Chandler v. Rider*, 102 Mass., 268; *Tainter v. Clark*, 13 Met., 220.

Even if an executor invested with a power to sell real estate, either as a matter of personal trust and confidence in him, or as a mode of administering the estate prescribed by the testator, which might be exercised by any successor, might make a good title to real estate, it by no means follows that the sureties on his bond would be responsible for the proceeds of such real estate, in view of the limited character of that instrument. The power to sell real estate, independently of that which may be given by the Probate Court for the payment of debts and legacies, is a trust power differing from that which properly belongs to the executor or administrator. It may be that the probate of the will fully invests him with this power and that, even if he should properly give bond, he may convey a good title without doing so, and yet that the sureties on the original bond would not be responsible. All that the sureties have agreed to be responsible for, so far as the real estate is concerned, are "the proceeds of his real estate that may be sold for the payment of his debts and legacies." This is a definite obligation and contemplates a sale of the real estate strictly for these purposes by authority of the Probate Court, as without this authority the executor or administrator, as such, can have no power to sell. To construe it as binding the sureties to be responsible for a sale of real estate, made for no such purposes but by authority of a trust power given in the will, is to extend their obligation much too far. There is certainly no expression in the bond which covers a responsibility for real estate sold under authority of the will.

We understand that the argument by which this responsibility is deemed to exist is, that the real estate, having been lawfully turned into money under the power of the will, the proceeds become of "the goods, chattels, rights and credits" of the estate, for the faithful administration of which the sureties were bound. If this argument were tenable, it would follow that when real estate was ordered to be sold, to a greater amount in value than was necessary for the payments of debts and legacies, which the Probate Court is authorized to do when land cannot be divided, the sureties on an administration bond in the form here used would be responsible for the surplus. Yet this is certainly not the case. An additional bond has always in such case been taken for the protection of this surplus, for the reason that the sureties in the original bond have been held not responsible for it, until the recent change in the administration bond. *Bennett v. Overing*, 16 Gray, 267; *Robinson v. Millard*, *ubi supra*.

There has been on this subject, it must be conceded, a conflict of authority in the decisions of the several States, not reconcilable by reason of the differences which exist in the form of the bonds considered in the several

cases. They were all examined with great care in *Probate Court v. Hazard*, 18 R. I., 3. It was there held that, in a suit on an administrator's bond conditioned to administer all the "goods, chattels, rights and credits" of the deceased, the sureties were not liable for proceeds of real estate sold by the executor under a power in the will. The words "the proceeds of real estate sold for the payment of debts and legacies" are not found in the Rhode Island bond; but how strictly these have been limited in Massachusetts is shown by the cases already cited. Even if the real estate had been changed into money, by virtue of a power in the will, it is not, in our view, that personal property for the administration of which the sureties became responsible. The direction of the will that his real estate should be turned into money did not make it "his goods, chattels, rights and credits," for the administration of which, in addition to "the proceeds of all his real estate sold for the payment of debts and legacies," the sureties became responsible.

In ascertaining the amount for which the sureties are to be held liable, it is important to determine whether any weight should be given to the books kept by Healy, and the evidence by which it was sought to supplement them. That the book which professed to be "the account of the fund left by the will of John Percival to John P. Healy to be used by him for charitable purposes," supplemented by the receipts of the respective societies to whom funds were given, and which shows an expenditure of \$1,100 to three charitable societies, although objected to by the plaintiff, was properly admitted, cannot fairly be questioned. Even if as executor Healy failed to settle his account, as it is found that there are no debts and legacies to be paid, if he distinctly devoted as trustee the funds left by Percival to charitable purposes, to the extent to which they were thus devoted, the damages would be reduced. That these three gifts were thus set aside from the Percival fund is found by the auditor and the facts fully justify the finding.

The only evidence to show that Healy made other payments from the Percival fund, is derived from the entries in certain family expense books, commencing in 1863, and including items as payments to charities, taxes, personal gifts, etc. By comparison of the amounts expended by Healy during the time covered by these books, and in former years, the defendants seek to establish the proposition that certain sums were expended from the Percival fund in discharge of his obligation to expend it in charity. Unless these family expense books were admissible in favor of the sureties, to show the fact of payments from this fund, we have no occasion to consider the weight and the sufficiency of the evidence afforded by them. If properly rejected by the assessor there was no evidence before him which would have justified a finding in favor of the sureties, as to the sums claimed by them to be thus shown to have been expended. The statements in these books were not even entries made in a book of accounts for the purpose of charging those to whom they were made. They are mere declarations that certain sums were paid by Healy in charity; the payments do not purport to have been made on account of the Percival

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fund. Such declarations cannot afford legal evidence of payments by Healy in charity; far less of payments from the Percival fund, and were properly rejected by the assessor. Nor was the assessor bound, as contended by the defendants, to render judgment in their favor upon the presumption that the residue in Healy's hands was paid out in accordance with the terms of the trust. Upon this point, the burden of proof was on the defendants. *Choate v. Arrington*, 116 Mass., 552.

There remain the questions of interest upon the sums for which the sureties are liable, and of any charges or commissions which may properly be deducted. When there is a willful breach of duty, interest may be allowed, with annual rests. *Jennison v. Hapgood*, 10 Pick., 77, 104.

Ordinarily, when a trustee fails to pay over or to distribute money, he should at least be charged simple interest thereon. The question of compensation is also one within the discretion of the court to a large extent and it may be wholly disallowed. *Brooks v. Jackson*, 125 Mass., 307.

In view of all the circumstances of the case, no willful breach of duty is shown; it may have been that Mr. Healy wrongly thought, indeed, that no legal duty was imposed on him, but an obligation binding on his conscience only. There has certainly been a failure to pay over the money when it should have been done. Admitting that the trustee was entitled to a certain length of time for the selection of the proper objects of charity, no reason appears why an ample opportunity had not been afforded when he made, in February 25, 1867, the donation to the Ladies Home Educational Society. The last act done by him strictly as executor was on November 25, 1865, and the whole estate had been converted into personal property a considerable time previously. Upon the balance then due, deducting the sum of \$4,700, the price of the real estate, simple interest at six per cent should be computed from February 25, 1867, to the rendition of the judgment, and added to the principal sum. From this should be deducted Healy's commission of 2½ per cent, as computed by the master, the amount left in his hands.

Ordered accordingly.

Franklin P. BAKER

v.

William J. COPELAND et al.

A defendant, illegally arrested in a civil action, does not, by giving a bail bond to procure his discharge from imprisonment, waive his right to object to the service of the writ.

(Decided November 28, 1885.)

ON plaintiff's exceptions. Overruled.

Action of tort, in which a writ for the arrest of the defendant was issued upon the following affidavit made by the plaintiff:

Commonwealth of Massachusetts,
County of Suffolk, ss.

March 21, A. D. 1884.

I, Franklin P. Baker, the plaintiff named in the annexed writ, on oath declare that I believe and have reason to believe that I, said

plaintiff, Franklin P. Baker, have a good cause of action against the defendant; that I have reasonable expectation of recovering a sum equal at least to one third the damages claimed in the writ; and that I believe and have reason to believe that the defendant intends to leave the State, so that if execution be obtained it cannot be served upon him.

Franklin P. Baker.

Commonwealth of Massachusetts,
Suffolk, ss.

March 21, A. D. 1884.

Personally appeared the above named Franklin P. Baker, and made oath that the above affidavit, by him subscribed, in my presence, is true; and I certify that I am satisfied the same is true. And satisfactory cause having been shown, I authorize the arrest of the said defendant, if his arrest is authorized by law to be made after sunset.

Edward J. Jones,
Master in Chancery.

The officer's returns were as follows:
Suffolk, ss. Boston, March 22, 1884.

By virtue hereof, I this day arrested the within named Arthur P. Dodge, and on the same day said Dodge gave bail for his appearance at court as within required, and I thereupon discharged him from arrest. (See, bail bond hereto annexed.)

Thomas Fee, Jr.,
Deputy Sheriff.

Suffolk, ss. Boston, June 17, 1884.

The within named defendant, Wm. J. Copeland, not being an inhabitant of or resident in this State, and not finding him, or any last and usual place of abode, tenant, agent or attorney of his within my precinct, I could make no further service of this writ.

Thomas Fee, Jr.,
Deputy Sheriff.

Thereupon the said Dodge, by his attorney, entered a special appearance and filed a motion to dismiss, upon the ground of insufficient service. The motion was called up in the Superior Court. At the hearing, the plaintiff moved that the action be continued to allow time for additional service. After hearing, the presiding Justice ordered the action dismissed and refused to allow the plaintiff to take out an order for additional service. To these rulings the plaintiff excepted.

Messrs. Edwin C. Gilman and Charles M. Barnes, for plaintiff:

It is not denied that the original arrest in this case was unlawful. *Hitchcock v. Baker*, 2 Allen, 431.

It may also be true that giving a bond did not waive the tort, so as to prevent an action for damages. *Carleton v. Akron Sewer Pipe Co.*, 129 Mass., 40.

That insufficiency of service based on the ground of illegal arrest may be waived is shown by the fact that it is waived by a general appearance and answer to the merits. *Brigham v. Clark*, 20 Pick., 43.

The exact case here presented seems not to have arisen, but it has been held generally that if a person receives a paper as service which he might consider invalid, yet if he receives it without objection and thereafter so acts as to lead the opposing party to believe that he is treating the service as valid, he cannot afterward rely

upon the invalidity. *Sherman v. Gregory*, 42 How. Pr., 481, 484; *Cortland Co. Mut. Ins. Co. v. Lathrop*, 2 Id., 146; *Ga. Lumber Co. v. Strong*, 3 Id., 246.

The same principle was impliedly recognized by this court in *Carleton v. Akron Sewer Pipe Co.*, *supra*.

That the plaintiff in this case was misled is clear. If the defendant had notified him that he intended to rely upon the defect, or if he had proceeded to relieve himself from arrest by a writ of *habeas corpus* (see *Re Henry D. Stone*, 22 L. Rep., 599), the plaintiff might clearly have remedied the defect by a strictly legal service.

But even assuming that the original service is to be treated as invalid, the plaintiff had the right to have the case continued and an order for additional service issued in the superior court. Pub. Stats., ch. 161, § 84.

It is true that the language of this statute is permissive only and not imperative on its face. But it has frequently been held that a statute directed to public officials in a matter affecting the public welfare or the rights of third persons, although permissive in form, is to be construed as imperative. *Mayor of N. Y. v. Furze*, 8 Hill, 612; *Hogan v. Devlin*, 2 Daly, 184; *Hines v. Lockport*, 5 Lans., 16, 21; *Rex v. Barlow*, 2 Salk., 609; *King v. Inhab. of Derby*, Skin., 370.

In *Mayor of N. Y. v. Furze*, *supra*, the court says: "The inference deducible from the various decisions on this subject seems to be, that where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, although the phraseology of the statute be permissive merely and not peremptory."

Mr. Wilbur H. Powers, for Arthur P. Dodge, defendant:

This was arrest on mesne process, in an action of tort.

Before the arrest could lawfully be made, the plaintiff must prove, "to the satisfaction of some magistrate" authorized to act in the premises, that there was a statutory cause for the arrest of the defendant. No such arrest is authorized except by statute, and "The affidavit must conform strictly to the requirements of the statute." Pub. Stat., ch. 162, § 2; *Crocker*, Pub. Stats., 394; *Wood v. Melius*, 8 Allen, 434; *Stone v. Carter*, 13 Gray, 575.

In *Hitchcock v. Baker*, 2 Allen, 431, Metcalf, J., says: "We are all of the opinion that the affidavit on the writ which was put into the defendant's hands for service, would not have justified him in arresting Goulding. The writ was against two defendants, Goulding and Gregory, but the affidavit refers to 'the within named defendant,' and to 'the defendant.'"

"The writ commanded him to attach the property of both defendants and for want thereof to take their bodies, if found in his precinct; but before he could legally take the body of either, the law required that the plaintiff in the writ, or some one in his behalf, should make affidavit to his belief of certain facts. Stat. 1857, ch. 141, § 17, reenacted by Gen. Stat., ch. 124, § 1.

"The affidavit in this case was not so made as to warrant the arrest of either, because it did not designate either, and its meaning could not be expounded by the plaintiff's direction to ar-

rest Goulding, nor by the description of Gregory in the writ, as now of Houston, in the State of Texas. Gregory, although thus described, might, perhaps, have been found in the officer's precinct." See also, *Smith v. Bean*, 180 Mass., 298; *Learnard v. Bailey*, 111 Mass., 160.

There was no legal service on Dodge, for an illegal arrest cannot be a legal service, and the appearance for him was special, and he does not thereby waive his right to object to the legality of the service. *Willington v. Stearns*, 1 Pick., 497; *Ames v. Winsor*, 19 Pick., 247.

The bond was voidable; nay, more, was it not void because it was based upon an illegal arrest, and given under duress, and the defendant waives no rights by giving it. *Watkins v. Baird*, 6 Mass., 506; *Fisher v. Shattuck*, 17 Pick., 252; *Tilley v. Damon*, 11 Cush., 247; *Carleton v. Akron-Sewer Pipe Co.*, 129 Mass., 40.

It was in the discretion of the presiding Judge to allow or disallow the plaintiff's motion for additional service. Pub. Stat., ch. 161, § 84; St. 1874, ch. 187; *Pickering v. Reynolds*, 111 Mass., 88; *Monk v. Beal*, 2 Allen, 585; *Reynard v. Brecknell*, 4 Pick., 302; *Payson v. Macomber*, 3 Allen, 69; *Kittredge v. Russell*, 114 Mass., 67; *Sullings v. Ginn*, 131 Mass., 479; *Lang v. Bunker*, 6 Allen, 61.

By the Court:

The defendant [Dodge] having been illegally arrested in an action of tort returnable to the Superior Court, appeared specially, in that court and moved to dismiss the action for insufficiency of service. The court refused to allow the plaintiff to take out an order for further service and dismissed the action. The plaintiff excepted to these proceedings of the Superior Court.

By the Pub. Stats., ch. 161, § 84, it is within the discretion of the court, if the service of a writ is defective or insufficient, to issue an order for further service. No exception lies to the exercise of such discretion.

The plaintiff now contends that the action ought not to have been dismissed because, by giving a bail bond, the defendant waived his right to object to the service. This is not so. The bond was given *alto intuitu*, to procure his discharge from imprisonment, and the fact that he gave it does not indicate that he surrendered his right to object, upon the return of the writ, that the service was illegal. *Carleton v. Akron Sewer Pipe Co.*, 129 Mass., 40.

Exceptions overruled.

Edward SONIER

v.

BOSTON & ALBANY R. R. Co.

1. Where it is necessary to cross a railroad track in order to reach the train for which a ticket has been sold, a passenger has a right to rely to some extent upon the giving of proper signals of danger, and the mere fact that he did not look to see if a train was approaching is not conclusive of a want of due care on his part.
2. Where a passenger is injured in a place where he has a right to be, and the railroad company has negligently omit-

ted to give him such proper warning as he had a right to expect, the question of the passenger's due care should be submitted to the jury.

(Suffolk, Decided January 11, 1886.)

ON defendant's exceptions. *Overruled.*

This was an action of tort to recover for personal injuries suffered by the plaintiff, tried in the Superior Court.

The plaintiff testified that on October 15, 1883, he bought of the defendant, at Westboro', a ticket entitling him to ride thence to South Framingham, which he did, arriving there at about ten minutes before 8 o'clock in the morning, coming to the station on the track on the south side thereof; that after alighting from the train, he went into the station at South Framingham and bought a ticket of the Old Colony R. R. Co., entitling him to be carried by that company from South Framingham to Southboro', a station between South Framingham and Fitchburg; that the train he expected to take was to leave South Framingham a few minutes after 8; that after buying that ticket he went out upon the north side of the station and saw the train he was to take standing on the Old Colony R. R., distant some fifty feet, perhaps, the engine not being yet attached to the cars; that after he had been for a second or two standing on the platform of the defendant near its track, waiting for this train to be ready to start, he was struck by a train on defendant's road coming from the east; that he didn't know at the time what struck him; did not hear the train coming, nor hear any bell ring; that when hit he was standing with his back toward the direction whence the train came and looking across in a northwesterly direction to the place where his train stood; that he was standing still when hit; was thrown down and seriously injured.

Two witnesses called by the plaintiff testified to seeing that a step on the baggage car of the train was broken after the accident, and one of them stated that a broken part of the step protruded beyond the side of the car. Neither of them saw the accident, but both saw the plaintiff after it occurred, and both testified that no sound was made by the train as it came in.

The engineer and fireman of the train testified for defendant that the engine bell was rung for more than 250 feet before reaching the station.

The baggage master of the train, called by the defendant, testified that the step of the baggage car was not broken when it left Boston.

One Plimpton, not employed by defendant, testified that he was waiting for the train from Boston, and as it was approaching saw the plaintiff ten or twelve feet ahead of him walking westerly along the platform, so near the edge of it that he thought he was in danger of being struck; that as the train came along the plaintiff paid no attention to it, did not turn around nor look around and was struck, as he thought, on the back of his shoulder by the iron rail or handle on the forward end of the baggage car, by which people assist themselves in getting upon or from the car, and was turned around and thrown forward and down upon his hands and knees between the platform and the track.

and was then caught by the step and carried under the wheel and run over.

It was in evidence that the platform extended to within twenty inches of the outside of the rail, and that the cars standing on the track overlap the platform somewhere from one to two inches; that the platform was about nine inches high, and was constructed in the same way and in substantially the same relation to the track as all other platforms on the road; and that these cars were of the regular width of all railroad cars for passenger trains.

It was in evidence that the train which plaintiff was intending to take to Southboro', was standing without its engine at a platform on the Old Colony R. R., and that there was no passenger house except the defendant's at South Framingham, and no ticket office except defendant's.

This was in substance the whole evidence, except what related to the question of damages.

At the close of the evidence the defendant asked the court to rule that on the whole evidence the verdict must be for the defendant. The court refused so to rule and ruled that there was evidence which would warrant the jury in finding a verdict for the plaintiff, and submitted the case to the jury with instructions, which were not objected to otherwise than as being inconsistent with the defendant's request.

In answer to questions propounded in writing by the court to the jury, the jury found specially that the defendant negligently omitted to ring the bell of the engine, and that this omission caused the accident.

Mr. A. L. Soule, for defendant:

It has been held by the court that if a person crosses a railroad track without looking up and down the track to see whether a train is approaching or not and is struck by a train, he cannot maintain an action against the railroad company because of his negligence. It is submitted that the same rule of law applies where a plaintiff has stationed himself so near the rails that a passing train must strike him, which is this case. The case, therefore, comes within the rule of law stated and often reiterated by the court. *Lucas v. New Bedford & Taunton R. R. Co.*, 6 Gray, 64; *Gahagan v. Boston & L. R. R. Co.*, 1 Allen, 187; *Todd v. Old Colony & Fall R. R. Co.*, 8 Allen, 18; *Wilson v. Charlestown*, 8 Allen, 187; *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227; *Allyn v. Boston & Alb. R. R. Co.*, 105 Mass., 78; *Wheelwright v. Same*, 185 Mass., 225.

Mr. Seth J. Thomas, for plaintiff:

The plaintiff had been conveyed by the defendant to South Framingham, and on arriving there bought his ticket for continuing the journey, at the defendant's station, where only he could have bought it. No other station or waiting room than the defendant's, where this ticket was bought, was provided. There was evidence to warrant the jury in finding that the plaintiff was rightfully occupying the defendant's premises, and by the implied if not the express invitation of the defendant. *Sweeney v. Old Colony & N. P. R. R. Co.*, 10 Allen, 372.

The defendant was bound to use ordinary care and diligence for the safety of passengers rightfully upon its premises. There was contradictory evidence which the jury had a right to believe, that "the train came in very still."

Warren v. Fitchburg R. R. Co., 8 Allen, 281.

The question of due care by the plaintiff and negligence of the defendant was properly submitted to the jury. *Tyler v. N. Y. & New England R. R. Co.*, 187 Mass., 238.

C. Allen, J., delivered the opinion of the court:

It must now be assumed as found by the jury, that the defendant negligently and improperly failed to give the plaintiff warning of the approaching train, and that this negligence caused the accident. The question remains, however, whether the plaintiff should be precluded from recovering by reason of a failure to show due care on his own part. By the arrangement of the defendant's road, it was necessary for the plaintiff to cross the track in order to reach the train which he was about to take and for which the defendants had sold him a ticket. Under these circumstances he had a right to rely to some extent upon the giving of proper and usual signals of danger or other suitable warning, in case of the approach of a train; and the mere fact that he did not look to see if a train was approaching is not, under the circumstances, conclusive of a want of due care on his part.

Gaynor v. Old Colony & Newport R. Co., 100 Mass., 208, 213; *Chaffee v. Boston & L. R. R. Corp.*, 104 Mass., 108; *Mayo v. Boston & Maine R. R. Co.*, 1 Id. 41-142.

There was testimony to the effect that the plaintiff was standing still upon the platform at the moment of the accident. We cannot say that the step was not broken before this time; or that it was not projecting beyond the side of the car, or that the plaintiff was not hit in consequence of such projection. It is not made certain by the testimony that he was on the point of stepping down from the platform upon the track. Certainly he was where he had a right to be, unless at that particular moment he was guilty of a want of due care in failing to look out for the train; and, inasmuch as the defendant negligently omitted to give him such due and proper warning as he had a right to expect, the question of his due care, under these circumstances, was properly submitted to the jury.

Exceptions overruled.

Benjamin F. STURTEVANT

v.

Lester WALLACK.

1. When the defendant in an action for goods sold claims that the goods were charged to him without authority, evidence that they were sent to him marked with his address is proper, in connection with evidence of sending bills and a draft therefor to him, to which he made no response.
2. When a charge for goods claimed to have been sold is of such a kind that, according to common experience, a man would naturally repudiate it if unfounded, the fact that such charge was made against defendant and not repudiated by him is proper to be considered by the jury.

(Suffolk—Decided February 24, 1886.)

ON defendant's exceptions. *Overruled.*

This was an action of contract to recover the price of an engine and fan or blower, which were constructed by the plaintiff and sent to the defendant, who was building a theater in New York, by the order of one Frederick Tudor, who had a contract with the defendant for heating and ventilating his theater. The question at issue was, whether or not Tudor was authorized by the defendant to order said goods from the plaintiff, on the defendant's account. The defendant, in his answer, alleged that the articles were included in a contract made by him with Tudor for heating and ventilating the theater; and that suits had been brought for them by Tudor and that he had settled said suits, and thereby paid for them, and he introduced evidence tending to support that allegation. The contract with Tudor was partly by a written proposal and completed by terms expressed in oral negotiations, and the evidence was conflicting upon the question whether the articles in suit were included in the terms of the contract.

Subsequently, controversies arose between Tudor and the defendant, as to the fulfillment of his contract, and suits were brought by Tudor in New York City, for the recovery of the sums claimed by him to be due under the contract. These suits were settled at the office of the attorneys of Tudor in New York City, and there was considerable conflicting evidence as to whether the articles furnished by the plaintiff were embraced in and made the subject of these suits and included in the settlement or not, Tudor being a witness at this trial for the plaintiff.

Neither party produced the record of those suits; but the evidence of the witnesses on each side, as to what was embraced therein, was not objected to and was admitted. The defendant's counsel asked the presiding Justice "To instruct the jury that if, in the settlement made by Mr. Tudor through his attorneys in New York with the agents of Mr. Wallack, a release was drawn excluding the engine and fan, which are the subjects of this suit, and this release was rejected and a general release was drawn and signed afterwards, the duty is incumbent on this plaintiff to produce the evidence of what was the subject of this suit, or that the absence of the schedule and the particulars of that claim must be weighed as affecting and discrediting the testimony of Mr. Tudor," but the court declined so to rule, but instructed the jury that where a party knew that evidence was likely to be introduced at a trial inconsistent with his own claim, and if his claim was well founded, it would be in his power to produce other evidence which would control that brought against him, his failure to produce such other evidence should be considered as a circumstance against him, and left it for them to say whether said principle was applicable to the conduct of either of the parties in this case; to which the defendant excepted.

It appeared that the plaintiff, as soon as he had constructed the machinery for which he sued in this action, packed the same in cases which were distinctly marked "Lester Wallack, New York City," and shipped to Wallack, where the

articles were received and put into the theater; and he forwarded a bill of the same, made out to Lester Wallack upon one of his printed bill-heads, as a purchase from him, and on the first of the following month sent a statement of account, upon a printed heading, in which Lester Wallack was charged as indebted to the plaintiff for the amount corresponding to the previous bill of items; that he followed this with another letter demanding payment, and afterwards by a sight draft which was returned unpaid, and wrote another letter to Wallack, making demand of payment, and that Wallack made no reply to either of these communications. The presiding Justice instructed the jury that they might consider the marking and sending of these cases as testified to; the sending of the bill, the statement of account, and the letters and draft, and the absence of any reply, with a view of determining whether the circumstances were such as would naturally have called for a reply from the defendant, if the order of the articles on his account had not been authorized by him; and whether the defendant's conduct indicated that such authority had been given. Counsel for the defendant asked the court to modify these instructions by omitting or qualifying as much as related to the marking of the cases, which he contended was not entitled to any weight, and not to be considered by the jury; but the court declined to qualify the instructions, which were, that all these circumstances were to be considered together, with proper instructions, not excepted to as to the burden of proof in the case.

To the refusal of the presiding Justice to rule as requested upon the subject of the production of the record evidence in New York, and the refusal to qualify the instructions as stated, relating to the marking of the packages with the address of the defendant, in New York City, the defendant excepted.

Mr. Augustus Russ, for defendant:

The instruction that the jury might consider the marking the address of the defendant upon the cases containing the articles which were indisputably furnished to defendant, upon the delivery of which no question arose in the case, was an error; and the refusal to modify those instructions by the omission or qualification of the same as applied to the marking of the cases was clearly erroneous. The following cases are directly in point, as the marking of the cases was a declaration of the plaintiff which could be of no greater effect than the entries in the books in these cases. *Keith v. Kibbe*, 10 Cush., 85; *Gorman v. Montgomery*, 1 Allen, 416; *Somers v. Wright*, 114 Mass., 171, 174; *Bentley v. Ward*, 116 Mass., 383, 387.

Mr. Henry D. Hyde, for plaintiff:

The records of the suits were not in the custody of either party. The witnesses on each side had testified as to what was embraced therein, and the same had been admitted without objection. Either party could have produced the court records, or admissible copies thereof. There was no surprise to either party as to what the claim of the other was. The rule of law was correctly stated and, as it might apply to either party, the court properly left it to the jury to say whether the rule was applicable in this case; and if so, to which party. *Eldridge v. Hawley*, 115 Mass., 410.

If the only fact in the case tending to show that the plaintiff was selling direct to the defendant had been the marking of the merchandise when shipped, while it would have had but little weight, still it was competent; but taken in connection with the other facts shown, it was clearly material, as showing the facts of the case and the understanding on the part of the plaintiff, that he was dealing directly with the defendant; and it was the direct duty of the defendant, if he had a different understanding, to notify the plaintiff. *Commonwealth v. Harvey*, 1 Gray, 487, 489; *Commonwealth v. Kenney*, 12 Met., 235; *Hayes v. Kelly*, 116 Mass., 800.

Holmes, J., delivered the opinion of the court:

1. The evidence that the engine and fan had been embraced in a suit and settlement between Tudor and the defendant seems to have been admitted as tending to contradict Tudor's testimony in the present case, which, as we understand it, was to the effect that he ordered them in the defendant's name and by his authority, in which case of course he would have had no claim.

If we are to infer that a part of the evidence introduced for this purpose was that a release was drawn excluding the engine and fan, that this was rejected by Mr. Wallace, and that a general release was drawn and signed afterwards, this of course would tend to show that at that time Mr. Tudor was understood to make a claim in respect of them, and might lead to the inference that they were embraced in his suit; but it could not be said to lead to the latter inference as matter of law, or to make it the plaintiff's duty to produce the record of the Tudor suit. The record was equally accessible to both parties and, if the inference sought to be established by the defendant was true, would have helped him as much as in the other event it would have helped the plaintiff. Secondary evidence of the contents of the records was put in by both sides without objection. It was for the jury to say what inference if any, they would draw from the failure to produce a certified copy. See, *Eldridge v. Hawley*, 115 Mass., 410.

If the court was called on to select a piece of evidence for comment at all, which seems to have been competent only by way of contradicting a witness, the instructions given seem to be entirely correct.

2. The fact that the engine and fan were shipped at once to the defendant, distinctly marked with his address, was properly left to the consideration of the jury in connection with the other circumstances of the repeated sending of bills to him, and the letter demanding payment, and the drafts, coupled with the fact that the defendant made no reply. We do not say that the marking of the cases alone would have been evidence against the defendant; and we readily admit that it is not every charge, however expressly made, that calls for an answer. *Percy v. Bibber*, 134 Mass., 404; *Commonwealth v. Eastman*, 1 Cush., 189, 215; *Commonwealth v. Harvey*, 1 Gray, 487, 489; *Commonwealth v. Kenney*, 12 Met., 235, 237.

But when a charge is of such a kind that according to common experience a man would

naturally repudiate it if unfounded, the fact that it was made and not repudiated may be left to the jury.

We cannot say that it might not have been found properly that if the defendant had denied Tudor's authority to charge him with the machinery, he would naturally have written to the plaintiff that he was sending his bills to the wrong man and must look to Tudor; *Commonwealth v. Kenney*; *Commonwealth v. Harvey*, *ubi supra*; *Hayes v. Kelley*, 116 Mass., 800; and this evidence having been admitted as it was without objection, all the circumstances including the marking of the cases were to be considered by the jury.

Exceptions overruled.

Hubbard S. LOOMIS, *Plff.*,

v.

A. H. G. LEWIS.

Where there is a valid attachment of mortgaged personal property and the mortgagee is summoned as trustee, appears, and the mortgage is adjudged valid, and the attaching creditor paid the amount due upon the mortgage as ascertained upon order of court within the ten days allowed by statute, the property seized is liable to sale on execution.

(Hampden—Decided October 24, 1885.)

PLAINTIFF'S exceptions. *Overruled.*

1 This was an action of tort against a deputy sheriff for the conversion of one hundred and twenty-five cords of wood, alleged to be the property of plaintiff, and seized and sold by the defendant as the property of one Atkins. The defendant sought to justify, and claimed that he sold the same by virtue of an execution against one Atkins, who was the former owner of the wood in question, and alleging that at the time of the attachment of the same upon the writ in suit upon which an execution was issued against Atkins, Atkins was the owner thereof, and that the same was never conveyed to plaintiff and, if so, said conveyance was void as against Atkins' creditors. There was evidence tending to show a sale to plaintiff by Atkins, June 22, 1888, and that at the time thereof the property was subject to a mortgage thereon. Plaintiff claimed that defendant could not seize and take on execution said wood while said mortgage remained unpaid, and asked the court to rule that if the jury were satisfied upon the evidence that defendant's seizure of wood upon said execution was before said mortgage was paid, said seizure and levy of execution was void, and defendant could not justify a sale thereof by virtue of his doings under said execution. Plaintiff also asked the court to rule that mortgaged personal property could not be seized and taken on execution. All which rulings the court refused to give, but ruled that the proceedings with the execution were legal; that the single question for the jury was: was the sale to the plaintiff, of June 22, 1888, a fraudulent sale? If it was not, the plaintiff was entitled to recover but if it was proved to

be fraudulent, the defendant was entitled to a verdict against the plaintiff. The jury found a verdict for the defendant.

The plaintiff, being aggrieved, excepted, and his exceptions were allowed.

Mr. E. B. Maynard, for plaintiff.

Mr. A. M. Copeland, for defendant:

The wood was attached on the original writ, properly, under the provisions of P. S., ch. 161, § 79.

Mortgaged personal property may be attached in the same manner as if it were unincumbered, P. S., ch. 161, § 74, and if the attachment remains undissolved until after judgment, it may be seized and sold on execution the same as unincumbered personal property.

W. Allen, J., delivered the opinion of the court:

Mortgaged personal property was sold on an execution against the mortgagor. The plaintiff, claiming under a fraudulent sale from the mortgagor, stands in his place; and the question is whether the property was liable to be taken and sold on the execution.

Personal property subject to a mortgage cannot be taken on execution against the mortgagor, except in a suit in which it has been attached on mesne process. *Lyon v. Coburn*, 1 Cush., 278; *Leonard v. Hair*, 183 Mass., 455.

The Pub. Stats., ch. 161, §§ 71, 83, provide for the attachment on mesne process of such property, but there is no express statutory authority to take it on execution. The right to take on execution is inferred from the right to attach on mesne process. The attachment is for the purpose of holding the property, so that it may be taken on the execution which may be issued in the suit. Pub. Stats., ch. 161, §§ 88, 52.

And the right to attach property implies the right to take it on such execution while the attachment subsists. Whether the property in question was liable to be taken on the execution depends upon whether it was, at the time, held under a valid attachment in the suit in which the execution was issued.

The Pub. Stats., ch. 161, §§ 79, 80, provide that mortgaged personal property of a debtor in the possession of the mortgagor may be attached in the same manner as if unincumbered, upon a writ in which the mortgagee is summoned as trustee of the mortgagor, to be examined concerning the mortgage; if the mortgage is found to be valid, the court is to ascertain the amount due upon it and direct the payment of it within such time as it may order; "and if the attaching creditor does not pay or tender the sum within the time prescribed, the attachment shall be void and the property shall be restored." This is the only mode provided by the statute for avoiding or dissolving an attachment made under this provision.

The attachment is valid unless and until it is avoided. It is an attachment as of unincumbered property, upon condition subsequent that the debt shall be paid as provided in the statute; if there is a failure so to pay the debt, the attachment becomes void but continues as an attachment of unincumbered property until such failure. In this case there was a valid attachment of the property and the mortgagee was summoned as trustee. He appeared and asserted the validity of the mortgage, and it

was adjudged valid, and the amount due upon it ascertained, and the attaching creditor ordered to pay it to the mortgagee within ten days; and he paid it accordingly. The fact that he paid it five minutes after the defendant took the property on the execution is immaterial. When the defendant took the property, there was a valid subsisting attachment, which was, indeed, liable to be made void by the failure of the creditor to pay the mortgage debt within the ten days; but before the ten days had elapsed and before the property was advertised for sale on the execution, that failure had been rendered impossible by the payment of the debt, and the attachment was shown to be indefeasible by this provision of the statute. See, *Furber v. Dearborn*, 107 Mass., 122; *Jackson v. Colcord*, 114 Mass., 60.

Exceptions overruled.

David HILL et al., Petitioners.

Selectmen of EASTHAMPTON et al., *Repts.*

1. **Districts are towns**, and the inhabitants of districts **have all the powers, rights, privileges and immunities of towns, except the right of electing a representative.**
2. **In legislation** concerning the municipal rights and duties of towns, **districts**, when not specially mentioned, are **included** under the designation of towns.
3. **The Town of Easthampton is the same corporate municipality** which was **established** in 1785, and by "its incorporation" the Legislature, by the Pub. Stats., ch. 27, § 11, included the Act which was the commencement of its **corporate existence**, which was the Act 1785, ch. 7.
4. **Such Town may appropriate money** to celebrate the centennial anniversary of its incorporation.

(Hampshire—Decided January 5, 1886.)

PETITION to restrain payment of money voted by the Town of Easthampton.

The facts are stated in the opinion.

Messrs. Hill & Wainwright, for petitioners:

The authority claimed by the Town to raise money for this celebration is found in Pub. Stats., ch. 27, § 11.

The intention of the Legislature is the law governing the interpretation of statutes. But that intention must be gathered from the language of the statute itself. *Opinions of the Justices*, 7 Mass., 524; *Wales v. Stetson*, 2 Mass., 143, 146; *State v. B. & O. R. R. Co.*, 12 Gill & J. (Md.), 399; *S. C.*, 38 Am. Dec., 817, 819, 820; *Hoke v. Henderson*, 4 Dev. (N. C.), 1; *S. C.*, 25 Am. Dec., 677-679; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.), 358; *Orndoff v. Turman*, 2 Leigh (Va.), 200; *S. C.*, 21 Am. Dec., 608, 613.

The intention of the Legislature in this case is clearly shown by the language of the original statute, which has the word "own" between "its" and "incorporation." Laws, 1874, ch. 112.

The common use of the word "town" does not carry with it the word "district," and does not mean the same thing.

The words "town" and "district" are not interchangeably used in this statute, and if they were it would be equally fatal to the claim of the respondents.

At the time this statute was enacted, there was not a "district" within the Commonwealth, and had not been for years. R. S., ch. 15, § 9; Laws, 1870, ch. 293.

So the Legislature could not have intended that the provisions of this Act should apply to district centennials.

This court will presume that the Legislature intended nothing beyond what the language in fair legal construction will indicate. *Sewall v. Janss*, 9 Pick., 412, 414; *Doane v. Phillips*, 12 Pick., 228, 226; *Salling v. McKinney*, 1 Leigh (Va.), 42; *S. C.*, 19 Am. Dec., 722, 724, 725; *Gains v. Gains*, 2 A. K. Marsh., 190; *S. C.*, 12 Am. Dec., 375, 377; *Hoke v. Henderson*, *supra*; *People v. Utica Ins. Co.*, *supra*; *Phillips v. East. R. Co.*, 138 Mass., 128, 128; *Hale v. Comrs. Hampshire*, 187 Mass., 111, 114.

The policy of our law is carefully to guard the rights of taxpayers, and of minorities, and to hold majorities to a strict compliance with the law, in the use of the public credit and the expenditure of the public money. *Hood v. Mayor of Lynn*, 1 Allen, 103, 104, 106.

No district was ever incorporated, with the right of independent representation, differing in this respect from towns. 1 Holland, Hist. of Western Mass., 202; Lyman, Hist. of Easthampton, 23.

See also, in respect to districts and their rights and duties, Ancient Charter and Laws of Mass. Bay, ch. 285; 1 Laws of Mass., 318.

In 1785, Easthampton was incorporated, not a "town," with the rights of a town, but a district with the rights of a district. 1 Mass. Special Laws, 100.

The Legislature did not intend to make Easthampton a town because it had no power to do so under the Constitution, Easthampton lacking the necessary number of ratable polls as admitted by the respondent's answer. Const. of Mass., part 2, ch. 1, § 3, art. 2; Pub. Stats., p. 26.

The word "place" in the article of the Constitution referred to should be interpreted "town." Pub. Stats., ch. 3, § 3, cl. 17.

The right of independent representation belonged at that time exclusively to towns. Const. of Mass., § 3, art. 2; also § 3, art. 8, which shows the qualifications of a representative of a town.

See also, as to the right of representation being incident to and the chief right of a town, "Comp. Const. Law," Crane & Moses, 110, 113, 116; Acts and Laws of His Majesty's Province of Mass. Bay in New England, ch. 19, p. 31; 1 Democracy in America, De Tocqueville, topic, *Township*, p. 81, translation; Province Charter, of 1691; Ancient Charter and Laws of Mass. Bay, ch. 35, p. 97.

Easthampton was incorporated a town June 16, 1809, Mass. S. Laws, p. 11, and for twenty-seven years thereafter, and until the mode of representation was changed, it enjoyed the right of independent representation. Lyman, Hist. of Easthampton, 101, 102.

Mr. Wm. G. Bassett, for respondents:

The appeal does not open any question on the merits of the case. The only question that can

be raised is, whether the decree is justified by the record. *Stanley v. Stark*, 115 Mass., 259, 261; *Isaigi v. C. B. & Q. R. Co.*, 129 Mass., 46; *Sparhawk v. Sparhawk*, 120 Mass., 390.

But that question is not open. The granting or refusing an injunction was a matter resting in the sound discretion of the court. 2 Story, Eq. Jur., §§ 863, 959, a, 959 b; Hilliard, Inj. c. 1, §§ 17, 18, p. 15; Pub. Stat., ch. 27, § 129; *Charles River Bridge v. Warren Bridge*, 6 Pick., 376, 400.

If evidence is now to be examined to sustain the allegation of the answer, it appears by inspecting the statute that the Act of Incorporation was passed June 17, 1785, as alleged. The Statute is evidence. Pub. Stats., ch. 169, § 68.

It was thought that enough local history accumulates in a century of municipal existence to review and commemorate with some profit. Laws 1874, ch. 112; Laws 1881, ch. 88; Pub. Stats., ch. 27, § 11.

The object of the authors of the statute will control in its construction, if it can be ascertained. *Henshaw v. Foteser*, 9 Pick., 312; *Commonwealth v. Kimball*, 24 Pick., 366, 370; *Op. of Justices*, 7 Mass., 524; *Walker v. B. & M. R. R. Co.*, 3 Cush., 16.

But the town was a town within the meaning of the word in the Statute from 1785. *Op. the Justices*, 3 Mass., 568; Province Laws 1761, ch. 285, Anc. Chart. & L. of M., 641; 1 Laws of Mass., 318, Act for Regulating Towns, § 9; *Freeland v. Hastings*, 10 Allen, 580; *Porter v. Sullivan*, 7 Gray, 444; *Hill v. Boston*, 122 Mass., 349; *Commonwealth v. Roxbury*, 9 Gray, 485; *State, ex rel. Pell, v. Newark*, 11 Vroom, 550; *S. C.*, 29 Am. R., 266; Rev. Stats., ch. 15, § 9; ch. 2, § 6, cl. 7; Gen. Stats., ch. 3, § 7, cl. 17; Pub. Stats., ch. 3, § 3, cl. 23.

See use of names, town and district indiscriminately, in incorporating municipalities having the same powers: Act de Danvers, Acts & R. of the Prov. of Mass. Bay, vol. 4, ch. 1 (1757); de Amherst, vol. 4, p. 178, district (1759); de Ware, same, p. 486, district (1761); de Belcher's Town, same, p. 464, town, without right of sending representative (1761); de Ashby same, p. 908, town, districted with Townsend (1767); de Bethlehem, 1 Special Laws, 256, district, but not districted, indexed as town (1789).

Designated territory with inhabitants upon it with a form of government established by law having the appropriate character of a town constituted a town. 1 De Tocqueville, ch. 5, title, *The American System of Townships*: Am. Cyclopaedia, Town; Webster, Dic., Town.

The summary preventive remedy by injunction will not be granted unless the right to it is clear; it will not be granted where the alleged right depends upon an unsettled point of law. *Citizens Coach Co. v. Camden R. R. Co.*, 29 N. J. Eq., 299; Bigelow, Eq., ch. 22, title, *Injunction*.

W. Allen, J., delivered the opinion of the court:

This is a petition under the Pub. Stats., ch. 27, § 129, to restrain the Town of Easthampton from the payment of money voted by the Town to defray the expenses of celebrating in the year 1885, the 100th anniversary of its incorporation. The Pub. Stats., ch. 27, § 11, authorize any town

to appropriate money "for the purpose of celebrating any centennial anniversary of its incorporation." By the Stats. of 1785, ch. 7, Easthampton was incorporated into a district, "with all the powers, privileges and immunities that districts in this Commonwealth are entitled to, or do or may enjoy, according to law." By the Statutes of 1809, ch. 11, the District of Easthampton was incorporated into the Town of Easthampton with all the powers, privileges and immunities to which towns were entitled, agreeably to the Constitution and laws. The question presented is: which incorporation was intended by the Pub. Stats., ch. 27, § 11. An examination of legislation upon the subject affords an easy answer.

The earliest Act incorporating a district which we have found, is the Prov. St. of 1751, 1752, 25 Geo. II., ch. 14; 3 Prov. Laws, State ed. 538, erecting the district of Danvers. The circumstances which led to this Act, inaugurating the usage of incorporating districts, and the terms of the Act, are important.

Under the Province Charter, each town was entitled to at least one representative in the general court. In 1742, Governor Shirley refused his assent to bills incorporating towns, on account of the increase thereby of the number of representatives. See, on this subject the notes of the commissioners in 3 Prov. Laws, State ed. 69-72, 665, 666, 745; Prov. Laws, State ed. 93-626-629.

The corporate district arose from the necessity to the people of new towns as municipalities, and the refusal of the Crown to assent to their erection as separate constituencies. By the Stat. of 1751, 1752, ch. 14, it was enacted that two parties in Salem and the inhabitants thereof "be erected in and to a separate and distinct district by the name of Danvers; and that said inhabitants shall do the duties that are required and enjoined on other towns, and enjoy all the privileges and immunities that towns in this Province by law enjoy, except that of separately choosing and sending one or more representatives to represent them at the General Assembly." The form afterwards used in the frequent incorporation of districts under the charter was, that the territory and its inhabitants were erected into a district and "invested with all the powers, privileges and immunities that towns are or by law ought to be vested with," sometimes, "or that towns do or may enjoy," * * "that of sending a representative to the General Assembly alone excepted." Subsequently a few towns were incorporated under the charter, excepting the right of separate representation, and the form of the Acts was the same as in the incorporation of districts, except the designation of "town" instead of "district." In the few districts incorporated since the Constitution, the same form was sometimes used, and sometimes the form of the Easthampton Act. The Stats. of 1781-82, 1 Geo., III., ch. 12, 4 Prov. Laws, State ed. 468, recited that it had been found expedient to erect districts with the powers of towns, "the privileges of sending a representative to the General Assembly only excepted," etc., and enacted that districts "Shall be and hereby are subjected to all the duties which towns, by law, are subjected to, and made liable to all the penalties for neglect or failure therein, which towns, by

law, are liable to, and shall, to all intents and purposes, be considered as towns, the privilege and duty of sending a representative to the General Assembly only excepted."

The Stat. of 1775 enacted and declared that every exception of the right to send representatives, in any Act before passed, incorporating any town or district, should be taken to be void, and that every town and district was entitled to separate representation; and that every district incorporated with the rights of a town except the right of choosing a representative, should be held to be a town to all intents and purposes. Anc. Chart., 796.

The Constitution provided, in ch. 1, art. 2, that every corporate town containing 150 ratable polls might elect one representative; and that each town then incorporated, though it did not have that number of polls, might elect one representative, but that no place should thereafter be incorporated with the privilege of electing a representative, unless it contained 150 ratable polls.

The Stat. of 1785, ch. 75, entitled, "An Act for Regulating Towns, Setting forth Their Powers, and for the Choice of Town Officers, and for Repealing all Laws heretofore Made for that Purpose," made no mention of districts except in § 9, in which all districts, incorporated before January, 1777, were declared to be towns, and districts incorporated after that time, or which should subsequently be incorporated, were declared subject to the Act.

The Rev. Stats., ch. 15, being the chapter concerning the powers and duties of towns, in § 9, reenacted the provisions of the Stat. of 1785, ch. 75, § 9.

The Gen. Stats., ch. 3, § 7, cl. 17, provided that the word "town" might be construed to include cities or district.

The Constitution and legislation since its adoption, as well as before, include districts within the designation of towns in regard to matters other than those relating to the right of representation. The Constitution, ch. 2, art. 3, provides that the qualified voters within the several towns in the Commonwealth shall vote for Governor in town meeting in presence of the selectmen and town clerk. The Justices of this court, in answering in the negative the question whether the inhabitants of incorporated plantations could vote for Governor, say that the word "town" in this provision of the Constitution includes districts. The Justices say: "It was formerly the usage of the Legislature to incorporate the inhabitants of particular places, not only by the name of districts, with all the powers, privileges and immunities of towns, except the right of choosing a representative, but also by the name of towns, with the same powers, privileges and immunities and under the same exception. From the terms of the incorporation, therefore, it appears that districts are towns, with the same officers, but without the right of electing a representative. * * * For the inhabitants of districts having all the powers, privileges and immunities of towns, and being by law to be considered as towns, to all intents and purposes, except in the election of representatives, whatever privilege, not within that exception, is vested by the Constitution in the inhabitants of towns, may be enjoyed by the inhabitants of

districts." *Op. of Justices*, 3 Mass., 568-572.

In legislation concerning the municipal rights and duties of towns, districts, when not specially mentioned, were included under the designation of towns. For instance, the Highway Act, Stat. 1786, ch. 81, named only towns as bound to keep highways in repair, etc.; yet there could have been no doubt that districts were included, even if the Stat. of 1796, ch. 58, had not expressly recognized that construction. So in regard to the selection of jurors, towns only are mentioned until the revision of the Acts upon the subject in the Stat. of 1812, ch. 141, in which towns and districts are both named. See, Stats. 1784, ch. 7; 1802, ch. 92; 1807, ch. 140.

It is obvious that, under the Constitution, as well as under the Charter, districts were, and were regarded by the Legislature as being, towns without the rights of separate representation. If a place incorporated into a municipality contained 150 ratable polls, it was denominated a town, and if less than that number, a district. When a district had acquired the requisite number of polls, the only way in which the Legislature could give it the right of electing a representative was by giving it the denomination of a town by incorporating it as a town. The whole effect of the change was to give to the municipality a corporate right which it did not before have. The fact that this was done by giving to it a new denomination, which involved a grant of the right by the Constitution, was not regarded as destroying the identity of the corporation, any more than would be a grant of a new power to a corporation by express legislative enactment. The change of denomination meant only the added right of representation; and the effect and meaning of the change was the same, whether it was accomplished by a general law or by a special Act of incorporation.

We think that the Town of Easthampton is the same corporate municipality which was established in 1785; and that by its "incorporation" the Legislature intended the Act which was the commencement of its corporate existence, and not the Act which only effected a change of name and the accession of a corporate right which was afterwards taken from it, and which it does not now possess.

Petition dismissed.

COMMONWEALTH of Massachusetts

v.

Clarence A. SMITH.

Milk inspectors have no power, under the existing statutes, to appoint an agent who shall have the right, in the absence of an inspector and without his immediate personal direction and control, to take samples of milk from carriages used for its conveyance.

(Suffolk—Decided February 24, 1886.)

ON defendant's exceptions. *Sustained.*

Complaint to the municipal court of the South Boston district, by James F. Babcock, milk inspector, of the City of Boston, alleging,

that on July 18, 1885, the defendant "Did willfully and maliciously hinder, obstruct and interfere with John Killeen, of said Boston, in the performance of his duty, as the assistant to the said Babcock, milk inspector; he, the said Killeen, being then and there the duly appointed agent of the said Babcock, to take samples of milk for analysis, and he, said Smith, then and there well knowing the said Killeen to be the agent of the said Babcock, against the peace," etc.

At the trial in the Superior Court, Killeen was called for the Government and was asked if he had been appointed milk inspector's agent. To this the defendant objected: 1, that there was no law or authority for such appointment; and 2, because the appointment being in writing (the witness stated that his appointment was by letter) it could not be proved by parol.

The court overruled the first objection, and Killeen testified *de bene* that he asked the defendant on July 18, 1885, the defendant then having charge and control of a wagon containing milk, which was then being delivered to purchasers, for a sample of milk for analysis, uncovering a badge on his vest at the same time, which the defendant refused; that he then tried to take the sample himself from the defendant's carriage, but was obstructed and prevented by the defendant; that he did not present to the defendant, nor did he have in his possession, any request in writing; that he had never met the defendant before and that nothing was said or done by him to indicate his authority, beyond the request and the uncovering of the badge, as stated above. What was on the badge, if anything, was not put in evidence.

The defendant testified that he did not know and never had met Killeen before said July 18, that he did not see the badge; that Killeen did not say what he wanted the sample of milk for, but that he suspected that it was wanted for analysis by the milk inspector; and that he did refuse and prevent Killeen from taking the milk.

To prove Killeen's appointment as agent, the Government then offered and put in evidence the following writing: "Appointment of John Killeen. This may certify that Mr. John Killeen is a regularly authorized collector of samples for the department of milk inspector of the City of Boston. James F. Babcock, Milk Inspector."

James F. Babcock testified, without objection, that he was the duly appointed inspector of milk for the City of Boston.

The evidence being all in, the defendant asked the court to rule that there was no evidence to warrant a conviction.

The court refused to so rule and instructed the jury that Babcock was authorized by law to appoint agents to take samples of milk for analysis, and that there was evidence in the case upon which they might find Killeen had been duly appointed as such agent; to which ruling and refusal to rule the defendant excepted.

The jury returned a verdict of guilty.

Mr. James A. McGeough, for defendant.

The appointment of milk inspectors' agents or assistants can only be under some express provision of statute, or by necessary implica-

tion of law; but there is no express provision of statute for such appointments. P. S., ch. 57, § 1. The only statutes in which any mention at all is made of such agents or assistants are ch. 310, § 5, Acts of 1884; ch. 352, § 4, Acts of 1885.

In neither statute is there any authority given for their appointment; and delegated powers, especially, in public officers, "who shall be sworn before entering upon the duties of their office," are a personal trust, and, unless otherwise expressly provided; may be executed only by the person to whom they are given. *Boylston Market Assn. v. Boston*, 113 Mass., 528; *Day v. Green*, 4 Cush., 433; *Brewster v. Hobart*, 15 Pick., 302; *Story, Agen.*, 12, 13, 14; 2 Kent, Com., 633; *Ewell's Evans, Agen.*, 51, *et seq.*, and cases cited; *Lyon v. Jerome*, 26 Wend., 485.

Besides, the collection of samples is one of the principal, if not the most important, of the milk inspector's duties; analyzing the samples is no part of his work, and a mere servant may not assume or perform the principal duties of a public officer. Pub. Stat., ch. 57, § 2; Acts, 1885, ch. 352, § 4; Acts, 1884, ch. 310, § 3; *O'Conner v. Arnold*, 53 Ind., 208; *Commonwealth v. Carter*, 132 Mass., 12, 15.

The inspector's certificate of Killeen's appointment should have been ruled out. It does not show when or by whom the appointment was made. If made by the inspector himself, this writing is not the original letter, or a transcript of any record of the fact, and therefore it was clearly incompetent. 1 Greenl. Ev., 498; *Hanson v. South Scituate*, 115 Mass., 336; *Wayland v. Ware*, 109 Mass., 248.

If the appointment was made by the mayor and aldermen, the milk inspector is not the proper certifying officer. *Commonwealth v. Chase*, 6 Cush., 248.

Section 3, ch. 310, Acts of 1884, was in force at the time of the alleged offense and required the servant or agent to have a request in writing. The Act, 1885, ch. 352, § 4, purports to be an amendment of § 2, ch. 57, Pub. Stats. But § 2, ch. 57, Pub. Stats., was superseded by the above Act of 1884, and, therefore, said Act of 1885, having nothing to operate upon is of no effect. *Commonwealth v. Kelliher*, 12 Allen, 480; *Ashley's Case*, 4 Pick., 21; *Sullivan v. Adams*, 3 Gray, 476; *Leighton v. Walker*, 9 N. H., 59; *Wakefield v. Phelps*, 37 N. H., 295; *Bartlett v. King*, 12 Mass., 537.

At least said Act of 1885 contains no provision repealing the above Act of 1884, and therefore both Acts should be construed together. *Harnden v. Gould*, 126 Mass., 411; *Gilson v. Emery*, 11 Gray, 430.

Mr. Edgar J. Sherman, Atty-Gen., for the Commonwealth;

The rulings of the court were correct. The court properly instructed the jury that Babcock was authorized by law to appoint agents to take samples of milk for analysis; the language of the statutes is clearly to that effect. Pub. Stat., ch. 57, § 8; Acts, 1884, ch. 310, § 5; Acts, 1885, ch. 352, § 4.

Section 3, ch. 310, Acts of 1884, amending § 2, ch. 57, Pub. Stats., which the defendant claims was in force at the time of the complaint, was repealed or revised, and rendered inoperative by the passage of § 4, ch. 352, Acts

of 1885, approved June 18, 1885. This section was also an amendment of § 2, ch. 57, afore-said.

According to the law in force at the time of the complaint (§ 4, ch. 352, Acts of 1885) no "request in writing" was necessary.

Field, J., delivered the opinion of the court:

By P. S., ch. 57, § 1, "The mayor and aldermen of cities, and the selectmen of towns may annually appoint one or more persons to be inspectors of milk for their respective places, who shall be sworn before entering upon the duties of their office," and each inspector is required to publish or post up a notice of his appointment. Such inspectors are, therefore, sworn public officers, known to the public. By the 2d section they are authorized to "Enter all places where milk is stored or kept for sale and all carriages used for the conveyance of milk, and when they have reason to believe that any milk found by them is adulterated, they shall take specimens thereof, and cause the same to be analyzed, etc.;" by the 3d section "Every person who conveys milk in carriages or otherwise for the purpose of selling the same shall annually be licensed by the inspector or inspectors of milk, etc.;" and by the 8th section, "Any inspector of milk and any servant or agent of an inspector who willfully connives at or assists in a violation of the provisions of the chapter shall be punished, etc."

The right given by the statutes to take specimens of milk was held to be a constitutional exercise of the police power of the Commonwealth, in *Commonwealth v. Carter*, 132 Mass., 12, on the ground that it was a reasonable method of inspecting an article of food.

By Stat., 1884, ch. 310, § 3, § 2 of ch. 57 of the Public Statutes is amended so as to read as follows: "Said inspectors may enter all places where milk is stored or kept for sale, and all persons engaged in the sale of milk shall, on the request in writing of an inspector, deliver to the person having the request a sample or a specimen sufficient for the purpose of analysis of the milk then in his possession, etc.;" and by § 5, *ibid.*, § 8, of P. S., ch. 57, is amended "by adding after the word 'chapter' in the third line thereof the words 'and whoever hinders, obstructs, or in any way interferes with any inspector of milk or any servant or agent of an inspector in the performance of his duty'." It is under this section of the P. S. as thus amended that the present complaint was made.

By Stat., 1885, ch. 352, § 4, § 2 of ch. 57 of the Public Statutes is amended so as to read as follows: "Said inspectors or their assistants may enter all places where milk is stored or kept for sale and all carriages used for the conveyance of milk and the said inspectors or their assistants may take samples for analysis from all such places and carriages." Cities and towns can appoint as many inspectors as they see fit, and can determine their compensation; the statutes imply that these inspectors may employ servants, agents and assistants, but no authority is given to inspectors of milk to appoint deputies or assistants as officers with defined powers, although such authority is given to inspectors general of other articles. See, P. S., ch. 56, §§ 4-23, 50, 64, 74; also, Stat., 1882, ch. 203, §§ 5, 7.

It is perhaps immaterial to this case whether § 3 of ch. 310, St., 1884, is repealed by § 4, ch. 352, St., 1885, because John Killeen, whom the defendant is charged with hindering, obstructing and interfering with, did not have a request in writing from an inspector of milk addressed to the defendant. It may be assumed that § 4, ch. 352, St., 1885, is the only statutory provision now in force in place of P. S., ch. 57, § 2. As there is no provision for the appointment of assistants to an inspector of milk, we think that the word assistants in Stat., 1885, ch. 352, § 4, must mean the servants or agents of the inspectors who are protected from interference in the performance of their duties by § 5, ch. 310, St., 1884.

The important question of law in this case is whether an inspector can, under existing laws, appoint an agent who shall have the right, in the absence of an inspector and without the immediate personal direction and control of an inspector, to take by force and against the will of the owner, samples of milk from carriages used for the conveyance of milk. The right to take samples of milk against the will of the owner can only be justified by an Act of Legislature regulating a business which otherwise might become injurious to the community. The inspectors in the performance of their duties may need the assistance of servants and agents, but an intention on the part of the Legislature that the inspectors should have the right to delegate their powers to other persons ought not to be inferred from equivocal phrases. The general rule is that the performance of public duties cannot be delegated by public officers; and the reasonable inference is, that unless there is a clear expression in the statutes to the contrary, the Legislature intended that public duties requiring the exercise of discretion should be performed by public officers selected for that purpose with a view to the intelligent and discreet discharge of such duties. Without considering whether the Legislature could authorize inspectors to delegate their power to servants or agents, we think the existing laws show no such intention. See, *Boylston Market Assn. v. Boston*, 113 Mass., 528; *Day v. Green*, 4 Cush., 433; *Clark v. Washington*, 12 Wheat., 40 (25 U. S. bk. 6 L. ed., 544).

There is no evidence that Killeen, in endeavoring to take samples of milk from the defendant's carriage, was acting under the specific direction of an inspector of milk. The evidence tends to show that he was acting upon his own judgment and according to his own discretion.

Exceptions sustained.

COMMONWEALTH of Massachusetts

v.

Walter H. LEIGHTON.

Where there was evidence tending to show that defendant illegally sold intoxicating liquors on the Lord's Day to persons who were not guests at his inn, the case was properly submitted to the jury.

(Middlesex—Decided November 28, 1885.)

ON defendant's exceptions taken in the Superior Court. *Overruled.*

Complaint for illegal sale of liquors by licensed innkeeper, and for maintaining a common nuisance.

Messrs. W. B. Gale and J. W. McDonald, for defendant.

Mr. Harvey N. Shepard, Asst. Atty.-Gen., for Commonwealth:

The rulings of the court were correct. A person may be convicted of maintaining a common nuisance, upon evidence of illegal sale, although he has a license. *Commonwealth v. Murray*, 138 Mass., 508.

The evidence introduced was competent, properly submitted to the jury, and sufficient to warrant a conviction. *Commonwealth v. Barnes*, 138 Mass., 511; *Same v. Tabor*, 138 Mass., 496.

By the Court:

There was evidence, proper for the consideration of the jury, tending to show that the defendant illegally sold intoxicating liquors on the Lord's Day, to persons who were not guests. The court properly submitted the case to the jury.

Exceptions overruled.

Inhabitants of SPENCER

v.

Inhabitants of LEICESTER.

The statute which provides that any person of the age of twenty-one years, having an estate of inheritance and freehold in any place within the State, and living on the same three years successively, shall thereby gain a settlement in such place, P. S., ch. 88, § 1, cl. 4, does not apply to married women.

(Worcester—Decided October 24, 1885.)

ON agreed facts, from Superior Court. *Judgment for defendant.*

This was an action for recovery of money expended by plaintiffs in the relief of a married woman and her children whose settlement was alleged to be in defendant Town.

The facts are sufficiently stated in the opinion.

Mr. Frank P. Goulding, for plaintiff.

Mr. H. O. Smith, for defendant.

Morton, Ch. J., delivered the opinion of the court:

The plaintiff contends that Sarah E. Edwards, a married woman, gained a settlement in Leicester, she having bought a farm in that town in 1873, taking the deed in her own name, and having occupied it with her husband for more than three years.

The statute upon which the plaintiff relies provides that "Any person of the age of twenty-one years, having an estate of inheritance or freehold in any place within the State, and living on the same three years successively, shall thereby gain a settlement in such place." Pub.

Stats., ch. 88, § 1, *cl.* 4. This provision of our settlement laws has been in force, unchanged, for many years. Stat. 1821, ch. 94, § 2; Rev. Stats., ch. 45, § 1, *cl.* 4; Gen. Stats., ch. 69, § 1, *cl.* 4; Stat. 1878, ch. 100, § 1, *cl.* 4.

All of these statutes make specific provisions for determining the settlement of married women. They provide that a married woman shall follow and have the settlement of her husband, if he has any within the State; otherwise, she shall retain her own, if she had any at the time of the marriage; provisions which, under many circumstances, would be inconsistent with her obtaining an independent settlement by owning and occupying for three years an estate of inheritance.

It cannot be doubted that, previously to the recent legislation changing to some extent the common law *status* of married women, the provision we are considering could not be construed as applicable to married women. There is no reason to suppose that, in the revision of 1880, the Legislature intended to change the existing law in this respect. It reenacted the provision in the same language previously used, and it is to be presumed it intended that it should have the same meaning and construction. In *Somerville v. Boston*, 120 Mass., 574, it was held that the Stat. of 1874, ch. 274, providing that "Any woman of the age of twenty-one years, who resides in any place within this State for five years together, without receiving relief as a pauper, shall thereby gain a settlement in such place," did not apply to married women.

If we follow this decision and the reasons upon which it is based, it must be held that the provision we are considering does not apply to married women. It is true that, perhaps in consequence of this decision, the Legislature enacted, by the Stat. of 1879, ch. 242, § 2, that the clause of the Stat. of 1878, which was a reenactment of the above cited clause of the Stat. of 1874 should apply to married women who have not a settlement derived by marriage.

But the Stat. of 1879 does not apply to any other clause or provision of the settlement Acts. In the codification of the laws in the Public Statutes, the same limited application is preserved. The 1st section in the 6th clause provides that any woman of the age of twenty-one years may gain a settlement by a residence of five years; and the 7th clause provides that "The provisions of the preceding clause shall apply to married women who have not a settlement derived by marriage."

If the Legislature had intended further to change the law, and to make the clause preceding the 6th apply to married women, it would have said so in the Statute. It may be, as argued by the plaintiff, that the reasons for making the 6th clause applicable to married women apply with equal force to the 4th clause. But the court can go no further than the Legislature has gone by clear provisions. If the best policy requires that the 4th clause should be applicable to married women, this must be effected by legislative enactment, and not by judicial construction. We are of opinion that, as the statutes now stand, the 4th clause does not apply to married women and, therefore, that the plaintiff cannot maintain this action.

Judgment for the defendant.

Joseph ROBERTSON

v.

Moses COLEMAN *et al.*

1. A check given to the order of a person under an assumed or fictitious name, and indorsed by him by such name, is valid and collectible against the drawer by a *bona fide* holder for value, the payee being the person intended and with whom the drawer dealt in receiving the consideration of the check, although fraudulently obtained by payee.
2. The name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name.

(Suffolk—Decided February 26, 1886.)

REPORT for opinion, on verdict for plaintiff.
Judgment on verdict.

This was an action to recover the amount of a bank check for \$91.08, signed by the defendants, dated March 31, 1883, and payable to the order of Charles Barney.

The following facts appeared at the trial: on March 27, 1883, a young man went to the Metropolitan Hotel in Boston, of which the plaintiff was proprietor, and registered his name as Charles Barney. On that or the next day he took to the place of business of the defendants, who sold property as auctioneers, a team, of which he represented himself to be the owner, and which he desired them to sell on his account. He gave his name there as Charles Barney. In reply to an inquiry regarding him, they received a message by telegraph that Charles Barney of Swansea, was a responsible and reliable man. Believing him to be Charles Barney of Swansea, they sold the team for him, and three days afterward, gave him in payment of the money received, the check declared on. On the 31st day of the same March, he left the plaintiff's hotel where he had been staying in the meantime under the name of Charles Barney, and before going he gave the check to the plaintiff in payment of his board bill of \$16.75, and received the balance of its amount in cash from the plaintiff. At the same time he indorsed it in blank with the name of Charles Barney.

It turned out that Charles Barney was not his true name, and there was no evidence that he had ever gone by that name before registering at the plaintiff's hotel. The defendants discovered that he had stolen the team which he left with them, and by their order the bank upon which the check was drawn refused to pay it. It was in evidence that there was a person in existence by the name of Charles Barney, of Swansea. It appeared that the plaintiff made no further inquiry as to the identity of the payee, than for information which was founded upon the representations of his said lodger.

Upon these facts the court, against the defendants' objection and subject to their exception, instructed the jury as follows: "If the person who took the team to the defendants' place of business left it there under the name

of Charles Barney, and the defendants in receiving it dealt with him as Charles Barney, and sold the team for him, and three days afterwards gave him the check in the belief that he was Charles Barney, of Swansea, and was the owner of the team, and said person had in the meantime been boarding at the plaintiff's hotel under that name and had gone by that name while at said hotel, the plaintiff, upon the receipt from him of said check in good faith, for a valuable consideration, with his indorsement upon it, acquired a good title to it as against the defendants." A verdict was returned for the plaintiff, and at the request of the defendants the case is reported to the Supreme Judicial Court for its opinion upon the questions of law involved. If the instruction was correct, judgment is to be entered upon the verdict. Otherwise, such order is to be made as law and justice may require.

Mr. Charles F. Kittredge, for plaintiff:

The check in suit was given by the defendants to the person who indorsed it for value to the plaintiff.

It was given to the person who was known to the defendants and to the plaintiff and known in Boston by no other name than the one written as payee of the check.

The plaintiff is an innocent third party, who took the check and paid its full value, upon representations made by the defendants on the face of their check, that the person to whom the check was delivered was the payee and that he was Charles Barney. It is submitted by the plaintiff:

As the name of Charles Barney is the only name by which the payee of the check was known in Boston, this, in the business with which the check is connected, is his name, and his indorsement gave plaintiff a perfect title.

If the name Charles Barney is not the Christian and family name of the person to whom the defendants made and delivered the check, but is an assumed or fictitious name, the plaintiff can recover if the person to whom the defendants made and delivered the check is the same person who indorsed it to the plaintiff; and this the case finds.

Whatever may have been the name by which the payee of the check commonly went, outside of Boston, the defendants named and made him Charles Barney in the business in Boston with which the check is connected.

It is immaterial whether there is a Charles Barney in Swansea, with whom the defendants thought they were dealing; it is immaterial whether the defendants thought they were dealing with Charles Barney of Swansea, when in fact they dealt with the person who indorsed the check to the plaintiff. The fact that there was a person by name of Charles Barney, of Swansea, did not prevent the payee of the check from doing business and making valid contracts under that name. The defendants' contract on the check was not with Charles Barney, of Swansea, but with the man for whom they sold the team.

The defendants made no contract with and did not deliver the check to Charles Barney, of Swansea, and his indorsement of it would not be good.

The name is of no consequence, except to

describe the person with whom the business was transacted.

It is not material in this case what was the consideration of the check nor whether there was any.

The check is commercial paper, put in circulation by the defendants and passed to plaintiff by the payee's indorsement; and in the hands of an innocent third party without notice is not affected by equities between drawer and payee.

The defendants are estopped from setting up fraud practiced upon them by the payee. *Byles*, Bills, 6th ed. § 130, note and cases cited; *Frazier v. Massey*, 14 Ind., 382; *Blodgett v. Jackson*, 40 N. H., 26 and cases cited; *Forbes v. Espy*, 21 Ohio St., 474; *Ames v. Meriam*, 98 Mass., 294; *First Nat. Bank v. Harris*, 108 Mass., 514.

Mr. Seth J. Thomas, for defendants.

Field, J., delivered the opinion of the court:

The name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name. The defendants, for a valuable consideration, gave the check to a person who said his name was Charles Barney, and whose name they believed to be Charles Barney, and they made it payable to the order of Charles Barney, intending thereby the person to whom they gave the check. The plaintiff received this check for a valuable consideration in good faith, from the same person whom he believed to be Charles Barney and who indorsed the check by that name. It appears that the defendants thought the person to whom they gave the check was Charles Barney, of Swansea, a person in existence, but it does not appear that they thought so from any representations made by the person to whom they gave the check, although this perhaps is immaterial.

It is clear from these facts that, although the defendants may have been mistaken in the sort of man the person they dealt with was, the person was the person intended by them as the payee of the check designated by the name he was called in the transaction, and that his indorsement of it was the indorsement of the payee of the check by that name. The contract of the defendants was to pay the amount of the check to this person or his order, and he has ordered it paid to the plaintiff. If this person obtained the check from the defendants by fraudulent representations, the plaintiff took it in good faith and for value. See, *Samuel v. Cheney*, 185 Mass., 278; *Edmunds v. Merch. Trans. Co.*, 185 Mass., 288.

Judgment on the verdict.

COMMONWEALTH of Massachusetts

v.
James MAGEE.

1. To convict defendant of keeping beer for sale, the Government must prove beyond a reasonable doubt that at the time of the keeping for sale it contained more than 3 per cent of alcohol by volume at 60 degrees Fahrenheit.

2. When the **chemist and state assayer** testified to his having **analyzed** the beer and that he found it contained three and fifty-eight hundredths per cent alcohol, the **case was properly submitted** to the jury.

(Suffolk—Decided February 23, 1886.)

ON exceptions. Overruled.

Criminal prosecution for keeping for sale, beer containing more than 3 per cent of alcohol.

Mr. John L. Eldridge, for defendant.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth:

The evidence shows that the beer was analyzed by a chemist and state assayer; there is a presumption that the acts and duties of such a person are in due form and proper, and the question as to whether the analysis was properly made was properly submitted to the jury upon all the evidence. *Commonwealth v. Blos*, 116 Mass., 57; see, *Same v. Bentley*, 97 Mass., 551.

By the Court:

The court rightly instructed the jury that to convict the defendant of keeping for sale the beer in question the Government must prove beyond a reasonable doubt that at the time of the keeping for sale it contained more than 3 per cent of alcohol by volume, at sixty degrees Fahrenheit. Pub. Stats., ch. 100, § 27.

There was evidence which justified the jury in finding this fact. The testimony of the chemist and state assayer, who analyzed the beer taken from the defendant's stock, justified the finding that at the time it was taken it contained more than 3 per cent of alcohol by volume at sixty degrees Fahrenheit. It is objected that the testimony of the witness does not state that he analyzed it at sixty degrees. It appeared that the beer was delivered by the defendant to an officer for the purpose of having it analyzed to ascertain if the defendant was violating the statute; that the officer took it to the witness, who was a state assayer, accustomed to analyze liquors, to see if the statute was violated. The jury might reasonably infer that he mistrusted the purpose for which he was to analyze the beer, and that in his testimony he meant to be understood as saying that under an analysis according to the statute it contained 3 $\frac{58}{100}$ per cent of alcohol. The case was properly submitted to the jury.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

James HENDERSON.

In a prosecution for exposing and keeping for sale intoxicating liquors without a license, it is immaterial whether the proceedings of the officer in serving the search warrant were regular or lawful or not, or whether the liquors were exposed or concealed.

(Suffolk—Decided October 23, 1885.)

MASS.

ON exceptions taken in the Superior Court.

Overruled.

This was a complaint in the municipal court against the defendant for unlawfully keeping and exposing intoxicating liquors for sale, without a license or other lawful authority.

On the trial in the Superior Court, the jury returned a verdict of guilty, and defendant alleged exceptions.

Complaint for illegal keeping and exposing of liquors with intent to sell the same. The complaint was as follows:

To the Justices of the Municipal Court of the City of Boston, holden at said Boston for the transaction of criminal business, within the County of Suffolk, Lawrence Cain, of the City of Boston, in the County of Suffolk, in behalf of the Commonwealth of Massachusetts, on oath, complains that James Henderson, of said Boston, on the 5th day of September, in the year of our Lord 1885, at Boston aforesaid, and within the judicial district of said court, unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth, the said Henderson not having then and there any license, authority or appointment, according to law, then and there to expose, keep for sale, or sell said liquors, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

Lawrence Cain.

Suffolk, to wit:

Taken and sworn to, this 7th day of September, in the year of our Lord 1885,

Before said Court.

A true copy. Attest:

J. C. L. Sanborn, Fourth Asst. Clerk.

A copy. John J. Manning } Clerk of said
Attest: Superior Court.

The defendant filed in the lower court and renewed in the Superior Court, a motion to quash for insufficiency.

The motion was overruled and defendant excepted.

Messrs. C. R. Morse and Geo. W. Searle, for defendant:

The testimony of sale on another and different occasion, on the 3d to show intent on the 5th was irrelevant and incompetent and served to prejudice the defendant and keep him from a fair trial of the case at bar. As the law now stands, it is never competent to offer other and independent offense, not connected with the offense in issue, for any purpose whatever. This is the rule distinctly laid down in New Hampshire as late as 1876, in *State v. Inpage*, 57 N. H., 245, and there is no law in this State to the contrary. See *Roscoe, Cr. Ev.*, 7th Am. ed. 91, and *n.*; *Dunn v. State*, 2 Ark., 229; *Commonwealth v. Call*, 21 Pick., 515.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth:

The motion to quash the complaint was properly overruled. The complaint is in the usual and approved form. The ruling requested as to the meaning of the word expose or exposure was properly refused. Pub. St., ch. 100, § 1; *Commonwealth v. Dolan*, 121 Mass., 374; *Same v. Curran*, 119 Mass., 206; *Same v. Atkins*, 186 Mass., 160.

The instructions given were sufficient and proper, those requested were correctly refused.

Commonwealth v. Kahlmeyer, 124 Mass., 322;
Same v. Jennings, 107 Mass., 488.

By the Court:

The complaint is sufficient, and the motion to quash was rightly overruled. It is immaterial whether the proceedings of the officer in serving the search warrant were regular and lawful or not, and the instructions requested on this subject were properly refused.

It is immaterial whether the liquors which the defendant kept for sale were exposed or concealed, and the instructions requested upon the meaning of the word "exposed" were properly refused. *Commonwealth v. Atkins*, 136 Mass., 180.

We can see no ground for contending that the evidence admitted was incompetent, or that the instructions given were erroneous.

Exceptions overruled.

COMMONWEALTH of Massachusetts, v.

Albert TOBIAS.

1. A criminal complaint for selling **adulterated milk** need not allege that an analysis had been made.
2. P. S., ch. 57, §§ 5, 6, 7 and 9, relating to the sale of milk, **construed**.
3. **Proof that milk was sold as skimmed milk** out of a tank marked as required by statute, is a **good defense** to a charge of selling milk containing less than 13 per cent of milk solids.
4. The words "containing less than 13 per cent of milk solids" as descriptive of the milk sold, identify the offense charged and cannot be rejected as surplusage; and the **complaint for selling adulterated milk cannot be maintained** by proof of a sale of watered milk, if the milk as watered contained more than 13 per cent of milk solids.
5. Selling milk and having it in possession with intent to sell are but **one offense** and may be alleged in one count. When charged in distinct counts and the milk referred to in each is the same, there is **no misjoinder**.
6. **The defendant should not be subjected to double punishment** if the milk referred to in each count is the same, and if the having in possession was on the same day as the sale and preliminary to it.
7. **The offense of having adulterated milk in one's possession, with intent to sell**, is a continuing offense and may be committed at a time other than that of the sale.

(Decided February 24, 1886.)

ON defendant's exceptions. *Sustained* in part.
 This is a complaint charging the defendant in one count with the offense of selling adulterated milk, and in the second count with having such

milk in his possession with intent to sell, and is as follows:

John F. McCaffrey, of the City of —, in the County of Middlesex and Commonwealth of Massachusetts, in behalf of the Commonwealth of Massachusetts, on oath, complains that Albert Tobias, of said Boston, on the 8th day of April, 1885, at the City of Boston, and in said Roxbury District, in the County of Suffolk, with force and arms did sell a certain quantity, to wit: one pint of adulterated milk, to wit: milk containing less than 13 per cent of milk solids, to your complainant, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the said McCaffrey, in behalf of the Commonwealth of Massachusetts, on oath further complains that the said Albert Tobias, on the 8th day of April, 1885, at the City of Boston aforesaid, and in said Roxbury District, did have in his said Tobias' possession a certain quantity, to wit: one pint of adulterated milk, to wit: milk containing less than 13 per cent of milk solids, with intent then and there, at the City of Boston aforesaid, and in said Roxbury District, to unlawfully sell the same; against the peace of said Commonwealth, and the form of the statute in such case made and provided.

John F. McCaffrey.

The defendant filed a motion to quash, which was overruled. The grounds of the motion were:

1. There is no proper and legal designation of the residence of the complainant.
2. There is no proper designation of the person to whom the alleged sale was made.
3. The complaint is not made by any milk inspector, or any person or official authorized and empowered to make the same.
4. The complaint charges no legal offense, properly and substantially; but is double, uncertain and ambiguous.
5. The offense attempted to be charged should be under § 7, and not § 6 of chapter 57, Pub. Stats.
6. The complaint is in other respects uncertain, indefinite and insufficient.
7. The complaint does not allege that there was any analysis made, or that in and by analysis it appeared that it contained less than 13 per cent, etc.

At the trial in the Superior Court the Government introduced evidence tending to show the purchase of a quantity of milk from a woman in charge of a shop where pastry and milk were sold; that said milk, on analysis, was shown to contain 9-34 per cent milk solids, and was a watered milk; and that defendant was the proprietor of the shop where said milk was purchased. Said woman was the servant and agent of the defendant in the sale of said milk.

The defense introduced the testimony of the woman who was in charge of the shop and of the proprietor, tending to show that said milk was kept in a tank duly marked "Skimmed Milk," and that they sold it as skimmed milk, and did not water it.

The defense then asked the court to rule as follows:

1. If the jury find on the evidence that there was a consummated sale, they cannot convict under the second count.

2. If the jury find and believe that defendant sold skimmed milk out of a tank legally marked "Skimmed Milk," they cannot convict on this complaint.

3. Selling out of a tank so marked, with no representation save what is indicated by that marking, would be in law a sale of skimmed milk.

4. If the jury find the reason why the milk contained less than 13 per cent milk solids was that a portion of the cream was removed, they must find the defendant not guilty.

5. If they find that the milk contained less than 13 per cent of milk solids, solely in consequence of a removal of a portion of the cream, they cannot find defendant guilty under this charge.

6. All the evidence in this case proves no offense under § 5 of the Milk Statute.

7. There is no standard for skimmed milk. That kind of milk need not contain 13 per cent of solids.

8. If the defendant's servant sold the milk out of a skimmed milk tank properly marked, and made no false representation as to its quality and character, the defendant cannot be convicted under either count.

The court declined to give the instructions in the language of these requests, and the defendant duly excepted; but did instruct the jury that if they should find upon the evidence that water had been added to the milk described in the complaint and that it was watered milk and that the defendant sold the said milk by his servant or agent, they would be authorized to return a verdict of guilty on the first count; and if they should further find that the defendant kept the same milk with intent to sell it, they would be authorized to return a verdict of guilty on the second count. And the court also instructed the jury that if the milk was skimmed milk, they would not be authorized to convict the defendant on either count, upon the evidence that the milk contained less than 13 per cent of milk solids, unless they should also find that water had been added to the milk so that it was watered milk at the time of the alleged keeping and sale.

The jury rendered a general verdict of guilty.

Mr. George W. Searle, for defendant.

Mr. Edgar J. Sherman, *Atty. Gen.*, for the Commonwealth:

The motion to quash the complaint was properly overruled. This is a statutory offense, and in the complaint it is sufficient to follow the language of the statute. Pub. Stat., ch. 57, §§ 5, 6, 7; *Commonwealth v. Keenan*, 139 Mass., 193, 195; *Commonwealth v. McLaughlin*, 105 Mass., 460, 463.

The fact that § 10, ch. 57 of the Pub. Stats., provides that it shall be the duty of every inspector to institute a complaint for a violation of any of the provisions of said chapter, upon satisfactory evidence being laid before him, does not preclude any other person from making the complaint. The objection that the residence of the complainant was not properly set forth in the complaint was filed too late and is, moreover, of no consequence. *Commonwealth v. Intoxicating Liquors*, 113 Mass., 13, 19; *Commonwealth v. Taylor*, 113 Mass., 4.

Field, J., delivered the opinion of the court: The complaint was sufficient and the motion

to quash rightly overruled. *Commonwealth v. Keenan*, 139 Mass., 193; *Same v. Taylor*, 113 Mass., 4.

It is not necessary to allege that an analysis had been made of the milk. *Commonwealth v. Bowker* [not yet reported].

Pub. Stats., chapter 57, § 10, does not prohibit any person not an inspector, from making a complaint. The construction we give to P. S., ch. 57, §§ 5, 6, 7 and 9, is that these sections prohibit the sale, etc., of milk containing more than 87 per cent of watery fluid, or less than 13 per cent of milk solids, unless it is sold not as pure milk, but as skimmed milk and out of a vessel, can or package marked as required by § 7; and when that is made a charge, it is immaterial what is the deficiency of the milk solids; that the sale, etc., of milk "To which water or any foreign substance has been added, or milk produced from cows fed on the refuse of distilleries, or from sick or disordered cows" is prohibited, whether it is sold as skimmed milk and whether it contains more or less than 13 per cent of milk solids; and that the sale of skimmed milk as pure milk is prohibited, even if it contains more than 13 per cent of milk solids; and is prohibited in all cases unless it is sold as skimmed milk out of a vessel, can or package marked as required by § 7.

One question then is, whether if the defendant sold the milk as skimmed milk out of a tank marked as required by § 7, he can be convicted on this complaint by proof that the milk was watered. We think he cannot. The difficulty is in the form of the complaint. Proof that the milk was sold as skimmed milk out of a tank duly marked is a good answer to the charge, namely: that of selling "milk containing less than 13 per cent of milk solids." The quantity of skimmed milk solids which skimmed milk must contain was not defined before the passage of Acts, 1885, ch. 352.

We think that this specification cannot be rejected as surplusage. *Commonwealth v. Lucomb*, 130 Mass., 42, decides that in a complaint which charged that the defendant had in his possession with intent to sell "one pint of adulterated milk to which milk water had been added" could not be supported by proof that the milk was natural milk but contained less than 13 per centum of milk solids, because the words "to which milk water had been added" were descriptive of the milk and identified the charge.

It was assumed without deciding, and it has since been decided, that natural milk which contains less than 13 per cent of milk solids is adulterated milk, within the meaning of Stat. 1880, ch. 209, §§ 3 and 7, which is now P. S., ch. 57, §§ 5 and 9. The court say that "The question is not whether it was originally necessary to insert all these words but whether, having been added, they are so essentially descriptive as to be required to be proved. We think the words of the specification in the complaint in the case at bar, although said under a *ridicet*, are descriptive of the milk and identify the offense charged; and that this complaint could not be maintained by a proof of a sale of watered milk if the milk as watered contained more than 13 per cent of milk solids. The offense of selling adulterated milk can be committed in several different ways, namely: by selling milk to which water or any foreign substance has

been added, or milk from cows fed on the refuse of distilleries, or from sick or diseased cows, whether the milk contains more or less than 13 per cent of milk solids. As this complaint has set out the method by which the offense was committed, it must be proved as charged. If, then, the defendant proved that he sold the milk as skimmed milk out of a tank duly marked, it was a sufficient answer to the offense as charged. It was not competent for the Government to rely upon evidence that the milk had been watered, because it had not charged him with selling watered milk; and whether the milk was watered or not was immaterial in proving the offense as charged. The defendant is found guilty, not of selling the milk containing less than 13 per cent of milk solids, the offense as to which he is charged, but of selling milk to which water had been added, an offense with which he is not charged.

If the effect of the removal of a part of the cream was to reduce the milk solids below 13 per cent, the defendant can be convicted upon a complaint charging him with selling adulterated milk (to wit: milk containing less than 13 per cent of milk solids), unless he sold it, not as pure milk but as skimmed milk and out of a vessel, can or package marked as required by § 7; and it was not necessary that the complaint charging such an offense should be drawn under § 6.

There remain the first request for instructions, and the instructions given instead of it. Under provisions of statutes such as § 5, prohibiting the sale, etc., or having in possession with intent to sell, etc., it has been held that this is but one offense and the acts prohibited may be alleged in one count of a complaint or indictment. *Commonwealth v. Nichols*, 10 Allen, 199; *Same v. Curtis*, 9 Id., 266.

In *Commonwealth v. Eaton*, 15 Pick., 273, the indictment, which contained but one count, charged that the defendant did unlawfully offer for sale and "did unlawfully sell" one half of a lottery ticket. The Act provided that "If any person shall sell or offer for sale or, etc., any lottery ticket or part of a lottery ticket he shall forfeit," etc. The defendant demurred on the grounds of duplicity. The court say: "It is true that an offer to sell without selling a ticket is an offense by the statutes, but an offer to sell and actually selling is but one offense." In the present case there is clearly no misjoinder of counts, because one and the same milk is intended in both counts. The counts are for the same offense described as committed in different ways; if the milk was not the same, the counts describe different offenses of the same kind. If the same milk was intended in both counts, and the having in possession was on the same day as the sale and preliminary to it, it is plain, we think, that the defendant ought not to be subjected to double punishment. See, *Stevens v. Commonwealth*, 6 Met., 241.

It is plain, too, that the defendant may have had adulterated milk in his custody or possession with intent to sell it, and yet never have sold it; and that he may have sold adulterated milk which he never had in his custody or possession, for he may have bought and sold milk which was never delivered to him. The offense charged in each count is, besides, the offense of having adulterated milk in one's possession

with intent to sell; it is a continuing offense and may be committed at a time other than that of the sale of it. If the complaint had contained only the second count, it would have been supported by evidence that the defendant had had the milk described in his possession, with intent to sell it and had actually sold it. The first request for instructions ought not, therefore, to have been given. The question does not arise whether, if the defendant had once been convicted of selling adulterated milk, he could again be convicted of having had on the same day before the sale, in his possession, the same milk with intent to sell it, the rights of the defendant are protected, if he is subjected to but one punishment for having in his possession with intent to sell and for selling the same milk on the same day.

Exception sustained.

Alvin RÖDLIFF *et al.*

v.

Frank W. DALLINGER.

1. Evidence that the owner of goods refused to sell them to a broker, but delivered them to him on the understanding that the goods were sold to an undisclosed principal of the broker, is admissible, notwithstanding the fact that the sale was entered on the owner's books as a sale to the broker and that a bill was made to him.
2. Where the sale was not made to the broker and there was, as matter of fact, no undisclosed principal, there was no sale.
3. There having been no sale, the delivery of the goods to the broker gave him no power to convey a good title to a bona fide purchaser or to pledge or mortgage the goods, and the owner can reclaim them from a pledgee.

(Decided January 11, 1886.)

ON defendant's exceptions. *Overruled.*

This was an action of replevin to recover possession of twenty bags of California wool.

The plaintiffs, under the firm name of Rodliff & Eaton, were wool dealers in the City of Boston, and on or about November 15, 1882, delivered said wool to one Henry Clementson, a wool dealer and broker in Boston.

The defendant was a public warehouseman in Boston, who received the wool in question on storage from Clementson, on or about said date, not knowing where he obtained it, and issued a warehouse receipt for the same.

On the day after the delivery of the wool, Clementson applied to the Massachusetts Loan & Trust Co. of Boston, a corporation whose business is that of advancing money upon staple merchandise, for a loan of \$2,000 on the wool, then in the public warehouse of the defendant; and the trust company sent a man to the warehouse to examine the wool, and on his report made a loan of \$2,000 to Clementson, taking the warehouse receipt of the defendant, reciting that the wool had been delivered

from Henry Clementson and placed on storage for account of the Massachusetts Loan & Trust Co., the trust company having no knowledge where Clementson obtained the wool, his statement being that he had purchased the wool to sell upon the market, and the trust company, being the real party in interest, defended the suit.

Mr. Rodliff, one of the plaintiffs, testified that in September, 1882, his firm sold and delivered to Clementson certain California wool, amounting to about \$2,000, entered the same on their books as sold to him, and made out a bill of sale direct to him, the wool being sold on sixty days' time; that the wool was duly paid for by Clementson.

That afterwards, prior to November 14 of that year, the plaintiffs made two other sales to Clementson out of the same lot of California wool which had been consigned to the plaintiffs for sale; Clementson, acting as broker on each of these last two sales, received his brokerage, and gave the name of the party for whom the wool was purchased, viz.: Pomeroy & Sons, of Pittsfield, Mass. The wool in both these cases was charged to Pomeroy & Sons on the books of the plaintiffs, together with the entry of brokerage to Clementson. A bill was also made out directly to Pomeroy & Sons. In both these cases the wool was sold on time and duly paid for.

On or about November 14, 1882, one of the plaintiffs had an interview with Clementson, about which he testified as follows: "He came in and brought an offer of twenty-two and one fourth cents per pound for some manufacturer. This was for twenty bales of the same lot of California wool. Finally he said he did not want us to know who the manufacturer was; he wanted to conceal that. I told him I did not know how he could get over it, for I would not sell him that amount or anywhere near it. We finally made an arrangement that we were to let him have the wool, and we were not to lose our claim upon it, but he was to hand us over whatever he got for it as he got it. I said we would weigh up that wool, and he was to hand us over the check as soon as he got it. I was present when the wool was loaded on to the wagon he had sent to receive it." The plaintiffs did nothing about collecting pay for the wool until they had learned that Clementson had left the country, and made no inquiry of him relating to the same, the sixty-one days' credit not having then expired.

The plaintiffs asked Clementson who the parties were, and he wouldn't tell them, but said they were as good as Pomeroy, who was in good standing and credit with the plaintiffs.

The wool was sold on sixty-one days' credit, and was entered on the books of the plaintiffs as a direct sale to Clementson, and a bill was made direct to Clementson the same as in the sale to him in September previous, and no mention was made, either on the books or bill, of any other party or of any brokerage.

The wool was weighed up and marked "P" in a diamond, by the plaintiffs, a statement of the weights delivered to Clementson, and the wool was thereupon delivered to teams sent by Clementson, which took the wool to the warehouse of the defendant, the plaintiffs not knowing where the wool was taken.

Mr. Rodliff further testified that when the wool left the store they did not expect to see it again and only expected to be paid for it; that they knew Clementson was speculating in wool. After the delivery of the wool, Clementson had further transactions with the plaintiffs, and as late as January 2, 1883; but on January 5, 1883, learning that Clementson had left Boston, they replevied the wool before the expiration of sixty-one days, having received no payment for the wool. Early in 1883, Clementson left the country for Demerara, where he still resides. No part of the advance made by the trust company has ever been repaid.

There was evidence, which was denied by the plaintiffs, tending to show that the plaintiffs, about two weeks prior to the sale in question, upon inquiry made of them by another wool firm in Boston, recommended Clementson as worthy of credit to the amount of five or six thousand dollars.

It was an undisputed fact that Clementson had not any such offer, and did not act for any such party as the plaintiffs testified he represented, at the time of obtaining the wool.

Upon the foregoing facts the court instructed the jury that there were three possible views of the transaction:

1. That they might find it was an ordinary sale to Clementson; or, 2, that it was not a sale to Clementson, but was a delivery to Clementson as a broker, with a view to his selling it to some customer whom he expected afterward to negotiate with and with whom to consummate a sale; and if they found this, then there was a special provision of the statute which protects parties dealing in good faith with a broker having property in that way, so far as they make advances or loans upon property in pledge, in good faith, to persons who have custody of property as brokers, with authority to sell or dispose of it; or 3, that it was not a sale to Clementson, or a delivery to him as broker with authority to sell; but that it was a delivery to Clementson, upon his representation that he came from a purchaser, representing him, with an offer for it, a purchaser he did not disclose, and that these goods were delivered to him as the agent of that purchaser, as a sale to that purchaser; and if that was the fact, that the plaintiffs were entitled to the property, notwithstanding that it was subsequently pledged to the Massachusetts Loan & Trust Co.

The court also further instructed the jury upon the third view: "That if this was a transfer upon a false representation made by Clementson, a representation that he came with an offer from a third person whose name he did not wish to disclose and the goods were delivered to Clementson as a sale to him as the agent of this third person, whose offer he was bearing, with the view that the property should pass at the time to that third person and thus constitute a sale to that third person, from whom payment was to be made subsequently, and the payment to be brought back by Clementson as the agent of that third person, that Clementson had no right afterward to deal with that property at all; he got it into his possession by fraud, and he got it into his possession without any authority to make any subsequent sale or to do anything with it; it was wrongly in his possession from the start, and any person who saw fit to advance

money upon it or to buy it, however honestly and in good faith, would be the loser, and plaintiffs could pursue the property and get it wherever they could find it, whenever the fraud practiced upon them should come to their knowledge."

Upon the foregoing facts and rulings the jury found for the plaintiffs, and the defendant excepted to the third instruction of the court.

Mr. Henry D. Hyde, for defendant:

It has long been a well settled principle of law that a *bona fide* purchaser, without knowledge of any fraud, from a vendee who has obtained the goods by means of false and fraudulent representations, can hold the same as against the defrauded vendor. *Root v. French*, 13 Wend., 570.

In the following cases of fraud the *bona fide* purchaser was protected: *Rowley v. Bigelow*, 12 Pick., 306, where the fraud consisted in the vendee stating he was solvent, when in fact he was insolvent; *Hoffman v. Noble*, 6 Met., 68, where the fraud consisted in a false representation as to the mode of payment; *Titcomb v. Wood*, 38 Me., 561, where the fraud was by giving in payment property stolen by the vendee. See also, *Lee v. Portwood*, 41 Miss., 109.

In *Lynch v. Beecher*, 38 Conn., 490, where the fraud consisted of obtaining the property without the intention of paying for it, there is a distinct line of cases where the *bona fide* purchaser is held not protected. In all these cases, the fraud consisted in the defrauding party representing that he acted as agent of a principal known to the vendor and on whose credit the vendor relied. *Moody v. Blake*, 117 Mass., 23; *Samuel v. Cheney*, 185 Mass., 278; *Edmunds v. Merch. Deep. Trans. Co.*, 185 Mass., 283; *Hamet v. Letcher*, 37 Ohio St., 356; *Decan v. Shipper*, 35 Pa. St., 239; *Barker v. Dinmore*, 72 Pa. St., 427; *Hollins v. Fowler*, L. R., 7 H. L., Eng. & Irish App., 757; *Cundy v. Lindsay*, L. R., 3 App. Cas., 459; *Kingsford v. Merry*, L. J. N. S. Com. Law, 26 Ex., 83; *Higgins v. Burton*, L. J. N. S. Com. Law, 26 Ex., 342; *Hardman v. Booth*, 1 H. & C., 808.

These cases proceed on the theory that as the principal was known to the vendor, there was an intention to contract with this principal alone, and so no title at all passed to the defrauding party; but where no principal is named, there can be no intention to contract with him, and no reliance placed on his credit. See, Whart. Agen., § 434, note 2; Dicey, Part., 184; *Schmaltz v. Avery*, 16 Adolph & Ellis, N. S. Q. B., 655, 662.

Where the agent of an undisclosed principal is treated as principal, it is the policy of the law that where one of the two innocent persons must suffer from the fraud of the third, he shall suffer who, by his indiscretions, has enabled such third person to commit the fraud. *Root v. French*, *supra*.

Mr. Alfred Hemenway, for plaintiffs:

There can be no valid contract with a swindler buying goods for an imaginary principal; in such a case the relation of vendor and vendee does not exist, and the swindler, as he has no title himself, can pass none, even to an innocent third person. *Edmunds v. Merch. Deep. Trans. Co.*, 185 Mass., 283, 285.

This doctrine is limited, however, to cases in which he is estopped to deny the authority of

some person to sell or pledge the goods, by reason of some act or assertion of his upon which the innocent vendee or pledgee of that person has relied, with the knowledge of the owner. *Locke v. Lewis*, 124 Mass., 1, 12; *Stollenwerck v. Thacher*, 115 Mass., 224, 227; *Hawes v. Marchant*, 1 Curt., 144; *Gibson v. Stevens*, 8 How., 384 (49 U. S., bk. 12, L. ed., 1123).

An authority to hold the wool, to store it, to show it to customers, to deliver to a purchaser, does not carry authority to make a binding contract. *Nemo plus juris in alium transferre potest quam ipse habet*. *Thorndike v. Bath*, 114 Mass., 116; *Winchester v. Forster*, 3 Cush., 369; *Coggill v. Hartford & N. H. R. R. Co.*, 3 Gray, 545.

So, a purchase in good faith from one who has no title and no right to transfer the property will not constitute a defense. Even an auctioneer or broker who sells for one having no title, and pays over to the principal the proceeds, with no knowledge of the defect of title or want of authority, is liable to the real owner. *Zuchtmann v. Roberts*, 109 Mass., 53; *Hills v. Snell*, 104 Mass., 177; *Nickerson v. Darroch*, 5 Allen, 419; *Moody v. Blake*, 117 Mass., 26.

If a bailee of goods, for a particular purpose, transfers them to another in contravention of that purpose, the general owner may maintain trover against that person, even though he may be a *bona fide* vendee, "unless in market overt." *Stanley v. Gaylord*, 1 Cush., 536, 545.

Replevin is a concurrent remedy, and in similar circumstances may be maintained. *Zuchtmann v. Roberts*, *supra*.

In the case at bar, it was in evidence that Clementson bought the goods as for some manufacturer; that he did not want us, the plaintiffs, to know who the manufacturer was; that we were not to lose our claim upon it; that the parties were as good as Pomeroy, who was in good standing and credit with the plaintiffs. Under these circumstances, Clementson was not invested with power as factor or agent to sell or pledge the goods, so as to bring the case within Pub. Stat., ch. 71, §§ 1-4; *Thacher v. Moors*, 134 Mass., 156.

Holmes, J., delivered the opinion of the court:

The plaintiffs' evidence warranted the conclusion that they refused to sell to Clementson, the broker, but delivered the wool to him on the understanding that it was sold to an undisclosed manufacturer, in good credit with plaintiffs. This evidence was admissible and was not objected to, notwithstanding the fact that the sale was entered on the plaintiffs' books as a sale to Clementson and that a bill was made to him. *Commonwealth v. Jeffries*, 7 Allen, 548, 564.

It was admitted that Clementson in fact was not acting for such an undisclosed principal; and it follows that if the plaintiffs' evidence was believed there was no sale. There could not be one to the supposed principal because there was no such party; and there was not one to Clementson because none purported to be made to him, but on the contrary such a sale was expressly refused and excluded. *Edmunds v. Merch. Deep. Trans. Co.*; *Aborn v. Same*, 135 Mass., 283.

It was suggested that this case differed from the one cited because there the principal was disclosed, whereas, here he was not; and that

credit could not be supposed to have been given to an unknown person. We have nothing to say as to the weight which this argument ought to have with a jury, beyond observing that the plaintiffs had reason in Clementson's representations for giving credit to the supposed manufacturer. But there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party, and if the jury find that such a sale was the only one that purports to have been made, the fact that it failed does not turn it into a sale to the party conducting the transaction. *Schmaltz v. Avery*, 16 Adolph & E. N. S. Q. B., 635, only decided that a man's describing himself in a charter-party as "agent for the freight" is not sufficient to preclude him from alleging that he is the freighter. It does hint that the agent could not be excluded by express terms or by the description of the principal, although insufficient to identify the individual dealt with, as happened here; still less that in favor of third persons the agent would be presumed, without evidence, to be the undisclosed principal, although expressly excluded. The invalidity of the transaction in the case at bar does not depend upon fraud but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motives for making the contract, not to its execution; as, when a vendor expressly or impliedly represents that he is solvent and intends to pay for goods, when in fact he is insolvent and has no reasonable expectation of paying for them; or, being identified by the leases and dealt with as the persons so identified, says that he is A, when in fact he is B. But when one of the formal constituents of illegal transactions is wanting, there is no question of rescission; the transaction is void *ab initio*; and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want was due to innocent mistakes.

The sale being void and not merely voidable, or in simpler words there having been no sale, the delivery to Clementson gave him no power to convey a good title to a *bona fide* purchaser. He had not even a defective title, and his new possession did not enable him to pledge or mortgage. The consideration in favor of protecting *bona fide* dealers with persons in possession, in cases like the present, was much urged in *Thacher v. Moors*, 184 Mass., 156, but did not prevail. Much less can they be allowed to prevail against a legal title without the intervention of statute.

Exceptions overruled.

Caleb K. SAWYER

v.

William ORR, Jr.

Although parties who have testified to a fact or issue, directly discernable, are not entitled, as matter of right, to fortify their testimony by swearing to other facts to make their testimony more probably true, where no evidence is introduced to show improbability; yet this rule cannot be pressed so far as to exclude a document which affords

independent evidence of the principal fact alleged, merely because defendant testifies that it does refer to such fact.

(Worcester—Decided October 24, 1885.)

ON defendant's exceptions. *Sustained.*

This was an action on a promissory note for \$3,000. At the trial in the Superior Court before Bacon, J., the plaintiff in his opening stated that the consideration for the said note was a release by the plaintiff, to the defendant, of his interests in certain patents and devises in which they had been jointly interested. The plaintiff read said note to the jury and rested, without offering any other evidence. It was claimed on the part of the defendant that there was no sufficient consideration for said note, and that the consideration therefor had failed.

The defendant testified in his own behalf that he received no consideration for said note; that the plaintiff had never made any release to him of any kind; that plaintiff never had any claim against the defendant to release, but the note, together with \$500 was given upon plaintiff's promise to deliver to the defendant forty shares of the capital stock of the New Jersey Wire Cloth Co., and that the plaintiff was to retain thirty of said shares as collateral security for said note. The defendant then testified that the agreement, a copy of which is hereto annexed, marked A, related to the same transaction as the note, and that the note therein mentioned was the note in suit, and that the stock mentioned in said note and agreement was the same; the execution by the plaintiff of the agreement was admitted; the defendant then offered the agreement in evidence as an admission on the part of the plaintiff of the actual consideration of said note.

Copy of agreement marked "A."

"Clinton, June 21, 1880.

In consideration of \$3,500 paid me by Wm. Orr, Jr., for forty shares of the N. J. Wire Cloth Co.'s stock, part of which is held in note secured by said stock, I hereby promise that in case of loss of said stock, either by fire or failure of said Co. to meet its liabilities, I will make no claim upon any other property of the said Wm. Orr, Jr., provided the said shares have not been disposed of to the profit and advantage of the said Wm. Orr, Jr."

But the court excluded the said agreement as evidence and the defendant excepted.

Messrs. John W. Cocoran and Herbert Parker, for defendant:

The issue to the jury was upon the question of consideration alone. Parol or other evidence was clearly admissible, to show the actual consideration of the note. *Hove v. Walker*, 4 Gray, 818; *Howard v. Odell*, 1 Allen, 89; *Munde v. Lambie*, 122 Mass., 337, 338.

The agreement should have been admitted as evidence as urged by the defendant, as an admission made by the plaintiff. Admissions of a party may be proved, although they relate to a written instrument. *Loomis v. Wadhams*, 8 Gray, 557-562; *Smith v. Palmer*, 6 Cush., 513.

A party's own statements and admissions are in all cases admissible in evidence against him,

although such statements and admissions may involve what must necessarily be contained in some writing. What a party admits against himself may be reasonably taken as true. *Smith v. Palmer*, 6 Cush., 520, 521.

The weight and value of the statements and admissions will vary according to the circumstances, and must be determined by the jury. *Smith v. Palmer*.

As bearing upon the question of the real transaction between the parties, parol evidence, even of facts occurring after the execution of the document, the consideration of which is in question, is admissible. *Howard v. Odell*, 1 Allen, 89.

The general doctrine is that the declarations of a party to the suit, or of one identified in interest with him, are as against such party, admissible in evidence. 1 Greenl. Ev., § 171.

If there is a dispute about facts, or the credibility of a witness is drawn in question, or a material fact is left in doubt by the testimony, or there are inferences to be drawn from facts in the proof, then it will be proper to submit the matter to the consideration and determination of the jury. *Gavett v. Manchester & L. R. R. Co.*, 16 Gray, 506.

The plaintiff had to bear the burden of proof of the consideration, as he alleged it, there being evidence offered to rebut the *prima facie* case, established by proof of the note. *Delano v. Bartlett*, 6 Cush., 364.

It is not enough to show that there was an obligation on the part of the signer. There must be evidence that the instrument was given and accepted in payment or satisfaction of such obligation. *Warren v. Duffee*, 126 Mass., 340, 341.

The burden was upon the plaintiff to satisfy the jury upon all the evidence, and by the preponderance of evidence, that there was a consideration. *Black River Sav. Bank v. Edwards*, 10 Gray, 387; *Burnham v. Allen*, 1 Gray, 500, 501; *Estabrook v. Boyle*, 1 Allen, 413.

Mr. Charles G. Stevens, for plaintiff:

The issues presented to the jury at the trial of this action relate to the consideration of the note declared on, whether there was any consideration originally, or whether the original consideration had wholly failed. The defendant said the note was given upon plaintiff's promise to deliver to him certain stock, which was never delivered, and that he never received any consideration for said note. The agreement which was offered and excluded contained nothing to prove or disprove this statement. It related to an entirely different subject, respecting which no evidence was offered. Made many months after the note was given, it could not affect the question of consideration. For the issues before the jury it was incompetent, because it presented new questions to the jury having no connection with the issues tried; irrelevant, because it not only related to a distinct matter, and depended upon a contingency for any legal effect but was entirely immaterial to the case on trial, because without weight or consequence to assist the jury in their deliberations, and could only tend to mislead them. At least, after the direct, positive testimony of the defendant, it was in the discretion of the court to permit or refuse its submission to the jury.

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Holmes, J., delivered the opinion of the court:

The defendant set up want or failure of consideration for the note in suit. As the first step towards establishing the defense, it was necessary to show what the stipulated consideration was. The defendant testified that the note and \$500 were given upon the plaintiff's promise to deliver to him forty shares of the stock of the New Jersey Wire Cloth Co. This the plaintiff now admits, but no such admission was made at the trial, and the opening to the jury on his behalf stated a different consideration, so that the defendant's version stood denied. The defendant, to fortify his statement, offered in evidence an agreement signed by the plaintiff, which began as follows: "In consideration of \$3,500 paid me by Wm. Orr, Jr. for forty shares of the N. J. Wire Cloth Co.'s stock, part of which is held in note secured by said stock." This agreement was excluded. The plaintiff's signature was admitted, and therefore, if the document referred to the note in suit, it corroborated the defendant's statement most effectually. It is true that the only testimony that the document did refer to this note came from the defendant, who had already testified directly to what the consideration was. We do not forget that it was said in *Delano v. Smith Charities*, 138 Mass., 68, that parties who have testified to a fact in issue, directly discernible by the senses, are not entitled, as a matter of right, to fortify their testimony by swearing to other facts, merely for the purpose of making it more probable that what they said upon the principal point was true, when no evidence has been introduced to show improbability. But this rule cannot be pressed so far as to exclude a document which on its face suggests the probability that it refers to the note in suit, and which, if it does so, affords independent evidence of the principal fact alleged, merely because, for greater security the defendant adds his testimony that it does refer to the note in truth, as it seems to.

Exceptions sustained.

Wilbur F. WHITNEY,

c.

Elijah GROSS *et al.*

1. Upon the issue of negligence of defendants, an offer to show that loads like in character to the one which caused the injury complained of were habitually hauled down the hill where the injury was inflicted by the defendants, with the same horse and driver, at such speed that the horse could not control the load, is an offer to prove the careless habit of the driver and not any vice or habit of the horse.
2. Evidence of acts of negligence of defendants or their driver at other times, either in overloading their wagon, or driving at an unreasonable speed, is not admissible upon either issue, as to the vice of the horse or carelessness of the driver.

ON defendant's exceptions. *Overruled.*
This is an action of tort, in the nature of trespass *quare clausum*, commenced by writ dated October 8, 1884.

It was agreed by the parties, at the time of trial, that the south end of said west line of the plaintiff's premises was at a stake and stones in line of land of one Samuel A. Orr, and the precise location of this stake and stones was also agreed. It was also agreed that there was a well upon the premises, about twenty feet southerly from the highway. The plaintiff did not claim that the defendant had ever committed any act of trespass in any part of the premises described in the plaintiff's declaration, east of said well. The plaintiff put in evidence his deed from Aaron Hobart.

Upon this evidence, the defendant asked the court to rule that, by a legal construction of said deed, the west line of the plaintiff's premises, beginning at a stake and stones agreed, must extend through the center of the well referred to in said deed, and that the plaintiff, by his said deed, was estopped from claiming any land west of a line running northerly from said stake and stones, through the center of said well, to the highway, and could not be permitted to show by any evidence any line extending any farther westerly than the center of said well. The court refused so to rule.

The defendant alleged exceptions to the refusal to rule as requested, and to the admission of the testimony tending to show that the west line of the plaintiff's land extended farther west than the center of said well.

Mr. Hosea Kingman, for defendant:

It is a familiar rule that courses and distances are controlled by monuments. *Howe v. Bass*, 2 Mass., 882; *Pernam v. Wood*, 6 Mass., 138; *Flagg v. Thurston*, 18 Pick., 150; *Frost v. Spaulding*, 19 Pick., 446; *Clark v. Munyan*, 22 Pick., 414; *George v. Wood*, 7 Allen, 16; *Morse v. Rogers*, 118 Mass., 572; *Galvin v. Collins*, 128 Mass., 526; *Woodward v. Nims*, 130 Mass., 70; *Devine v. Wyman*, 131 Mass., 73.

And this rule holds good, although the monument is described and referred to after the descriptive part of the deed. *Sanborn v. Rice*, 129 Mass., 392; *Miles v. Barrows*, 122 Mass., 582.

Parol evidence is not admissible to vary this construction. *Howe v. Bass*, *supra*; *Cook v. Babcock*, 7 Cush., 528; *Bond v. Fay*, 12 Allen, 88; *Hannum v. Kingsley*, 107 Mass., 360; *Henshaw v. Mullens*, 121 Mass., 147.

By the Court:

Looking at all the parts of the deed from Hobart to the plaintiff, it is clear that it was not the intention of the parties that the well should be a monument fixing the west line of the lot conveyed. It is not mentioned in the description in the granting part of the deed. The west line starts at a fixed point, where the parties agree there were a stake and stones, and thence runs "north forty-two degrees west, forty-four rods, to the fence at the highway." The description leaves the well on the plaintiff's lot, about eleven feet from the line.

The clause in the latter part of the deed, "except a right, which is reserved, to draw water at the well on the west line of said land," was

not intended to make the well a monument; it was inserted *alio intuitu*, for the purpose of creating in the grantor an easement in the plaintiff's land. If the well were a monument, the line would run through its center; each party would have an equal right to use it, and there would be no occasion for the grantor to reserve a right to draw water from it. In order to carry into effect the intention of the parties, the expression "on the west line of said land" must be interpreted as meaning near the west line, or on the west part of said land.

Exceptions overruled.

COMMONWEALTH of Massachusetts

c.

Michael KERRISSEY.

If a person keeps and uses premises for the illegal sale or keeping of intoxicating liquors at any period of time or on a single occasion covered by the complaint, he is guilty under the statute.

(Norfolk—Decided February 23, 1886.)

ON defendant's exceptions. *Overruled.*
Prosecution for the illegal keeping and sale of intoxicating liquors, and of maintaining a common liquor nuisance.

Mr. J. D. Eldridge, for defendant.

Mr. Edgar J. Sherman, *Atty-Gen.*, for Commonwealth:

Possession is enough even if it be but for a single occasion and for a short time. The offense of maintaining a common liquor nuisance may be committed by a violation of the statute on a single occasion. *Commonwealth v. Cogan*, 107 Mass., 212; *Same v. Gallagher*, 1 Allen, 592; *Same v. Higgins*, 16 Gray, 19; *Same v. Hoar*, 121 Mass., 875; *Same v. Cleary*, 105 Mass., 384.

By the Court:

A part of the government evidence was that in March 26, 1885, a day covered by the complaint, the saloon of the defendant was searched under a search warrant, and a bottle of beer found in a cupboard back of his bar. The defendant asked the court to rule that if this rum was kept for sale in the saloon by the defendant it was not sufficient to convict the defendant, unless the jury should find that the saloon was used at other times for the illegal keeping and illegal sale of intoxicating liquor by the defendant.

The court could not properly give this instruction, for if the defendant kept and used the premises for the illegal sale or keeping of intoxicating liquors at any period of time, or on a single occasion covered by the complaint, he is guilty of the offense charged, and it is not necessary to prove that he used it for the illegal purpose on other days or at other times. *Commonwealth v. Cogan*, 107 Mass., 212.

The instructions substantially to this effect, given in answer to the request of the defendant, are not open to exception.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

John McGRATH.

1. To convict a person of polygamy it must be alleged and proved that he had a wife living at the time of the second marriage.
2. The fact that a person was alive at a certain time affords some presumption that she was alive a month later, and in the absence of other evidence it would be deemed conclusive, but may be affected by the circumstances of the particular case.
3. In case of a second marriage it is for the jury to judge of the strength of the presumption of the innocence of defendant, as well as of the continuance of the life of the former wife, in view of all the circumstances of the case.

(Worcester—Decided November 24, 1885.)

ON defendant's exceptions. *Sustained.*
Indictment for polygamy.

The case is sufficiently stated in the opinion.

Messrs. Verry & Gaskill, for defendant.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth :

The rulings of the court were correct. There was no variance between the allegations in the indictment and the proof; the difference in the actual date of the marriage being immaterial; the marriage, in fact, having been proved. *P. S.*, ch. 214, § 26; *Commonwealth v. Ducey*, 107 *Mass.*, 206; *Same v. Morgan*, *Id.*, 205; *Same v. Hall*, 97 *Id.*, 578.

The marriage of the defendant and Nettie Wilfert was sufficiently proved by the certificate from the records. *P. S.*, ch. 145, § 29; *P. S.*, ch. 32, § 11; *Kennedy v. Doyle*, 10 *Allen*, 161.

There is no presumption of law as to the continued existence of a person. It is purely a question of fact for the jury. *Reg. v. Lumley*, 11 *Cox, C. C.*, 274; *S. C.*, *L. Rep.*, 1 *C. C.*, 196; *Hyde Park v. Canton*, 130 *Mass.*, 509; *Re Phené's Trusts*, *L. R.*, 5 *Ch. App. Cas.*, 139; *Davie v. Briggs*, 97 *U. S.*, 628, (bk. 24, *L. ed.*, 1086); *Rez v. Harborne*, 2 *Ad. & Ell.*, 540; *Rez v. Twynning*, 2 *Barn. & Ald.*, 386.

The presiding Judge properly instructed the jury as to the burden of proof. While the *onus probandi* is on the Government to prove all the material allegations in the indictment, and this beyond a reasonable doubt; yet if the defendant sets up any matter strictly in avoidance, the duty is upon him to prove it, and this, by the better authority, by a preponderance of proof. *Commonwealth v. Boyer*, 7 *Allen*, 306 and cases cited; *Whart. Cr. Ev.*, § 331.

W. Allen, J., delivered the opinion of the court :

The *Pub. Sts.*, ch. 207, § 4, provide that "Whoever, having a former husband or wife living, marries another person," shall be deemed guilty of polygamy. To convict a defendant of the offense, it must be alleged and proved that he had a wife living at the time of the

second marriage. This is sufficiently alleged in the indictment, and the motion to quash was properly overruled.

The only exception to the evidence of the former marriage is, that there was a variance between the allegation and the proof. The indictment alleges a marriage on January 23, 1880, and the evidence was of a marriage on January 24, 1880. The allegation of the time of the marriage was not material, and it was not necessary to prove it as laid.

The defendant offered evidence to prove that he was married, in 1876, to a woman who was alive within a month of the former marriage alleged in the indictment; and asked that the ruling be given that, if the first wife was alive a month before said January 24, the presumption of law, in the absence of evidence to the contrary, was that she was alive on that day, and that the jury would be warranted in so finding. The court instructed the jury that there was no presumption that she was alive on that day, but it must be proved as a fact; that, if there was any presumption, it was that the marriage was legal. We think that the instructions given, with the refusal to give those asked for, were liable to mislead the jury. The fact that a person is alive at a certain time does afford some presumption that he is alive a month later, as it does that he was alive an hour or a year later. It is evidence tending to prove that fact, which in ordinary cases, in the absence of other evidence, would be deemed conclusive. Its weight, of course, would be affected by any circumstances affecting the probability of the continuance of life in particular cases, or rendering it probable that death had occurred; and, in this case, the fact of the defendant's marriage is such a circumstance. But the question whether a person is alive at a certain time, whether a day or a month or a year or any period less than seven years, after direct evidence that he was living, is for the jury, to be determined by the general presumption or probability of the continuance of life, modified by the circumstances of the particular case. See, *Hyde Park v. Canton*, 130 *Mass.*, 505; *Kelly v. Drew*, 12 *Allen*, 107; *Rez v. Twynning*, 2 *B. & Ald.*, 386; *Nepean v. Knight*, 2 *M. & W.*, 894; *Lapsley v. Grierson*, 1 *H. L. Cas.*, 498, 505; *Rez v. Harborne*, 2 *A. & E.*, 540; *Re Phené's Trusts*, *L. R.*, 5 *Ch. App. Cas.*, 139; *Regina v. Lumley*, *L. R.* 1 *C. C.*, 196.

The jury were to judge of the strength of the presumption of the innocence of the defendant, as well as of the continuance of the life of his former wife, in view of all the circumstances affecting them. The instructions of the court were not merely that there was no presumption of law, and that the fact was for the jury to find upon the evidence, but were in effect a ruling that the presumption of innocence destroyed the presumption of the continuance of life, so that the fact that the first wife was alive a month before the second marriage was not to be considered as evidence that she was living at the time of that marriage. While leaving the question with the jury, the effect of the instructions was to withdraw from their consideration the competent and apparently plenary evidence upon which they might determine it.

Exceptions sustained.

Thomas MURRAY

v.

Patrick RILEY.

1. **Whether a conveyance** of real estate, accompanied by an agreement by the grantee to reconvey to the grantor on condition, **is a mortgage or a sale depends on the intention** of the parties, to be ascertained from the whole transaction as well as from the instruments.
2. **Evidence** in such a case, where the agreement to reconvey contained no undertaking by the grantor to pay the money for reconveyance, **examined** and found to warrant a finding that the **transaction was not intended to operate as a mortgage.**
3. There is no inconsistency between the relation of landlord and tenant and that of mortgagor and mortgagee; and a **mortgagee may maintain an action against the mortgagor for use and occupation** of the mortgaged premises, upon a contract to pay therefor.

(Decided January 9, 1886.)

ON defendant's exceptions. *Overruled.*
Complaint under Pub. Stat., ch. 175. The case was transferred to the Superior Court at the request of defendant upon a question of title, from the Second District Court of Bristol.

At the trial in the Superior Court without a jury, it appeared in evidence that the defendant on the 17th day of March, 1878, conveyed the demanded premises to the claimant by a warranty deed in usual form and soon after recorded; that on the same day the claimant, Murray, gave back a bond to the defendant, which was recorded in Bristol County, No.—Registry of Deeds, Feb. 27, 1885, and was as follows:

Know all men by these presents: That I, Thomas Murray, of Somerset, in the County of Bristol, in the Commonwealth of Massachusetts am held and stand firmly bound unto Patrick Riley, of Somerset aforesaid, in the sum of \$500 to be paid to the said Patrick Riley, his executors, administrators or assigns, to which payment well and truly to be made I bind myself, my heirs, executors and administrators, firmly by these presents.

Witness my hand and seal. Dated the 15th day of March, 1878.

The condition of this obligation is such, that if within one year from this date, upon the request of the said Patrick Riley or his heirs, executors or administrators, and the payment of the sum of \$817.81, lawful money of the United States, with interest on the same at the rate of 7 per cent per annum, payable monthly, the said Thomas Murray, his heirs, executors and administrators shall make, execute and deliver to him, the said Patrick Riley, his executors, administrators or assigns, a good and valid deed in fee, with customary covenants of warranty, of a certain parcel of land with the buildings thereon, bounded and described as follows, to wit: situated on the highway leading from the Village of said Somerset to Labor in Vain Bridge, so called, and opposite the Catholic Church, and bounded on the north by said highway, on the east by land of Thomas Bran-

non, on the south by land of heirs of Collins Chace and on the west by land of the Mount Hope Iron Co.; the premises being then in as good condition as they now are, necessary decay and deterioration excepted; and shall also duly acknowledge the same to be his free act and deed, then this obligation above written shall be wholly void and of no effect, but otherwise the same shall be and remain in full force and virtue.

Executed and delivered.

(Signed) Thomas Murray. (Seal)

In the presence of J. B. Slade.

After the execution of the deed and bond the defendant was and continued in possession of the demanded premises, except as hereafter stated. In August, 1884, but after August 9, 1884, the complainant gave him a notice to quit, in due form and duly served, for non-payment of rent. No question was raised as to the legal service of the notice. It appeared that the writ was brought after the expiration of the fourteen days mentioned in said notice.

Plaintiff testified as follows: Riley did not comply with the condition of the bond. He never paid or tendered me the amount he was to pay. After the expiration of the year, I told him he could live there another year by paying as rent \$6.25 a month. He agreed to pay that as rent. He didn't pay the full amount that year. He paid in all that year \$70. After that the rent was cut down to \$6 a month. He said it was enough, and paid it all along until last August. The rent day was the second Saturday of each month. He paid in July the rent up to then, and this was the last payment.

Other witnesses testified to various occasions between 1878 and 1884 in which Riley paid rent to Murray. It also appeared that before said deed was given, Murray held a first mortgage of \$600 on the land and estate in question, and one Brannon, a second mortgage of \$40, and that Riley owed sundry debts for which his property was attached. A default in the condition of Murray's mortgage had arisen. At the time Riley gave the deed first mentioned and as part of the consideration thereof, Murray paid up the second mortgage and said debts. The mortgage mentioned in said deed was the first mortgage.

It also appeared in evidence that in 1882, Murray put on an addition to the house at an expense of \$520, thus making an additional tenement in the house which Murray rented and received the rent of afterwards. The property was always taxed to Murray and was insured by Murray at his own expense. The defendant testified that the amounts paid by him were paid as interest, and denied that he agreed to pay rent. If the deed and bond constituted a mortgage, there was no evidence of any foreclosure thereof.

Upon this evidence the defendant requested the court to rule that the deed and the bond back constituted a mortgage; and that, inasmuch as there never had been any foreclosure of the same, the parties still stood in the relation of mortgagor and mortgagee, and the mortgagee never having been in actual possession of the demanded premises, this action could not be maintained.

The court declined so to rule, and found as facts:

1. That the transaction of March 15, 1878, relative to the deed and the bond, was not intended by the parties to operate as a mortgage, and the deed absolute in form was not intended for a deed of defeasance.

2. There was a parol contract between the parties at the expiration of the year mentioned in said bond, by the force of which the defendant became and was tenant at will of the complainant in the premises in question, and the recognized relation of landlord and tenant existed between the parties up to and at the date of the writ.

The court found and ordered judgment for the complainant. To the refusal of the court to rule as above requested, the defendant excepted.

Messrs. Cummings & McDonough, for defendant :

The deed and the bond, taken together, are in themselves the only evidence to be considered, in searching for the intention of the parties to the transaction. *King v. King*, 7 Mass., 498; *Cary v. Rawson*, 8 Mass., 159; *Harlow v. Thomas*, 15 Pick., 66.

Suppose, for illustration, that the evidence of the contract had been an ordinary mortgage deed, could the court then have found as a fact that the parties did not intend to have it operate as a mortgage? And yet, the legal effect of the transaction of March 17, 1878, relative to the deed and the bond, was the same as that of an ordinary mortgage deed. Pub. Stat., ch. 182, § 44; *Nugent v. Riley*, 1 Met., 117; *Murphy v. Calley*, 1 Allen, 107; *Bayley v. Bailey*, 5 Gray, 505.

Whatever may have been the intention of the parties, it cannot operate to defeat the legal effect of the transaction, *Bayley v. Bailey*, *supra*.

The bond contained all the requisites necessary to constitute a defeasance. It was executed and delivered at the same time with the deed; it related to the same subject matter; it was between the same parties; it was under seal and of as high a nature as the deed itself. *Harrison v. Trustees*, 12 Mass., 456; *Murphy v. Calley*, *supra*.

Since there was never any foreclosure under the statute, the relation of mortgagor and mortgagee existed at the time of the beginning of this action. Pub. Stat., ch. 181, §§ 1, 2.

Messrs. James M. Morton and Alfred H. Hood (Fall River), for plaintiff:

Whether the transaction of March 15 was a mortgage or was a sale and agreement to reconvey depended upon the intention of the parties. *Flagg v. Mann*, 14 Pick., 467, 478, 480; *Campbell v. Dearborn*, 109 Mass., 141; *Trow v. Berry*, 118 Mass., 147.

The court below has found as a fact that the deed and bond were not intended to constitute a mortgage, and such finding will not be revised here. *Sheffield v. Otis*, 107 Mass., 282; *Backus v. Chapman*, 111 Mass., 886; *Edmundson v. Bric*, 136 Mass., 189.

Devens, J., delivered the opinion of the court :

The Superior Court having found as a fact that the deed and the bond to reconvey were not intended to and did not constitute a mortgage, such finding will not be here revised, unless it shall be seen, as matter of law, that it

could not properly have been made. *Sheffield v. Otis*, 107 Mass., 282; *Edmundson v. Bric*, 136 Mass., 189.

Whether the transaction by which the defendant conveyed to the plaintiff the premises in question, receiving in return an agreement to reconvey on the performance of a certain condition, was a mortgage or sale depended on the intention of the parties, to be ascertained from the whole character of the transaction, as well as from the expressions in the instruments themselves. Undoubtedly those expressions might be so clear in the conveyance as to leave nothing for construction, as if the whole contract had been embraced in an ordinary mortgage deed with the usual provisions, showing that such conveyance was in truth only security for a loan. Where it appeared from an instrument, executed contemporaneously between grantor and grantee, that the grantor had a right to "redeem" the estate, and agreed to "refund" the money advanced, it was held to be necessarily a mortgage. *Bayley v. Bailey*, 5 Gray, 505.

Where it was agreed that if the party entitled to reconveyance should fail to pay at the time specified, the deed should be absolute "with no further right of redemption;" it was also held that the intent to make a mortgage was clear, as a right of redemption necessarily implied that a mortgage interest was all that was conveyed. *Murphy v. Calley*, 1 Allen, 107.

Where language is not explicit, and thus controlling any circumstances attending the transaction, it is competent to determine from these and the expressions used in regard thereto what the intention is. Conversely, it may thus be shown that a deed absolute in form is really a security for a loan. *Fiagg v. Mann*, 14 Pick., 467, 480; *Campbell v. Dearborn*, 109 Mass., 141; *Hassam v. Barrett*, 115 Mass., 256.

The plaintiff in the case at bar had held an earlier mortgage on this property; the defendant had made a second mortgage thereon to another person, and owed debts for which his equity of redemption was under attachment. The second mortgage and these debts were paid by the plaintiff. The deed was then made to the plaintiff who, on the same day, gave the bond to reconvey on payment of a specified sum. There was no agreement by the defendant to pay the money for reconveyance, nor are there any expressions to be found in the bond which indicate that there was any loan of money for which the deed was held as security. Where the intent that a transaction shall constitute a mortgage is not clear, the fact that there is no collateral undertaking to pay the money is important. As, in such case, the holder of the estate must bear the loss if property depreciates, it is equitable that he should have the profit arising from any subsequent advance in the value of the estate, if the terms of the bond are not complied with.

The court might properly have found that the transaction as to the deed and bond was not intended to and did not operate as a mortgage.

But if the transaction could have been treated as a mortgage, the finding of the court in favor of the plaintiff was still correct. Even if the only title of the plaintiff was that of mortgagee, it was proved that the defendant became

his tenant at will at the expiration of the time mentioned in the bond, agreed to pay and did pay rent for the premises, and that the relation of landlord and tenant existed between them at the date of the writ; and, further, that a formal notice to quit for non-payment of rent had been served on the defendant. There was nothing inconsistent between this relation and that of mortgagor and mortgagee. If any part of the mortgage debt remained due, the mortgagee would take the rents recovered in trust for and to apply towards its payment. Whether, in the absence of any agreement for payment, the mortgagee may maintain an action against the mortgagor for use and occupation of the mortgaged premises has been doubted; but that he may maintain such an action upon a contract to pay therefor has not been questioned. *Morse v. Merritt*, 110 Mass., 458.

Upon the findings that the relation of landlord and tenant existed and that the proceedings necessary to eject a tenant for non-payment of rent had taken place, judgment was properly rendered for the plaintiff.

Exceptions overruled.

William M. OSBORNE, Chairman of Special Committee of Common Council, *Petitioner*,

v.

George A. WILSON.

1. When it appears that, since a case was commenced, such changes have taken place that the questions involved are moot questions having no practical bearing on the case, they will not be considered.
2. When the members of a water board whose conduct is to be investigated by a committee of the council have been removed from office, and the only object of a further investigation is to procure evidence to be used in another suit, a petition to compel the attendance of witnesses before the committee will be denied.
3. A party to such suit should not be thus compelled to furnish evidence against himself to be used in a suit against him.

(Suffolk — Decided March 1, 1886.)

PETITION, to a Justice of this court by a Committee of the Common Council of Boston charged with the investigation of the facts relating to the purchase, by the water board, of land on Fisher Hill, praying that he will compel the attendance and testimony of George A. Wilson before the committee. *Denied.*

Mr. R. M. Morse, Jr., for the committee: Pub. Stat., ch. 169, § 7 provides:

Witnesses may be summoned to attend and testify, and to produce books and papers before a city council, or either branch thereof or a joint or special committee of the same, or either branch thereof, or a board of selectmen, at any hearing before either of them as to matters within their respective jurisdictions, and such witnesses shall be summoned in the same manner, be paid the same fees and be subject to the

same penalties for default as witnesses before Police Courts. The presiding officer of such council or of either branch thereof, and any member of such committee or board of selectmen may administer oaths to witnesses appearing before such council or either branch thereof, or any such committee or board, respectively.

The common council of a city has no power to commit or punish for contempt and so much of Stat. 1863, ch. 158, as undertook to confer that authority was unconstitutional and void. *Whitcomb's Case*, 1876, 120 Mass., 118.

Subsequently to this decision Stat., 1883, ch. 195, was enacted. This statute provides: "Any Justice of the Supreme Judicial Court or the Superior Court, either in term time or vacation, upon the application of any tribunal having authority to summon but not power to compel the attendance of witnesses and the giving of testimony before it, may, in its discretion, compel the attendance of such witnesses and the giving of testimony before any such tribunal in the same manner and to the same extent as before said courts." The present petition is made under this last named statute.

This committee is a "tribunal having authority to summon but not power to compel the attendance of witnesses and the giving of testimony before it" within the meaning of Stat., 1883, ch. 195.

The grand jury was already protected by the decision of this court that a witness refusing to testify before it might be punished by the court for contempt. *Heard v. Pierce*, 8 Cush., 338.

And a distinct statute provision covered cases before masters in chancery, auditors and county commissioners. Pub. Stat., chap. 169, § 6.

The power of justices of the peace to punish for contempts has generally been recognized. *Clarke's Case*, 12 Cush., 320; *Piper v. Pierson*, 2 Gray, 120; *State v. Copp*, 15 N. H., 212; *Re Cooper*, 82 Vt., 253.

The subject of inquiry committed by the Common Council to its committee was within the jurisdiction of the council; it was the investigation of the facts relating to the "purchase of two pieces of land on Fisher Hill in Brookline, by the water board of Boston, for the high service system." Stat., 1854, ch. 448, §§ 37, 51; Stat., 1885, ch. 266, § 1. See, Stat., 1846, ch. 167; Stat., 1849, ch. 187; Stat., 1864, ch. 271; Stat., 1865, ch. 181; Stat., 1871, ch. 185; Stat., 1872, ch. 177; Stat., 1873, ch. 287; Stat., 1881, ch. 129; Stat., 1875, ch. 80.

Chapter 27 Rev. Ordinances City of Boston, 1882, provides for the establishment of a water board.

Public Stat., ch. 205, § 10, provides for the punishment of any executive, legislative or judicial officer "who corruptly accepts a gift of gratuity, or a promise to make a gift, or to do an act beneficial to such officer," under an agreement that his official action shall be influenced thereby.

Section 11 provides a penalty for officials "authorized to procure materials, supplies or other articles, either by purchase or contract," etc., who shall take commissions, etc.

Section 12 imposes a penalty on any member of any municipal board of a city who is personally interested in any contract made by the board.

Wilson was a material witness in this inquiry, and the court might properly, in its discretion, compel his attendance and testimony.

Stat., 1883, ch. 195, is constitutional. The court will not declare a statute unconstitutional unless it clearly violates a provision of the Constitution. *Commonwealth v. Sav. Bank*, 5 Allen, 432; *Commonwealth v. Butler*, 14 Rep., 442; *M. V. & B. Wire Co. v. Brown*, 18 Rep., 591.

The only constitutional right which it can be claimed that this statute infringes is that secured by the 12th article of the Declaration of Rights: "No subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land." But the power to commit for contempt has always existed in the higher courts of justice and is part of the law of the land within the meaning of *Magna Charta* and of our Declaration of Rights. *Whitcomb's Case*, 120 Mass., 118, citing *Bac. Abr. Courts, E.*; *Re Fernandez*, 6 H. & N., 717; 10 C. B. N. S., 3; *Re Chiles*, 23 Wall., 157 (89 U. S., bk. 22, L. ed., 819); *Cartwright's Case*, 114 Mass., 230.

So it has been held that the House of Representatives of Massachusetts had such power so far as it was expressly conferred by the Constitution, ch. 1, § 3, arts. 10, 11; *Burnham v. Morrissey*, 14 Gray, 226.

On the other hand, it is well settled that legislative bodies not exercising judicial functions and not expressly authorized by the Constitution, have not the power to punish for contempt. It has been so held in the case of the House of Representatives of the United States. *Kilbourn v. Thompson*, 103 U. S., 168 (bk. 26, L. ed., 377).

And of the Senate of the State of New York. *People v. Keeler*, 32 Hun, 563.

And of the common council of the City of Boston. *Whitcomb's Case*, *supra*.

But it is entirely competent for the Legislature from time to time to enlarge and vary the jurisdiction of the courts, and to provide new tribunals, instrumentalities and methods for the discovery of truth. See, *Const. Mass.*, part 2, ch. 1, § 3.

Special reliance may be made on the New York Statute and cases. N. Y. Stat., 1855, ch. 20; *Briggs v. Mackellar*, 2 Abb. Pr., 30; *Briggs v. Matzell*, 2 Abb. Pr., 156.

New York Stat., 1860, ch. 39, §§ 1, 2, is substantially the same as Stat., 1855, ch. 20, so far as the question of constitutionality is concerned.

An application under the Rev. Stat. of Wis., § 4066, p. 990, was granted by the court. *State v. Lonsdale*, 48 Wis., 348. See also, Rev. Stat. of N. J., 1833, § 2; Ind. R. S., § 426.

Messrs. Augustus Russ and Seth J. Thomas, for defendant:

It is the settled law of this Commonwealth that a committee of the common council or board of aldermen, or of any such municipal board, is not a tribunal invested with any judicial power of judicial functions. *Whitcomb's Case*, 120 Mass., 118, 123.

The powers of committees of the national Legislature and those of either house of the supreme legislative bodies of a State to compel any person to attend or be examined as a wit-

ness is limited to examinations occurring in course of some investigation ordered for the purpose of obtaining information necessary and proper to enable such bodies to legislate, or to take some action within the exercise of their constitutional powers. *Kilbourn v. Thompson*, 103 U. S., 168 (bk. 26, L. ed. 377); *Keeler v. People*, N. Y. Ct. App., Oct. 6, 1885, 1 Cent. Rep., 157.

In the government of this Commonwealth one department cannot exercise the functions of another department. *Const. of Mass.*, Bill of Rights, § XXX.

Upon the subject of this investigation, to wit: a purchase of two pieces of land for the extension of the high service system, the common council had no power to legislate. The Legislature of the Commonwealth had delegated the whole subject to the City of Boston, "by and through the agency of the Boston Water Board." See, *Acts of 1881*, ch. 129.

Morton, Ch. J., delivered the opinion of the court :

It appears by public events, of which the court may take judicial notice and by admissions of the counsel at the bar, that since this case was commenced such changes have taken place in the state of things that the principal questions argued have become little more than mere moot questions, which have no practical bearing upon the decision of the case. The petition is brought under the Statute of 1883, ch. 195, by the Chairman of a Special Committee of the Common Council of Boston for the year 1885. This Committee was appointed under an order of the common council passed June 4, 1885, which is as follows: "Ordered, that a special committee of five members be appointed by the chair to investigate and report to the council all the facts relating to the recent purchase by the water board of two pieces of land on Fisher Hill, in Brookline, for the extension of the high service system."

The common council of 1885 has ceased to exist, and its committee has no further power to conduct any investigation. But if this is not an insuperable obstacle in the way of maintaining this petition, there are other facts which show that the prayer of the petitioner should not be granted. The members of the water board whose conduct was to be investigated, have been removed from office, and the city has brought a suit against Wilson and W. A. Simmons to recover money alleged to have been fraudulently obtained by them in the purchase and sale of the two pieces of land on Fisher hill. The only object which would be accomplished by a further investigation is to procure evidence to be used in this suit. The Statute of 1883 leaves it entirely to the discretion of the justice to whom the application is made, whether he shall issue an order compelling the witness to testify. In this case, the Justice to whom the petition was presented has reserved, not merely the question of the constitutionality of the statute, but the whole question, whether, in the discretion of the court, Wilson should be compelled to testify. If we assume, in favor of the petitioner, that the statute is constitutional and applicable to the case, yet we are clearly of opinion that, as the case now stands, it would not be the exercise of a wise or just

discretion to compel the witness to testify. He would thus be compelled to disclose in advance his defense, and to furnish evidence against himself to be used in a suit against him. In that suit the city may file interrogatories to the defendants or examine them as witnesses, but it would be unjust to Wilson and giving the city an unfair advantage to compel him to appear and testify before a committee representing the plaintiff in that suit.

Without considering the other questions raised in the case, we are of opinion that in the exercise of the discretion of the court or of any Justice, the prayer of the petitioner ought not to be granted.

COMMONWEALTH of Massachusetts

v.

Karl WACHENDORF.

In a prosecution brought under § 1, Stat. 1885, chap. 90, which provides that no person shall sell or expose or keep for sale **spirituous** or intoxicating liquor, except as authorized in this chapter, **defendant is not necessarily the seller** when the sale proved was made by a servant without his knowledge, in opposition to his will and **contrary to his directions.**

(Suffolk—Decided February 26, 1886.)

ON defendant's exceptions. *Sustained.* Criminal prosecution for sale of intoxicating liquors at a time of the day prohibited by conditions in the license.

The facts are sufficiently stated in the opinion.

Mr. Augustus Russ, for defendant:

The rule here stated is too well settled to need further citation; but that the sale by the defendant's servant or agent is only *prima facie* evidence of the assent of the employer and may be rebutted has also been settled by the decisions in: *Rez v. Almon*, 5 Burr., 2686; *Verona Cent. C. Co. v. Murtaugh*, 50 N. Y., 314, 319; *Barnes v. State*, 19 Conn., 398, 406; *State v. Wentworth*, 65 Me., 234, 240.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth:

The ruling of the court was correct. The instructions of the presiding Justice were clearly correct; one having a license must, at his peril, keep within the terms thereof. It was the duty of the defendant, not only to instruct his servants as to the time during which sales of intoxicating liquor might, under his license, be legally made, but also to see that such instructions were obeyed and followed. No circumstances were shown which relieved the defendant from the responsibility for the wrongful act. *Commonwealth v. Holmes*, 119 Mass., 195; *Same v. Uhrig*, 138 Mass., 492; *Same v. Barnes*, 138 Mass., 511 and cases cited; *George v. Gobe*, 128 Mass., 289; *Commonwealth v. Kelley*, 1 New Eng. Rep., 384 (*ante*).

Morton, Ch. J., delivered the opinion of the court:

The complaint charges that the defendant, on

October 3, 1885, unlawfully sold intoxicating liquors between the hours of 11 at night and 6 in the morning. Stat., 1885, chap. 90, § 1.

At the trial it appeared that the defendant kept a restaurant and saloon and that he had a license, one of the conditions of which was that no sale of spirituous or intoxicating liquors should be made therein between the hours of 11 at night and 6 in the morning. There was evidence tending to show a sale, by one of the defendant's witnesses, of a bottle of Bass' ale after 11 o'clock at night on the day named in the complaint. The defendant introduced evidence to show that he had given strict orders to close the sale of intoxicating liquors at 11 o'clock at night, and wished the court to note that "If one of his *employés* willfully or in violation of his instruction had sold a bottle of ale on that night, after 11 o'clock, such a sale would not make him liable under this law."

The court refused this instruction and instructed the jury that the license was violated if any sale was made after 11 o'clock, though by a servant in violation of the instructions of the defendant; and that if the sale proved in this case was made by a servant of the defendant in the course of business which he was doing for the defendant, defendant was liable, although he had given directions to his servant not to sell after 11 o'clock.

It may be that a license is forfeited by the unauthorized act of another person, done without the knowledge and against the express directions of the licensee. The Legislature has judged it wise, in view of the wrong devices resorted to in order to waive the law, to make the conditions of license very stringent.

It has been held in several cases that a licensee takes his license subject to the conditions whatever they may be, and is bound at his peril to see that these conditions are complied with or to lose the protection of his license. *Commonwealth v. Uhrig* 138 Mass., 492; *Same v. Barnes*, 138 Mass., 511 and cases cited.

But the question in this case is not whether the defendant's license is forfeited.

The complaint is not brought under the 18th section of chap. 100, of the Public Statutes, assigning that he has violated the provisions of his license. It is brought under the 1st section, which provides that "No person shall sell or expose or keep for sale spirituous or intoxicating liquor, except as authorized in this chapter."

It was held in *Commonwealth v. Nichols*, 10 Met., 259, decided under a law similar in its terms, that the defendant was not liable necessarily as a seller, when the sale proved was made by a servant without his knowledge, in opposition to his will and which was in no way participated in, approved or countenanced by him. This decision is conclusive of the case before us. It would require a clear expression of the will of the Legislature to justify a construction of a penal statute which would expose an innocent man to a disgraceful punishment for an act of which he had no knowledge, which he did not in any way take part in or authorize, but which he had forbidden.

In other parts of the statute, where the

Legislature intends to impose a more stringent liability, different language is used.

Thus broader language is used in the conditions of the license, such as "That no sale of spirituous or intoxicating liquors shall be made 'between 11 and 6 o'clock,' that no liquor except such as is of good standard quality and free from adulteration shall be kept or sold," that "there shall be no disorder, indecency," etc., on the premises. It may be that the fair inference is that the Legislature intended by the use of this language to hold the licensee responsible for the unauthorized acts of others, and to require that he should see at his peril that the conditions were complied with. Such a construction has been given to the 12th section, which provides that no licensee shall place or maintain or permit to be placed or maintained on the premises any screen, curtain or other obstruction.

It was held that the defendant was liable for a screen or curtain which a servant maintained in the absence of the defendant and against his orders, upon the ground that in view of the language used and the nature of the prohibited act, the inference was that the Legislature intended to hold the licensee responsible for the condition of his premises, and liable whether the prohibited act was done by him personally or by his agent left by him in charge of his business. *Commonwealth v. Kelley*, [ante, 384.]

The 1st section, upon which this complaint is based, subjects to punishment any person who sells liquor. It is to be presumed that the Legislature intended to use the language in its natural sense and with the meaning given to equivalent language by the court in *Commonwealth v. Nichols*, 10 Met., 259. It is not a necessary or reasonable construction to hold that it subjects to punishment a person who does not sell, because a servant in his employment, in opposition to his will and against his orders, makes an unlawful sale.

We are, therefore, of the opinion that the instructions requested by the defendant should have been given.

Of course, it would be for the jury, under the instruction, to determine whether the defendant did in good faith give instructions, intended to be obeyed and enforced, that no sale should be made after 11 o'clock. If he did and a sale was made in violation of them and without his knowledge, he cannot be held guilty of the offense charged in the complaint.

Exceptions sustained.

William PRAY
v.
Charles STEBBINS.

1. **Tenancy by entireties** is essentially a joint tenancy as modified by the common-law doctrine that husband and wife are one person, and not changed by the statutes enacting that "Conveyances and devises of land made to two or more persons shall be construed to create estates in common and not in joint tenancy," etc.
2. **Statutes enacted to enable married women to take and hold property to**

their sole and separate use **do not** in terms apply to an estate granted to husband and wife which conveys **common-law rights** incapable of severance; and **construing** the different provisions of the **statutes** in relation to **husband and wife** and conveyances by married women, **with reference to each other**, it is clear the Legislature intended that this peculiar tenancy by entireties should be **preserved** as it existed at common law.

3. **Evidence of what a witness testified to on a former trial** of the cause, if the witness be dead, is **competent**; and where such witness made a **statement** before the judge of the trial court, in the **presence of defendant** and his counsel, at the trial, and it is not shown how he could have made the statement unless he was treated as a **witness** by the court, and no denial of the fact stated is shown, the **testimony is competent** as some evidence of an **admission** of the fact by the defendant.

(Middlesex—Decided February 26, 1886.)

ON report. *Judgment on verdict for plaintiff.*
This was an action under chap. 175, Pub. Stats., to recover possession of a room in a dwelling house in Melrose, alleged to be unlawfully detained by the defendant.

The plaintiff claimed title under a lease in the ordinary form, bearing date June 27, 1884, whereby Orice K. Stebbins leased to him for one year from said date real estate which included said dwelling house. He also put in evidence a deed bearing date October 31, 1868, whereby said real estate was conveyed to Orice K. Stebbins and Ann, his wife, to have and to hold, etc.; to the said Orice K. Stebbins and Ann, his wife, their heirs and assigns, etc. The evidence tended to show that the defendant was in possession of the room in question under the authority of the said Ann Stebbins, either as a tenant at will or a licensee, and that he forcibly resisted the plaintiff's effort to deprive him of that possession.

The defendant asked the court to rule that the lease to the plaintiff from Orice K. Stebbins did not give him a title upon which he could maintain this process against the defendant, if he was in possession as licensee or tenant at will under Ann Stebbins. The court declined so to rule and the defendant excepted.

To prove notice to the defendant, of the making of the lease and of the plaintiff's claim under it before the suit was brought, the plaintiff called witnesses who testified that the defendant was present and was represented by counsel at the trial of this action in the district court, and that one John G. Robbins, a constable of Malden, since deceased, was also present and stated to the presiding Judge in the course of the trial, that he served such notice upon the defendant, and that there was no denial of the notice on the part of the defendant during that trial. The witnesses testified that they could not remember whether said Robbins had been sworn or testified as a witness at the time of making such statement, unless his making the statement was to be considered testifying. To the admission of this evidence the defendant excepted,

There was other evidence introduced by the plaintiff on the question of notice, all of which was uncontradicted.

The jury found for the plaintiff. At the request of the defendant the case is reported to the Supreme Judicial Court for decision of the questions of law involved. If there was error of law in the above refusal to rule, or in the admission of testimony, the verdict to be set aside and a new trial granted; otherwise judgment is to be entered on the verdict.

Messrs. M. Coggan and William Schofield, for plaintiff.

Messrs. Wm. P. Harding and A. V. Lynde, for defendant:

By the deed of Tibbetts to Stebbins and his wife in 1868, a joint and indivisible estate was created in them and the survivor of them, and they became the joint owners and were in joint possession of the entire estate. P. S., ch. 126, §§ 5, 6; *Wales v. Coffin*, 13 Allen, 215; *Pierce v. Chace*, 108 Mass., 254; *Mander v. Harris*, L. R., 24 Ch. D., 222; also, S. C. L. R., 27 Ch. D., 186; *Jones v. Oyle*, L. R., 8, Ch. App. Cas., 192.

A written lease for years has the same legal effect as a conveyance in fee, and one joint tenant cannot convey or lease the joint estate in entirety. Such a lease is invalid. *Dillon v. Brown*, 11 Gray, 179; *Kelly v. Waite*, 12 Met., 302; *Pratt v. Farrar*, 10 Allen, 520; *Tainter v. Cole*, 120 Mass., 162; *Taylor, Land & Ten.*, Willard's 7th ed. § 114; *Shep. Touchstone*, 268.

The wife's real estate, which is not her separate property, cannot be conveyed except by the joint deed of husband and wife. Nor can he deprive her of her right of possession and occupation without her consent. G. S., chap. 108, §§ 1, 2; P. S., chap. 147, §§ 1, 2; *Walsh v. Young*, 110 Mass., 399; Stat. 1874, chap. 184.

The plaintiff cannot maintain proceedings against the defendant to recover possession of the room, under P. S., chap. 175.

Nor under the lease, because it is not a joint lease and is invalid. Nor of the whole estate, because the wife had a right of possession equally with the husband. Nor against the defendant, because he was lawfully in quiet possession and actual occupancy prior to the date of the lease on which the plaintiff relies. *King v. Dickerman*, 11 Gray, 480; *Boyle v. Boyle*, 121 Mass., 87; *Woodside v. Ridgeway*, 126 Mass., 292; *Walsh v. Young*, *supra*; *Austin v. Shaw*, 10 Allen, 552; *Webster v. Vandeverter*, 6 Gray, 428; 1 Washb. Real Prop., 642.

The defendant, being in peaceable and lawful possession, was entitled to have a proper notice of the transfer of the right of possession to the plaintiff before the latter could maintain an action under P. S., chap. 175. *Furlong v. Leary*, 8 Cush., 409; *Decker v. McManus*, 101 Mass., 68; *Right v. Cuthell*, 5 East., 491.

In *Commonwealth v. Kinison*, 4 Mass., 646, Parsons, Ch. J., says: "It is an indispensable rule of law that evidence of an inferior nature which supposes evidence of a higher in existence, or which may be had, shall not be admitted." *Commonwealth v. Goldstein*, 114 Mass., 276.

The evidence which was admitted, the declarations of a deceased officer who served the notice without first proving the contents of the notice, or his return of doings thereon, was in-

competent. *Warren v. Nichols*, 6 Met., 264; *Morrill v. Titcomb*, 8 Allen, 100.

There was no evidence that the officer, when making the declarations, was a witness testifying under oath. 1 Greenl. Ev., § 168.

Field, J., delivered the opinion of the court:

The real property was conveyed to Orice K. Stebbins and Ann his wife, their heirs and assigns, by deed dated October 31, 1868. At common law both husband and wife were seised of the estate thus granted *per tout et non per my*, as one person and not as joint tenants or tenants in common. There could be no severance of such an estate by the act of either, and no partition of the land during their joint lives, and the survivor became sole seised of the entirety of the estate. *Pierce v. Chace*, 108 Mass., 254; *Wales v. Coffin*, 13 Allen, 218.

This tenancy by entireties is essentially a joint tenancy as modified by the common-law doctrine that husband and wife are one person, and was not changed by our statutes enacting that "Conveyances and devises of land made to two or more persons shall be construed to create estates in common and not in joint tenancy unless," etc., because, among other reasons, the statute expressly excepted conveyances and devises to husband and wife. P. S., chap. 126, §§ 5, 6; G. S., chap. 89, §§ 13, 14; R. S., chap. 59, §§ 10, 11; *Wales v. Coffin*, *ubi supra*. See, *Shaw v. Hearsey*, 5 Mass., 522.

This exception was repealed and conveyances to husband and wife declared to create estates in common by Stat., 1885, ch. 237; but this statute cannot affect the decision of this case, as it was passed after the plaintiff's right had become vested and his action brought.

The statutes which were enacted before this conveyance, to enable married women to take and hold property to their sole and separate use, do not in terms apply to an estate granted to husband and wife. St., 1845, ch. 208, § 3; St., 1855, ch. 304; St., 1857, ch. 249; G. S., ch. 108, § 1.

Neither do the statutes on the same subject enacted since their conveyance. St., 1874, ch. 184; P. S., ch. 147, § 1; St., 1884, ch. 301; St., 1885, ch. 255.

In *Pierce v. Chace*, *ubi supra*, the deed to husband and wife was dated June 29, 1857, which was the day on which St., 1857, ch. 249, took effect. The deed was held to convey the common-law rights, although the effect of the statutes then in force relating to the separate property of married women was not noticed.

In *Hayward v. Cain*, 110 Mass., 273, the deed was dated September 17, 1866, and recited a consideration paid by the husband and wife, but the grant was to the husband, and the court found that there was a resulting trust in favor of the wife in one half of the land. But the court say: "It is true that if the deed had been made to them jointly, as the master reports it was their understanding that it should be, it would have created an estate in them which would have been incapable of severance; *Wales v. Coffin*, *supra*; because that is the legal construction of such a deed, and the circumstances of the purchase would not be admissible to show a different intent."

The statutes enabling a married woman to receive, hold, manage and dispose of real and personal property in the same manner as if she

were sole cannot, we think, be construed to apply to the estate, by entireties, of husband and wife, because other statutes in effect prevent their conveyance from being construed as creating a tenancy in common, and if a married woman held this estate as if she were sole she would hold it as a tenant in common with her husband. At common law, by a conveyance to A and B, his wife, and C, A and B took one half and C the other; but, if under the statutes, B is to take as if she were sole, A, B, and C would each take a third, unless it were held that these statutes did not affect her rights, except those between husband and wife. See, *Mander v. Harris*, L. R., 27, Ch. Div., 166.

The provisions requiring the assent of the husband, in writing, to her conveyance on his joining with her in the conveyance, or the consent of one of the judges, etc., in G. S., ch. 108, § 3, which were in force when this conveyance was made, could not be held applicable to an estate by entireties in husband and wife, unless it be held that the husband's assent, in writing, to her conveyance, or the consent of one of the judges, etc., either enables her to convey the estate of both, or severs the wife's interest so that she can convey that in the same manner as if she held an interest as an ordinary joint tenant or as tenant in common with her husband, and there are no words that indicate any such intent on the part of the Legislature. Such an intent is not to be assumed where other provisions of the statutes prevent conveyances to husband and wife from being construed as creating estates in common, and when no authority is given to the husband to sever this tenancy by conveyance, which he cannot make, or to convey his own real property by an assent to the deed of his wife; and it was not the intention that the effect of his assenting to his wife's conveyance should be to convey any property which he had in his own right. If the wife had her interest in such a tenancy as this is, to her sole and separate use, the tenancy would be destroyed, because the essential characteristic of the estate is that the interest of husband and wife in it cannot be separated; and construing the different provisions of the statutes with reference to each other, we think it appears clear that the Legislature intended that this peculiar tenancy should be preserved as it existed at common law.

The decisions in other States upon the effect of somewhat similar statutes turn more or less upon the particular terms of the statutes. For decisions that these statutes do not affect estates by entireties, see: *Bertles v. Nunan*, 92 N. Y., 152; *Marburg v. Cole*, 49 Md., 402; *Hulett v. Inlow*, 57 Ind., 412; *Hemingway v. Scales*, 42 Miss., 1; *McCurdy v. Canning*, 64 Pa. St., 39; *Dicer v. Dicer*, 56 Pa. St., 106; *Fisher v. Probin*, 25 Mich., 347; *Robinson v. Eagle*, 29 Ark., 202; *McDuff v. Beauchamp*, 50 Miss., 581; *Rogers v. Grider*, 1 Dana, 242; *Den v. Hardenbergh*, 5 Halst., 42.

Contra: *Cooper v. Cooper*, 76 Ill., 57; *Hoffman v. Stigers*, 28 Iowa, 302; *Clark v. Clark*, 56 N. H., 105.

The rights of husband and wife in this estate, therefore, must be determined by the common law. By that law the right to control the possession of such an estate during their joint lives is in the husband, as it is when the wife

is sole seised; "neither can convey during their joint lives so as to bind the other or defeat the right of the survivor to the whole estate."

Pierce v. Chace, *ubi supra*.

But subject to this limitation the husband has the rights in it which are incident to his own property and the rights which by the common law he acquires in the real property of his wife. He has, during coverture, the usufruct of all the real estate which his wife has in fee simple, fee tail, or for life. By the great weight of authority he has a right to make a lease of an estate conveyed in fee to him and his wife, which shall be good against the wife during coverture and shall fall only in the event of his wife's surviving him. *Washburn v. Burns*, 84 N. J. L., 18; *Barber v. Harris*, 15 Wend., 615; *Jackson v. McConnell*, 19 Wend., 175; *Topping v. Sadler*, 5 Jones (N.C.) L., 357; *Fairchild v. Chastelleux*, 1 Barr, 176; *Pollock v. Kelley*, 6 Ir. C. L., 387, 375; *Bertles v. Nunan*, *ubi supra*; *Wycoff v. Gardner*, 1 Spencer, 556; *Ames v. Norman*, 4 Sneed, 688; *Ward v. Ward*, L. R., 14 Ch. D., 506; *Godfrey v. Bryan*, L. R., 14 Ch. D., 516.

If it be assumed that the defendant was a tenant at will or licensee of the wife, even with the permission of the husband, the execution and delivery of the written lease by the husband to the plaintiff determined the tenancy at will or the license, and the plaintiff was entitled to the possession.

The remaining exception is to the admission of the testimony of what one Robbins, who died before the trial in the superior court, said or certified to at the trial of this action in the district court, concerning the service on the defendant of a notice from the plaintiff that a lease had been made to him and that he claimed possession under it. The objection was not taken, on the ground that this was testimony of the contents of a written paper which could have been produced. Evidence of a witness in a former trial of this action, if the witness be dead, is competent. It is not certain whether the statement of Robbins was made before or after he was sworn as a witness; but it was made to the presiding Judge of the district court in the course of the trial and in the presence of the defendant and his counsel and, as far as appears, without objection by them, and "there was no denial of the notice on the part of the defendant during that trial." If it was a part of Robbins' testimony it was clearly competent. It is not shown how Robbins could have been permitted to make the statement to the presiding Judge, unless he was a witness or was treated as a witness by the court with the consent of the defendant; but if the statement of Robbins with the consent of the defendant and his counsel was taken by the court as evidence of any fact in the cause, it might well be considered that it was the duty of the defendant or his counsel to deny the fact stated, if he did not intend to admit it, and the testimony is competent as some evidence of an admission by the defendant.

Judgment on the verdict.

COMMONWEALTH of Massachusetts

v.
Philias RAY.

1. **Where a statute authorizes a city to prohibit persons, under a penalty, from riding or driving in its streets faster than a specified rate fixed by the city, it does not authorize the imposition of a penalty for driving on any street "at an immoderate gait, so as to endanger or expose to injury any person standing, walking or riding in or on the same."**
2. **No authority for the ordinance in question can be drawn from the Pub. Stats. chap. 27, § 15, authorizing cities and towns to make by-laws for the purpose of maintaining their internal police.**

(Bristol—Decided January 7, 1886.)

ON defendant's exceptions. *Sustained.*

Complaint for a violation of an ordinance of the City of New Bedford.

Before the jury was impaneled, defendant filed a motion to quash. At the hearing upon said motion, defendant contended that the ordinance was passed in pursuance of § 13, chap. 58, P. S., and was, therefore, vague, uncertain, unreasonable and void, in that it transcended the power vested in the city under the statute, and was inconsistent with and repugnant to the provisions of said statute and the laws of the Commonwealth.

The court overruled the motion of defendant and ruled for the purpose of the trial that said ordinance was valid. To which ruling and refusal to rule, defendant excepted and appealed.

At the trial, under instructions not excepted to, the jury returned a verdict of guilty against defendants who alleged exceptions, and an appeal was allowed.

Mr. T. F. Desmond, for defendant:

A city or town may, by ordinance or by-law, prohibit persons from riding or driving beasts of burden, carriage or draft, upon any one of the streets or ways for public travel therein, at a rate of speed which it deems inconsistent with the public safety and convenience. Pub. Stats. chap. 58, § 18; St. 1865, chap. 31, § 1.

An ordinance, to be valid: 1, must be lawful and reasonable; 2, must not be oppressive; 3, must be impartial, fair and general. Dill. Mun. Corp., chap. 12.

An unreasonable by-law is void. *Commonwealth v. Robertson*, 5 Cush., 438.

A by-law to be valid must be reasonable. If it places an unreasonable restraint upon many citizens, it is void. *Austin v. Murray*, 16 Pick., 125; *Commonwealth v. Stodder*, 2 Cush., 569.

A by-law or ordinance which exceeds the power conferred by the Legislature, is unreasonable and wholly void. *Commonwealth v. Wilkins*, 121 Mass., 356.

To prove the violation of an ordinance, *mala prohibita*, it is not necessary to show that it was done willfully. The ordinance declares a thing to be illegal; it, therefore becomes illegal to do it without a wrong motive charged or proved. *Commonwealth v. Adams*, 114 Mass., 324; *Commonwealth v. Farren*, 9 Allen, 491.

Applying these principles to the ordinance of New Bedford, its provisions are obviously vague, uncertain, unreasonable and oppressive.

Under the ordinance, the jury are to determine, not only that the driving was immoderate but also that it actually endangered or exposed persons to injury.

Therefore, they determine in each case the rate of speed which is to be deemed inconsistent with the public safety; whereas, the statute makes it the duty of the City of New Bedford to prohibit a rate of speed which it deems inconsistent with the public safety.

Under the ordinance, the jury are the judges of the law and the facts. The rate of speed which ought to be allowed in different cities is a practical question, upon which the mayor and the city council can judge better than any court or jury. See, *Op. Dewey, J., Commonwealth v. Robertson*, 5 Cush., 442.

But the prosecution may contend that the city ordinance is valid under the statute giving cities and towns power to enact by-laws for preserving the peace and good order, and maintaining its internal police. Pub. Stats., ch. 27 § 15; Stat. 1785, ch. 75, § 7.

Unquestionably, under this statute a city could adopt a valid by-law prohibiting fast driving. *Commonwealth v. Worcester*, 8 Pick., 462.

A statute is impliedly repealed by a subsequent one revising the whole subject matter of the first. *Commonwealth v. Cooley*, 10 Pick., 37; *Nichols v. Squire*, 5 Pick., 168; *Goddard v. Boston*, 20 Pick., 407; *Whitney v. Blanchard*, 2 Gray, 208; *Bartlet v. King*, 12 Mass., 545; *Commonwealth v. Kelliher*, 12 Allen, 490.

A later statute containing provisions plainly repugnant to those of a former statute, repeals it as absolutely as by a negative clause. *New London N. R. R. Co. v. Boston & A. R. R. Co.*, 102 Mass., 389; *Commonwealth v. Kelliher*, *supra*.

It is obvious that § 13 of Pub. Stats., ch. 53, was substituted for § 15 of Pub. Stats., ch. 27, with reference to the power of cities and towns to enact by-laws prohibiting fast driving.

Mr. Edgar J. Sherman, Atty-Gen., for the Commonwealth.

W. Allen, J., delivered the opinion of the court:

The Pub. Stats., ch. 53, § 13, provide that "A city or town may by ordinance or by-law prohibit persons from riding ordinary beasts of burden, carriage or draught, upon any of the streets or ways for public travel therein, at a rate of speed which it deems inconsistent with the public safety or convenience, under such penalties as it may impose for breaches of other ordinances or by-laws." The complaint charges a violation of an ordinance of the City of New Bedford, which provides that "no person shall ride any horse or drive any horse or horses attached to any carriage of any description either of burden or pleasure, or cause the same to be rode or driven, in any street, lane or alley, or over any bridge, in the city, at an immoderate gait, so as to endanger or expose to injury any person standing, walking or riding in or on the same." The defendant moved to quash the complaint, for the reason that the ordinance was not authorized by the statute; which motion was overruled.

The statute authorizes a city to prohibit persons, under a penalty, from riding or driving in

its streets faster than a specified rate of speed fixed by the city. Perhaps under this statute, a city might prohibit driving at a particular gait, as at a trot or gallop, as in *Commonwealth v. Worcester*, 3 Pick., 462; but it clearly does not authorize the imposition of a penalty for driving at a rate of speed or at a gait that shall be found, upon inquiry into the circumstances, to have been immoderate, so as to have exposed persons to injury. The intention of the Legislature was that the city should determine what act should be unlawful, not that it should annex a penalty to an act otherwise unlawful. The latter would partake rather of the character of a law than of a by-law or city ordinance.

We think that the statute was intended to prescribe the manner in which towns and cities can prohibit, under penalties, fast driving in their streets; and that no authority for the ordinance in question can be drawn from the Pub. Stats., ch., 27, § 15, authorizing towns to make by-laws, for the purpose of maintaining internal police thereof.

Exceptions sustained.

Charles FRAZER

v.

BIGELOW CARPET CO.

1. In an action for damages for the negligent destruction of property, where a party has been prevented from having his damages ascertained and in a sense has been kept out of the sum which would have made him whole at the time, so long that that sum is no longer an indemnity, there is no reason why the jury, in their discretion in determining the amount of the original loss, may not consider the delay caused by the defendant, and take interest on the original damages as a measure.
2. Where plaintiff made timely presentation of his claim for damages, and was informed that defendant denied liability, plaintiff might postpone his suit until a test case* had settled the question. The delay for that purpose was in such event caused by defendant as truly as if the case had been begun and continued to await the decision in the test case.

(Suffolk—Decided February 24, 1886.)

ACTION OF TORT, to recover damages for the washing away of certain dams, buildings and soil, and certain personal property belonging to plaintiff, by the escaping of water accumulated by defendant in its reservoir or dam, and for interest on the award.

The action was brought September 12, 1881. The defendant's liability was admitted on the authority of *Bryant v. Bigelow Carpet Co.*, 131 Mass., 491, this loss being another like result of the cause of the loss in that case. The auditor to whom the case was referred assessed damages, as of the day of the injury, at \$4,000, to wit: \$2,700 on the real estate, and \$1,300 on

the personal property. The only question is: whether or not the plaintiff is entitled to interest on the loss from the date of the injury.

Messrs. John C. Coombs and N. U. Walker, for plaintiff:

This question seems to be settled by the best possible precedent. The record of the case, upon the authority of which the defendant's liability is admitted in this case, awards interest for the same period, i. e., from the date of the injury instead of the date of the writ; and that award, with all questions of law reserved, has been before this court and approved. *Bryant v. Bigelow Carpet Co.*, *supra*.

The right to interest is also supported from analogy, both as to the real and personal property. In taking land by right of eminent domain, interest is allowed if payment is delayed. *Parks v. Boston*, 15 Pick., 198-208; *Whitman v. B. & M. R. R.*, 7 Allen, 318-326; *Reed v. Hanover B. R. R. Co.*, 105 Mass., 303, 305; *Old Col. R. R. Co. v. Miller*, 125 Mass., 1-4.

So in case of injury to land not taken, where the action is like an action of tort. *Lawrence R. R. Co. v. Cobb*, 35 Ohio St., 94.

So, of the personal property. In contract, interest is allowed for money had and received. *Porter v. Bussey*, 1 Mass., 436-438.

It is also allowed to the successful defendant in replevin. This is, in certain instances, regulated by statute, P. S., ch. 184, § 14; but it has also been allowed from analogy and on general principles of law. *Huggeford v. Ford*, 11 Pick., 223; *Wood v. Braynard*, 9 Pick., 322.

In tort, also, the time of the damage is the same as that above declared in *Parks v. Boston*, *supra*, for a taking by eminent domain. *Stone v. Codman*, 15 Pick., 297-300.

It is allowed in trespass *de bonis asportatis*, the rule being the same as in trover, where interest is always allowed. *Felton v. Fuller*, 35 N. H., 226-229.

In trover it has been repeatedly and conclusively decided that the plaintiff is entitled to interest from the date of the conversion. *Sargent v. Franklin Ins. Co.*, 8 Pick., 90; *Greenfield Bank v. Leavitt*, 17 Pick., 1; *Weld v. Oliver*, 21 Pick., 559; *Johnson v. Sumner*, 1 Met., 172; *Fowler v. Gilman*, 13 Met., 267; *King v. Ham*, 6 Allen, 298; *Forbes v. B. & L. R. R. Co.*, 133 Mass., 154-158.

And it is the rule, although the defendant may have sold the property since the conversion and received more than its value at the time of the conversion. *Kennedy v. Whitwell*, 4 Pick., 466.

Elsewhere than in this State in an action of tort, other than trover, interest appears to have been allowed, as of right. *Lawrence R. R. Co. v. Cobb*, *supra*; *Parrott v. Knickerb. & N. Y. Ice Cos.*, 46 N. Y., 361; *Meiller v. Exp. Prop. Line*, 61 N. Y., 312.

Finally, if the plaintiff is not entitled to interest as a matter of law there is certainly no law that forbids it; and in such cases it has not infrequently been left to the jury. *Beals v. Guernsey*, 8 Johns., 348; *Lincoln v. Claffin*, 7 Wall., 132 (75 U. S., bk. 19, L. ed., 106); *Walrath v. Redfield*, 18 N. Y., 457; *Root v. L. S. & S. M. R. Co.*, 105 U. S., 189-277 (bk. 26, L. ed., 975); *Hinds v. Barton*, 25 N. Y., 544; *Sanborn v. Webster*, 2 Minn., 323; *Williams v. Am. Bank*, 4 Met., 317-322.

*Reported, 131 Mass., 491.

Messrs. Hutchins & Wheeler, for defendant:

By the rule of the common law in England, interest could not be recovered in an action for a tort. *Robinson v. Bland*, 2 Burr., 1077-1087.

And in *assumpsit* or debt it could only be recovered in those cases where it appeared that the parties had intended the demand to carry interest. *Higgins v. Sargent*, 2 Barn. & C., 348.

Or when under peculiar circumstances it was given as damages for the wrongful detention of a liquidated demand. *Hilhouse v. Davis*, 1 Maule & S., 169.

But it could not be recovered even in an action sounding in contract, until the amount of the demand had been made certain. *Rishton v. Griessell*, L. R., 10 Eq. Cas., 393; *Blogg v. Johnson*, L. R., 2 Ch. App. Cas., 225; *Caledonian R. Co. v. Carmichael*, L. R., 2 H. L., Scotch App., 56.

By § 29, Stats. 8, 4, Wm. IV., ch. 42, the jury were authorized, if they should see fit, to give interest in trover or trespass *de bonis asportatis*, both actions for injuries to personal property. But they were not authorized to give interest in actions of trespass on the case for negligence for injuries either to real or to personal property; and at the present day no interest is recoverable in England in actions of this nature. In the following cases the rule of damages was the amount of injury suffered at the time the cause of action accrued. *Webster v. Brit. Emp. Mut. L. Assu. Co.*, L. R., 15 Ch. D., 169; *Smith v. Thackerah*, L. R., 1 C. P., 564; *Hosking v. Phillips*, 3 Wels. Hurl. & G. Exch., 168; *Newcastle v. Hundred of Brorstone*, 4 Barn. & A., 273; *Firth v. Bowling Iron Co.*, L. R., 3 C. P. Div., 254; *Crowhurst v. Amersham Board*, L. R., 4 Exch. Div., 5.

In the early cases in Massachusetts the strict rule of the common law was followed, not allowing interest even in actions of contract, unless it had been agreed to be paid. *Porter v. Bussey*, 1 Mass., 486-488.

Although this court has since become more willing to allow interest in actions of contract, yet in an action for injury to the plaintiff's real estate and personal property thereon by the defendant's negligence, the measure of damage continues to be, as in England, the amount of the loss at the time of the injury. *Barnard v. Poor*, 21 Pick., 878; *Gilmore v. Driscoll*, 122 Mass., 199; *Howes v. Grush*, 181 Mass., 207; *White v. Dresser*, 135 Mass., 150.

In the following cases this court has been called to lay down the measure of damages in actions for trespass and negligence, and in none of them has interest been included: *Barnard v. Poor*, *supra*; *Coolidge v. Choate*, 11 Met., 79; *Gillett v. Western R. R. Corp.*, 8 Allen, 560; *Gardner v. Field*, 11 Gray, 151; *Moulton v. McOwen*, 103 Mass., 587.

In actions of trover a different rule of damages applies, for the reason that the defendant, to be liable, must have had possession of the property. *Bushel v. Miller*, 1 Str., 128.

On a similar principle it has been held that when land is taken for a public purpose, the damages are the value of the land with interest from the time of the taking. *Drury v. Midland R. R. Co.*, 127 Mass., 571; *Old Col. R. R. Co. v. Miller*, 125 Mass., 1.

The reason being that the taker becomes possessed of the premises from the time of the taking, and should therefore pay interest as a purchaser from that time. *Parks v. Boston*, 15 Pick., 198, 208; *Rhys v. Dare Val. R. Co.*, L. R., 19 Eq. Cas., 93; cited in *Old Col. R. R. Co. v. Miller*, 125 Mass., 4.

Whenever this court has been called upon to state the measure of damages in trover, it has said that it consists of the value of the property, with interest thereon from the time of the conversion. *Kennedy v. Whitwell*, 4 Pick., 466; *Johnson v. Sumner*, 1 Met., 172; *Greenfield Bank v. Leavitt*, 17 Pick., 1; *Fowler v. Gilman*, 13 Met., 267; *King v. Ham*, 6 Allen, 298; *Forbes v. Boston & L. R. Co.*, 138 Mass., 154.

When the same court has been called upon to state the measure of damages in actions for negligence, it has always omitted interest as one of the elements. *Barnard v. Poor*, *supra*; *Coolidge v. Choate*, *supra*; *Gardner v. Field*, *supra*; *Gillett v. Western R. R. Corp.*, 8 Allen, 560; *Moulton v. McOwen*, 103 Mass., 587; *Gilmore v. Driscoll*, *supra*; *Howes v. Grush*, *supra*; *White v. Dresser*, *supra*.

In New Jersey, Missouri, Illinois, South Carolina, Virginia and Kentucky, it has been expressly decided in cases where the question has been fully argued and discussed, that interest cannot be recovered in this kind of action. *Speer v. Van Orden*, 3 N. J. L., 652; *Kenney v. Hannibal & St. J. R. R. Co.*, 63 Mo., 99; *Atkinson v. A. & P. R. R. Co.*, Id., 367; *Marshall v. Schrieker*, Id., 308; *Meyer v. A. & P. R. R. Co.*, 64 Mo., 542; *Chicago v. Allcock*, 86 Ill., 384; *South Park Comrs. v. Dunleavy*, 91 Ill., 49; *Buckmaster v. Grundy*, 3 Gilm., 626; *Anacrum v. Stone*, 2 Speer, 594; *Brugh v. Shanks*, 5 Leigh, 598; *Gibson v. Governor*, 11 Leigh, 600; *Ormsby v. Johnson*, 1 B. Mon., 80.

In the federal courts it has been repeatedly stated in actions for breach of contract that it is not agreeable to legal principles to allow interest on unliquidated and contested claims sounding in damages. *Gilpins v. Consequa*, Pet. C. Ct., 95; *Willings v. Consequa*, Pet. C. Ct., 179.

And in one case a verdict of a jury was set aside for allowing interest on an unliquidated claim for breach of warranty in a contract of sale. *Youqua v. Nixon*, Pet. C. Ct., 224.

In actions of tort it has been held that the measure of damages in trover is the value of the property converted and interest thereon from the date of the conversion. *Matthews v. Menedger*, 2 McLean, 145.

In cases of infringement of patent rights it has been held that it lies in the discretion of the tribunal assessing damages whether or not interest shall be allowed before the final decree. Interest was disallowed in *Mourey v. Whitney*, 14 Wall., 620 (81 U. S., bk. 20, L. ed. 860); *Parks v. Booth*, 102 U. S., 96 (bk. 26, L. ed., 54); *Littelfield v. Perry*, 21 Wall., 205, (68 U. S., bk. 22, L. ed., 577).

In an action to recover for fraud in a sale of property it has also been stated by the court that if the plaintiff was entitled to recover the value of the property of which he was deprived, it would probably be in the discretion of the jury to say whether he should also recover interest on its value, but no express decision was made to that effect. *Lincoln v. Claffin*,

7 Wall., 132 (74 U. S., bk. 19, L. ed., 106).

Interest is recovered in actions at law, says Best, C. J., on two principles: "First, when the intent of the parties that interest should be paid is to be collected from the terms or nature of the contract; secondly, when the debt has been wrongfully detained from the creditor." *Arnott v. Redfern*, 8 Bing., 353, 360.

The fact that the plaintiff did not receive his damages on the day the injury happened was not the fault of the defendant. Being an uncertain demand it could not make a tender. *Lawrence v. Gifford*, 17 Pick., 366.

The delay in the plaintiff's getting his damages is due to two causes: first, his own laches in waiting so long before bringing his action, and second, the necessary time occupied by the court in determining the damages after the action was begun. For neither of these causes of delay is the defendant responsible. *Caledonian R. Co. v. Carmichael*, *supra*.

There is no power on the part of a jury, or rather a jury would be recommended by the judge not to give interest, in cases where there has been no default on the part of the person against whom interest is claimed. *Webster v. Brit. Emp. Mut. Life Assur. Co.*, L. R., 15 Ch. D., 169.

As the plaintiff saw fit to let his demand lie for five and a half years, it was his own fault, and it has been again and again determined that where the delay in establishing his claim is due to the plaintiff's own laches, he can have no interest as damages, even in those actions where he would otherwise be entitled to it. *Webster v. Brit. Emp. Mut. Assur. Co.*, L. R., 15 Ch. D., 169; *Anderton v. Arrowsmith*, 2 Perry & D., 408; *Caledonian R. Co. v. Carmichael*, *supra*; *Redfield v. Ystalyfera Iron Co.*, 110 U. S., 174 (bk. 23, L. ed., 109); *Bann v. Dalzell*, 3 Car. & P., 376; *Newel v. Keith Esr.*, 11 Vt., 214; *Adams Exp. Co. v. Milton*, 11 Bush, 49; *Morford v. Ambrose*, 3 J. J. Marsh, 688; *Thompson v. Boston & Me. R. R.*, 58 N. H., 524.

In *Goff v. Rehoboth*, 2 Cush., 475, an action of contract, it was held that "A demand to lay the foundation of a claim for interest must be a separate and distinct demand for a debt or sum of money which is afterwards admitted or proved to be true."

In the case at bar there was a trial before the court without a jury; the finding of the court, therefore, represents the verdict of a jury, and we presume that interest should be allowed from that time. P. S., ch. 171, § 6.

Holmes, J., delivered the opinion of the court:

This is an action for the negligent destruction of property by the same disaster which was discussed in *Bryant v. Bigelow Carpet Co.*, 181 Mass., 491.

The defendant's liability is admitted, and the only question is whether the tribunal assessing the damages has power in its discretion to add interest to the sum which it finds to represent the plaintiff's loss on the day it took place.

Interest was allowed without discussion in *Bryant v. Bigelow Co.*, *ubi supra*. It is allowed as of right in trover and other like actions, and although in each case it is suggested that the defendant may be presumed to have had the using the goods since the conversion, this is not

necessarily the fact, and if it was would have no bearing on the indemnity due the plaintiff. Interest is allowed in the admiralty upon damages for collision and other courts have adopted the admiralty doctrine.

Straker v. Hartland, 2 Hem. & Miller, 570; *Amalia*, 34 L. J., N. S. Eq. Adm., 21; *Dundee*, 2; *Hagg Adm.*, 137; *The Vaughn and The Telegraph*, 2 Ben., D. C. 47; *Parrott v. Knickerbocker & N. Y. Ice Cos.*, 46 N. Y., 361; *Mailler v. Express Prop. Line*, 61 N. Y., 312.

The same principle has been applied in other cases of the negligent destruction of property. *Chapman v. Chicago & N. W. R. Co.*, 26 Wis., 295, 304; *Sanborn v. Webster*, 2 Minn., 323. See also, *Lawrence R. R. Co. v. Cobb*, 35 Ohio St., 94.

Notwithstanding the language of Wood, V. C., in *Straker v. Hartland*, *supra*, it may be conceded for the purpose of the decision that a new liability to pay such a sum, if any, as a jury may hereafter determine, cannot properly be called a debt. *Read v. Nash*, 1 Wilson, 305; *Leickner v. Freeman*, Finch, Prec. Ch. 105; *S. C.*, 1 Eq. Cas. Abr., 149; 2 Freeman, 236.

Freeland v. Pa. R. R. Co., 66 Pa. St., 97, and we will assume that the sum ultimately found by the jury cannot be said to have been wrongfully detained before the finding in such a sense that interest is due. *Blogg v. Johnson*, L. R., 2 Ch. App. Cas., 225, 230; *Chicago v. Allcock*, 86 Ill., 384.

But we have heard no reason suggested why, if a party has been prevented from having his damages ascertained and in that sense has been kept out of the sum that would have made him whole at the time, so long that that sum is no longer an indemnity, the jury in their discretion and as incident to determining the amount of the original loss may not consider the delay caused by the defendant, and in our opinion they may do so, and if they do, we do not see how they can do it more justly than by taking interest on the original damage as a measure. See, further, *Lincoln v. Claffin*, 7 Wall., 182, 189 [74 U. S., bk. 19, L. ed., 109], and often cited language of Shaw, C. J., in *Parks v. Boston*, 15 Pick., 198, 206; *Burt v. Merch. Ins. Co.*, 115 Mass., 1-14; *Old Col. R. R. Co. v. Miller*, 125 Mass., 14; *Sedg. Dam.*, 886.

It is agreed that the discretion was exercised wrongfully, because the delay was due to the plaintiff's not bringing his action. But he presented his claim and was informed that the defendant denied the liability; under such circumstances the most prudent and economical thing for both parties was for the plaintiff to postpone his suit until the test case had settled the question. The delay for that purpose was caused by the defendant as truly as if a suit had been begun and continued to await the decision in *Bryant v. Bigelow Carpet Co.*

Judgment for plaintiff for \$4,000, and interest.

J. D. PUTNAM

v.

Alexander BOYER and Trustee, and Chas. Martell, Clmt., Appt.

Where the appeal bond fails to recite against whom judgment was given, or

when rendered, or what was the amount thereof, is without date and does not appear to have been approved, the **appeal should be dismissed.**

(Worcester—Decided October 28, 1885.)

ON plaintiff's motion to dismiss appeal. *Judgment affirmed.*

The motion to dismiss the appeal was based upon the ground that the bond filed by the appellant, claimant in an action by trustee process, was defective.

The defects in the bond are sufficiently stated in the opinion.

Mr. J. M. Cochran, for plaintiff:

The motion to dismiss the appeal for want of a sufficient bond was rightfully allowed. The filing of a sufficient bond in the lower court is necessary to establish the right of appeal. It is an essential prerequisite, and unless such a bond is filed and approved the superior court has no jurisdiction in the case. *Keene v. White*, 136 Mass., 23; *Santom v. Ballard*, 133 Mass., 464.

The filing of the bond cannot be waived. Consent of parties cannot create a jurisdiction over a cause and subject matter which is not vested in the court by law. *Brown v. Webber*, 6 Cush., 560; *Ashuelot Bank v. Pearson*, 14 Gray, 521; *McQuade v. O'Neil*, 15 Gray, 52; *Riley v. Lovell*, 117 Mass., 76.

The provisions of law requiring a bond are not wholly for the benefit of the appellee, but partly upon considerations of public policy. Parties cannot by their consent dispense with the bond, and thus without complying with the law deplete the inferior court of its jurisdiction and transfer the case to the higher court. *Santom v. Ballard*, 133 Mass., 464.

If the claimant wrongfully lost this right of appeal, he has his remedy by review. *Keene v. White*, 136 Mass., 23.

There is nothing upon the bond to show that it was ever approved by the plaintiff or justice of the district court. Pub. St., ch. 159, § 29.

The appellee is entitled to a bond fully identifying the cause in which it is filed, with proper surety or sureties and duly approved, before the appeal can be allowed. It must be a bond upon which an action can be brought and sustained at law and without resort to equity, as was intimated in a late case, and no rights of the plaintiff have been waived in this action, as in *Wheeler & Wilson Mfg. Co. v. Burlington*, 137 Mass., 581.

Mr. A. J. Bartholomew, for claimant.

Devens, J., delivered the opinion of the court:

It was the duty of the appellant, if he desired effectively to prosecute his appeal from the district court, to file, within twenty-four hours after the entry of judgment, a bond to the adverse party, with sufficient surety or sureties, to be approved by the adverse party or the justice, in a reasonable sum, fixed by the justice or approved by the adverse party, with condition to enter and prosecute his appeal with effect, and to satisfy, within thirty days from the entry thereof, any judgment which might be entered against him in the superior court, upon said appeal, for costs.

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Pub. Sts., ch. 154, § 52; ch. 155, § 29. St. 1882, ch. 95.

The bond filed by the claimant recites in its condition an appeal from a judgment given in favor of the plaintiff, but against whom it was given does not appear. There is no statement when such judgment was rendered nor what was the amount thereof, either in debt or costs. The bond itself bears no date nor does it appear to have ever received the approval of the adverse party or the justice. An examination of the record of the justice shows that the claimant recognized before him with sufficient sureties, but the record makes no mention of any bond.

The contention of the claimant is, that, taking the whole instrument together, in connection with the record, the intention of the parties signing the same can be gathered therefrom; that they must be held liable; and thus that he has perfected his appeal. It may be that the omissions in this bond, or in regard to the failure by the magistrate to act thereon, if the plaintiff had seen fit not to object on account thereof, would not have been held to be of so vital a character as to deprive the Superior Court of its jurisdiction; and that, if the plaintiff had eventually prevailed, he might, by the aid of the record and such other evidence as would connect this bond with the case at bar, have maintained an action thereon against its signers. *Santom v. Ballard*, 133 Mass., 464; *Keene v. White*, 136 Mass., 23; *Wheeler & Wilson Mfg. Co. v. Burlington*, 137 Mass., 581.

But the plaintiff is not compelled to submit to the manifest inconveniences to which such errors necessarily subject him. They are not purely immaterial and, when a motion to dismiss, on account of them is seasonably made by the plaintiff, it should prevail. The remedy by review, when any party, without fault on his own part, has lost his right of appeal, affords him ample protection. Pub. Sts., chap. 187, § 25; *Keene v. White*, *ubi supra*.

The appellee is entitled to a bond fully identifying the cause in which it is filed, with proper surety duly approved, before the appeal should be allowed. There is no such bond in the case at bar.

Judgment affirmed.

Daniel W. DESMOND,

v.

Marshall B. STEBBINS.

Under an **oral contract**, a broker is **entitled to compensation** if he substantially effects a sale by **procuring and introducing a purchaser**, to whom the owner sells the land.

(Suffolk—Decided November 28, 1886.)

ON defendant's exceptions. *Overruled.*

Action on oral contract, made by defendant employing plaintiff to procure a purchaser for a certain lot of land and dwelling house thereon belonging to defendant, who agreed and promised to pay plaintiff therefor, and in pursuance of said agreement plaintiff procured a purchaser.

Mr. T. S. Dame, for defendant :

The contract relied on was a specific contract to sell, and not a contract for the general employment of plaintiff, as a broker. This contract if proved, in the absence of evidence of usage, should be construed by the court, *Globe Works v. Wright*, 106 Mass. 207, and cases there cited, and should be construed in the same manner whether made with a broker or any other party. *Ward v. Fletcher*, 124 Mass. 224.

To constitute a sale, plaintiff must not only find a purchaser, but make a valid contract for the sale. *Tombs v. Alexander*, 101 Mass. 255; *Rice v. Mayo*, 107 Mass. 550.

The instruction that plaintiff sold the house, if defendant stepped in and closed the contract without calling in plaintiff for further services, was erroneous and not pertinent to any issue raised by the pleadings. *Veuzie v. Hoosmer*, 11 Gray, 396; *Palmer v. Sawyer*, 114 Mass. 15.

Defendant did not waive his right to the instruction excepted to, by not objecting to evidence of the contract proved, for the instruction excepted to was not pertinent to any issue raised by the pleading, and no evidence was offered for the purpose of proving that defendant made such a contract as the instruction authorized the jury to find was made. *Rice v. Entwright*, 119 Mass. 187.

Mr. A. J. McLeod, for plaintiff:

The only question is, was it necessary, to entitle the plaintiff to recover, that he should have done, when willing and unrequested, everything required to be done between vendor and purchaser to pass a legal title to the property ultimately purchased of the defendant by the person introduced by the plaintiff as a purchaser? And the court rightly instructed the jury that it was not. *Pope v. Beals*, 108 Mass. 561; *Chapin v. Bridges*, 116 Mass. 105; *Rice v. Mayo*, 107 Mass. 550; *Peterson v. Mason*, 120 Mass. 58; *Nechall v. Pierce*, 115 Mass. 457; *Middlesex Co. v. Osgood*, 4 Gray, 447.

By the Court :

Under the instructions given them, the jury must have found that the contract between the parties was as set out in the declaration, namely: that the defendant employed the plaintiff to procure a purchaser for the land and house of the defendant. There was no written contract. The employment was by an oral agreement and, upon the evidence, it was competent for the jury to find that it was the ordinary case of the employment of a broker to procure a purchaser. Under such a contract, the broker is entitled to compensation, if he substantially effects a sale by procuring and introducing a purchaser, to whom the owner sells the land. The instructions at the trial were sufficiently favorable to the defendant.

Exceptions overruled.

CITY OF WORCESTER

r.

Inhabitants of GREAT BARRINGTON.

1. The words, in statutes providing for the relief of paupers, "**any unsettled person**," mean any person unsettled at the time the statute took effect, and

the words, "any unsettled woman," in the Statute of 1879, have the same meaning.

2. The object of the statute is to provide relief for persons now in distress or who may hereafter fall into distress; and one who has already a settlement has no need of its provisions; hence, a woman who had a settlement through a former husband gains no settlement under the statute.

(Worcester—Decided October 26, 1885.)

APPEAL, on agreed facts, from a judgment of the Superior Court in favor of defendants. *Affirmed.*

This was an action to recover money expended by plaintiff in relief of a poor married woman whose settlement was alleged to be in defendant Town.

The facts are sufficiently stated in the opinion.

Mr. Frank P. Goulding, for plaintiff.

Messrs. Dewey & Wright, for defendants.

Morton, Ch. J. delivered the opinion of the court:

The rights of the parties in this suit depend upon the question, whether Margaret Quigley, the grandmother of the pauper, gained a settlement in Great Barrington prior to February 11, 1878. She was born in Ireland, came to this country in 1845, was married to Thomas Quigley in 1851, she being then of age, and lived with him in Great Barrington until his death in 1856. After the death of her husband, she lived in Great Barrington, a widow, until 1859, when she married one Finneran. She continued to live with Finneran in the same Town until 1867, when they removed to Huntington, where Finneran died in 1869. She then returned to Great Barrington and lived there until 1878, when she married one Burke, who then had and now has a settlement in Sandisfield, in this State, where they now live. Neither Thomas Quigley nor Finneran ever had any settlement in this State.

The plaintiff, upon these facts, contended that Margaret gained a settlement in Great Barrington, under the Statute of 1878, ch. 190, § 1, cl. 6, as amended by the Statute of 1879, ch. 242, § 2. The Statute of 1878 provides that "Any woman of the age of twenty-one years, who resides in any place within this State for five years together, without receiving relief as a pauper, shall thereby gain a settlement in such place." The Statute of 1879 made this provision applicable to married women, and further provided that "A settlement thereunder shall be deemed to have been gained by any unsettled woman upon the completion of the term of residence therein mentioned, although the whole or a part of the same accrues before the passage of this Act." These provisions are reenacted in the Pub. Stat. ch. 88, § 1, cl. 6, 7.

Upon the admitted facts, Margaret, having resided in Great Barrington for more than five years, prior to 1878, must be deemed to have gained a settlement there, under the Statutes of 1878 and 1879, if she is a person within the purview of these statutes. This depends upon the meaning of the words, "any unsettled woman," in the Statute of 1879, ch. 242, § 2. If

these words mean any woman who was unsettled at the time the statute took effect, she is not within the statute, because, in 1873, she by her marriage with Burke gained a settlement in Sandisfield, which continues to the present time.

The provisions of the present laws were derived from the Statute of 1874, ch. 274. Section 3 of that Act provides that "No existing settlement shall be changed by any provision of this Act, unless the entire residence and taxation herein required accrues after its passage; but any unsettled person shall be deemed to have gained a settlement upon the completion of the residence and taxation herein required, though the whole or a part of the same accrues before the passage of this Act."

Several cases have been decided under this statute, but the question now before us has never arisen, because, in those cases, it appeared that the person alleged to have gained a settlement under it had no settlement in the State except that conferred by the statute itself. *Cambridge v. Boston*, 180 Mass. 357; *Fitchburg v. Ashby*, 132 Mass. 495; *Dedham v. Milton*, 136 Mass. 424. See also, *Worcester v. Springfield*, 127 Mass. 540.

We concur with *Mr. Justice Field* in the statements of the first paragraph of his dissenting opinion in *Fitchburg v. Ashby*, *ubi supra*, that the words "existing settlement" mean a settlement existing at the time the statute took effect, and that the words "any unsettled person" mean any person unsettled at the time the statute took effect; and we are of opinion that the words, "any unsettled woman," in the Statute of 1879, have the same meaning. Generally, a statute speaks from the time it takes effect. The object of the statute is to provide for the relief of poor persons who are now in distress or may hereafter fall into distress, by giving them a settlement in some town which shall be under obligation to relieve them. A person who already has a settlement has no need of such provision. It has been held, in regard to a similar statute, that it did not apply in the case of a person who died before it took effect; *Taunton v. Boston*, 181 Mass. 18; and also that the Statute of 1874 did not apply to the case of a person who had ceased to be a resident of the State many years before its passage. *Fitchburg v. Athol*, 180 Mass. 370.

The purpose of the statute is not to force upon a person who has a settlement a former settlement for the benefit of his children and grandchildren, but to provide for the present and the future, and to afford to such as are or may be in distress, succor and relief.

We are therefore of opinion that Margaret Quigley gained no settlement in the defendant Town; and that the plaintiff cannot maintain this action.

Judgment for the defendant.

THE LITERATI

v.

Benjamin F. HEALD.

It is **not a breach of duty** of a treasurer of a literary society **to expose the funds** of the organization **to attachment** by its creditors.

(Middlesex—Decided March 8, 1886.)

ON plaintiff's exceptions. *Overruled.*
Action by a literary Corporation against its treasurer, for breach of official duty as defined in article 11 of its by-laws, which is as follows: "It shall be the duty of the treasurer to take charge of all moneys belonging to the Society; to collect all fees and taxes; to pay all bills against the Society when approved by the board of directors; to keep a full account of all receipts and expenditures, in a book belonging to the Society; to invest the funds of the Society, with the consent and approval of the board of directors; and at the annual meeting, to make a full and detailed report in writing, and at such other times as he shall be required by said board."

The action was brought upon his bond, the condition of which was: "That he shall faithfully discharge his said trust as treasurer, and shall take good care of the corporate funds, which may come to his hands, and shall make good to the Corporation any losses therein, which may accrue by reason of any gross neglect or misfeasance of his, during his official service; and shall faithfully fulfill his duties as treasurer, according to the constitution and by-laws of said corporate society."

Mr. Robert B. Caverly, for plaintiff.

Messrs. G. F. & F. Lawton, for defendant.

By the Court:

The jury have found that the defendant, *Heald*, the principal obligor in the bond sued on, had not in his hands as treasurer, any money of the plaintiff at the time his successor made a demand upon him for funds in his possession. It was not a breach of his duty as treasurer that he exposed property of the Corporation to be attached by one of its creditors. There is no evidence as shown by the bill of exceptions, of a breach of any condition of the bond in suit.

Exceptions overruled.

COMMONWEALTH of Massachusetts,

v.

Mary FLAHERTY.

If the wife acts in the absence of her husband, there is no presumption that she acts under his coercion; **but if the husband is near enough for the wife to act under his immediate influence and control, although not in the same room, he is not absent**, within the meaning of the law.

(Norfolk—Decided January 7, 1886.)

ON defendant's exceptions. *Sustained.*
Complaint for keeping a common nuisance used for the illegal sale and illegal keeping of intoxicating liquors.

The instruction excepted to is stated in the opinion of the court.

Mr. John L. Eldridge, for defendant:

The instruction given was erroneous on two respects. It made the actual presence of the husband necessary to raise the presumption. It took from the jury the question whether the sale was made under the influence of the husband,

and was substantially that the defendant would be liable for the sale if her husband was not actually present when it was made. *Commonwealth v. Burk*, 11 Gray, 437; *Same v. Munsey*, 112 Mass. 287; *Same v. Pratt*, 126 Id. 462.

Mr. Harvey N. Shepard, *Asst. Atty-Gen.*, for Commonwealth.

Upon the evidence there could be no conclusive presumption of law that the defendant, in selling the intoxicating liquor, was acting under the immediate influence and control of her husband, and the question was properly left to the jury. *Commonwealth v. Gorinley*, 133 Mass. 580; *Same v. Roberts*, 132 Id. 267; *Same v. Murphy*, 2 Gray, 510; *Same v. Butler*, 1 Allen, 4; *Same v. Munsey*, 112 Mass. 287; *Same v. Burk*, 11 Gray, 437; *Same v. Welch*, 97 Mass. 593; *Same v. Gannon*, 97 Id. 547.

Holmes, J., delivered the opinion of the court:

The complaint alleges the keeping of a common nuisance, namely: a tenement used for the illegal sale and illegal keeping of intoxicating liquors.

The evidence was of three sales: two in the presence of the defendant's husband, and a third when he was in the yard outside the kitchen, where the sale was made.

As to this last sale, the jury were instructed that "No presumption arises that sales made by the wife, when the husband is on the estate or on the premises, not in her presence, are made under constraint of the husband, and the defendant would be liable for any such sale so made."

We think the jury must have understood this language as meaning that if, at the moment of the sale, the husband was not immediately and visibly in the presence of the wife, she would be liable for it, as matter of law, although he was on the premises. We also think, although perhaps this is less important, that the word "liable" must be taken to mean liable on this complaint, which was the point on which the jury were to be instructed, as otherwise there would seem to have been a mistrial.

Thus construed, the instructions went too far, and justice to the defendant requires that she should have a new trial, even if the actual meaning of the Judge was correct.

It is true that, if the wife acts in the absence of her husband, there is no presumption that she acts under his coercion. But if the husband is near enough for the wife to act under his immediate influence and control, though not in the same room, he is not absent, within the meaning of the law. *Commonwealth v. Burk*, 11 Gray, 437, 438.

This principle was restated and applied in a case where, if it appeared at all where the husband was, he was in the barn while the sales were made in the house. *Commonwealth v. Munsey*, 112 Mass. 287.

That case was, if anything, stronger than the present; for there the wife was complained of as a common seller; whereas, in the present case (for keeping a nuisance), the sales do not constitute the offense, but are only evidence of it; *Commonwealth v. Patterson*, 138 Mass. 498; and as the husband "was a cripple, generally at home, except that he could hop out," it is conceivable that his wife might be so far free from

his influence as to be answerable for the sale, and yet not so independent as to be deemed to have acquired control of the place. See, *Commonwealth v. Churchill*, 136 Mass. 148, 151.

The ruling sustained in *Commonwealth v. Roberts*, 132 Mass. 267, concerned unlawful sales made by a woman while her husband was at sea, and while, therefore, his absence could not be disputed.

Exceptions sustained.

William P. RICE *et al.*

v.

NANTASKET COMPANY.

A mechanic's lien cannot be enforced upon several lots of land for work done on some of the lots and also upon other lots not described in the petition and statement, and not contiguous to any therein mentioned, for a general balance of an account due under an entire contract.

(Plymouth—Decided October 24, 1885.)

PETITION to enforce a mechanic's lien.
Judgment for respondent.

Agreed statement of facts:

"The petition, the answer and demurrer of the respondent, and the statement of the petitioners filed in the registry of deeds, may be referred to.

It is agreed that the petitioners performed the labor and for the price as alleged, and that work on some of the eleven houses was done within thirty days prior to filing their statement, and within ninety days prior to filing their petition; but as to the seven houses on the North Commons, work was done on some of them within the thirty days but not upon all; and that the "extra labor" was performed under a subsequent agreement with Penniman, who had authority from the respondent, which for the purposes of this case, is agreed to be the owner. Part of the labor was performed on seven houses on the North Commons, which were situated as follows, viz.: one upon each of the lots numbered 835 on N Street, 279 on O Street, 290 on Central Avenue, 467 on M Street, and 354 on Beach Avenue, as shown on the plan of cottage lots referred to in said petition and statement, dated 1878, and duly recorded with Plymouth deeds.

The sixth was built upon the lots numbered 199 to 200 on said plan (not upon lot 196), and the seventh on lots numbered 206 and 207, as alleged. None of the houses were upon contiguous lots, and some of the eleven were more than a mile from the others, with streets and other lands and owners between.

On each of the lots numbered 276 and 196 there was in fact no house or building.

By deed dated July 31, 1883, the Nantasket Company conveyed the house, being one of the seven, situated on said lot numbered 279 on O Street, for a valuable consideration, to one J. F. Wilson, who had no notice of the lien, and who still owns said house and lot; but said Company had notice thereof, prior to said conveyance.

The eleven houses were all that were erected at Hull in 1882, by the Company.

The work, except the extra labor, was done under a contract made for laying the brick and doing the plastering in the erection of the eleven houses aforesaid, as set forth in the petition, and that work was to be performed upon any or all of said houses as might be required, and the work was not completed or the contract fulfilled until labor upon all of the said eleven houses was finished.

All the streets on said North Commons were staked out by stakes and fences at every corner, and many of the lots were staked out. Some of these lots, however, were not, except on said plan, staked out by well defined bounds on the premises.

It is agreed that the court may enter judgment for the petitioners, if, upon these facts agreed upon and upon the law arising thereon and upon the demurrer of the defendant, they are entitled thereto; otherwise, judgment for the defendant. That portion of the demurrer relating to insufficient service is waived by the defendant.

Mr. Nathan H. Pratt, for petitioners:

When labor is performed or furnished under an entire contract, in the erection or repair of several buildings, owned by the same person and situated on the same lot, a lien attaches upon the whole estate for the whole value of the labor performed, although the contract specifies separate amounts for the work to be done on each house. *Wall v. Robinson*, 115 Mass. 429; *Worthley v. Emerson*, 116 Mass. 374.

One claim of lien may be filed against any number of several houses erected together as an entire work at one time, under one contract and belonging to one individual or class of individuals. *Pennock v. Hooter*, 5 Rawle, 291; *Taylor v. Montgomery*, 20 Pa. St. 443.

A claimant in pursuance of one contract with the owner or his contractor, having furnished labor or materials to several buildings standing upon adjacent lots, is not bound to divide his claim into the number of houses built, but may enforce one general lien therefor upon all the buildings and lots; and this, although since the work was commenced the property may have been sold to several parties. *Prine v. Bonney*, 6 Abb. Pr. 101; *S. C.*, 4 E. D. S. 734.

Where eleven buildings are contiguous to each other and all owned by one person, they may, as against him, be treated as one building. *Moran v. Chase*, 52 N. Y. 346.

Where a mechanic's lien for materials furnished for the erection of seven houses, under an entire contract, had been prosecuted to judgment and sale, such lien holder was entitled to payment of the full amount of his lien from the surplus moneys arising upon the foreclosure and sale of four of the houses, under a prior mortgage, and not merely to four sevenths of his claim. *Livingston v. Miller*, 16 Abb. Pr. 371.

If there appears enough in the description to enable a party familiar with the locality to identify the premises intended to be described, with reasonable certainty, to the exclusion of others, it will be sufficient. *McClintock v. Rush*, 63 Pa. St. 203.

It is enough that the description points out

and indicates the premises so that, by applying it to the land, it can be found and identified. *Parker v. Bell*, 7 Gray, 429; *Caldwell v. Asbury*, 29 Ind. 451; *Kelly v. Brown*, 20 Pa. St. 446; *Harker v. Conrad*, 12 Serg. & R. 301; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507; *O'Halloran v. Leachey*, 39 Ind. 150; *O'Halloran v. Sullivan*, 1 Iowa, 75; *Gordon v. South Fork Canal Co.* 1 McAll. C. C. 513.

The validity of the lien shall not be affected by any inaccuracy in the statement relating to the property to be covered by it, if such property can be reasonably recognized from the description. P. S. ch. 191, § 8. *Parker v. Bell*, 7 Gray, 429; *Patrick v. Smith*, 120 Mass. 510. **Messrs. A. & J. R. Churchill**, for respondent:

In *Landers v. Dexter*, 106 Mass. 531, it was held that a lien for a general balance of an account for labor performed in erecting a block of houses, under separate and independent contracts as to different parts of the same block, could not be maintained on the whole block as one estate. See also, *Rathbun v. Hayford*, 5 Allen, 406.

Authorities to the point, that a lien upon separate buildings on separate lots is a nullity, are numerous. See, Phillips, Mech. Liens, § 376; *Fitzgerald v. Thomas*, 61 Mo. 502; *Steigleman v. McBride*, 17 Ill. 300; *Culver v. Elwell*, 73 Ill. 536; *Davis v. Alcord*, 94 U. S. 545 (bk. 24, L. ed. 283); *Campbell v. Furness*, 1 Phila. 372; *Chambers v. Yarnall*, 15 Pa. St. 265; *Goepf v. Gartiser*, 35 Pa. St. 180; *Wharton v. Douglas*, 92 Pa. St. 66; *Chapin v. Perse & B. Paper Works*, 30 Conn. 461; *Morris Co. Bank v. Rockaway Mfg. Co.*, 16 N. J. Eq. 150; *Beckel v. Petticrew*, 6 Ohio St. 247.

In at least one case, under a statute substantially the same as ours, the court refused to sustain such a lien, even where the lot was single. *Fitzgerald v. Thomas*, 61 Mo. 499.

On the other hand, this court has sustained liens for such a general balance for work done upon separate buildings, where the lot was single and the contract single and entire. *Wall v. Robinson*, 115 Mass. 429; *Batchelder v. Rand*, 117 Mass. 176.

"Under the contract, the labor performed upon each building created a lien upon the whole lot, and therefore upon all the other buildings," and the decision is in terms based upon "the spirit of the statute" rather than its letter. *Wall v. Robinson*, *supra*.

It has been held by this court, in two cases, that a general lien for work done partly on land described and partly on adjoining land was fatal to the maintenance of a lien. *Serens v. Lincoln*, 114 Mass. 476; *Foster v. Cor*, 123 Mass. 45.

Should the petition be amended by dropping the vacant lots and substituting the two lots and houses omitted, the case then presented would be identical with *Bristow v. Evans*, 124 Mass. 552.

It does not appear affirmatively that the land not described in the petition, on which part of the labor was done, was owned by the respondent. But, whether he was the owner or not, no lien can be maintained on the land described for labor performed on land not included in the petition, although it be contiguous to the parcel described. *Foster v. Cor*, 123 Mass. 45, 46.

Gardner, J., delivered the opinion of the court:

It appears that land at Nantasket had been divided into lots and a plan of the same made, called "Plan of Cottage Lots of North Commons at Nantasket Beach," which plan was recorded with Plymouth deeds. The petition and statement of the petitioners, required to be filed, described several of the lots upon which the liens are claimed by the numbers of the lots upon this plan, without other description. They both describe one lot as "276 on O Street," as a lot upon which one of the houses was built, and upon which the petitioners claim a lien. No building was in fact erected upon this lot, and no work was done upon it by the petitioners.

Upon lot No. 279 on O Street, upon the plan, one of the eleven buildings was erected upon which the petitioners worked.

In like manner, the lot described in the petition and statement as "196 on Q Street" was not built upon, but a building was erected upon lots numbered 199 and 200 on the plan, upon which building the petitioners also worked. Neither of the lots numbered 279, 199 and 200 is described, mentioned or referred to in the petition or statement.

None of the eleven houses were upon contiguous lots, and some of them were more than a mile distant from the others, with streets and other lands and owners between. The work, except the extra labor, was done under a contract made for laying the bricks and doing the plastering in the erection of eleven houses, and was to be performed upon any or all of said houses, as might be required. The extra labor was performed, under a general agreement, in the erection of the eleven houses. The petition and statement both set out a general balance of account, due for laying brick, plastering and for the extra labor. No separate price was agreed upon and no separate account was kept of the amount of labor upon the separate houses.

It may fairly be assumed, from the agreed statement of facts, that the respondent was the owner of lots numbered 279, 199 and 200, during the time the labor was performed by the petitioners upon the houses built on these lots.

The petitioners seek to enforce a lien on the several lots of land described in their petition and statement, for work done on some of said lots and also upon other lots not described in their petition and statement and not contiguous to any therein mentioned, for a general balance of an account due under an entire contract. This cannot be done. *Foster v. Coz*, 123 Mass. 45; *McGuinness v. Boyle*, 123 Mass. 570.

As this disposes of the case, it becomes unnecessary to consider whether the petitioners can enforce a lien upon eleven different buildings of the respondent, situated upon separate and not contiguous lots of land, some more than a mile distant from the others, for a balance of an account upon an entire contract for work done thereon.

Judgment for the respondent.

Edwin P. HENDERSON

v.

Michael BENSON.

The statute requires a party appealing from a district court to file a bond with sufficient surety and, unless this bond is filed pursuant to statute, the appellate court acquires no jurisdiction and the appeal fails.

(Middlesex—Decided February 26, 1886.)

APPEAL from the District Court in an action of replevin. *Affirmed.*

The case is stated in the opinion.

Mr. Asa Cottrell, for plaintiff:

The P. S. ch. 154, § 52 and the Statutes of 1882, ch. 96, § 1, require that a party appealing from a District Court etc., shall file a bond with sufficient surety or sureties to the adverse party, with conditions, etc.

Unless such bond is filed no appeal can be allowed and the appellate court has no jurisdiction of the cause or the subject matter. *Santom v. Ballard*, 133 Mass. 464.

The parties even cannot waive the bond and thereby divest the inferior court of its jurisdiction and create a jurisdiction in the higher court. See, *Santom v. Ballard*.

The *Wheeler & Wilson Mfg. Co. v. Burlingham*, 137 Mass. 581, supports *Santom v. Ballard* and *Mr. Justice Holmes* says: "Conditions attached to the exercise of appellate jurisdiction in the public interest or the regular administration of justice or otherwise cannot be waived."

Messrs. Wm. P. Harding and A. V. Lynde, for defendant:

If the defendant duly filed the appeal bond in the lower court, and afterwards entered the case in the appellate court, the latter acquired jurisdiction over the parties and subject matter. Mass. Stat. 1882, ch. 95; P. S. ch. 155, §§ 29-33; *Wheeler & Wilson Mfg. Co. v. Burlingham*, 137 Mass. 581; *Simonds v. Parker*, 1 Met. 508-511; *Ripley v. Warren*, 2 Pick. 598, 594; *Holbrook v. Klenert*, 113 Mass. 269.

The statute does not prohibit the plaintiff taking or accepting a bond in any other form. *Morse v. Hodsdon*, 5 Mass. 815.

If after trial, judgment had been rendered for the plaintiff, the defendant would have been liable on the bond for the costs of suit. *Sweetser v. Hay*, 2 Gray, 52.

The acts of plaintiff's former counsel in relation to the conduct of the case are binding on the present counsel, and the latter is estopped to deny the validity of the bond accepted by the plaintiff on the ground of non-compliance with the exact terms of the statute. P. S. ch. 154, last clause of § 52; *Bank of Brighton v. Smith*, 5 Allen, 415; *Adams v. Robinson*, 1 Pick. 461.

The general tendency of the decisions upon the validity of bonds required in the processes of the courts of this State, is in favor of establishing the bonds for mere irregularity or formality. *Mosher v. Murphy*, 121 Mass. 276; also *Campbell v. Brown*, Id. 519; *Wolcott v. Mead*, 12 Met. 518; *Hewes v. Cooper*, 115 Mass. 48.

The case of *Santom v. Ballard*, 133 Mass. 464, on which plaintiff relied in the superior court, differs from the case at bar, in having no bond filed in the lower court, but simply a recog-

nizance, so that the appellate court obtained no jurisdiction of the case.

The motion to dismiss not having been made at the September, but at the following March Term of court, was not seasonably made. P. S. ch. 167, § 35; Superior Court rules, No. 14; *Ripley v. Warren*, 2 Pick. 593; *Claylin v. Thayer*, 13 Gray, 459; *Wheeler & Wilson Mfg. Co. v. Burlingtonham*, *supra*.

C. Allen, J., delivered the opinion of the court:

When a party wishes to appeal from the judgment of a District Court, compliance with the statutory requirement of a bond with surety (Stat. 1883, ch. 95; P. S. ch. 154, §§ 52, 89; ch. 155, § 29), has been held to be a condition essential to the allowance of the appeal and the consequent jurisdiction of the Supreme Court. A bond without a surety is not such a compliance and adds nothing to the liability which the appellant is under when the judgment appealed from is affirmed on complaint. P. S. ch. 155, § 84.

If the consent of the adverse party could dispense with the surety, it might also dispense with the bond itself. Whatever question there may be in respect to the waiver of formal defects, or errors in the bond, the statutory requirement of a bond with surety must be observed or the appeal fails; and the objection of a want of jurisdiction may be taken at any time before judgment. *Santom v. Ballard*, 133 Mass. 464; *Keene v. White*, 136 Mass. 28; *Wheeler & Wilson Mfg. Co. v. Burlingtonham*, 187 Mass. 581; *Putnam v. Boyer*, 140 Mass. 235.

Judgment affirmed.

Lyman WARNER

v.

Reuben JONES.

Where evidence which was immaterial to the issue was admitted and it is not shown that the defendant was in any way prejudiced by its admission, an exception thereto cannot be sustained.

(Hampden—Decided October 26, 1885.)

ON defendant's exceptions. *Overruled.*

The case is stated in the opinion.

Mr. George M. Stearns, for defendant.

Mr. Charles L. Long, for plaintiff.

Devens, J. delivered the opinion of the court:

It is conceded by the defendant in this bill in equity, that the action at law, brought by him in 1862, was for two breaches of covenant in the deed of warranty made by the plaintiff, of certain premises, in this: first, that Marcia Warner had dower in a larger portion thereof than was stated by the exception in the deed; and secondly, that the exception in the deed extended only to Marcia's right, while the heirs of Vashni Warner had a reversionary right in the premises covered by her dower.

Marcia having died subsequently to the decision in the original action, the defendant brought a writ of entry to recover that portion of the premises covered originally by the dower of Marcia Warner, in which the heirs

of Vashni Warner claimed a reversion. This reversionary right, so far as he did not own the same, had been purchased by the plaintiff of the other heirs of Vashni Warner. The plaintiff then brought the bill in equity to reform the deed made by him, alleging that the exception therein should have covered the reversion, as well as Marcia's title.

The plaintiff, who was a witness, was pressed by the inquiry why he had not, some years before, sought to reform the deed when the matter had been brought to his attention by the first action, if he then believed the deed was wrong; and it was further contended by the defendant that the plaintiff had been guilty of laches.

To meet this, the plaintiff put in, without objection, the record of the writ of entry brought by the defendant, the declaration, answers, etc., and a bill of exceptions offered by the defendant and allowed by the presiding Judge, from which it appeared that the Judge had ruled that the present defendant, then the plaintiff, could not recover upon the second count in his declaration, which was for breach of covenant, as to the reversion in the dower land. This was in effect to rule that the whole estate in the land covered by the dower had been excepted from the conveyance, and thus to construe the deed for breach of covenant in which the action had been brought. It cannot be fairly contended that the Judge might thus have ruled for lack of evidence to sustain the count, or for technical reasons. If the defendant had prosecuted his exceptions, he would have been entitled to a decision of the question, whether a cause of action was set forth by the count. The instruction to the jury, in connection with the ruling on the second count, as to what it was necessary to prove to recover upon the first count, indicates clearly that the ruling as to the second count was, that it did not set forth a cause of action.

When, therefore, the plaintiff was permitted to prove that the present defendant had, as plaintiff in that suit, presented and put on file by his attorney another bill of exceptions, in which it was stated that the court ruled that the plaintiff in the writ of entry could not recover on the second count, as the portion of the house, etc., named in the deed was wholly excepted from the deed, and that the defendant in that suit had not covenanted that he was seised in fee of the same, nothing more was shown than had already been proved by the bill of exceptions admitted without objection. This evidence was, therefore, immaterial, and exception thereto cannot be sustained, as it is not shown that the defendant was in any way prejudiced thereby. *Burghardt v. Van Deusen*, 4 Allen, 874; *Bragg v. Boston & Worcester R. R. Corp.*, 9 Allen, 54; *Wing v. Chesterfield*, 116 Mass., 353.

Exceptions overruled.

John SOARS

v.

HOME INSURANCE CO.

1. An invalid award by referees appointed to assess damages on loss by fire,

under an insurance policy, can have no effect on the rights of the parties.

2. Where the agreement of submission merely refers to arbitrators the appraisal and estimate of the damages, a valid award under the submission might be evidence of the damage in an action on the policy, but will not support an action on the award.

(Suffolk—Decided November 28, 1885.)

ON defendant's exceptions. *Overruled.*

This was an action upon an insurance policy issued by the defendant Company to the plaintiff on three knitting machines, tools and fixtures, in his building at Newton. At the trial it appeared in evidence that a fire occurred on July 8, 1883, and that said property was injured; and that in accordance with the terms of the policy an agreement was entered into by the parties to refer the question of damages to the property to referees; that the referees were chosen, visited the premises, and made an award that the plaintiff had sustained damages in the sum of \$285; and there was evidence tending to show that the plaintiff claimed as claimant under the award, which evidence consisted of a statement of loss as \$285, signed and sworn to by the plaintiff, but which he testified was prepared by defendant's agents, and that he could not read and was ignorant of its contents. Before payment was made he brought this action on the policy, not declaring on the award. The defendant asked the court to rule that if the parties had entered into an agreement to refer, and the referees had met and made an award, and award had been ratified and was binding, that the plaintiff could not recover in this form of action, but they must find for the defendant. The court declined to so rule, but ruled that if the reference was had and an award was made for \$285, the plaintiff would, under the policy, be entitled to recover the said sum \$285, with interest, in this action. To this ruling the defendant Company excepted.

Messrs. I. S. & G. A. Morse, for defendant:

The instructions asked for should have been given. At the trial it was proved that the parties entered into an agreement to refer; the agreement was in writing and signed by the parties. Referees were chosen by the parties and, after examination, made their award in writing; and the plaintiff filed with defendant a written claim under the award, filled up in part by his counsel and sworn to before him; and his remedy after that was by a declaration on the award and not by suit on the policy. *Sperry v. Ricker*, 4 Allen, 17; *Harden v. Harden*, 11 Gray, 435; *Mickles v. Thayer*, 14 Allen, 114; *Fairchild v. Adams*, 11 Cush. 549.

Mr. Thomas Weston, Jr., for plaintiff:

Under our practice, an award may be impeached when set up in defense to an action of this nature, without resort to a bill in equity or other proceeding to set it aside. Stat. 1883, ch. 223, § 14.

By the Court:

The jury have found that the award which the defendant relies on is invalid. It can therefore have no effect upon the rights of the parties.

But if it had been a valid award, it could not, as contended by the defendant, prevent the plaintiff from maintaining his suit upon the policy. The award has reference merely to the damages. The agreement of submission merely refers to arbitrators the appraisal and estimate of the damage by fire to the plaintiff's property, and expressly provides that the award shall have no reference to any other question or matter of difference, and shall be "of binding effect only so far as regards the actual cash value of or damage to such property." A valid award under this submission might be evidence of the damages in an action upon the policy; but it is too clear to admit of any discussion that the only action of the plaintiff must be upon the policy and not upon the award.

Exceptions overruled.

Augustus B. R. SPRAGUE

Horace H. BIGELOW.

1. When a libel is printed in an edition of many copies for general circulation, the extent of the circulation procured or caused by the publisher, may be shown against him as evidence of the injury to the person libeled. All of the several deliveries to different persons, of the libelous pamphlet, are to be treated as substantiating the allegation of publication.
2. The intermarriage of the aunt or uncle of a juror with the aunt or uncle of plaintiff suing for damages for a libel, is not such a relationship as will disqualify the juror.
3. A verbal slander is not such a provocation as will justify or mitigate a libel, hence evidence of such slander is properly excluded.

(Worcester—Decided January 6, 1886.)

ON defendant's exceptions, taken on the trial of a petition in case of libel. *Overruled.*

This is an action in tort for the publication of a libel, and contains an allegation: 1, that the defendant caused to be published in a certain pamphlet a false and malicious libel; 2, that the defendant, meaning and intending to injure, etc., caused to be published the aforesaid false and malicious libel in the pamphlet aforesaid, at Worcester, at Northborough and at divers and sundry other places.

Against the defendant's exception the plaintiff was allowed to prove, and the court instructed the jury, as matter of law, that all publications found to have been made before the date of the writ were to be treated as a publication on which the plaintiff could recover in this action, and refused to rule that the plaintiff should elect which act of publication he relied on as proving his declaration; ruling that all the evidence in regard to publication was competent to prove one act of publication without indicating which one was the one to be proved.

Messrs. Benj. F. Butler, Wm. B. Gale and Joseph A. Titus, for defendant:

Each publication of the same libel gives the plaintiff a different cause of action. *Thomas v. Rumsey*, 6 Johns. 81; *Woods v. Pangburn*, 75 N. Y. 495.

A libel is not published to every person who receives it, and the ruling of the learned Judge excludes the defendant from the benefit of his defense. Assume that the plaintiff sees fit to bring another action for libel, which libel can the defendant plead has been already the subject of suit between the parties? It is not denied that the repetition is admissible, to prove deliberation and malice; *Bodwell v. Sloan*, 3 Pick. 376; *Hastings v. Stetson*, 130 Mass. 76; but for no other purpose. *Swift v. Dickerman*, 31 Conn. 285.

The rule that the material and actual words must be proved, *Whiting v. Smith*, 13 Pick. 371, implies that the proof shall be fixed, definite and certain, as to time and place as well as to what was said. It was no hardship to the plaintiff to be compelled to select the occasion he considered proved, and was in accordance with the general practice. *Sheffill v. Van Dusen*, 15 Gray, 485.

Again; the defendant is not responsible, either as on a distinct cause of action or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition without his authority or request by others over whom he had no control. *Hastings v. Stetson*, 126 Mass. 329, and cases cited.

Wardwell was the author of the publication, and has been by the court held personally responsible for the publication of the same libel. *Commonwealth v. Wardwell*, 136 Mass. 164.

The testimony of the witness Woods was incompetent, either to prove publication or motive, or as part of the *res gestæ*, since it appeared that he did not read the pamphlet given him by the defendant. *Lyle v. Clason*, 1 Cal. 581; *Clutterbuck v. Chaffers*, 1 Stark. 471.

The court ruled as a matter of law that there was no relationship between the plaintiff and the juror Whipple, and that the juror was in no way disqualified, and that the juror answered truly when he said he was not related to the parties. Affinity as well as consanguinity is matter of challenge. *Mounson v. West*, Leon. pt. 1, 88, 89.

In *Vernon v. Manners*, 3 Dyer, 319, it was held that consanguinity of the ninth degree, between the sheriff and the husband of defendant, was a good challenge.

In *Outten v. Morse*, 2 Kerr, 78, the court held that where the sheriff and coroner had married sisters there was a good ground of challenge to the array that the jury was returned by the coroner in a case where the sheriff was defendant.

The exception is to the ruling of the court as matter of law that there was no relationship, and that the juror was correct in so answering; and the case differs from the cases of *Woodward v. Dean*, 113 Mass. 297, and *Smith v. Earle*, 118 Mass. 531, both of which came up on exceptions to the decision of the court below on motion for a new trial.

Defendant's exceptions, as drawn, are stricken out by the commissioner; the substance of the exception was to the ruling that "A reiteration of the libel, or to say that you can refer to such a paper, is not in itself a libel, in the sense that 190

it may be a provocation." If the exception can be considered by the court, the defendant submits that the essence of publication is the communication of defamatory matter to the mind of another, and that all persons who participated in such communication are equally liable for the offense. 3 Greenl. Ev. § 169.

On petition to establish truth of exceptions.

The petitioner is bound to establish the substantial truth of the exceptions tendered, not the exact expressions; immaterial changes are not to be regarded. *Farnsworth v. Lowery*, 134 Mass. 512; *Sawyer v. Yale Iron Works*, 116 Mass. 424; *Markey v. Mut. Ben. Life Ins. Co.* 118 Mass. 178-192.

The petitioner has a right to waive such exceptions as he fails to establish, and argue such of them as he succeeds in establishing. *Commonwealth v. Marshall*, 15 Gray, 202; *Cullen v. Sears*, 112 Mass. 299, 307.

Messrs. W. S. B. Hopkins and F. P. Goulding, for plaintiff.

Holmes, J., delivered the opinion of the court:

1. Sprague had introduced evidence tending to show that Bigelow was concerned as a principal in printing and distributing a large number of copies of a libelous pamphlet; and the jury were instructed that all of the distinct publications, if any, or if more than one, which they should find to have been made by Bigelow were to be treated in them as substantiating the allegation of a publication in the declaration; that all publications that they should find to have been made by Bigelow before the writ were to be treated by them as a publication upon which Sprague could recover.

The words "distinct publications" referred to the several deliveries of copies of the pamphlet. We assume, without deciding, that Bigelow has proved his exception to this ruling, and is entitled to have it considered. The Judge also refused to order Sprague to elect which act of publication he would rely on as the cause of action, but to this refusal no exception appears to have been taken.

Bigelow's argument goes on the assumption that the delivery of some one copy of the pamphlet constitutes the cause of action, and that the delivery of other copies stands like the repetition of an oral slander, which, it is said, is admissible to prove deliberation and malice, but for no other purpose. It is said, too, still on the same assumption, that the result of the ruling of the court below is to leave Bigelow in the clouds, not knowing which publication he is called on to meet, or which has been found against him, or what the scope of the judgment is, if Sprague prevails.

If we confine ourselves strictly to what is open on the exception taken, the only question is whether the court was right in allowing the jury to give damages for the delivery of different copies of the pamphlet to different persons; for the instruction in the charge which is excepted to, cannot have affected the conduct of the cause or the agreements, and, whichever was the technically correct view, it did not matter to Bigelow, at that stage, whether the jury were told that, if they found more than one delivery by Bigelow proved, they should regard one as the cause of action, and consider th

others as enhancing the damages, or that they might regard all the several deliveries as constituting one publication and one cause of action.

On this question of damages, we are not aware that it has ever been doubted that, when a libel is printed in an edition of many copies for general circulation, the extent of the circulation procured or caused by the publisher may be shown against him as evidence of the injury to the person libeled. *Gathercole v. Miall*, 15 Mees. & Welsb. 319; *Fry v. Bennett*, 28 N. Y. 324-330; *S. C.* 3 Bosw. 200, 234; *S. C.* 4 Duer, 247-255.

This rule disposes of the exception and shows that the supposed analogy to repetition fails. For when a repetition not constituting the cause of action is admitted, as is commonly said, to prove malice (*Hastings v. Stetson*, 130 Mass. 76), the jury are instructed not to give damages for it. *Bodwell v. Swan*, 3 Pick. 376, 378; *Pearson v. Lemaitre*, 5 Man. & Gr. 700; *Swift v. Dickerman*, 31 Conn. 285-290.

And if we are to go a step further than is strictly necessary, it seems to follow from the cases first cited, and from *Commonwealth v. Blanding*, 8 Pick. 304, 311, that the court below was technically correct in ruling that all the several deliveries made by Bigelow were to be treated as substantiating the allegation of a publication. For the effect of *Commonwealth v. Blanding* seems to be that the distinct publications of copies of a newspaper, which the jury might find to have been made in a certain county, from evidence that the number of the paper was received and circulated there, sustained the allegation of the indictment.

Our conclusion derives some further support from the doctrine that a publication in a newspaper may be unauthorized when some less widespread publication would be protected. *Brown v. Croome*, 2 Stark. 297, 299, 301; *Laughton v. Lord Bishop of Sodor and Mans.* L. R. 4 P. C. Cas. 495, 504.

For if each delivery of a copy is to be dealt with only and for all purposes as a separate publication, courts could not distinguish between publication in a newspaper and in a private letter. A closer analogy than that suggested by the counsel for Bigelow would seem to be that of a moral slander addressed to a crowd. But whether the publication of the edition is to be regarded technically as, so to speak, one composite act, we need not consider.

2. Supposing that the exception to the testimony of one Martin as to a speech of one Wardwell at a meeting can be considered, notwithstanding the failure of the bill of exceptions as tendered to state that Bigelow presided, or that the evidence was confined to what was said in Bigelow's presence (*Glidden v. Child*, 122 Mass. 433; *Arvilla v. Spaulding*, 121 Mass. 505, 506), it does not appear what was said (*Pennock v. McCormick*, 120 Mass. 275), or that it did not tend to show Bigelow's connection with the publication of the pamphlet.

Supposing that similar objections do not apply to the exception to the testimony of one Griffin, that he saw the pamphlet in question at a picnic where Bigelow introduced Wardwell, there was evidence in the course of the trial from which it could fairly be inferred that Bigelow was concerned in the publication of them. The evidence was admitted only on con-

dition that Bigelow's connection with the distribution was shown.

The bill of exceptions as tendered states that Bigelow excepted to the admission of the testimony of one Woods, who testified that he received a pamphlet, but did not read it and so could not tell what was in it, and threw it away. This exception was properly disallowed, as he omits to state the facts found by the commissioner, that he received the pamphlet from the defendant and identified it as the one which Bigelow was charged with publishing. *Glidden v. Child*, and *Arvilla v. Spaulding*, *ubi supra*.

3. During the trial, Bigelow moved that a juror should be withdrawn from the panel, on account of his relationship to Sprague.

It appeared that an uncle of Sprague married an aunt of the juror, and that two uncles of the juror married aunts of Sprague, but that each of these marriages had been dissolved by the death of one of the parties and it did not appear that there was issue of any of them living. The court rightly ruled that the juror was not related to Sprague. No absolute disqualification ever existed. *Chase v. Jennings*, 38 Me. 44; *Rank v. Sherrey*, 4 Watts, 218; *Johnson v. Richardson*, 52 Tex. 481; Co. Litt. 157, a.

And, by the weight of authority, if it had existed, it had come to an end. *Y. B.* 14 Hen. 7, 2, pl. 6; *Finch's Law*, 9; *State v. Sharv*, 3 Ired. Law, 532, 534; *Cain v. Ingham*, 7 Cowen, 478; *Carman v. Newell*, 1 Den. 25. See, *Paddock v. Wells*, 2 Barb. Ch. 331, 333; *Vannoy v. Girens*, 3 Zab. 201, 202.

Although we have preferred to deal with this question on its merits, as it has a semblance of importance, the exception alleged in the bill did not set forth the fact that the marriages had been dissolved by death, and was properly disallowed.

Bigelow's exception to the exclusion of what Wardwell, who wrote the pamphlet in question, heard of Sprague's doing in the way of provocation, was rightly disallowed. It alleged that the court "excluded the evidence, on the ground that verbal slander would not be sufficient provocation to justify or mitigate a libel." In fact, the court did not exclude evidence of a libel actually published by Sprague, but stated that "a reiteration of the libel, or to say that you can refer to such a paper, is not in itself a libel. If he says that you can find in such and such a newspaper such and such an article, which I refer you to, I do not think that that is a publication of the libel in the sense that that may be a provocation."

It is plain that the "reiteration" supposed, means the same thing as the last sentence, in different words, and a very different thing from that alleged in the bill of exceptions. Whether a provocation to Wardwell was disclosed, or, if disclosed, could justify Bigelow, we need not consider.

We believe that we have disposed of all the questions raised in the argument of Bigelow's counsel upon the exceptions. We have examined the great number of others raised, or sought to be raised, by the bill, but find nothing in them which calls for special remark, or which can be sustained as proved and valid.

Exceptions overruled.

Joseph BALDWIN *et al.*
v.

Inhabitants of WILBRAHAM.

1. The Pub. Stat., ch. 27, § 129, giving **authority to hear and determine** in equity the **petition** of ten taxable inhabitants **to restrain a town** from illegally appropriating money, provides for **a matter not cognizable under the general principles of equity** jurisprudence.
2. The **authority to restrain** the abuse of corporate powers by **cities and towns** is a special power, **in the nature of a power of supervision** over other departments of the Government, **conferred upon the highest judicial tribunal**, and is **not included** in the enumeration of the **equity powers** in the Pub. Stat., ch. 151, § 2, which are **transferred** to the Superior Court. The **jurisdiction** in such cases is **exclusive in this court**.

(Hampden—Decided January 8, 1886.)

PETITION by ten taxable inhabitants of the Town of Wilbraham in Hampden County, seeking to restrain the Town from erecting at the cost of its taxable inhabitants a "Memorial Hall," to perpetuate the memory of the men of Wilbraham who died for their country, etc.
Dismissed.

Messrs. Geo. M. Stearns and Maynard & Spellman, for plaintiffs:

It is manifest that the real occasion for the erection was the attempt to perpetuate the "memory of the men of Wilbraham who died for their country," etc.

If this is true, the fact that some portions of the building were designed for proper uses cannot legalize the vote, if otherwise invalid. *Spaulding v. Lowell*, 23 Pick. 71-80; *George v. School Dist.*, 6 Met. 497-510.

The treasurer has no authority to borrow money under the pretended vote reported, upon the credit of the Town, to defray the expense of the erection of a memorial hall.

It is then one of those "other debts" which a town can incur only "by a vote of two thirds of the voters present and voting," and if the record does not show that the vote was passed by the required two thirds, it confers no authority. *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503.

The plaintiffs contend that the vote is invalid, inasmuch as it did not provide for the payment of the debt within ten years. P. S. ch. 29, § 8.

If this vote is insufficient to authorize the treasurer to borrow, as he proposes to do, there can be no doubt the court obtains jurisdiction under P. S. ch. 27, § 129.

Here the court has jurisdiction; and "The authority to hear and determine a cause in equity includes the power to administer relief in any of the established methods used by the courts of chancery." This includes the power to "enjoin all parties from making any future application of the money or credit of the Town to the payment of these unlawful claims." *Frost v. Belmont*, 6 Allen, 152; *Jenkins v. Andover*, 103 Mass. 94; *Minot v. West Roxbury*, 112 Mass. 1; *Coolidge v. Brookline*, 114 Mass. 592; *Simmons*

v. Hanover, 28 Pick. 188; *Clayton v. Hopkinton*, 4 Gray, 502.

Messrs. C. L. Long and C. L. Gardner, for defendants:

The Town of Wilbraham was authorized to purchase land, and to erect a building to be used for town purposes. P. S. ch. 27, § 10; *Friend v. Gilbert*, 108 Mass. 408.

The fact that such building was to be called a memorial hall and, as may be inferred, was to be constructed with that object incidentally in view, would not affect the legality of the vote so long as the use of the building for town purposes remained one of the essential objects of its erection. *Spaulding v. Lowell*, 23 Pick. 71; *French v. Quincy*, 3 Allen, 9; *Minot v. West Roxbury*, 112 Mass. 1; *Commonwealth v. Wilder*, 127 Mass. 1.

Authority to devote portions of such building to a public library and a reading room is expressly conferred by law, and the Town may rent such portions as are not required for immediate use. P. S. ch. 27, § 10; *French v. Quincy*, *supra*.

See also, St. 1885, ch. 189, authorizing towns to make Grand Army Posts custodians of certain funds for the purposes of distribution.

The money which the Town voted to raise and appropriate during the current year was legally assessed. *Freeland v. Hastings*, 10 Allen, 570.

To enable the Town to incur a debt, other than for temporary loans, such debt must be authorized by a vote of two thirds of the voters present and voting at the town meeting; and the fact that the debt was so authorized must appear by the record of the town clerk. P. S. ch. 29, § 7; *Andrews v. Boylston*, 110 Mass. 214.

By P. S. ch. 27, § 60, it is made the duty of the moderator at a town meeting to "make public declaration of all votes passed," and the record of this declaration would seem to be conclusive evidence of the result of such vote.

This court derives its jurisdiction in this case from P. S. ch. 27, § 129. When a town votes to raise by taxation or pledge of its credits, or to pay from its treasury any money for an illegal purpose, the court, upon petition, has power to enjoin such towns and may afford such other remedy as the statute provides. This jurisdiction is limited, however, and does not extend to all the powers invoked in the plaintiffs' bill. *Carlton v. Salem*, 103 Mass. 141.

Morton, Ch. J. delivered the opinion of the court:

This is a petition, under P. S. ch. 27, § 129, by ten taxable inhabitants of the Town of Wilbraham brought in the Superior Court, to restrain the Town from an alleged illegal expenditure of money.

We are met on the threshold of the case with the question whether the Superior Court has jurisdiction of the petition, which, though not raised in the Superior Court, and not argued by counsel, it is necessary that we should consider.

The Statute of 1883, ch. 223, § 1, provides that "The Superior Court shall have original and concurrent jurisdiction with the Supreme Judicial Court in all matters in which relief or discovery in equity is sought, with all the powers and authorities incident to such jurisdiction. The language of the statute is broad and, with-

out doubt, it was intended to confer upon the Superior Court concurrent jurisdiction in equity in all suits between individuals, involving private rights, of which the Supreme Judicial Court has jurisdiction by virtue of the general principles of equity jurisprudence.

But there are numerous provisions of our statutes which confer upon the Supreme Judicial Court, sitting as a court of equity, certain special powers and duties not within the general jurisdiction of a court of equity. Such are the statutes giving supervision over the courts of insolvency; the statutes in the nature of special insolvent laws, providing for the appointment of receivers and the winding up of savings, banks, banks of deposits and insurance companies; the statutes authorizing the court to compel by injunction the payment of taxes by savings banks, to compel the harbor and land commissioners to enforce restrictions in the deeds by the Commonwealth, of lands on the Back Bay; to restrain the erection of unlawful buildings upon commons or parks; to restrain the use of buildings for hospitals; to compel the observance of laws governing street railway companies; and to restrain a city or town from the illegal appropriation of money and many others which might be mentioned. It would not be proper for us to decide whether any of these numerous special powers, conferred by statute on this court, are transferred to the Superior Court by the Statute of 1883, except the one involved in this case.

We are of opinion that the authority under Pub. Stats. ch. 37, § 129, to hear and determine in equity the petition of ten taxable inhabitants to restrain a town from illegally appropriating money, was not so transferred. The subject of the statute is not a matter cognizable under the general principles of equity jurisprudence. However it may be in other jurisdictions, it has never been held in this Commonwealth that a suit by a taxpayer, to restrain an illegal appropriation of money by a town, was within the general scope of the jurisdiction of a court of equity. If the court already had jurisdiction of the matter, the statute enacted for the purpose of conferring jurisdiction was unnecessary. *Carlton v. Salem*, 103 Mass. 141; *Loud v. Charlestown*, 99 Mass. 208.

This authority in this court to restrain the abuse of corporate powers by cities and towns was first conferred by the Statute of 1847, ch. 37. It is a special power in the nature of a power of supervision over other departments or agencies of the Government, conferred upon the highest judicial tribunal. It is not included in the enumeration of the equity powers in the Pub. Stats. ch. 151, § 2, which are transferred to the Superior Court; and we think it was not the intention of the Statute of 1883, to give this power to the Superior Court. This view is fortified by the provisions of § 2 of the Statute of 1883, which excepts from the operation of the Act, § 1 of the Pub. Stats. ch. 151.

The section thus excepted provides that, "In addition to the jurisdiction in equity otherwise conferred, the Supreme Judicial Court shall have original and exclusive jurisdiction of every original process, whether by bill, writ, petition or otherwise, in which relief in equity is prayed for, except when a different provision is made." The fact that this provision is excepted indi-

cates that it was the intention of the Legislature to give the Superior Court concurrent jurisdiction in all matters within the scope of the general equity jurisprudence, but to retain within the exclusive jurisdiction of the Supreme Judicial Court, other special bills, writs or petitions allowed by our statutes, in which relief in equity is prayed for.

For these reasons, we are of opinion that the Superior Court has no jurisdiction of this petition.

Petition dismissed.

ELIZA COWLEY

r.

Ann McLAUGHLIN *et al.*

1. If at the time of the **attachment** of real property, the attachment **debtor** appeared **on the records** of the registry of deeds **as owning a third mortgage** on the property attached and nothing more on the face of the records, he **had nothing to attach**, although at the time he might have owned the **equity of redemption**, the **conveyance** of which to him was **not recorded**.
2. In such case an **assignment over of the third mortgage and the equity of redemption takes precedence** of the attachment, **although made and recorded after the attachment levy**.

(Middlesex — Decided February 25, 1886.)

ON exceptions by both parties. *Overruled.*
Defendants' exceptions:

Writ of entry to recover premises situated in Townsend, in said county, the demandant declaring upon seisin in mortgage, and heard by the court without a jury.

It appeared in evidence that the demanded premises were subject to three mortgages: one given by one Moody to Hildreth, dated February 1, 1861; one given by one Thompson to Moody, dated January 4, 1866; and one given by one Ryder to Thompson, dated November 15, 1866; all of which mortgages were duly recorded on or about their respective dates; that on June 24, 1867, said Thompson, the then holder of said third mortgage, assigned said third mortgage to one Charles Cowley, which assignment was recorded July 5, 1867; that on December 5, 1868, said Moody, the then holder of said second mortgage, at Townsend, in Massachusetts, assigned said second mortgage to said Charles Cowley, which assignment was recorded October 26, 1881; that on December 10, 1868, one George Brewster, who was then the owner and holder of said first mortgage, assigned said first mortgage, to said Charles Cowley, which assignment was recorded October 26, 1881; that on said December 10, 1868, one C. C. Ryder, who was then the owner of the equity of redemption from said mortgages, conveyed said equity of redemption to said Charles Cowley, which conveyance was recorded October 8, 1881; that on said December 5, 1868, at the time of the assignment of said second mortgage to said Charles Cowley, said Charles Cowley took possession of the demanded premises, un-

der each of said mortgages; that thereafter, on the evening of said December 5, 1868, said Charles Cowley, at Lowell, Massachusetts, assigned all three of said mortgages to the defendant by one instrument, which assignment was not recorded until October 26, 1881; that in October 1873, all the real estate of said Charles Cowley in said Middlesex County was duly attached upon a writ against said Charles Cowley; that judgment was duly entered on said writ for the plaintiff for \$2,217.27 damages and \$478.78 costs; that execution duly issued thereon and the demanded premises were duly levied on within thirty days after said judgment as the property of said Charles Cowley at the time of said attachment, and were duly sold on said execution to W. F. and W. S. Slocum by Luther L. Parker, then a deputy of the sheriff for said Middlesex County, who duly executed, acknowledged and delivered to said purchasers a sufficient deed thereof, which was dated August 20, 1881, and was duly recorded in said Middlesex County on November 3, 1881; that proper notice and advertisement of the time and place of said sale was given, and all the proceedings in relation to said attachment, levy and sale were regular and conducted according to law; that on the 3d day of September, 1883, said Slocums duly conveyed to Ann McLaughlin, one of the defendants, said premises by a deed which was delivered by said W. F. Slocum to said Ann McLaughlin on that date; said deed was duly recorded in said Middlesex County on October 30, 1883, and thereafter said Ann McLaughlin conveyed the demanded premises to Walter Osgood, the other defendant, by a deed which had been duly recorded in said Middlesex County; the attachment was made upon the writ in favor of Lawrence McLaughlin, and said McLaughlin at the time of said attachment had no knowledge of any of the assignments and conveyances before mentioned.

The defendants requested the court to rule as follows:

If the assignor of a mortgage takes a deed of the equity of redemption from said mortgage, and thereafter and before said assignment is recorded, the premises described in said mortgage and deed are attached as the property of the assignor, said attachment will take precedence of said assignment.

If Eliza Cowley, at the time of the attachment against Charles Cowley, held an unrecorded deed of the premises, and the attaching creditor had no knowledge of said deed, said deed would not be valid as against the attachment.

If Charles Cowley at the time of the attachment had a deed of the equity and assignments of all the mortgages, which deed and assignments were not then recorded but were subsequently recorded, when they were recorded the title by attachment became thereby good.

The court declined to rule as requested, and found that the plaintiff was entitled to the possession of the premises for breach of the conditions contained in the second and third mortgages, and to these refusals to rule and to this finding the defendants excepted.

Plaintiff's exceptions:

This action was tried by the court without a jury, and a finding for the plaintiff filed April 16. The 19th of April fell upon a Sunday.

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The defendants filed a bill of exceptions April 20, and on the same day the attorney signing the same deposited in the postoffice in Lynn, in Essex, a notice thereof to plaintiff's attorney in Lowell, in Middlesex, Lynn and Lowell being the place of residence of said attorneys respectively; but the plaintiff's attorney did not receive said notice, nor did the same reach Lowell until April 21.

The attorney signing said bill of exceptions and said notice was present at and took part in the trial; but his appearance was not entered upon the docket until some days after the trial, and it was then entered by him without notice to and without the knowledge of the plaintiff or her attorney.

The plaintiff objected to the allowing of said bill of exceptions and moved the dismissal: 1st, because no prayer for the rulings therein mentioned or for any rulings was presented in writing to the court or to the plaintiff until after defendants' counsel had begun and proceeded with his closing argument; 2d, because the same were not filed within the time required by law and the rules of this court; 3d, because the attorney who signs the same was not the attorney of record of the defendants at the time of the trial; 4th, because the plaintiff's attorney was not notified of the same within the time required by law and the rules of this court, and was not notified thereof by any attorney of the defendants within the meaning of the law and the rule of court.

The court overruled the plaintiff's objections and her motion to dismiss said exceptions, and allowed said exceptions. To these overrulings and allowings the plaintiff excepted.

Mr. Charles Cowley, for plaintiff:

The term, "within three days," in § 8, ch. 158, of P. S. and in the 36th Rule of the Superior Court, should be taken in its common acceptance. If Sundays were not to be counted, the statute and the rule would have said, Sundays excepted. *Conway v. Callahan*, 121 Mass. 165; *Tufts v. Newton*, 119 Mass. 476; *Leyland v. Pingree*, 184 Mass. 367.

In *Blair v. Laffin*, 127 Mass. 518, 521, the decision was controlled by the facts that both the attorneys lived "in the same county," and that the notice reached the locked box of the attorney to be notified, in due season. But here, the attorneys lived in different counties, and the notice did not reach Lowell until April 21.

In *Campbell v. Vedder*, 3 Keyes, 174, the N. Y. Court of Appeals held that the non-recording of the assignment of a prior recorded mortgage does not affect the rights of the holder thereof as against purchasers of the premises.

In *Greene v. Warnick*, 64 N. Y. 220, it was held that the only effect of recording the assignment of a mortgage is to protect the assignee from a subsequent sale of the same mortgage. *Crane v. Turner*, 67 N. Y. 437; *Clark v. Jenkins*, 5 Pick. 280; *Kellogg v. Smith*, 26 N. Y. 18.

If the mortgagee assigns or transfers the mortgage, and then acquires the absolute title, this does not operate to merge the mortgage. *White v. Hampton*, 13 Iowa, 259; *Purdy v. Huntington*, 42 N. Y. 334; *S. C.*, 1 Am. Rep. 532; *Goodwin v. Keney*, 47 Conn. 436; *Duffy v. McGuiness*, 13 R. I. 595; *Campbell v. Vedder*, 1 Abb. Ct.

ec. 295; 15 Reporter, N. S. 250; *Rumpp*
tens, 59 Cal. 496; *Porter v. Millet*, 9
 01.

s. A. J. Edwards, C. C. Mayberry,
 Jpton and N. D. A. Clark, for de-
 s:

nes, J., delivered the opinion of the

is a writ of entry, the demandant declar-
 n a seisin in mortgage. The tenants are
 ers at an execution sale, and their title
 s upon the effect of the attachments in
 nce of which the sale was made.

attachment was made in October, 1873,
 he real estate in Middlesex County, of
 Cowley. At that time he appeared on
 rds of the registry of deeds as owning a
 mortgage on the premises and nothing
 In fact this mortgage, and also a second
 ge, the assignment of which to him had
 n recorded, had been assigned by him to
 mandant after entry for breach of con-

These last mentioned assignments to
 him were recorded October 26, 1881,
 ter the attachments. At the time of the
 ment he owned the equity of redemption,
 conveyance to him was not recorded
 October 3, 1881. It may be assumed that
 ed the first mortgage and that there had
 merger.

he face of the records Charles Cowley
 hing to attach. *Blanchard v. Colburn*,
 ss. 345; *Eaton v. Whiting*, 3 Pick 484;
Root, 116 Mass. 410, 412.

f the conveyance of the equity to him
 een recorded, the attaching condition
 not have been affected by Cowley's as-
 nt over of the third mortgage which
 n his name, but he would have been en-
 o treat it as merged so far as to give
 attachment priority. *Clark v. Jenkins*, 5
 89.

it may be argued with some plausibility
 attachment reached the equity of re-
 on none the less because Cowley's title
 appear and that his seeming ownership
 mortgage must have the same effect as
 case supposed.

we are of the opinion that this argument
 prevail. When the registry shows a ti-
 ect to attachment, the attaching credit-
 something of a stretch, is regarded in the
 f a *bona fide* purchaser to whom the re-
 deeds have been exhibited and to whom
 nveyances over have been disclosed.
ard v. Sartwell, 129 Mass. 210; *Coffin v.*
Met. 212.

when the registry shows no title and the
 r does not know that his debtor has one,
 we must assume to have been the fact
 it be in any way material, we think that
 t take what accident throws into his net,
 nds it, and that he cannot claim the ben-
 a fiction to get more than his debtor
 owned. See, *Hoynes v. Jones*, 5 Met.

creditor cannot be taken to have relied
 owley's seeming ownership of the mort-
 ven infinitesimally, in making his attach-
 unless he knew that Cowley owned the
 because the mortgage standing by it
 him no good. All ground for treating

the creditor as a *bona fide* purchaser as against
 the assignee of the mortgage disappears, there-
 fore, and the attachment must be regarded as
 having reached nothing that Cowley did not
 actually own.

It is argued that as the conveyance of the
 equity to Charles Cowley was recorded before
 his assignment of the third mortgage was re-
 corded, although after the attachment, he did
 for a time stand upon the record after the at-
 tachment as if before the attachment there had
 been a merger of the third mortgage and the
 equity. But this temporary state of the record
 after this attachment was made, not acted on
 in any way, has no effect upon this plaintiff's
 rights. *Moore v. Albro*, 129 Mass. 9, 18.

It follows that the finding of the court that
 the plaintiff was entitled to possession for
 breach of condition of the second and third
 mortgages was correct, and the defendants' ex-
 ceptions must be overruled.

It also follows that the plaintiff's objections
 to the allowance of the defendants' bill of ex-
 ceptions, if rightly taken by a second bill of
 exceptions, do not require discussion. We may
 say, however, that Sunday is excluded from
 the three days allowed for the filing of a bill of
 exceptions by P. S. ch. 153, § 8; *Thayer v. Felt*,
 4 Pick. 354; *Hannum v. Tourtellott*, 10 Allen,
 494; *Cunningham v. Mahan*, 112 Mass. 58.

We are disposed to think the notice sufficient.
Blair v. Laflin, 127 Mass. 518.

Exceptions overruled.

COMMONWEALTH of Massachusetts

τ.

Edwin J. HOBBS.

1. An indictment for a statutory offense which follows the language of the statute is sufficient.
2. On trial of an indictment charging the statutory offense of attempting to poison a human being, where the evidence shows the bread and meal used for the purpose alleged contained the substance known as white arsenic, evidence to show a previous purchase of that article is competent; and where the purchase of a poison of uniform manufacture was proved, it is sufficient to admit evidence of the chemist's analysis of another box of the same article.
3. The fact that the poison used was changed in appearance by foreign coloring matter is immaterial; and the objection that the relative quantity or proportion of poison found in the bread or meal did not correspond with that charged in the indictment, is immaterial.
4. Evidence of the bias of a witness against the defendant might be admissible to impeach his credibility; but no useful purpose would be served by the admission of such evidence upon a distinct and collateral issue, for the purpose of showing the charge to be untrue.

ON defendants' exceptions. *Overruled.*

Indictment, under statute for an attempt to poison.

Mr. J. A. McGough, for defendant.

Messrs. E. J. Sherman, *Atty-Gen.*, and **Harvey N. Shepard**, *Asst. Atty-Gen.* for the Commonwealth:

The motion to quash was properly overruled. This is a statutory crime, and in the indictment it is sufficient to follow the language of the statute. P. S. ch. 202, § 32; *Commonwealth v. Bearse*, 108 Mass. 487; *Same v. Galaran*, 9 Allen, 271.

The evidence offered by defendant concerning the time at which certain pictures were injured, for which an indictment was then pending, was properly excluded, as relating to a collateral matter.

The motion to dismiss the first four counts was rightly refused, and the evidence was properly submitted to the jury. The variance, if any, is not substantial or material. *Commonwealth v. McLaughlin*, 105 Mass. 460, 463.

C. Allen, J., delivered the opinion of the court:

1. The indictment was sufficient in form. *Commonwealth v. Bearse*, 108 Mass. 487; *Same v. Galaran*, 9 Allen, 271.

2. There being evidence to show that the bread and Indian meal contained the substance known as white arsenic, evidence to show a previous purchase or possession of white arsenic by the defendant would be clearly competent. And evidence to show that there was but one article called "Rough on Rats;" that it was manufactured by one Wells; that it was a uniform article; and that the defendant had bought two boxes of this article prior to the time of the alleged attempt to poison, for the declared purpose of killing cats and rats, was sufficient to make it proper to receive in evidence the chemist's analysis of another box of that article, showing that it consisted almost wholly of white arsenic.

3. The fact that the white arsenic was colored with lampblack was immaterial. It still remained the substance known as white arsenic, though no longer white in appearance.

4. The objection, that the relative quantity or proportion of arsenic found in the meal did not correspond with that charged in the indictment, is immaterial. *Commonwealth v. McLaughlin*, 105 Mass. 460.

5. The defendant was allowed, without objection, to show bias against him on the part of the witness Elizabeth H. Cram, by proof that she had preferred several other charges against him, prior to the finding of this indictment, and that she had procured his arrest upon one of them, for which an indictment was now pending. In order to show that the bias of the witness was of a deeper grade than might otherwise be inferred from the bringing of these charges, the defendant offered to show, in addition, that the particular charge contained in the indictment was false and was known to be so by the witness. But this would be going further than is required for purposes of justice.

If the defendant were allowed to put in evidence that the charge was false, the Government might meet this evidence by showing that the charge was true, and thus a distinct and col-

lateral issue would be presented to the jury.

No useful purpose would be subserved by requiring the jury to investigate the merits of other controversies, or to listen to the details of the quarrels between the witness and the defendant. The only legitimate purpose of the testimony would be to show bias, and thus to impeach the credibility of the witness. It is impracticable to carry an inquiry into the precise degree of ill feeling or bias so far as the defendant sought.

Exceptions overruled.

Wilhelmina C. POST

v.

City of BOSTON.

1. A town is liable for damages for injury caused by a defect in a highway which might have been remedied, or which injury or damage might have been prevented by reasonable care and diligence on the part of the town; if such town had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on its part, although the defect had not existed for any particular length of time, and although it had not actual notice thereof.

2. Where the evidence shows that the cover of a cesspool was liable to come off and float away and from natural causes, such as the jury would be warranted in finding that reasonable care, diligence and prudence should guard against, the liability of the town is absolute.

(Suffolk—Decided February 25, 1886.)

ON defendant's exceptions. *Overruled.*

Action for damages for personal injury sustained by reason of a defective street, owing to negligence of the Municipality in failing to repair and keep the same in safe condition.

Mr. Thomas M. Babson, for defendant:

The evidence introduced by the plaintiff, that a witness had seen the cover off at different times within a year prior to the accident, was unaccompanied by any proof that the condition of the cover or cesspool was the same during the year that it was at the time of the accident. It was indefinite, remote as to time, and tended to raise collateral issues which it was impossible for the defendant to meet, and should have been excluded. *Crosby v. Boston*, 118 Mass. 71; *Hutchins v. Littleton*, 124 Mass. 289.

It was not contended that the cover was defective in any way, except that it could be lifted off by pressure from below. The liability to become a defect is not a defect. *Billings v. Worcester*, 102 Mass. 329; *Ryerson v. Abington*, 102 Mass. 526.

The defendant's evidence tended to show that the drain from the cesspool to the sewer, a drain five feet below the surface of the street, had given way or become stopped up; that the water pouring into the catch basin during the rain of that evening could not flow off into the

sewer and rose in the catch basin and floated off the cover; that the cover was safe, except that it might come off if a heavy rain came while the drain or sewer was blocked up. *Donaldson v. Boston*, 16 Gray, 508; *Crosby v. Boston*, *supra*; *Monies v. Lynn*, 119 Mass. 272; *Same v. Same*, 121 Mass. 444; *Same v. Same*, 124 Mass. 165.

The City could not be chargeable with lack of diligence in repairing the defect until it became a defect, *i. e.*, became immediately dangerous. It was immaterial how the defect came to be there. *Billings v. Worcester*, *supra*; *Monies v. Lynn*, 124 Mass. 165.

The cases of *Macarty v. Brookline*, 114 Mass. 527; *Winn v. Lowell*, 1 Allen, 177 and *Blood v. Hubbardston*, 121 Mass. 233, are unlike this case. In all of those cases the highway had been rendered unsafe by the defect for more than twenty-four hours before the accidents.

The Stat. of 1877, ch. 224, while in some respects changing the liability of towns, did not make a construction of the highway which was not "presently dangerous," but might become so if certain probable things happened, a defect of which the town was bound to take notice. P. S. ch. 52; G. S. ch. 44.

Messrs. Stillman B. Allen and Joseph Bennett, for plaintiff.

C. Allen, J., delivered the opinion of the court:

Under the Gen. Stats. ch. 44, § 22, a person who received injury through a defect in a highway might recover damages of the town, by law obliged to repair the same, if such town had reasonable notice of the defect or if the same had existed for the space of twenty-four hours previous to the occurrence of the injury. Under this statute it was held that it was the intention of the Legislature to limit the liability to cases where the precise defect which caused the injury was known to the town or had existed for twenty-four hours, and that if the defect had not existed for twenty-four hours the town could not be held liable, on the ground that its agents had constructed or repaired the way so negligently that it was reasonable to suppose that such a defect would be produced. *Monies v. Lynn*, 121 Mass. 442, 444.

And in a later stage of the same case it was declared that a liability to become defective is not in itself a defect. 124 Mass. 171. See also, *Hutchins v. Littleton*, 124 Mass. 289.

Under that statute and earlier ones to the same effect, it had often been held that the liability of the town became absolute if the defect had existed for twenty-four hours, and that the town could not exonerate itself by proof of due diligence on its part. *George v. Haverhill*, 110 Mass. 506; *Bodwell v. North Andover*, *Id. note*, 511, 512.

The Stat. of 1877, ch. 234, which was an Act to amend the above chapter of the Gen. Stats., made two changes in the section referred to. In the first place it did away with the absolute liability imposed on towns where the defect had existed for twenty-four hours, and exonerated them from liability in all cases where there had been no lack of proper diligence on their part. *Rooney v. Randolph*, 128 Mass. 580; *Hayes v. Cambridge*, 136 Mass. 402; S. C. 138 Mass. 461.

And it substituted therefor a liability for an

injury or damage received through a defect which might have been remedied, or which injury or damage might have been prevented by reasonable care and diligence on the part of the town, if such town had reasonable notice of the defect or might have had notice thereof by the exercise of proper care and diligence on their part, although the defect had not existed for any particular length of time and although the town had no actual notice thereof. This statute, reenacted in Pub. Stat. ch. 52, § 18, is now in force. It has essentially modified the rule as declared in *Monies v. Lynn*, above cited, which is the principal reliance of the defendant in the present case. The duty is now cast upon towns of using reasonable care and diligence to remedy defects and to prevent damage or injury to persons and property, by guarding against the effects of causes which are likely to produce such defects. *Flanders v. Norwood* [*ante*, 448.]

The evidence in the present case was sufficient to show that the cover of the cesspool was liable to come off and to float away, from the accumulation of water in such rainfalls as often occur and such as the jury would be warranted in finding that reasonable care, diligence and prudence should guard against. The case is thus brought directly within the existing statute, and taking the instructions, as a whole, the case was fairly left to the jury.

It is indeed contended on the part of the plaintiff that the present case is distinguishable from *Monies v. Lynn*, and that the verdict might well be supported as fully within the decision in *Hodgkins v. Rockport*, 116 Mass. 573.

But in view of the change in the legislation it becomes unnecessary to consider this ground of contention. The evidence that the cover had been off on other occasions within the year prior to the accident was competent, as bearing on the question whether the defect might have been remedied or the injury prevented by reasonable care and diligence on the part of the Town.

Exceptions overruled.

COMMONWEALTH of Massachusetts
v.

John C. HAYES *et al.*

1. Although a jury may convict, upon the uncorroborated testimony of an accomplice, yet evidence, in order to be competent as corroborative, must be evidence tending to convict the defendant on trial with the crime charged.
2. Evidence of the stealing of goods in one county and of their asportation to another county and disposition of them there is evidence of a single transaction and is admissible in corroboration of the evidence of an accomplice.

(Suffolk—Decided January 4, 1886.)

ON defendant's exceptions. *Overruled.*

The case is sufficiently stated in the opinion.

Mr. W. B. Gale, for defendants.

Messrs. Edgar J. Sherman, Atty-Gen., and *Harvey N. Shepard, Asst. Atty-Gen.*, for Commonwealth:

The office of corroborative evidence is, by confirming the testimony of the accomplice in regard to matters which are not within the general knowledge, but likely to be known only to those engaged in the crime, to induce the belief that he is to be generally credited in his statements. Its weight is for the jury.

The evidence of the receiving of the stolen goods by the defendants, Levi and Goldstein, was amply corroborated and sufficient to warrant their conviction. *Commonwealth v. Bosworth*, 22 Pick. 397; *Same v. Brooks*, 9 Gray, 299; *Same v. Price*, 10 Gray, 472; *Same v. O'Brien*, 12 Allen, 183; *Same v. Larrabee*, 99 Mass. 413; *Same v. Elliott*, 110 Id. 104; *Same v. Snow*, 111 Id. 417; *Same v. Ford*, Id. 394; *Same v. Glover*, Id. 395; *Same v. Scott*, 123 Id. 238.

Morton, Ch. J., delivered the opinion of the court:

The only exception taken by the defendants, Goldstein and Levi, was one to the instructions given as to the corroboration of the testimony of Williams, concerning the larcenies in the County of Suffolk.

The subject of the admission and effect of corroborative testimony was fully considered in the case of *Commonwealth v. Holmes*, 127 Mass. 424, and it was there held that, although a jury may convict upon the uncorroborated testimony of an accomplice, yet that evidence, in order to be competent as corroborative of an accomplice, in the sense of rendering it safe and prudent to convict, must be evidence tending to connect the defendant on trial with the crime charged. In the case at bar, the instructions were in conformity with this decision. The evidence shows that the defendants, Hayes and Williams, formed and carried out a scheme to steal goods in the neighboring cities and towns, and to bring them into Boston for the purpose of disposing of them to the defendants, Goldstein and Levi. Hayes and Williams might be convicted of larceny in the county in which the goods were stolen, and also, by reason of the new asportation, in Boston, of larceny in the County of Suffolk. But the transaction of stealing the goods and disposing of them in Boston was a single, connected one; and the evidence showing that Hayes took part in the original larcenies tended to connect him with the crime committed in Boston. It corroborated the testimony of Williams, because it showed the joint action of the two in the early stages of the criminal transaction, and thus tended directly and strongly to show that Hayes participated in the crimes charged in the indictment. *Commonwealth v. Larrabee*, 99 Mass. 413.

The evidence, therefore, was properly submitted to the jury for their consideration, as evidence corroborating the testimony of the accomplice Williams.

Exceptions overruled.

CITY OF WORCESTER

r.

Inhabitants of NORTHBOROUGH.

1. A printed book entitled, "Record of Massachusetts Volunteers," one of the volumes printed under ch. 98 of the Resolves of 1866, is a public document

and is admissible in evidence to prove the facts contained therein.

2. A clerk in a public office taking part in the routine a year later, and who continues there for a long time, knows from a multitude of small details, whether the course of business which he finds is new or long established; and his testimony as to the course of business of the year preceding his entry into the office is competent to prove that a person had been assigned as part of the quota of a certain town.
3. Plaintiff can only recover for the board and attendance furnished within two years of the date of the writ. A town furnishing relief to a pauper is not required to wait until it has stopped giving relief, before bringing suit.

(Decided January 5, 1886.)

ON defendant's exceptions. *Sustained.*

In suit to recover for services rendered in the care and support of a pauper.

Messrs. A. Norcross and H. C. Hartwell, for defendant.

The book entitled "Record of Mass. Volunteers" was inadmissible in evidence.

It was not admissible as an official register or book kept by a person in public office, as the contents are not transactions occurring in the presence or in the course of the public duties of the Adjutant General. 1 Greenl. Ev. §§ 484, 493.

The book is not admissible as a public inquiry; it is not the finding of any legally constituted power. *Id.* 556.

It is not like an inquiry of lunacy or an inquest of office, as in *Stokes v. Dawes*, 4 Mason, 268; or the lists of soldiers as made out by selectmen of towns, as in *Wayland v. Ware*, 104 Mass. 46.

It is not such a public document as to be admissible; the contents are not matters which came within the official cognizance and observation of the Adjutant General. 1 Greenl. Ev. § 491.

It is not like the volume of public documents, containing letters of the Secretary of State, etc., held admissible in *Whiton v. Albany City Ins. Co.* 109 Mass. 24, or the volume of "American State Papers" as in *Doe v. Roe*, 13 Fla. 602, and *Bryan v. Forsyth*, 19 How. 334 (60 U. S. bk. 15, L. ed. 674.)

No evidence was offered that table No. 4 or any assignment of quotas made by the Adjutant General was ever allowed by the war department. *Wayland v. Ware*, *supra*.

In *Hall v. Wood*, 9 Gray, 60, the contract declared upon was an entire contract to be paid for as one piece of work, and the cause of action did not accrue until the work was all done.

So in *Eliot v. Lawton*, 7 Allen, 274, an action for services of an attorney, it was held that the contract of an attorney to carry on a suit is an entire contract, and the period of limitation runs only from the termination of suit, unless the relations between him and his client change prior thereto.

Mr. Frank P. Goulding, for plaintiff.

Holmes, J., delivered the opinion of the court:

- 1 It is not denied that the printed book put

in evidence was in fact one of the volumes printed under chap. 98 of the Resolves of 1866, as it purported to be. This being so, it was properly admitted. Assuming that the Resolves could not directly affect the rules of evidence, they made the document a public document, and would seem to have been passed with the purpose of causing the facts to be recorded while still fresh, for the benefit of the public.

The volume was recognized by an Act of the Legislature, Stat. 1866, ch. 301, § 1. The facts collected in it were public facts. Stark. Ev. 10th Am. ed. 273.

They were known to the Adjutant General, *ex officio*. See, *Brockton v. Uxbridge*, 133 Mass. 292.

Moreover, this class of evidence is not strictly confined to facts within the personal knowledge of the officer making the record. See, *Hanson v. South Scituate*, 115 Mass. 336; *Whiton v. Albany City Ins. Co.* 109 Mass. 24.

2. The clerk, Kezar, was properly allowed to testify that, in 1862 the Adjutant General's department was governed by the place of residence stated in the description rolls in assigning credits to towns, although Kezar was not employed in that office until July, 1863, and only professed to be able to state this from his knowledge of the custom of the department after he was employed there. It would be difficult to say that the jury might not have inferred what was the practice of the office in 1862, from direct evidence of what it was in 1863.

But it is evident Kezar's testimony was more than a marked inference of that sort. A clerk who is in the same office and taking part in the routine a year later, and who continues there for a long time, practically knows from a multitude of small details, which he cannot hope to reproduce, whether the course of business which he finds is new or long established.

Moreover, Kezar's testimony seems to have been, not merely the best, but the only evidence that could have been obtained upon this point. See, *Townsend v. Pepperell*, 99 Mass. 40, 43, 44.

3. It follows that the court rightly refused to rule that there was no evidence that Hawley was ever assigned as part of the quota of Northborough.

4. The last ruling requested should have been given, to the effect that the plaintiff could only recover for the board and attendance furnished within two years of the date of the writ. P. S. ch. 84, § 14.

We agree with the defendant, that a town furnishing relief to a pauper is not required to wait until it has stopped giving relief before it can bring suit. The services were rendered, and the liability accrued *de die in diem*. On this ground alone, the exceptions must be sustained, unless the plaintiff remits all but \$15.56.

Exceptions sustained.

COMMONWEALTH of Massachusetts

v.

Elizabeth FITZPATRICK.

1. It is **not competent** for the purpose of **contradicting** the testimony of a witness **to prove declarations** made by the defendant to the witness **six months**

prior to the action, for the purpose of showing ill will towards defendant.

2. **Questions on cross examination upon collateral and immaterial matters may be admitted or rejected, in the discretion of the trial court.**

(Norfolk—Decided January 7, 1886.)

ON defendant's exceptions. *Overruled.*

The defendant was tried for keeping a liquor nuisance in the Town of Dedham, from January 1, 1885, to March 9, 1885. Jennie Lamire testified for the Government, among other things, that she had several times gotten liquor at the defendant's house; that she had gone to the defendant's house on March 4, 1885, but that the defendant had told her that she didn't want her to come into her house, as the neighbors would talk, and that the defendant delivered the liquor to her in the woods, away from the house. She was asked on cross examination, whether or not she was not forbidden by the defendant several times to come to the house, and she replied that she had never been forbidden to come to the house of the defendant. She also disclaimed any ill feeling towards the accused. Mrs. Campbell was offered by the defendant as a witness, who testified that she lived next door to the defendant's house, and she was asked whether she had, during the last summer, ever heard Mrs. Fitzpatrick, the defendant, order Mrs. Lamire out of the yard, into which she had come to get water, and to keep out of the same in the future. The court ruled the question to be incompetent, and the defendant excepted.

James H. Chadwick testified for the Government that he went to the defendant's house in the capacity of a police officer, to make search for liquor; that he found certain bottles of lager beer; that he found certain tumblers in a cellar way; that the defendant said in his presence, "Just as I begin to do a little business, you jump on me." Being cross examined with reference to bias, which he disclaimed, Chadwick was asked whether at the time he made the seizure at the defendant's house, he had reason to believe and did believe that there were other places in the town in which liquors were sold in violation of law, at which no seizure had been recently made, or search been made by him. This question was excluded as incompetent, and the defendant excepted.

Mr. E. Greenhood, for defendant.

Messrs. Edgar J. Sherman, Atty-Gen. and Harvey N. Shepard, Asst. Atty-Gen., for Commonwealth:

The defendant was being tried for keeping a liquor nuisance; the questions, whether a certain witness for the Government had been ordered out of the yard of the defendant by her, or whether the officer who made the search believed or had reason to believe that liquor was being illegally sold in other places in the same town, were wholly irrelevant, and any evidence introduced on these points was clearly incompetent and inadmissible, and properly excluded as collateral matter. *Commonwealth v. Brown*, 136 Mass. 171.

W. Allen, J., delivered the opinion of the court:

The defendant was charged with keeping and

maintaining a common nuisance, namely: a tenement, between January 1 and March 9, 1885, used for the illegal sale and illegal keeping of intoxicating liquors.

One Lamire testified, for the Government, that she had several times procured liquor at the defendant's house, and that she went to the house on March 4, to get liquor.

On cross examination, she denied that she had ever been forbidden by the defendant to go to her house, and also denied that she had any ill-feelings toward the defendant.

The defendant offered to prove that, at one time in the course of the summer, before the time of the alleged offense, when the witness had gone into the defendant's yard to get water, the defendant ordered her to leave the yard and to keep out of it in the future.

The court excluded the evidence and we think rightly. It was not competent for the purpose of contradicting the testimony of the witness that she had not been forbidden the house; it was not a declaration or act of the witness competent for the purpose of showing ill will by her toward the defendant; and the fact that the witness had been ordered not to come to the defendant's yard for water was not material upon the question whether she did, six months afterwards, go to the defendant's house for liquor.

The question put, on cross examination, to the witness Chadwick, an officer who searched the defendant's premises and made a seizure of liquors, whether, at that time, he had reason to believe and believed that there were other places in the town where liquors were sold in violation of law, and where no search or seizure had been recently made by him, was upon collateral and immaterial matter, which the court in its discretion could reject or admit; and no exception lies to its exclusion.

Exceptions overruled.

Sarah N. BERNEY

v.

William B. DINSMORE *et al.*

1. **Testimony which describes the size, shape, color and quality of an article which cannot be produced in evidence, in a manner as accurately as the witness is capable of doing, should be admitted in evidence.**

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2. **There is no rule of law which requires a witness to be an expert, to testify to the size, shape and appearance of a visible object.**

(Suffolk—Decided January 11, 1886.)

ON exceptions. *Overruled.*

Mr. Henry W. Bragg, for plaintiff:

Every person is competent to express an opinion and give his judgment in regard to the size, color and weight of objects and their general appearance. *Commonwealth v. Sturtevant*, 117 Mass. 183 and cases cited; 1 Whart. Ev. §§ 436, 518; 1 Greenl. Ev. § 440 and cases cited; *Commonwealth v. O'Brien*, 184 Mass. 200.

Messrs. W. B. Gale and J. W. McDonald, for defendants.

Field, J., delivered the opinion of the court:

The testimony of the plaintiff described the size, shape, color and quality of the pearl in a manner perhaps as accurate as she was capable of doing. If any other rule were adopted than that used in this case, it might be impossible to determine the value of the pearl. When the evidence is the best evidence obtainable, it should be admitted, unless admitting it contravenes some established rule of law. There is no rule which requires that a witness must be an expert to testify to the size, shape and appearance of a visible object.

The witness Foss was an expert upon the value of pearls, and he was in effect asked what a pearl, such as the plaintiff had described, was worth, and the description given by the plaintiff was conveyed to his mind more accurately perhaps, by exhibiting to him pearls which the plaintiff had sworn were in all respects like the one she lost, than could have been done in any other manner. The jury were to weigh this evidence with all other evidence concerning the age, condition, size, shape, color and quality of the pearl, and the variations of value dependent upon these characteristics. We are satisfied that this method of determining the damages is more reasonable and better supported by modern authority than that laid down in *Armory v. Delamirie*, 1 Sm. L. Cas. 470, which was, "That unless the defendant did produce the jewel and show it not to be of the finest water" the jury "should presume the strongest against him, and make the value of the best jewels the measure of their damages."

Exceptions overruled.

SUPREME COURT OF NEW HAMPSHIRE.

George L. HOITT

v.

Alfred HOITT.

1. Where a will is not shown to have been expressly revoked, no subsequent changes in the circumstances of deceased, his family or estate; as, the death of his wife and one of his sons, both of whom were legatees; his second marriage but without issue; the alienation of the larger portion of his estate, and its nearly threefold increase in value through natural causes and judicious investments, will operate as a revocation by implication.
2. Inasmuch as the widow and children of a testator, not provided for in the will, are, under our statutes, entitled to the same share of the estate as if he had died intestate, the sole reason upon which the rule was grounded, that remarriage operated as a revocation no longer exists, and so the rule has in this jurisdiction become inoperative and obsolete.
3. The general rule is that a partial revocation only produces an ademption of the subject of the devise, and thus necessarily limits the operation of the will to the extent of the alienation; not by reason of defect in the will itself, but because it pleased testator to dispose of part of his estate in a manner different from his original intention, which it was competent for him to do, either by conveyance, a new will or by codicil.
4. The Statute of this State, G. L., ch. 193, § 14, provides the only modes by which a will can be revoked, and having so provided, it is not within the legitimate power of courts to dispense with the requirement of the statute, and accept even a definite intention to perform the prescribed act for the act itself.
5. Oral declarations of the testator, to the effect that he understood the will was revoked, are not competent evidence and should be rejected. His mere understanding cannot revoke his will; the legal requirements cannot be thus abrogated, for wills cannot be revoked by parol; nor are such declarations evidence, unless they accompany some act and thereby become a part of the *res gestæ*.
6. Such declarations are not competent upon testator's intention not to pass, by his will, after acquired real estate. If a contrary intent is inferable from the will itself, it cannot be disproved by extrinsic evidence; if not inferable and may be ascertained by the weight of com-

petent evidence, his declarations are not a part of such evidence and hence are inadmissible.

(Strafford—Decided March, 1886.)

PROCEEDINGS to probate a will. Decree reversed.

This is an appeal from a decree of the Judge of Probate, disallowing the will of Alfred Hoitt; the following facts are agreed by counsel for the respective parties:

Alfred Hoitt was a resident of Dover, and died in that city, November 9, 1883.

He resided at Durham, when said will was made, and removed to Dover in the year 1880, or 1881.

After his decease said will was found in the safe of the testator, in a bundle of old papers of no pecuniary value.

Included in this bundle were several apparently incomplete drafts or memoranda of wills never executed, without date, some of which were apparently made since the date of said will.

Said will bears date, February 12, 1864, and its due execution is admitted.

At the date of the will the testator had a wife, the mother of his children, and six sons and seven daughters, all of age except Washington, Charles and Sylvia, and all married, except the three minors and Franklin and George.

Two of them lived in Concord, three in Boston and the others in Durham.

His wife died April 25, 1877, and his son, Franklin, died unmarried in February, 1877.

The testator married a second wife, January 6, 1879, who still survives.

His children are all now living except Franklin; they all have children, except George, Charles, Washington and Sylvia.

Six of the testator's children reside in New Hampshire, the others, in Boston or vicinity.

The will was as follows:

"Be it remembered that I, Alfred Hoitt of Durham, in the County of Strafford, State of New Hampshire, being of sound mind and in usual bodily health, but considering the uncertainty of life, do make and publish this my last will and testament in manner following:

1st. To my beloved wife, Susan Hoitt, I give and bequeath the use, improvement and income of my homestead farm in said Durham, including all my lands lying on both sides of the Boston & Maine Railroad and adjoining the same, with the buildings thereon.

Also all the farming tools, utensils and personal property in the out buildings on said farm used by me for farming purposes, including a horse, a cow, a wagon and harness and a carriage and harness, but no other stock.

Also the dividends on sixty shares in the Boston & Maine Railroad.

Also all my household goods and effects, including plate, pictures, books and provisions, all during her natural life, at her decease to be subject to the provision hereinafter named. The foregoing bequest to my said wife to be in full of her claim of dower allowance or distributive share in my estate.

2d. To my son, Franklin W. Hoitt, after the decease of my said wife, I give and bequeath

the use, improvement and income of my said homestead farm, and also the use and improvement of the farming tools and other property above named thereon used for farming purposes, all during his natural life, and at his decease I give, devise and bequeath said homestead farm and also said personal property above named used by me for farm purposes to my sons, Washington Hoitt and Charles E. Hoitt and their heirs forever.

But if said sons last named or either of them should die without children living at his decease then I give the share and interest of such deceased son in said homestead farm and in said farm, property to his surviving brothers in equal shares.

8d. To my son Alfred D. Hoitt, in addition to what I have before given him, I bequeath the sum of one hundred dollars.

4th. To my son, Samuel P. Hoitt, I give and bequeath during his natural life, my old homestead farm situate in Lee, containing one hundred acres more or less, and lying on both sides of the N. H. Turnpike road, it being the same land I purchased of Lemuel Chesley, Rich'd Pickering, Benj. Mathes and Hatevil Hall and at his decease I give and devise said old homestead to the children of my said son, Samuel P., their heirs, etc., forever.

But if my said son should die leaving no child, then I give and devise said old homestead farm to his surviving brothers, in equal shares. I also give and devise to said Samuel P. my three wood lots in Barrington, bought of Robert Mathes, Richard Steele and Dan'l Harvey, to hold the same to the said Sam'l P. his heirs and assigns forever. I also give and bequeath to my said son Samuel P. the income on twenty shares in the Langdon Bank in Dover, during his natural life. At his decease, said bank shares to remain to his children. But if he should die leaving no child living at his decease, said shares are to remain to his surviving brothers. I also give and bequeath to my said son, Samuel P., all the farming utensils and other personal property left by me and now remaining on said old homestead.

5th. To my married daughters Alvina A. Pierce, Elizabeth S. Hayes, Lydia O. Willey and Henrietta Sherburne, each, after the decease of my said wife, I give and bequeath ten shares in the Boston and Maine Railroad.

6th. To my other married daughters Mary F. Bean and Martha A. Perkins each, after the decease of my said wife, I give and bequeath the dividends on ten shares in the Boston & Maine Railroad.

On the death of said Mary F. and Martha A., or either of them, the shares on which deceased's dividends accrued are to remain to the surviving sisters of the deceased, to be equally divided between them.

My said six married daughters to hold the bequest given to each, free from the interference or control of her husband.

7th. To my daughter, Sylvia Victoria, after the decease of my said wife, I give and bequeath all my household goods and effects above given for life to my said wife. I also give to my said daughter \$1,000, to be paid to her with interest in one year after my decease.

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8th. To my sons, Franklin W., George I., Washington and Charles E. Hoitt, I give and devise my Emerson lot in Lee, containing forty acres and thirty-seven rods. My Woodman lot in Barrington, containing thirty-five acres.

Also my Glass farm in Nottingham, containing two hundred and fifty-seven acres, to have and to hold the same, to them, their heirs and assigns forever. I also give, devise and bequeath to my said sons, Franklin W., George I., Washington and Charles E., all the rest residue and remainder of my estate, real and personal, not otherwise disposed of in this will.

To have and to hold the same (after the payment of my debts and the legacies above named) to them their heirs and assigns forever.

And lastly I constitute and appoint my said wife sole executrix of this my last will. Hereby revoking all former wills by me made. Meaning and intending that the several bequests to my said children are in full discharge and payment of all claims against me for services by them or any of them." The words 'living at his decease' on pages two and three inserted and the word 'provisions' prefixed to 7th line on 1st page from bottom and the words 'to his surviving brothers' erased on 2d page before signing.

He acquired, by purchase after the date of his will, the following parcels of real estate.

A parcel of real estate in Boston, which he purchased July 8, 1866, and for which he paid \$18,000.

He has since made improvements, and it has increased in value by the rise of property in Boston, so that it was estimated at his decease at \$32,000.

He bought the following parcels of real estate in New Hampshire:

In Dover. House and land on Maple Street by deed dated July 3, 1860, for which he paid about \$1,450, and which was appraised at \$1,400.

House and land on Fayette Street, by deed dated Aug. 12, 1881, paid \$2,750. Appraised, \$2,700.

House and land on Elm Street, deed March 23, 1877. Paid, \$3,950. Appraised, \$3,500.

Real estate on Silver Street, known as W. K. A. Hoitt estate, bought about 1875. Paid about \$2,500. Appraised, \$4,000.

Also another estate on Silver Street, known as the Bodge place, by deed April 21, 1880. Paid \$4,500. Appraised, \$4,700.

An estate in Dover, known as the Kinnear field, by deed, June 20, 1882. Paid, \$1,400. Appraised, \$1,400.

An estate in Durham, known as the Ballard, or Toby Place, deed September 25, 1882. Paid, \$1,500. Appraised at, \$1,400.

An estate known as the Hanson Pasture in Lee, by deed March 31, 1864. Paid, \$700. Appraised, \$700.

These estates were all purchased for cash, or substantially so.

The following table shows the estimated value of the several parcels of property known to have been owned by the testator at the date of the will, and the appraised value of the same, at the decease of the testator, except such parcels as have been sold, with the addition of such as have been subsequently acquired.

ESTATES OWNED AT DATE OF WILL.	SOLD.	APPRAISED AT DE- CEASE.
Mathes lot..... \$600	Barrington	\$900
Steele lot..... 200	"	250
2 Harvey lots..... 250	"	650
Woodman land... 800	".....	\$1,500
Emerson land.... 1,000	Lee.....	2,200
Glass farm..... 4,000	Notting-- ham	2,200
	Insurance and land damages .	1,400
Lee homestead. 2,000		1,000
Durham home- stead and per- sonal property there destroyed by fire, on which he recovered.	10,000	10,000
Langdon R. R. Stock	2,000	
Received from liq- uidation		
R. & M. R. R. Stock	6,000	Sold 8,400
		480
Totals.....\$26,850	\$26,700	\$3,880
Cost and appraised value of additional estates.....		\$8,980.00
	Costs.	Appraised
Maple St., Dover..	\$1,450	\$1,450
Fayette St.....	2,700	2,700
Elm St.....	3,950	3,500
W. K. A. H. Est..	2,500	4,000
Bodge Est.....	4,500	4,700
Kinnear Field.....	1,400	1,500
Ballard Place.....	1,500	1,400
Hanson Pasture.....	700	700
R. R. Boston.....	16,000	32,000
	\$34,700	\$60,890.00
Remaining personal estate.....		7,016.82
		\$67,846.82
There is in addition to the above, a sum of money collected on a life ins. policy.....		3,105.00
		\$70,951.82

Messrs. Dodge & Caverly, for appellant:

At common law a will might be revoked by any act of the testator which showed his intention without the use of any words whatever. 9 Jac. Fish. Dig., § 18,722 and cases cited.

The common-law rule was in force in this State it seems, on this subject unmodified, until the year 1791, when the following provision was enacted by the Legislature of New Hampshire: "That no will in writing concerning any goods or chattels or personal estate should be repealed or revoked, nor shall any clause, devise or bequest therein be altered or discharged by any words, or will by any word of mouth only, except the same be in the lifetime of the testator committed to writing and read to him, and proved so to be done by three witnesses at least."

The statute as passed in the year 1791, seems to have quieted the public mind for some years, for we find no other legislation on this particular subject until the year 1822, when § 14 of ch. 193, Gen. Laws, was enacted and became part of the existing statutes of the State.

There is a strikingly marked difference between § 14 of that chapter and the previous provisions of law on the same subject. The limitations of the statute are definite, precise and unyielding.

Section 14, ch. 193, reads as follows: "No will or clause shall be revoked unless by some other valid will or codicil, or by some writing executed in the same manner or by canceling,

tearing, obliterating or otherwise destroying the same by the testator, or by some person by his consent and in his presence."

The means to accomplish a specific revocation, and the only means, are here pointed out definitely and absolutely.

By the common law on the question of whether there was a revocation or not, the central idea was the intent. The act must have been done *animo revocandi*. "The mere act of canceling a will was no revocation, unless done *animo revocandi*." *Berkenshaw v. Gilbert*, Loft, 465.

There can be, since the passage of §§ 14, 15, ch. 193 Gen. Laws, no revocation except in accordance with the limitation there existing. Mere intention, however, plainly expressed, without the specific act or acts designated by the statute, cannot effect a revocation.

Since the enactment of the English Statute, 1st Vict., ch. 26, § 20, on revocation of wills, almost identical in form to the provisions of our own statutes and the law of many of the United States, the decisions of the courts in controverted cases arising under this head, are to the same effect in the several instances.

A direction that the will shall be destroyed, which is not fulfilled from any cause, however fraudulent, will not be a revocation; *Andrew v. Motley*, 12 C. B. N. S., 513, 524, 534; and so, if the testator attempts to destroy the instrument and is prevented by violence or fraud. *Runkle v. Gates*, 11 Ind., 95; *Kent v. Mahaffey*, 10 Ohio St., 204; *Clingan v. Mitchellree*, 7 Casey, 25.

Doe v. Harris, 6 A. & E., 209, cited in 2 Am. Lead. Cas., 491, is as follows: "A will which had been thrown in the grate by the testator was removed by his housekeeper, without his consent. The testator manifested his displeasure, and after demanding the will in vain, exacted a promise that it should be destroyed, which was not kept. The court held that the evidence did not establish a revocation. An intention to burn was not enough, however clearly manifested." This decision was founded on the Statute of Frauds, with provisions wholly similar to our statute.

If appellees rely to any extent on the fact that "the will was found in a bundle of papers of no pecuniary value," a recent case decided by this court, *Fellows v. Allen*, 60 N. H., 439, would seem to go much beyond settling that point.

It seems plain to us that there is no revocation of the will in question under the limitations of § 14, ch. 193, and we will pass to the consideration of the provisions of § 15 of the same chapter, which reads as follows: "The preceding section shall not control or affect any revocation of a will implied by law, from any change in the circumstances of a testator or his family devisees, legatees or estate occurring between the time of making the will and the death of the testator."

A mere general change in the testator's circumstances, as it regards the amount and relative value of his property, will not, in general if ever, have the effect to revoke a will, since the testator, by suffering it to remain uncancelled, does in effect reaffirm it from day to day, until the termination of his conscious existence. Redf. Wills, ch. 7, § 24.

The will being suffered to remain uncanceled evinces that his intention was not changed with respect to the other property there devised or bequeathed. *Carter v. Thomas*, 4 Me., 841.

A specific legacy of a stock or chattel is adeemed where the testator has collected the debt or disposed of the chattel in his lifetime, whatever his intention. *Richards v. Humphreys*, 15 Pick., 185.

Where a testator bequeaths a certain number of shares and then sells part of them, this is an ademption *pro tanto*. *White v. Winchester*, 6 Pick., 48.

So a conveyance of part only of real estate devised, is only a revocation *pro tanto*. *Terry v. Edminister*, 9 Pick., 855, note a; *Haves v. Humphrey*, 9 Pick., 350, 360; *Ward v. Ward*, 15 Pick., 511.

If part of the estate devised be conveyed by the testator, it will amount to a revocation *pro tanto* only, and if the deviser convey the whole estate it is a revocation *ex necessitate*, and no revocation is allowable by way of implication except from necessity. *Graves v. Sheldon*, 2 Chip. (Vt.), 71.

Revocation of a will cannot be implied by law from the death of the testator's wife and one of her children leaving issue, and the birth of another child contemplated in the will, and the testator's subsequent insanity for forty years, commencing soon after making his will and continuing till his death, and a fourfold increase in the value of his property, thereby greatly changing the proportion between the specific legacies given to some children, and other children who were made residuary legatees. *Warner v. Beach*, 4 Gray, 162; *Webster v. Webster*, 105 Mass., 588. See also, *Sturtevant v. Bowker*, 11 Met., 291.

Change in a testator's estate by loss or conveyance, if the devises or bequests are specific, may operate as a revocation of the will *pro tanto*, from necessity; but so long as there remains anything upon which the will can operate, there can be no revocation as a matter of law, except by the mode pointed out in the statute. *Fellows v. Allen*, 60 N. H., 439.

The changes in the family and legatees of the testator, considering the number embraced and the time elapsing, are remarkably few and afford no presumption of an implied revocation. In the great majority of testate estates settled, the changes are more marked than in this case.

See, *Lewis v. Lewis*, 2 Watts & S., 455.

What is said may always be given in evidence when it forms part of what is done. "If the conduct or declarations of the testator were admissible to show that he meant the will to stand, other acts or declarations might be adduced leading to a different conclusion, and the conflict and uncertainty would arise which the Statute of Frauds was designed to obviate." *Goodtitle v. Otway*, 2 H. Bl., 516, cited in 2 Am. Lead. Cas., 525. See also, *Mundy v. Mundy*, 15 N. J. Ch., 2 McCarter, 290, to same effect.

Such declarations, oral, of the testator can only be competent in connection with proof of an act of cancellation. A will not in accordance with the statute is not valid. A revocation not within its terms leaves the will in full force. *Colligan v. Burns*, 57 Me., 461.

In *Waterman v. Whitney*, 11 N. Y., 157, the court says: "That upon a question of revoca-

tion no declarations of the testator are admissible, except such as accompany the act by which the will is revoked." See also, authorities cited on that point in 1 Redf. Wills, 8th ed., § 554.

Section 2, ch. 193, Gen. Laws, reads as follows: "Any estate, right or interest in any real property acquired by the testator after making his will, shall pass thereby, if such shall appear to have been his intention."

His intention must be gathered from the general tenor or particular direction of the will itself.

The statute provision cited is a change of the common-law rule. The Statute of N. H. of 1822 reads as follows: "Any person lawfully seised and possessed of any real estate might devise it."

General words may as well include all which a testator expects to acquire as what he then actually owns. The term "all my property" may as well include all which may be his at the time of his decease, as all which is his at the date of the will, and will be so construed unless there be words which limit and restrain it. *Wait v. Belding*, 24 Pick., 136; *Loeeren v. Lamprey*, 22 N. H., 434; *Thayer v. Wellington*, 9 Allen, 288; *Brigham v. Shattuck*, 10 Pick., 809.

A general residuary devise will carry estates not in the contemplation of the testator, unless the will contains special indications of a contrary intention. *Morgan v. Surman*, 1 Taunt., 289.

General words in a residuary clause will carry every estate or interest which is not expressly or by implication excluded from its operation. *Cholmondeley v. Marez*, 12 East, 589; *Ballard v. Carter*, 5 Pick., 112.

Mr. Augustus Russ, also for appellant:

The Statute of Wills, 32 Henry VIII., contained careful provisions as to the mode of executing wills, but was silent as to the mode of revocation. The courts subsequently allowed proof of revocation by parol. Then the Statute of Frauds, 29 Charles II., was passed, containing provisions as to revocation, substantially as in our present § 14.

The courts thereafter held that the Statute of Frauds applied only to express revocations, and that there might be revocations by implication in certain classes of cases. *Brush v. Wilkins*, 4 Johns. Ch., 506, 511.

An entire revocation by implication of law is limited to a very small number of cases. *Warner v. Beach*, 4 Gray, 162, 163.

The revocation of the will takes place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself. *Marston v. Roe*, 8 Ad. & Ell., 14, 55. See, *Sneed v. Eving*, 5 J. J. Marshall, 460, 471.

Our Statute of 1822, and the similar Statute of 1836 in Massachusetts, were simply intended as a recognition of the existing common-law causes of revocation, not to create new causes.

In his argument in *Gage v. Gage*, 12 N. H., 371, 375, Mr. Atherton, one of the revisers, said in reference to this clause, "The additional clause in the statute of 1822 introduces no new ground of revocation."

The commissioners on the revision of the Massachusetts Statutes in 1836, gave the following reasons for adopting a similar statute: "The clause as to implied revocations recognizes and adopts the existing law, as established and un-

derstood among us; but as the words of the statute are so strong and explicit, and this exception is so important, it may be thought best to express it."

No trust concerning lands, excepting such as may arise or result by implication of law, shall be created or declared unless by an instrument signed by the party creating the same, or by his attorney. Gen. Laws, ch. 185, § 13.

Implied revocations, like resulting trusts, are deductions of law from established facts. *Sneed v. Ewing*, 5 J. J. Marsh., 460, 471.

Partial revocation does not prevent, probate or destroy the instrument, but merely curtails its operation and effect after it is probated. *Vanner v. Jeffery*, 3 Russ. Ch., 479; *Livingston v. Livingston*, 8 Johns. Ch., 148, 155; *Walton v. Walton*, 7 Johns. Ch., 258, 266; *Adams v. Winne*, 7 Paige, 97.

At common law, a total revocation in consequence of change in the testator's family relations took place in the following cases: subsequent marriage of a testatrix; subsequent marriage of a testator, when followed by birth of a child. Partial revocation in the following cases: alienation of thing devised; death of devisee in lifetime of testator.

These latter changes ordinarily work only a revocation *pro tanto*. They bear upon the effect of the will in giving title, not upon its existence as a valid instrument. It still subsists as a will, and is entitled to probate. *Hawes v. Humphrey*, 9 Pick., 350; *Carter v. Thomas*, 4 Greenl., 341.

In order to defeat altogether a testamentary disposition there must be a subsequent conveyance of the whole estate. If the conveyance be of a part only, it will amount to a revocation *pro tanto*. Toller, Exrs. 19. *Hawes v. Humphrey*, 9 Pick., 350, 360; *Carter v. Thomas*, *supra*.

Doctrines inevitably productive of uncertainty and long delay should not be introduced into the law, relative to estates of deceased persons. Courts would be running the hazard of substituting their will for that of the testator. *Brush v. Wilkins*, 4 Johns. Ch., 506, 518, 519.

Does the fact of a change in a man's circumstances afford a stronger presumption of an alteration of his intentions, than the fact of his preserving his will unaltered and unrevoked does of his intentions remaining the same? *Graves v. Sheldon*, 2 Chip. (Vt.), 75.

The danger of the principle of implied revocation is very great, and that is the reason why, although very strong cases of hardship have occurred, the judges have never ventured to advance beyond that one step which they have taken. *Wogan v. Small*, 11 Serg. & R., 141, 145.

In the latter case the will gave specific devises to two children, and a bequest to an illegitimate grandchild. Subsequently, the testator sold part of his property, so that at his death the children would receive nothing if the will stood, while the illegitimate grandchild would receive its whole bequest. Held, that the will was not revoked.

In *Vandemark v. Vandemark*, 26 Barb., 416, the changes in the testator's property after the date of the will were such as to nearly disinherit it one son provided for by the will. Held, no revocation.

Wogan v. Small was cited with approbation in the subsequent case, in the same State, of
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Marshall v. Marshall, 11 Pa. St., 490; and *Cooper's Est.*, 4 Barr, 88, there distinguished, of which the court says, p. 433: "It expressly recognizes the doctrine of revocation *pro tanto*."

The same distinction is pointed out in *Webster v. Webster*, 105 Mass., 538, where the changes of property were much more radical than in the case at bar.

In *Balliet's App.*, 14 Pa. St., 451, large legacies in the will were charged in and made payable out of the realty. Subsequently, the testator sold all his real estate. Held, not a total revocation.

The court says in the opinion, "In *Brydges v. Duchess of Chandos*, 2 Ves. Jr., 428, the Lord Chancellor states it as a principle, which is not shaken in authority, that any new disposition made subsequent to the will, or in other words, any conveyance of that which had been conveyed by the will, shall defeat the will; but then it must be a conveyance of the whole estate; it must extend as far as that appointment which the will has made; for if it be but a part, it affects the will no farther than that part goes."

In *Marshall v. Marshall*, *supra*, it is held that when the alteration in the testator's circumstances is such as to render it impossible to execute any part of his will, as in *Cooper's Est.*, it will be considered as entirely revoked.

The first brief of the appellee claims that "one of the earliest cases establishing this doctrine of total revocation by the changed circumstances of the testator is found in *Cook v. Oakley*, 2 H. Bl., 362." There is an error in the citation of this case; it should be 1 P. Wms., 302. It is incorrectly abstracted in the brief. The brief is as inaccurate in the statement of the case as in the citation.

We make a passing allusion to the *dictum* of the court in the case of *Woolery v. Woolery*, 48 Ind., 525; a *dictum* which misstates the common law. This misconception will appear by reference to *Brydges v. Duchess of Chandos*, 2 Ves. Jr., 417, 428, a leading case in the line of decisions referred to by the learned Judge who makes this *dictum*. The revocation of the entire will was not the subject of discussion, and the misconception of the Judge in his *dictum* arises from certain expression in the cases that the new disposition or conveyance of that which had been devised by the will was a revocation of the will.

See the exposition of law upon this point by the Lord Chancellor in *Brydges v. Duchess of Chandos*, hereinbefore referred to. And see the very case which the learned Judge cites as authority for his *dictum*. *Goodtitle v. Otway*, as reported in 2 H. B., 516, where Lord Chief Justice Eyre says: "If he, the testator, sold his estate after he made his will, of course it could not operate, because the estate was gone; but in neither of those cases was the will, properly speaking, revoked; it remained good, but lost the object upon which it was to operate. *S. C.*, 1 Bos. & P., 576, 581.

In *Webster v. Webster*, 105 Mass., 538, there were three principal bequests, one of about \$5,700, another of about \$3,700, a third of about \$8,700. By alterations in the estate the first was reduced to \$3,700, the second increased to about \$11,000, the third to a son of the testator, reduced from about \$8,700 to about \$50. Held,

no revocation, reviewing and distinguishing the case of *Cooper's Estate*.

In *Verdier v. Verdier*, 8 Rich. L. (S. C.), 185, the testator at the date of the will was worth from \$5,000 to \$10,000. The will gave a nephew \$3,000, and his wife the residue. At his death the testator's property had increased so that it then amounted to from \$300,000 to \$500,000. Held, no revocation.

Blandin v. Blandin, 9 Vt., 210, affirms the doctrine of *Graves v. Sheldon*, 2 D. Chip. (Vt.), 71, "that is, when the testator has aliened the devised estate, and there is nothing for it to operate upon, in so far, it is revoked," and held that revocation is not produced by new purchases. The court says: "It is believed that no case can be found of a revocation of a will being produced by new purchases."

In *Warner v. Beach*, 4 Gray, 162, the testator was insane for forty years, from soon after the making of the will until his death; and there was a fourfold increase in the value of his property, so as greatly to change the proportion between the specific legacies given to some children and the shares of other children, who were made residuary legatees. Held, no revocation.

The present case differs widely from *In re Cooper's Estate*, 4 Barr (Pa.), 88.

It is very clear that the Pennsylvania court did not intend to overrule the previous decision in *Wogan v. Small*, which it substantially reaffirmed in the later case of *Balliet's Appeal*, both of which we have cited.

Gage v. Gage, 12 N. H., 371, is not in point. The instrument offered for probate in that case was "in the form of a deed, executed and acknowledged as such."

Appellee criticises the authority of *Graves v. Sheldon*, 2 Chip., 71, denying its application; as he says under the Statute of Vermont, as it then existed, there was nothing to be done but deny the revocation of the will. This case was decided in 1824. Chancellor Kent says in *Brush v. Wilkins*, 4 Johns. Ch., 506, that "It had become the settled rule of law and equity, as early as the year 1775, that implied revocations of wills were not within the Statute of Frauds."

Section 14 is a substantial reenactment of the Statute of Frauds respecting revocation of wills of realty. It was a part of the New Hampshire Prov. Stat., May 2, 1719; and has now been made applicable to revocation of wills of personality as well as realty.

Before the New Hampshire Statute of 1848, chap. 726, less formality was required in executing wills of personality than wills of realty. Hence, a will embracing both real and personal estate might be revoked as to the personality by another instrument not sufficiently executed to operate as a will of realty. See, *Marston v. Marston*, 17 N. H., 508. But now the same formalities are required to execute or revoke a will of either description.

If the bundle of papers in which the will was found had been kept in an insecure place, that would not have justified the court in holding that the will was revoked. *Fellows v. Allen*, 60 N. H., 439, is a recent and decisive authority. See also, *Cheese v. Lorejoy*, L. R., 2 Prob. Div., 251; *S. C.*, 21 Moak Eng., 633; *Andrew v. Motley*, 12 C. B. N. S., 514.

A mere intimation by a testator of his intention to make by a future act a new disposition, does not effect an actual present revocation. 1 Jarm. Wills, Bigelow, ed. 171; Rand. ed. 337. Compare *Lewis v. Lewis*, 2 Watts & S., 455, where an unexecuted will of apparently later date was found with the will in question.

If the testator had actually signed one of the later drafts and had it attested by two witnesses, it would not have revoked this will. *Reese v. Court of Probate*, 9 R. I., 434.

The rule is well settled that the actual declaration of an intent to revoke by some future act is no actual revocation. *Brown v. Thorndike*, 15 Pick., 388, 408.

To hold that on the subject of revocation parol evidence is admissible, would be to disregard every well considered decision in which this subject has been discussed; notably in the English courts. *Goodtitle v. Otway*, 2 H. Bl., 516.

We all concur in the opinion that the revocation of the will takes place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself, and consequently that no such evidence is admissible. *Marston v. Roe*, 8 Ad. & Ell., 14.

By these decisions the question in England has been regarded as finally settled. 1 Wms. Exrs., 5th Am. ed. 168.

The American decisions on this point are in accord with this statement of the law. *Adams v. Winne*, 7 Paige, 97, 99.

Revocation must include the intention of the testator, but mere intention without some act is not effective to destroy a will. 60 N. H., 441. There must be the act as well as the intention.

All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two. L. R., 2 Prob. Div., 253.

Since the Statute of Frauds, it is clear that a man cannot revoke his will, even by manifesting in the strongest way his intention that it shall no longer operate, unless he pursues one of the modes pointed out by the Statute. *Andrew v. Motley*, 12 C. B. N. S., 514, 523.

The Statute positively requires things to be done, and not merely said or intended to be done. *Hise v. Fincher*, 10 Ired. L., 141.

With equal propriety we might hold that an intended will which the testator was prevented from executing should be established as against the heirs. *Kent v. Mahaffey*, 10 Ohio St., 204, 218.

The authorities go so far as to hold that if the intention to revoke is not executed, it makes no difference that the execution was prevented by fraudulently inducing the testator to believe that the will had been destroyed in accordance with his orders. *Hise v. Fincher*, 10 Ired., 139; *Mundy v. Mundy*, 15 N. J. Eq., 2 McCart., 290; *Doe v. Harris*, 6 Ad. & Ell., 209; *Kent v. Mahaffey*, *supra*; 204; *Boyd v. Cook*, 3 Leigh., 32; *Malone's Admr. v. Hobbs*, 1 Rob. (Va.), 846; *Runkle v. Gates*, 11 Ind., 95. So where cancellation is prevented by force, there is no revocation. *Gains v. Gains*, 2 A. K. Marsh., 190.

See generally, as to the inefficacy of unexecuted intention and the inadmissibility of parol declarations: *Perjue v. Perjue*, 4 Iowa, 530; *Clark v. Morrison*, 25 Pa. St., 453; *Lewis v. Lewis*, 2 Watts & S., 455; *Massey v. Massey*, 4

Har. & J., 141; *Gay v. Gay*, 60 Iowa, 415; *Parkhill v. Parkhill*, Bray, (Vt.), 239; *Graves v. Sheldon*, 2 Chlp. (Vt.), 75.

The early Connecticut cases were decided before the reenactment in that State of this part of the Statute of Frauds. See, 5 Conn., 167.

As to after acquired real estate. Any estate, right or interest in any real property, acquired by the testator after making his will, shall pass thereby if such shall appear to have been his intention. Gen. Laws, ch. 193, § 2.

The words of this residuary clause sufficiently show the intention of the testator to dispose of all the estate of which he might be the owner at the time of his death. *Loeven v. Lamprey*, 22 N. H., 484, 443, 444. See also, *Winchester v. Forster*, 3 Cush., 866.

The general rule is, that the intention of the testator must be gathered from the words used by him in the will, and not from his oral declarations. *Ordway v. Dow*, 55 N. H., 11.

Where a legacy is given to a class of persons, in general terms, as tenants in common, the death of one or more of them before the testator will not cause a lapse of any part of the fund, but the survivors of the class will take the whole. *Hooper v. Hooper*, 9 Cush., 122; *Jackson v. Roberts*, 14 Gray, 546, 550; *Workman v. Workman*, 2 Allen, 472; *Schaffer v. Kettell*, 14 Id., 528.

If the gifts of the residue or any part of it fail, whether by lapse, illegality or revocation, to the extent that it fails, the will is inoperative, and the subject of the gift passes to the next of kin. *Burnet v. Burnet*, 30 N. J. Eq., 595.

The rule is, that a gift by will to individuals described by name, although they may constitute a class and all of that class, yet an intention is indicated to give them only as individuals, and the survivors will not take the whole gift. *Dildine v. Dildine*, 32 N. J. Eq., 78.

Under a will which, after providing for other relatives of the testator, contains the following provision: "I give and bequeath to my nieces C. W., S. E. W., E. W., L. W., and to my nephew W. W., children of my sister, S. P. W., the sum of \$4,000 each, making in the whole the sum of \$20,000," and names all the legatees as equal residuary legatees, the legacy to C. W. lapses if she dies without issue before the testator. *Workman v. Workman*, *supra*.

A testator, by a codicil provided as follows: "I revoke and make void the legacy by my will given to A, he being since deceased." Held, that the shares originally given by the will to A did not pass to the survivors, but went as undivided estate. *Smith v. Haynes*, 111 Mass., 846.

The rule that by a devise or bequest to individuals by name, the share of one dying before the testator will not go to the survivors, may be controlled by the testator's intention appearing in other parts of the will that the heirs at law shall not take such share. *Jackson v. Roberts*, 14 Gray, 546; *Shaffer v. Kettell*, *supra*; *Stedman v. Priest*, 108 Mass., 293.

In *Sohier v. Inches*, 12 Gray, 385, which was a case where one of seven of the testator's children, who had the residue of his estate, died in the lifetime of the testator, the court says of the share of the deceased child, "It certainly cannot fall into the residue, because it was itself a part of the residue. It must, there-
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fore, pass to the heirs at law as undivided estate." See also, *Burnet v. Burnet*, *supra*. See, 1 Jarm. Wills, Rand. & Tal. ed. 687, note, and cases cited.

In *Towne v. Weston*, 182 Mass., 513, 516, the court says: "The intention of the testator is to govern, but this must be collected from the will and codicil, and the surrounding facts and circumstances. Even if it may be supposed that, by taking a bequest from one, he thought it would go to the others, that would not be sufficient, unless he expressed sufficiently his intention that such would be the result.

Where a devise or bequest is made to a number of persons as tenants in common, if one of them dies in the testator's lifetime, his share does not pass but remains as undivided estate. *Upham v. Emerson*, 119 Mass., 509, 512.

In *Johnson v. Goss*, 128 Mass., 433, the Supreme Court of Massachusetts had to consider the effect of precisely such a legacy as that contained in the fifth and sixth clauses of the will. In that case the testator owned one hundred and eighty shares of stock in a bank. He bequeathed to each of two daughters sixty shares, and after the will was made sold all this bank stock, as this testator has done. It was held that the subsequent sale of the stock in the Chicago bank held by him was not intended by the testator as a revocation of the bequests to his daughters, but that such bequests must be regarded as intended to be general pecuniary bequests.

The Massachusetts court in this case followed the decision of the N. Y. Court App. in *Tift v. Porter*, 8 N. Y., 516, where the English cases on the subject of general and specific legacies are reviewed.

Mr. Jeremiah Smith's supplemental brief for appellant:

Before the Statute of Frauds, Swinburne, who seems to be the most authoritative if not the only text writer of that early period on this subject, thus states the law in his treatise on Wills, first printed in 1590, pt. 7, § 15: "But no man is presumed to have revoked his testament once made, unless it be proved. Although the testator, after the making of the testament, have a child born, I suppose that the testament is not presumed thereby to be revoked; especially if the testator did live a long time after the birth of the child, and might have revoked the testament, and did not." *Id.* See, *Johnston v. Johnston*, 1 Philim., 447, 466.

Before the passage of the Statute of Frauds in 1676, the following decisions are reported:

In *Brook v. Warde*, 3 Dyer, 810, it was declared that a will in writing may be revoked by parol, but it must be by express words.

In *Montague v. Jeoffereys*, F. Moore, fol. 429; Rolle, Abr., 616; 1 Eq. Cas. Abr., 410; Poph., 108; Godol., 57, it was decided that "If a man seised in fee devises it to J. S. in fee or for life, and afterwards make a lease to J. D. for years, this, even at law, shall not be a revocation, but during the years; for his intent does not appear further than during the term for years."

In *Symson v. Kirton*, Cro. Jac., 115, it was said that this revocation must be by words in the present tense.

In *Cranuel v. Sanders*, Id., 497 it was said,

"If one makes his will in writing of land, and afterwards upon communication saith that he hath made his will, but that it shall not stand, or, 'I will alter my will,' etc., these words are not any revocation of the will, for they are words but *in futuro*, and a declaration what he intends to do; but if he saith, 'I do revoke it, and bear witness thereof,' he thereby absolutely declares his purpose to revoke it *in presenti*, and it is then a revocation."

A presumptive revocation of a will arising from marriage and the birth of a child is not mentioned, as far as I am aware, by any ancient text writer upon the law of England as a part of our English jurisprudence. It is not mentioned as a rule existing in Swinburne's time; nor is it enacted by the Statute of Frauds or any other statute. *Johnston v. Johnston*, 1 Phillim., 447.

The other changes or the length of time do not annul a testament. All the other changes that might happen between the time of making the testament and the death of the testator, even those which might make us presume some change of his will, would not annul it. 2 Domat, ed. 1850, § 3127, pp. 326, 327; *Overbury v. Overbury*, 2 Show., 242.

Winkfield v. Combe, 2 Cas. Ch., 16, is an earlier case in 1679, but it is not a case of revocation.

Hilton v. King, 3 Lev., 86, was a case where there was an attempt at revocation by written words indorsed on the will but not subscribed by the testator, but the Statute of Frauds was regarded as conclusive, although no judgment was apparently rendered, and the reporter says in conclusion, "I do not remember it was moved again."

The *Earl of Lincoln's Case*, commonly cited from 1 Eq. Cas. Abr., 412, decided in 1695, but best reported in Shower, P. C., 154, is the first case after the statute, in which alienation appears as a ground of revocation.

In 1696 the case of *Lugg v. Lugg*, 2 Salk., 592, was determined in an ecclesiastical court, and followed, *Overbury v. Overbury*, holding that marriage of a single man and the birth of a child was an implied revocation of a will of personality.

It is reported in 2 Salk., 592, where it was said, "Here was room and presumptive evidence to believe a revocation."

And the same language appears in another report of this case in, 12 Mod., 286.

The next case in the order of time is *Brown v. Thompson*, 1 Eq. Cas. Abr., 413, and in 1 P. Wms., 304, note 1702, where a bachelor made his will with provisions for his intended wife, afterwards married her, and died leaving her pregnant with a posthumous child.

About this time the case of *Eyre v. Eyre* was decided, cited in the report of *Cook v. Oakly*, 1 P. Wms., 304, and note, where a man made a will, and went beyond sea, where he became governor of one of the plantations, sent for an English woman of his acquaintance, whom he married and had children by her. It was determined that this total alteration of the testator's circumstances was an implied revocation of the will.

The next case is *Meredith v. Meredith*, in 1711, of which I find the only report in the opinion of Sir John Nicoll in *Johnston v. Johnston*, 1 Phillim., 480, who says he had the

manuscript notes of that case, which he incorporated in his opinion. The question was whether marriage, child born after will, and another will begun, was a revocation. Held, that it was.

Pollen v. Huband, was decided in 1712, reported in 1 Eq. Cas. Abr., 412, was a case where a testator, after devising certain real estate, conveying said real estate by lease and release, which was held a revocation.

The next cases, *Ward v. Phillips*, decided in 1734, reported in 1 Phillim., 482, 483; *Parsons v. Lanoe*, in 1748, reported in 1 *Id.*, 485; 2 Amb., 557; 1 Ves. Sr., 189, and 1 Wilson, 243, but what was decided in this latter case really was that the testator's will was made contingent upon his return from Ireland, and that by his return the will was avoided.

Wells v. Wilson was decided in 1756. This is reported in 1 Phillim., 485, 486, and Sir John Nicoll, in his opinion in *Johnston v. Johnston*, and also mentioned in a note to *Shepherd v. Shepherd*, 5 Term R., 51. But it was said in that case that the decision did not turn upon the naked fact of the birth of a child unprovided for, but upon that and the frequent declarations of the testator, the state of his mind, and his repeatedly declared intention in the interval between his fall and his death.

Shepherd v. Shepherd was decided in 1770. It seems to be fully reported in a note to the case of *Lancashire v. Lancashire*, 5 Term R., 51-54, and after reviewing the previously decided cases, the conclusion of the judgment is that marriage alone or birth of a child alone is not sufficient to operate a revocation.

A hundred years elapsed before judicial decisions made any further innovation upon the Statute of Frauds than, as I have stated, by the agreement in the argument of the eminent counsel who appeared for the respective parties in *Jackson v. Hurlock*, decided in 1764, and reported in 1 Amb., 487, and 2 Eden, 263.

In a note to this case it is said, it was not until the case of *Christopher v. Christopher*, cited in 4 Burr., 2171, that it was decided that marriage and the birth of a child were a revocation of a will of land.

This case, *Christopher v. Christopher*, decided in 1771, more fully reported in 2 Dickens, 445, was followed by the case of *Spraage v. Stone*, decided in 1773, and reported in 2 Amb., 721.

The next case was the oft cited case of *Brady v. Cubitt*, reported in 1 Doug. 38, and decided in 1778, in which nearly every case which had arisen up to this time was commented upon by either counsel or the court. Lord Mansfield says: "The subsequent marriage and birth of a child affords a mere presumption. But I am clear, on the other ground, that this presumption, like all others, may be rebutted by every sort of evidence."

After *Brady v. Cubitt*, which was fully argued, the next case was *Goodtitle v. Otway*, reported in 2 H. Bl., 516, in 1795, where one at least of the same Judges who had given the opinion in *Brady v. Cubitt*, reversed his opinion as to the admissibility of parol testimony in accord with the whole court. The Lord Chief Justice says, p. 523: "If he sold that estate after making his will, of course it

could not operate, because the estate was gone, but in no other of these cases was the will, properly speaking, revoked; it remained good, but it lost the object upon which it was to operate."

Almost contemporaneous with this case, the case of *Brydges v. Duchess of Chandos*, was decided, reported in 2 Ves. Jr., 417, in which the same view of revocation by alteration of the estate was taken by the Lord Chancellor, whose opinion as quoted from 2 Ves. Jr., by the Pennsylvania court, long after the decision of *Re Cooper's Est.*

The decision appears to have been made in 1795, and the decree was confirmed in the House of Lords, November 28, 1795. See, note to *Goodtitle v. Otway*, 2 H. Bl. 526.

In the ecclesiastical courts they continued to adopt the parol declarations of the testator as evidence of revocation. These cases, therefore, as is said by Tyndal, *Ch. J.*, in 8 Adol. & Ell. 55, 56, furnish no authority for the determination of the rules of common law.

Wright v. Sarmuda, 2 Phillim. 253, in note, reported in 1793; *Emerson v. Beville*, 1809, 1 Phillim. 342; *Johnston v. Johnston*, 1 Phillim. 447, in 1817, in which the elaborate opinion of Sir John Nicoll refers to and examines all the ecclesiastical cases up to that time, some of which are nowhere else reported. *Talbot v. Talbot*, 1 Hagg. Eccl. 705, in 1828; *Johnston v. Wells*, 2 Hagg. Eccl. 561, in 1829. In these last two cases the presumption was held not to be of sufficient force to produce a revocation.

The case of *Gibbens v. Cross*, may be noticed, in 2 Add. 445, reported in 1825. In this case it is said the presumption was, like any other, a subject to be rebutted.

In chancery we have the case of *Gibbons v. Caunt*, 4 Ves. 840, decided in 1799. In this case the Lord Chancellor expresses his doubt of what he calls the "famous case of *Christopher v. Christopher*;" There was a difference of opinion upon the bench, judgment given by Baron Perrot against the opinion of the other barons, and the Lord Chancellor expresses his preference for the reasoning of Baron Perrot.

The decision of Lord Eldon in *Ex Parte Earl of Ilchester*, 7 Ves. 348, decided in 1808, was a case where marriage and the birth of children did not revoke a will, the wife and children being provided for the settlement.

Next is the case of *Sheath v. York*, as reported in the 1 Ves. & B. 390, decided in 1818. In this case it was determined that marriage and the birth of a daughter was held not a revocation of a devise of real estate.

Lancashire v. Lancashire, 5 T. R. 49, was the first case that put the posthumous child on the same footing as one born during marriage, and the first case in which marriage and the birth of children is regarded as a tacit condition annexed to the will at the time of making it.

But it is now settled that even a devise of land may be revoked by what Lord Kenyon, in the case of *Lancashire v. Lancashire*, decided in 1792, calls "a total change in the circumstances" of the testator's family.

In *Kenebel v. Scrafton*, reported in 2 East, 580, decided in 1802, it was held that subsequent marriage and birth did not revoke a will, the possibility having been therein contemplated and provided for.

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Lord Ellenborough, in *Wilkinson v. Adam*, decided in 1818, and reported in 1 Ves. & B. 422, 465, remarks that the opinion in *Kenebel v. Scrafton*, consistently with former authorities, was that marriage alone will not revoke a will, although connected with the birth of a child it will; yet these two circumstances would not have that effect, the will containing a provision for children, if the testator should have any.

White v. Barford, 4 Maule & S. 10, was a case where a testator married and died leaving his wife pregnant with a child unknown to him. It was decided in 1815 by Lord Ellenborough who says: "Marriage, indeed, and having of children, where both these circumstances have concurred, has been admitted presumptive revocation; but it has never been shown that either of them singly is sufficient. In this case it is desired to extend the rule a step further, but I own I am afraid to do so."

And last, we come to the recent case of *Marston v. Roe*, 8 Ad. & Ell. 14 in which the Chief Justice said, "It must be admitted that the opinion of Lord Mansfield is expressed in terms the most explicit and unreserved that the presumption of revocation from marriage or birth of a child, like all other evidence, may be rebutted by every sort of evidence."

In *Doe v. Edlin*, 4 Ad. & Ell. 582, it is held, that the removal by death of the object of the testator's bounty and affection does not revoke the will. I know of no case where it has been held that the removal of an object of affection and bounty by death has been taken to be an implied revocation of a will, and in my opinion it does not operate so. *Id.* See, *Fellows v. Allen*, 60 N. H. 440, 441; also, *Warner v. Beach*, 4 Gray, 164.

The question then is, whether the Legislature of this State in passing the Act of 1822, re-enacted in § 15, ch. 198, Gen. Laws, intended to establish on this important subject a rule diametrically opposite to that in force in all other parts of the civilized world.

Section 15, chap. 198, Gen. Laws, was first enacted as a proviso at the close of § 7, ch. 28, Laws of 1822. The first part of § 7 prohibits revocation except by certain specified methods.

This statute is not to be "torn from the general body of the law, taken literally, and administered as if there were no other law." See, *Hitchins v. Pettingill*, 58 N. H. 390.

The phrase "circumstances of the testator or his family" is confined to changes produced by the creation of new family ties, in the very opinion upon which the appellee so largely relied on in the oral argument. *Johnston v. Johnston*, 1 Phillim. 447.

Marriage and issue are supposed to produce those new moral duties; every man is presumed to intend the making of a provision for his family. See also, 4 Adol. & Ell. 586; 48 Ga. 151, 154; 11 Serg. & R. 145.

There was no total revocation, unless there was a conveyance of the whole estate. So long as there remained anything upon which the will could operate, there was no total revocation. 60 N. H. 441.

An express written revocation, signed and sealed by the testator, in the presence of two witnesses, would be mere waste paper. To be effectual, it must have the same number of

witnesses required for the execution of a will. See *Reese v. Court of Probate* of 9 R. I. 434; *Barry v. Brown*, 2 Demarest, 309; *Re will of Ladd*, 18 N. W. Rep. 734.

Section 15 leaves it open to the court to decide that any of the common law causes had already been abrogated in 1822, or since been abrogated, by the removal of the reason upon which they are founded. Else, how could this court have held in *Fellows v. Allen*, 60 N. H. 439, that the common-law rule as to implied revocation of a woman's will by marriage is no longer in force in this State.

If the Legislature of New Hampshire, like that of New York, had incorporated that rule into our statute, this court must have decided as the New York court did in *Brown v. Clark*, 77 N. Y. 369. Section 15 simply prohibits the courts from abrogating any existing common-law cause on the ground of its inconsistency with the terms of § 14. It leaves them at liberty to abrogate existing causes for any reason except inconsistency with section 14.

The provisions of § 22 of the Statute of Frauds, relative to revoking wills of personalty, were much less stringent than those of § 6, relating to wills of realty. It was early held that marriage and birth operated as a revocation of wills of personalty. But it was not until nearly a century after the enactment of the statute, and not until after great doubt and hesitation, that the same doctrine was finally established with reference to wills of realty.

No court of last resort decided a case on this ground until 1771, when the case of *Christopher v. Christopher*, 2 Dickens, 445, was decided by three Judges against one. The dissenting opinion then delivered, and the doubts expressed both before and since (4 Ves. Jr. 848; 2 East, 540, 541; 1 Ves. Sr. 192) have had marked effect in inducing courts to decline the exception then introduced.

Revocation "implied according to law" means "according to existing law." The courts before and since 1822, have persistently refused to go beyond certain limits. In 5 Term Rep. p. 60, *Lord Kenyon, Ch. J.*, spoke of himself as "standing on former decisions, and not extending them beyond the rule established and incorporated into our law."

In 4 Maule & S. 12, 18, *Lord Ellenborough, C. J.*, after referring to the rule as to revocation by marriage and birth, said: "In this case it is desired of us to extend the rule a step further, but I own I am afraid of so doing." In 11 Serg. & R., 145, *Tilghman, C. J.*, said: "Judges have never ventured to advance beyond that one step which they have taken."

Messrs. Marston & Eastman, and Frink & Batchelder, for appellee:

The first question which to us seems to arise in the case is: what change in the circumstances of a testator or his estate, short of total alienation, will operate to revoke a will, the intention concurring?

Section 15, Gen. Laws, ch. 193, certainly recognizes the doctrine of a revocation of a will by changes in the circumstances and estate of the testator.

That there may be a revocation of a will by changes in the other modes suggested by this section of this Act, viz.: by changes in the family, devisees and legatees of the testator

will hardly be denied. Notably the marriage of the testator and birth of a child works a revocation.

To the same effect is the language of the Statute of 7 Will. IV & 1 Vict. ch. 26, § 19, which provides that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

One of the earliest cases establishing this doctrine of a total revocation by the changed circumstances of the will maker is found in *Cook v. Oakley*, 2 H. Bl. 362 (1 P. Wms. 302). There the testator made his will, giving his ornaments to his mother, and all things not before bequeathed, to his friend. His father died after he made his will, leaving him a valuable estate, of which fact the testator was ignorant. Held, that this change of his circumstances revoked his will.

We think that perhaps *Cooper's Est.*, 4 Pa. St. 88, lays down the true rule of law, that when the general scheme of the testator would be defeated by establishing the will, and the court would substantially make a new will for the testator by reason of the changes in the testator's circumstances, the will should be totally revoked.

The appellants call the attention of the court to an early case in Vermont. *Graves v. Sheldon*, 2 Chip. (Vt.) 71. Under the statute of that State, as it then existed, there was nothing to be done but to deny the revocation of the will.

That case was decided under the statute of 1808, which determined the only manner in which a will could be revoked. It is significant that after that decision, in 1829, we think, the law of that State was so changed, as appears by the Statute of 1840, as to except from its operation revocation by implication of law.

In the case of *Warner v. Beach*, 4 Gray, 162, there was no change in the estate of the decedent, excepting an increase in value. No new rights had intervened or alienation been made to substantially despoil each legacy in whole or in part, as in the case at bar.

In *Webster v. Webster*, 105 Mass. 542, *Judge Gray* seems to base his opinion upon the intention of the testator as discovered from his acts and the changes in his estate, and he admits that if there has been such a change in the estate, it might appear that the testator intended that his will should be revoked thereby, it would have operated as a revocation *in toto*.

In *Marston v. Roe*, 8 Ad. & E. 14, the court determined that the revocation was the result of an arbitrary rule of law, but all the later cases seem to go upon the ground that the intention to revoke must at least concur.

Webster v. Webster is a recognition of the doctrine that a will may be revoked by a change in the estate or circumstances of the testator, if the intention to revoke it can be found from these changes and other circumstances.

It will be conceded that this will is revoked "*pro tanto*." The appellants will contend, undoubtedly, that a revocation "*pro tanto*" is limited to those clauses or bequests which have passed out of the testator's estate. We do not agree with this contention.

In *Marshall v. Marshall*, 11 Pa. 433, the court lays down this rule as determining what parts of a will are revoked. Revocation of a will "*pro tanto*" embraces all that part of the

will the execution of which is totally destroyed or so far mutilated or impaired as to remove from the remnant the impress or trace of the testator's intention.

The testator gave to the residuary legatees all his estate "not disposed of in his will." There is authority for saying that these words exclude from the operation of this residuary clause all the property thus given away and that, whether deemed or alienated, it cannot be holden to pass into the residuum on account of these words of limitation. *Atty-Gen. v. Johnson*, 2 Amb. 577; *Davers v. Deves*, 3 P. Wms. 40.

This is a question of intention on the part of the testator, and if the court is of the opinion from the whole will that the testator intended to use the words in a restricted sense, then it is bound so to construe it. *Wms. Exrs. pt. 3, bk. 3, §. 1815*.

The common-law rule seems to be that a lapsed devise of real estate or the price of real estate as well as after acquired real estate goes to the heir and not to the residuary devisee. *Wms. Exrs. pt. 3, bk. III, §. 1814; Spence v. Robins*, 6 Gill & J. 507; *Greene v. Dennis*, 6 Conn. 293; *Treat v. Treat*, 35 Conn. 215.

What the effect of our statute may be as to lapsed legacies has never been determined here, although it has been considered in Massachusetts. The statute there however differs from ours. *Thayer v. Wellington*, 9 Allen, 283; *Prescott v. Prescott*, 7 Met. 141.

Appellee's additional brief.

Section 15, General Laws, ch. 193, leaves the revocation of wills by changes in the circumstances or estate of a testator, just as it was by the common law before the passage of any legislative act upon the subject.

The Statute of Massachusetts contains a somewhat similar provision.

So, in this State, we may say that this exception as to implied revocations recognizes and adopts the common law upon this subject, or, as the court in Massachusetts has recently put it "This exception has the force of an express enactment of the rules of the common law." *Swan v. Hammond*, 138 Mass. 45.

It is well settled both by authority and principle that except so far as restraints have been imposed by statute, a will may be revoked in any way in which the testator thinks best to intimate his wish to revoke it. *Clark's Exrs. v. Elorn*, 1 N. C. L. Rep. 91; 2 Am. Lead. Cas., 487; note to *Lawson v. Morrison*.

In *Woolery v. Woolery*, 48 Ind. 525, the court says, that "By common law, any considerable alteration such as a conveyance of part of the lands after devise was held to revoke the entire will."

But it was admitted that the line of decisions was sustained more from the force of precedent than from the soundness of the reasoning. *Goodtitle v. Otway*, 7 Term R. 400.

Most of the English judges regretted the rule which they were bound to follow. Lord Mansfield literally denounced it, saying in *Doe v. Pott*, 2 Doug. 710 that "All revocations which are not agreeable to the intention of the testator are founded on artificial and absurd reasoning."

A conveyance which was wholly inoperative and passes no estate whatever to the grantee,

may work a revocation by manifesting a change in the purpose of the testator. 4 Kent, Com. 528.

And if the testator conveys any of his estate, and then takes it back by the same instrument even it is a revocation. *Id.* 529.

Additional brief of appellee:

It is intent alone that constitutes a testament or revokes a testament.

Wills are everywhere revoked by implication as well as by express words and acts. *Ch. J. Eyre* said in *Goodtitle v. Otway*, 1 Bos. & P. 594: "Implied revocations are where the testator has done certain acts, or certain alterations have taken place in his situation as necessarily leads to the inference of an intention to revoke his will."

Chancellor Kent said, 4 Com. 520: "Implications are founded on the reasonable presumption of an alteration of the testator's mind arising from circumstances occurring since the making of the will."

Ch. J. Robertson said in *Sneed v. Ewing*, 5 J. J. Marshall (Ky.), 460. "In all cases of an implied revocation the principle is the same; it is that since the publication, a fact inconsistent with the legacy or the testament has occurred and from which the law presumes a correspondent change in the mind of the testator."

It is true that Lord Kenyon said in *Lancashire v. Lancashire*, 5 Term R. 49, that marriage and birth of a child revoked a will, on the ground that there was a tacit condition annexed to the will when made, that marriage and birth of a child should revoke it. No law, no court, no single judge, ever said that before or afterwards until 1833, when the English courts adopted that reason for holding the will revoked by marriage and issue because they said it was the only ground consistent with the Statute of Frauds.

Ch. J., Eyre in *Goodtitle v. Otway*, says: "If a testator parts with his estate after making his will, the subject is gone. The will is not revoked, for a revoked will may be re-established by republication, but republication won't bring back the estate."

Lord Mansfield said in *Brady v. Cubitt*, 1 Doug. 31-40: "There may be many circumstances where a revocation may be presumed," and Buller, J., said in the same case "Implied revocations must depend upon circumstances at the time of the testator's death." There are many cases in the English reports where revocation has been implied by an attempt to alienate the thing devised. 7 Bac. Abr. 866; *Beard v. Beard*, 8 Atk. 72; *Parsons v. Freeman*, Id. 743.

So the least alteration of the testator's interest in an estate by any act of his shows a different intention, and revokes his will in whole or in parts, as the case may be. *Sparrow v. Hardcastle*, 1 Ambler, 224; *S. C.* 3 Atk. 798.

The court said in *Sneed v. Ewing*, 5 J. J. Marsh. 472, "Some authorities require both marriage and issue to revoke a will, and others admit either one or the other; but reason and principle, as well as a preponderance of authorities, repudiate the notion that both marriage and issue are indispensable to revoke a will," and the court refers to 2 Fonblanque, note c., as sustaining the same view.

In *McCullum v. McKenzie*, 26 Iowa, 510, it was held that the birth of a child alone operated to revoke a will.

In *Tyler v. Tyler*, 19 Ill. 151, held that marriage subsequent to making a will revoked it. Affirmed, in 85 Ill. 41.

By English Statute, 1 Vic. wills are now absolutely revoked by the marriage of either man or woman.

Re Cooper's Est. 4 Pa. St. 88, the changes of circumstances related solely to the estate, and in that regard resembled the case at bar more than any to be found in the books.

Counsel for the appellee suggests that the sale of the railroad stock was not an ademption of the legacies to the daughters, and cites the case of *Johnson v. Goss*, 128 Mass. as an authority. But they do not say what the Massachusetts court said, in substance, that the case of *Johnson v. Goss* was a very peculiar one; that they derived no aid from authorities, and that their decision would be of very little use as a precedent for other cases.

Blodgett, J., delivered the opinion of the court:

No express revocation appears in this case. The will of the testator, executed in accordance with the statute formalities, has not been revoked by any subsequent "will or codicil, or by some writing executed in the same manner, or by canceling, tearing, obliterating, or otherwise destroying the same by the testator, or by some person by his consent and in his presence," as required by G. L. chap. 193, § 14. On the contrary, it was found in his safe after his decease, and in its original condition. It is true that it was in a bundle of papers of no pecuniary value, and that "Included in this bundle were several apparently incomplete drafts or memoranda of wills never executed, without date, some of which were apparently made since the date of said will."

But *Fellows v. Allen*, 60 N. H. 439, 441, is a recent and direct authority that the fact of a will being found among worthless papers, works no revocation of it; and the authorities, as well as reason, demonstrate that the memoranda, which, at most are merely evidentiary facts of an inchoate intention to make another will, have no legal significance as acts of revocation; for although the purpose of the mind always gives character to the act done, still the Legislature having established certain modes by which a will may be revoked, it is not within the legitimate power of courts to dispense with such requirements, and accept even a definite intention to perform the prescribed act for the act itself.

Neither has the bill become inoperative, as a whole, from necessity, either by an entire loss of the testator's estate, or its total alienation, or by the decease of all the devisees without descendants, and so leaving nothing upon which the will can operate.

If, therefore, there has been a valid revocation, it must be one arising from legal presumption or implication; and this, in fact, is the principal contention.

The existing statute as to the revocation of wills, which was originally adopted in 1822,

after pointing out the modes by which a will may be revoked, expressly excepts any revocation implied by law from changes in the circumstances of the testator, his family, devisees or estate, occurring between the time of making the will and his death. G. L. c. 193, §§ 14, 15. But what those changes are, § 15 does not in any manner, attempt to define; and the effect consequently is to leave the matter of revocation by legal implication just as it stood before the enactment of that section. That is to say, § 15, which in the Act of 1822 was a proviso to what is now § 14, is to be taken not as a recognition and adoption of the common-law doctrine of implied revocation, but as a recognition and adoption of the English decisions under §§ 5, 6 and 22 of the English Statute of Frauds relative to the revocation of wills, passed in 1676; for the common law as to such revocation was abrogated by that Statute.

The English Statute was doubtless the basis and model of our statute, directly or indirectly, and the proviso in the latter, we think, is to be regarded as merely explanatory of the preceding part of the section prescribing the manner of express revocation. Practically, and in effect, it was an adoption, under then existing conditions, of such implied revocations as had been introduced and established by the English courts, contrary to the plain meaning of the English Statute, and solely through the usurpation of legislative power.

But the English courts did not go the length of establishing a rule that revocation might be shown by any change of circumstances, affording satisfactory evidence of the testator's revoking, intention but stopped far short of it and restricted its application to a few exceptional cases as to which it was held the Statute did not apply.

Hence, there is no tenable ground for holding that any causes of revocation were intended by our Legislature to be embraced in the proviso to the Act of 1822, aside from the existing exceptions established by the English courts upon supposed equitable considerations; and much less can it be held that any alteration was affected or intended by the revision of 1842, making the proviso a separate section and slightly changing its phraseology. And as strongly tending to show that the purpose of the Legislature was such as has been indicated, and that such has been the universal understanding of the bar of this State, it is a significant fact that no litigation has arisen as to the legislative intent, or the meaning of the language used in its expression, during the more than sixty years which have elapsed since the Statute was first enacted.

No new cause of revocation being introduced by the Statute, the true inquiry is, whether the facts of this case bring it within any of the exceptions upon the subject of implied revocation recognized by the English Courts after the adoption of the Statute of 1676, which were quite limited in number and reasonably well defined and understood at the time our statute was enacted.

The causes assigned upon this point as ground of revocation are subsequent changes in the circumstances of the deceased, his family and estate. They are, substantially, the

death of his wife and his son Franklin, both of whom were legatees; his second marriage, but without issue; the alienation of the larger portion of his estate, and its nearly threefold increase in value, through natural causes and judicious investments.

But total revocation cannot be implied from the death of the wife and the son; "the death of a devisee is a contingency always in view." *Shaw, C. J. in Warner v. Beach*, 4 Gray 162, 164. "I know of no case," said Denman, *C. J.*, in *Doe v. Edlin*, 4 A. & E. 586, "where it has been held that the removal of an object of affection and bounty by death has been taken to be an implied revocation of a will, and in my opinion it does not operate so." And see, *Fellows v. Allen*, *supra*.

Nor can it be implied from the testator's remarriage, because the indispensable common-law requisite of the subsequent birth of a child is lacking. 1 Jarm. Wills, 5th Am. ed. 272; 1 Redf. Wills, 293; Pars. Wills, 59. Worthington, Wills, 528. "This principle of law is incontrovertibly established." 4 Kent, 522.

And in this connection it should also be borne in mind that the rule never applied except in cases where the wife and after born children, the new objects of duty, were wholly unprovided for in the will, and where there was an entire disposition of the whole estate to their exclusion and prejudice; therefore, inasmuch as the widow and children of a testator not provided for in the will are, under our statutes, entitled to the same share of the estate as if he had died intestate, the sole reason upon which the rule was grounded no longer exists, and so the rule itself has become inoperative and obsolete in this jurisdiction.

The inquiry thus becomes restricted to the effect of the changes in the testator's property; the phrase "circumstances of the testator," etc., relating to new family ties and not to changes in property. 4 Kent, 521, and authorities generally.

But if it were apparent, as it certainly is not, that in the case of a testator, an entire revocation by legal implication resulted, either before or after the Statute of 1676, from any change whatever of condition or circumstances except that of a subsequent marriage and child, it is the undoubted general rule that a partial revocation only produces what is inaptly and inaccurately called a revocation *pro tanto*, instead of an ademption of the subject of the devise, and thus necessarily limits the operation of the will to the extent of the alienation; not, however, by reason of any defect in the will itself, but because it pleased the testator to make a disposition of such part of his estate different from what he originally intended, which it is always competent for him to do, either by a conveyance or a new will or codicil; see, *Fellows v. Allen*, *supra*; *Carter v. Thomas*, 4 Greenl. 341, 343, 344; *Graves v. Sheldon*, 2 D. Chip. (Vt.) 71, 75; *Blandin v. Blandin*, 9 Vt. 210, 211; *Hawes v. Humphrey*, 9 Pick. 350; *Terry v. Edminster*, Id. 355, note; *Webster v. Webster*, 105 Mass. 588, 542; *Balliet's App.*, 14 Pa. St. 451; *Brush v. Brush*, 11 Ohio, 287; *Floyd v. Floyd*, 7 B. Mon. 290; *Re Nan Mickel*, 14 Johns. 324; *McNaughton v. McNaughton*, 34 N. Y. 201; *Warren v. Taylor*, 56 Iowa, 182; *Wells v. Wells*, 35 Miss. 638; *Brydges v. Duchess*

of Chandos, 2 Ves. Jr. 417; 4 Dane, Abr. 576, 577; *Lovell v. Wills*, 358; 1 Redf. Wills, 385; Pars. Wills, 68.

"Conveying a part of the estate, upon which the will would otherwise operate, indicates a change of purpose in the testator as to that part; but suffering the will to remain uncanceled evinces that his intention is unchanged with respect to other property bequeathed or devised therein." Weston, *J.*, in *Carter v. Thomas*, *supra*, 344.

The remaining circumstance, that of the increase of the estate, upon obvious considerations of public policy, has no weight; and to this effect is the great preponderance of authority. *Warner v. Beach*, *Webster v. Webster*, *Graves v. Sheldon*, *Blandin v. Blandin*, and *Balliet's App. supra*; *Brush v. Wilkins*, 4 Johns. Ch. 507, 518, 519; *Wogan v. Small*, 11 S. & R. 141, 145; *Vandemark v. Vandemark*, 26 Barb. 416; *Verdier v. Verdier*, 8 Rich. L. (S. C.), 135.

"A merely general change in the testator's circumstances, as it regards the amount and relative value of his property, will not in general, if ever, have the effect to revoke a will, since the testator, by suffering it to remain uncanceled, does in effect reaffirm it, from day to day, until the termination of his conscious existence." 1 Redf. Wills, 296.

The conclusion then is, that the subsequent changes in the circumstances of the testator, his family and estate, do not imply a revocation of his will. To effect a revocation, both the English and New Hampshire statutes require certain specific things, which are lacking in this case, to be done, and not merely contemplated, or even actually intended to be done. It is true that at an early day the English common-law courts fell into the error of exercising legislative power, and materially amending the Statute of 1676, by enlarging its specific methods of revocation, so as to include revocations founded upon new family ties and obligations on the part of the testator, arising from subsequent marriage, issue, and leaving wife and child without provision, and that, inasmuch as our statute must be regarded as a substantial reenactment of that statute, in the sense in which it had been interpreted by the English courts anterior to 1822, full effect must be given to their decisions, although plain encroachments upon legislative power. Yet no rule was expressly established, and none can be inferred from the decisions, that makes it our duty to trespass still further upon the legislative domain, and so far judicially repeal the statute, as to hold that the present case does not come within the purview of its 14th section; and indeed, the English courts had come to a halt prior to 1822, and refused to extend the rule as to implied revocations beyond the precedents; and so have the American courts generally. See, *Doe v. Barford*, 4 Maule & Sel. 10; *Tilghman, C. J.*, in *Wogan v. Small*, *supra*, and authorities generally.

The rule for which the appellee contends is, that a revocation may be proved or disproved by any circumstantial evidence showing the testator's intention; but the precedents do not support the contention. On the contrary, after a most thorough examination of the cases reported before the enactment of the New Hampshire Statute, it was unanimously held

in *Marston v. Roe*, 8 A. & E. 14, by the fourteen Judges sitting in the cause, that implied revocation takes place in consequence of a rule or principle of law independently altogether of any question of intention; and there is no reason to suppose that the Legislature of 1822, took a different view of the reported cases. If the purpose was to make intention of itself a ground of revocation, and thus inevitably incite litigation, and "produce infinite uncertainty and delay in the settlement of estates," the presumption is that the statute would have been drawn accordingly. Even *Johnston v. Johnston*, 1 Phillim. 447, upon which great stress has been laid by the appellee, while holding the subsequent birth of a portionless child to be an indispensable requisite which would effect a revocation when aided by other circumstances, and a subsequent marriage, not to be an essential requisite, does not hold that the revoking intent may be inferred from a general change of circumstances simply, but makes the controlling principle rest upon new moral obligations, and family ties arising after the making of the will, and thus limits its application to cases of subsequent marriage or birth, in which the wife or child would otherwise be left without provision for support. This case however, is not relevant—the will being one of personalty only, and the decision being made by an ecclesiastical court unincumbered by statute provisions; and if it were relevant, its governing principle when applied to this case, would be fatal to the appellees, for the reason that no child was born to the testator subsequently to the execution of his will. This being so, it is of no practical consequence here whether the doctrine of implied revocation rests upon the fact of a changed intention, as held in *Johnston v. Johnston*, or

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takes place in consequence of a rule or principle of law founded on a tacit condition annexed to the will itself when made, independently altogether of any question of intention, as held in *Marston v. Roe*; for the application of either principle to the facts of this case leaves the will unrevoked, because they fail to bring it within any of the exceptions introduced by the ecclesiastical or common law courts.

The proffered oral declarations of the testator, to the effect that he understood the will was revoked, were rightly rejected. The mere understanding of a testator cannot revoke his will, for legal requirements cannot be thus abrogated; nor can his oral declarations, for wills cannot be revoked by parol; nor, upon the great weight of authority, are such declarations evidence, unless they accompany some act of revocation and thereby become a part of the *res gesta*. *Jackson v. Kniffen*, 2 Johns. 31; *Dan v. Brown*, 4 Cow. 488; *Clark v. Smith*, 34 Barb. 140; *Waterman v. Whitney*, 11 N. Y. 157; *Randall v. Beatty*, 31 N. J. Eq. 648; *Lewis v. Lewis*, 2 Watts & S. 455; *Hargroves v. Redd*, 48 Ga. 142, 160; *Gay v. Gay*, 60 Iowa. 415; *Rodgers v. Rodgers*, 6 Heisk. (Tenn.) 489; *Smith v. Fenner*, 1 Gall. 170; *Doe v. Palmer* 16 Ad. & El. Q. B. 747; 2 Greenl. Ev. 9th ed. § 690; Abb. Trial Ev. 124; 2 Stark. Ev. 3d. ed. 1286; 1 Redf. Wills, 331.

Such declarations also were not competent upon the testator's intention not to pass, by his will, after acquired real estate. If a contrary intent is inferable from the will itself, it cannot be disproved by extrinsic evidence. If it is not thus inferable and may be ascertained by the weight of competent evidence, his declarations are not a part of such evidence.

Decree of Probate Court Reversed.

SUPREME COURT OF MASSACHUSETTS.

Charles B. PATTON, *et al.*

v.

John BELL.

1. Evidence examined and found sufficient to support a count for money had and received.
2. A plaintiff who has been engaged in buying, selling and cutting hay for fifteen or twenty years is qualified to give an opinion in his own behalf as to the value of hay.

(Suffolk—Decided February 25, 1886.)

ON defendant's exceptions. *Overruled.*

This was an action of contract, tried by the court without a jury. The declaration contains two counts; the first count being on an account annexed, for fifteen tons of hay at \$15 per ton, and the second for \$225, money had and received; the bill of particulars being for money received for fifteen tons of hay at \$15 per ton.

The evidence for the plaintiff was substantially as follows:

Charles B. Patton testified: in summer of 1883, I was a member of the firm of C. B. Patton & Co.; my partner being P. J. Daly. We had a lease of Long Island and ran the hotel there for the summer; also, cut and baled the hay grown on the island. Sometime in September I called at defendant's, a hay dealer's place in Boston, and saw a young man in charge; told him that our firm had some hay we wanted sold; he said, "All right; send it along and we'll sell it at \$1 per ton, commission." We sent 111 bales by Scott & Bridges' team, and I superintended the delivery of it and was there all the time, and we paid the teaming; afterwards I saw Mr. Bell, the defendant; he said he had got the hay and that the arrangement I made with the young man was all right about selling it for \$1 per ton; he said, also, that he had sent his own team over and got thirteen bales, weighing 1½ tons. That made 124 bales altogether, delivered to him. The hay was baled at Long Island, under my supervision and direction; it was baled so as to weigh eight bales to the ton. I have been buying, selling and cutting hay for fifteen or twenty years; was in the hay business for years, in Louisville, Ky., and have handled as much hay as any man of my age. Cut, buy and sell hay now, at my farm in Walpole. This hay was worth about \$17 per ton. After the hay was sent, I called on Bell two or three times for an account; the last time I called, Bell told me that the hay was not all sold. I went to the storehouse and a little lot of loose hay was shown me. It was not our hay; I saw none of ours there. At one of my visits to Bell's store, I saw him sell one small lot at the rate of \$17 per ton, and another small lot at the rate of \$18 per ton. Bell said he was getting pretty good prices by selling it in small lots. I never could get an account from Bell about the hay. There never was any question raised about the amount of hay he got until yesterday, when he claimed that he only received 111 bales. I told him I thought he was mistaken; that he had not credited me with the thirteen bales he took by his own team.

Patrick J. Daly testified: was a partner with C. B. Patton, as C. B. Patton & Co. Leased Long Island for summer of 1883; ran the hotel and cut hay there. Bell was at the island several times during summer. I was introduced to him by Mr. Patton, as his partner. Large sign, sixteen feet long, over landing, "Long Island House, C. B. Patton & P. J. Daly." Hay was baled at the island; was there in early part of baling; bales weighed 250 pounds. Was then taken sick. Know nothing about delivery of hay to defendant. In November, called a number of times on defendant for account. Never could get one. On December 5, rendered defendant a statement for 124 bales of hay; a copy of which is as follows:

"Boston, Dec. 5, 1883.

Mr. John Bell, Dr. to C. B. Patton & P. J. Daly, copartners, doing business under the name of C. B. Patton & Co. To 124 bales of hay consigned to you, for sale on commission of \$1 per ton," and asked for settlement. He made no objection, but said he hadn't sold all the hay. After that, and before this suit was begun, I called on him again, and couldn't get any account. He, defendant, said the hay was all sold, but there were a few small accounts he hadn't collected yet.

The defendant was present at the trial but did not testify, and offered no evidence.

At the close of the plaintiffs' case the defendant asked the court to rule that upon all the evidence the plaintiffs could not maintain their action, but the court declined so to rule, and the defendant excepted.

The defendant objected to the admission of the testimony of Patton, as to the market value of the hay, but the objection was overruled, and the defendant excepted.

The defendant requested the court to rule that the plaintiffs could, in no event, recover a sum in excess of \$14 per ton, but the court declined so to rule, and the defendant excepted.

The court found for the plaintiffs, and assessed damages in the sum of \$225 and interest from the date of the writ, making in all, \$244.12.

Messrs. Loring & Loring, for defendant:

The action upon the first count cannot be maintained upon the evidence, as the hay was not sold to the defendant, but consigned to the defendant to be sold on commission. *Ayres v. Sleeper*, 7 Met. 45; *Hull v. Richardson*, 4 Gray, 598; *Brown v. Hollbrook*, 4 Gray, 104.

It cannot be maintained on the second count, because it does not appear that defendant had actually received the money when the action was commenced. *Woodbury v. Jones*, 8 Gray, 261; *Bartlett v. Bramhall*, 3 Gray, 257.

The defendant was entitled to a reasonable time in which to sell the hay and collect the money, and if he was acting with due diligence and skill, and in good faith, he would not be liable to suit. The suit cannot be maintained in this form of action, if in any. *Torrey v. Bryant*, 16 Pick. 530; *Gorman v. Wheeler*, 10 Gray, 362.

The defendant is only liable on the second count for the money actually received by him, and not the market value of the hay, because if the defendant acted in good faith, and there is no evidence that he did not, and sold the hay for more or less than the market value, he was simply accountable for the amount he actually

received. *Bartlett v. Bramhall*, 8 Gray, 260; *Woodbury v. Jones*, 8 Gray, 261; *Shaw v. Becket*, 7 Cush. 443.

Under the law merchant the defendant had a right to sell for cash or on time. *Goodenow v. Tyler*, 7 Mass. 36-46; *Haggood v. Batcheller*, 4 Met. 578.

Another question here is, whether the defendant, having sold a part or the whole of the hay, and having received a part (how much does not appear) and not the whole of the money for the same, is liable on the second count. We submit that he is not liable; if he is, he is only liable for nominal damages, and the case should have been sent to an auditor to ascertain damages. *Cutler v. Rand*, 8 Cush. 91.

Defendant ought to have rendered an account, but should the court deem him negligent in this respect, we claim that for this negligence no action for money had and received can be maintained against him, but only an action for a failure to account. *Torrey v. Bryant*, 16 Pick. 580; *Woodbury v. Jones*, *supra*.

Messrs. Collins, Burke & Griffin, for plaintiffs:

Patton was shown to be sufficiently qualified to testify as to the market value of the hay. *Lavton v. Chase*, 108 Mass. 238.

The decision of the Judge below upon the admissibility of a witness as an expert is conclusive, if all the evidence is not reported. *Quinsigamond Bank v. Hobbs*, 11 Gray, 250.

C. Allen, J., delivered the opinion of the court:

The evidence was amply sufficient to support the second count. It tended to show that the defendant received a little over fifteen tons of hay to sell for the plaintiffs on a commission of \$1 per ton; that the hay was worth about \$17 per ton; that the defendant sold one small lot of it at the rate of \$17 per ton, and another small lot at the rate of \$18 per ton; that he said he was getting pretty good prices by selling it in small lots; that at another time he said that it was all sold but that there were a few small accounts he had not then collected, and that the plaintiff Patton, never could get an account from the defendant of the hay; it also appeared that the defendant was in court, but did not testify and offered no evidence. Now from this it might well be inferred that he had received as much as \$15 a ton, besides his commission, for fifteen tons.

Nor can we see that it was the duty of the Judge to reject Patton's opinion of the value of the hay. Even if Patton's qualifications were doubtful, we should be slow to revise the decision of the Judge; but that decision appears to have been correct.

Exceptions overruled.

Allen LOOK *et al.*

v.

Caroline M. LUCE.

1. In proceedings by *scire facias*, to procure a new execution against the goods and estate of a decedent where execution had been issued and levied for the full amount of the judgment

and costs, such levy was **invalid**, not upon the ground that the judgment was void, but upon the ground that execution was issued against the estate for the costs and the levy was void.

2. The technical objection that judgment is for a less sum is one which cannot harm defendant and can be cured by plaintiff remitting the amount of the costs.

3. Such *remittitur* may be entered as well after judgment as before, in the court where the cause remains, and when entered operates as an amendment of the judgment; and this obviates the objection that the execution does not pursue the judgment.

(Dukes — Decided January 8, 1886.)

ON report.

Scire facias.

Petition for issuance of a second execution. *Granted.*

Petition for a writ of *scire facias*, brought before Jeremiah Pease, by Allen Look, James F. Cleveland, Caroline W. Nickerson, Sarah C. Vincent, George West and Beriah T. Hillman, to obtain new executions upon a judgment recovered by them and Jared Vincent and William P. Bodfish now deceased, on July 1, 1882, before said Pease as trial Justice, against Caroline M. Luce as administratrix of the goods and estate of Theodore Luce, deceased, in an action commenced after the death of said Theodore, upon a demand due from him in his lifetime. The case came to the superior court by appeal.

At the hearing it appeared that Theodore Luce died in 1879, and that the defendant was duly appointed as administratrix of his goods and estate and gave notice of her appointment more than two years before April 10, 1884, the date of the petition for *scire facias*, but less than two years before June 12, 1882, the date of the suing out of the writ in the original action.

The petitioners, with said Jared Vincent and William P. Bodfish, on July 1, 1882, recovered judgment before said trial justice upon a demand due from said Theodore Luce in his lifetime and sued after his death.

On July 5, 1882, an execution issued on said judgment, in common form, for the damages and costs of suit, together amounting to \$115.46, commanding the levy of said sum of the money of the said Theodore Luce, deceased, or of his goods and chattels, lands or tenements, in the hands of the said Caroline M. Luce, administratrix as aforesaid.

On August 12, 1882, this execution was duly levied on lands claimed by the judgment creditor to be the real estate of said Theodore Luce, the record title to which stood in the name of said Caroline M. Luce, the creditors receiving seisin and possession of said lands from the officer in full satisfaction of the execution, which with the levy and proceedings thereon was recorded in the registry of deeds and returned to said trial justice on September 2, 1882.

On April 27, 1883, the judgment creditors brought their writ of entry against Caroline M. Luce, to recover the lands so levied upon, which writ of entry is the action reported in 136 Mass.

249, *et seq.*; and after that decision the judgment creditors became nonsuit in said action and paid costs, and said Jared Vincent and William P. Bodfish having died, the petitioners, who are the surviving judgment creditors, suggested said deaths to said justice, who entered a memorandum of said suggestion upon the original record, and thereupon the petitioners on April 10, 1884, sued out this writ of *scire facias*, claiming to have two executions, one for said damages, against the estate of said deceased, and another for said costs, against the defendant, Caroline M. Luce, personally.

Upon the foregoing facts, the defendant asked the court to rule that the writ of *scire facias* was barred by the two years Statute of Limitations in favor of executors and administrators, and that an execution must follow the record and the Superior Court has no power to divide or change the record of the trial justice and by that record no execution could legally issue, and that no execution had ever issued upon the original judgment, and that no execution could now be ordered to issue thereon either for damages or for costs; and the plaintiffs asked the court to order execution to issue for the petitioners for said sum of \$106 damages against the moneys, goods or chattels, lands or tenements of said Theodore Luce in the hands of said Caroline M. Luce as administratrix, and also to order another execution for said sum of \$9.46 against the goods and estate, etc., of said Caroline M.

The court ruled upon the foregoing facts that it was not required to find for the defendant, and that the petitioners were not entitled to have a new execution for said costs, and were entitled to have a new execution as prayed for said sum of \$106 damages, against the estate of said deceased in the hands of said defendant as administratrix, and ordered such execution for damage to issue accordingly; and thereupon reported the case to the Supreme Judicial Court for its determination.

Mr. C. G. M. Dunham, for petitioners:

The petitioners claim that this writ is not barred by the statute. The statute, P. S. ch. 136, § 9 is that no executor or administrator shall be held to answer to the suit of a creditor of the deceased, unless such suit is commenced within two years from the time of his giving bond, etc.

Dane, Abr. ch. 190, art. 1, § 8, says, speaking of *scire facias*: "It is sometimes a new action and sometimes a mere continuation of the former action; on a judgment, it is always such a continuation." In § 8, he says: "It is not properly an action, but the mere continuation of an action, whenever it is used to carry into effect a former judgment against a party to it," etc.

In *Wright's Exrs. v. Nutt*, 1 T. R. 388, *sci. fa.*, to obtain execution was held not to be a new action, but only a continuation of a former one.

In *Wolf v. Pounsford*, 4 Ohio, 397, it is said: "A *scire facias* to revive a judgment is only a continuation of the former suit, and is not an original proceeding."

Also, 2 Bouv. Law Dict. 499, says of *scire facias* to revive a judgment and obtain execution thereon, that it is merely a continuation of a former suit when founded on a judgment.

P. S. ch. 136, § 12, that "the plaintiff may commence a new action * * * within one year," etc., implies that the limitation of two years is for commencing new actions, and not for a supplementary process like a *scire facias* to obtain an execution on a judgment rendered in a suit begun within said two years.

Remedial statutes are to be construed beneficially so as to advance the remedy. *Perry v. Perry*, 2 Gray, 380.

The *scire facias* is a remedial proceeding and ought, if possible, to be advanced, especially since the petitioners have not been guilty of laches, and the necessity for it arose from a proceeding in the former execution which was apparently authorized by the language of the statute. See, 136, Mass. 249, *et seq.*, and P. S. ch. 172, § 55.

The petitioners claim that upon the record of the trial justice executions can legally issue. The provisions of chapter 166, P. S. do not direct what the form of the judgment shall be; they only specify against what the executions shall run.

In *Hamilton v. Lyman*, 9 Mass. 19, the court says: "Probably, on suggestion made to the court, of the death of one of the creditors in a judgment, execution would be ordered to issue in the name of the survivors only." In that case the execution did not strictly pursue the judgment.

Dane, Abr. ch. 190, art. 3, § 11: "The death ought to be suggested on the record, then execution against the survivors."

Same, art. 4, § 12: "Judgment against three defendants; one died, *scire facias* against the two survivors." By parity of reasoning, in case of judgment in favor of several plaintiffs, and some die, *scire facias* should issue in name of the survivors.

The officer made an error in the proceeding by including in the levy more than he was warranted by law to do, so that the estate levied on could not be held thereby; and, therefore, the case is brought under § 53, ch. 172, P. S., so far as the execution for damages is concerned, and under § 17, ch. 171, P. S., so far as it relates to execution for costs.

But if, on the other hand, the execution which issued was wholly void, then, under § 17, ch. 171, we are entitled to our *scire facias* to obtain one execution for the damage and another for the costs, on the ground that the judgment remains unsatisfied after the expiration of the time for taking out execution.

Mr. H. K. Braley, for defendant:

Morton, Ch. J., delivered the opinion of the court:

This is a petition for a writ of *scire facias*, to obtain a new execution upon a judgment of a trial justice, brought under the Pub. Stat. ch. 172, § 53. The original writ was against the defendant as administratrix of the estate of Theodore Luce. The trial justice rendered a judgment that "The plaintiffs recover against the goods and estate of the said Theodore Luce, deceased, in the hands of the said Caroline M. Luce, administratrix as aforesaid, the sum of \$106 damages, and costs of suit taxed at \$9.46 cents."

An execution for said damage and costs, running against the estate, was issued and levied

upon the estate of Theodore Luce for its full amount. It was held in *Look v. Luce*, 136 Mass. 249, that such levy was invalid, upon the ground, not that the judgment was void but that the execution issued against the estate for the costs was illegal, and the levy of such execution was void.

In view of the provisions of the statutes discussed in *Look v. Luce*, *ubi supra*, it was irregular for the trial justice to render a judgment against the estate for costs, but this does not make the judgment void. *Hardy v. Call*, 16 Mass. 530.

The defendant now contends that the order of the Superior Court, that execution should issue against the estate for the damages, is erroneous, because such execution would not conform to the judgment.

The respect in which it fails to pursue the judgment is that it is for a less sum, a difference which cannot harm the defendant. But this technical difficulty can be cured by the plaintiff's remitting the amount of the costs, and thus substantial justice will be done.

A *remittitur* may be entered, as well after judgment as before, in the court where the cause remains. *Hemmenway v. Hickey*, 4 Pick. 497; *Hutchinson v. Crossen*, 10 Mass. 251. Such *remittitur*, when entered will operate as an amendment of the judgment, and thus obviate the objection that the execution does not pursue the judgment.

We are of opinion that, in this case, justice requires that the plaintiffs should have the right to enter such *remittitur*; and that, upon their doing so, an execution should issue against the estate for the damages awarded by the judgment.

Ordered accordingly.

James H. PRESTON *et al.*
v.

William A. ETTER.

1. The clause of a composition deed, by which the signing creditors agreed to discharge the debtor from all indebtedness, must be construed in connection with other parts of the deed, and be limited so as to embrace only debts within the declared intention of the parties.
2. Where the scheme of the composition was to give to each creditor notes of the debtor indorsed by his wife to the amount of thirty per cent of the several debts, the trustees being authorized to pay these notes and nothing more, a note received from the debtor indorsed by his wife for the balance of a book account, and not included in the notes provided for, under the composition deed, is not released or barred by the composition deed.

(Bristol—Decided January 8, 1886.)

ON defendant's exceptions. *Overruled.*

Suit on a note given by defendant and indorsed by his wife, payable about thirteen days
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after the execution of an assignment to creditors and release by creditors of all indebtedness on payment of notes given for thirty per cent of his indebtedness but given prior to making of the deed of trust.

Mr. S. M. Thomas, for defendant:

Was this instrument broad enough in its terms to cover this note? This question must depend upon the construction of the written instrument itself. We cannot look elsewhere for the intention of the parties. *Rice v. Woods*, 21 Pick. 34.

The fact that the plaintiffs did not consider the note was included, has no bearing upon the question. A party cannot be allowed to explain what his intent was in the matter, it is purely a question of law. *Deland v. Amesbury W. & C. Mfg. Co.*, 7 Pick. 244.

It is not a question of intent but a question of construction, and where general words are used they are to be construed most strongly against the releasor. *Dunbar v. Dunbar*, 5 Gray, 105.

In order that a release of all demands should be a release of any particular demand, it is not necessary that the particular demand should have been in the minds of the parties at the time. *Hyde v. Baldwin*, 17 Pick. 307.

If the defendant had been the indorser of this note instead of the maker, this release would not protect him. His liability would not become a debt until these events happened. And as these events would happen subsequent to the release, it could not be said that at the date of the release he was owing a debt. That is, the fact that he was a debtor or would become such, was not fixed and certain, at that time. *Hamblen v. Ratigan*, 119 Mass. 155.

But in this case his liability was fixed and certain. The very ground of their action is this contract, which antedates the release; it is a debt fixed and certain as distinguished from a liability. *Hamblen v. Ratigan*, *supra*.

The exact question was decided in the case of *Pontious v. Durlinger*, 59 Ind. 31. The holder of a note sued the indorser; the defense was a release by the holder to the maker by a deed of assignment, and so a release of the indorser; the word debts was used in the instrument instead of indebtedness in our case; the answer to this defense was that the note was not payable at the time of the release.

Has the operation of this instrument been cut down in any way by the plaintiffs so as to let this note out?

The fact that Durgin used a seal in signing their name has no bearing on the case, because a seal is not necessary to an instrument of this kind when other creditors sign. *Farlington v. Hodgdon*, 119 Mass. 457.

Also, when a seal is used and is not necessary, it is considered as having no binding effect. 2 Greenl. Ev. § 61, n. 5; *Wood v. Auburn & R. R. Co.*, 8 N. Y. 160.

The amounts set against the different signatures are nowhere mentioned or referred to in the body of the instrument. The agreement is to sign off all their indebtedness, not a part of it nor such parts of it as they shall set opposite their names. *Fowler v. Perley*, 14 Allen, 19.

It does not hold him bound for any indebtedness that is not in his hands at the time of signing, although the figures he puts opposite

his name would indicate that such indebtedness was still in his hands. *Powder v. Perley, supra.*

The law does not allow a creditor to transfer any part of such indebtedness after signing the instrument so that a party to whom it is transferred, not signing the instrument, could collect the whole of such indebtedness, and then come in for his full percentage on the balance. *Farrington v. Hodgdon*, 119 Mass. 453.

Has the operation of this instrument been cut down in any way by any act done, or neglected to be done, by the defendant so as to make him still liable on this note?

His acts of commission or omission cannot enlarge the rights of the creditor as against the debtor, or the rights of the debtor as against the creditor. *Bigelow v. Baldwin*, 1 Gray, 248.

An absolute refusal to take less than 100 cents on the dollar, was a waiver by the plaintiffs of any tender of settlement notes. The law does not require idle and useless ceremonies. *Farrington v. Hodgdon*, 119 Mass. 458; *Carpenter v. Holcomb*, 105 Mass. 281, 285; *Curtis v. Aspinwall*, 114 Mass. 193; *West v. Platt*, 127 Mass. 370; *Galvin v. Collins*, 128 Mass. 527.

What is the effect of this instrument upon the rights of the plaintiffs to recover upon this note?

The legal effect of this instrument, so far, is in the nature of a mortgage for the security of debts. *Bigelow v. Baldwin*, 1 Gray, 247.

If a party, for a consideration, agrees or covenants that he will release a right, this takes effect as a release at once. *Tuckerman v. Newhall*, 17 Mass. 585.

There was no other act of the creditors in this case, in the way of a release to the defendant, not even by the plaintiffs in regard to their other claim which they admit they released; showing, that neither they nor any other creditors considered any other act necessary to constitute a release, but that this instrument was in itself an absolute release on their part. *Tuckerman v. Newhall, supra; Bigelow v. Baldwin, supra.*

If by the terms of the instrument no provision is made as to time and manner for any further act to be done by the creditor in the way of a release, the instrument itself is considered an absolute release. *Tuckerman v. Newhall.*

When the creditors covenant or agree that they will receive their proportions and release, they mean that they do release because the fund from which they are to be paid is already transferred. *Id.*

The accord and satisfaction effected by this instrument, viz.: the agreement to accept certain property and covenants in satisfaction and discharge of the defendant's indebtedness to the plaintiff, is a good legal defense and bar to this action and such should have been the ruling of the court. *Bigelow v. Baldwin, supra.*

Mr. L. E. White, for plaintiffs.

Morton, Ch. J., delivered the opinion of the court:

The defendant contends that the composition deed signed by the plaintiffs is a bar to the suit. By this deed, which was dated December 18, 1883, the defendant conveyed his

stock in trade, and other property, to trustees, "In trust for the following purposes, namely: that they shall sell and dispose of such goods and chattels, and collect said book accounts, and apply the proceeds to the payment of certain promissory notes given to said creditors, and indorsed by Jessie S. Etter, his wife, on thirty, sixty and ninety days' time, making in all thirty cents on each dollar owed by said Etter to said several creditors, being ten per cent thereof in thirty days, ten per cent thereof in sixty days, and ten per cent thereof in ninety days from this date." Then, after the payment of said notes as aforesaid, to deliver up to said Etter all that may remain of said goods, chattels, and book accounts, to have and to hold the same to said Etter, and his heirs and assigns, to their own use and behoof, discharged of said trust, said creditors hereby agreeing to grant said Etter a full discharge from all indebtedness, upon the payment of said notes as aforesaid."

The several creditors of Etter signed this deed, placing against their names respectively the amount of their debts on account of which they had received the notes of Etter indorsed by his wife, to the amount of thirty per cent.

The plaintiff signed it by an attorney, and against their signature was the sum of \$108.41, which was the amount of a book account due them, not including the note in suit. For this amount they had received notes of Etter indorsed by his wife, but they never received any such notes for thirty per cent of the note in suit.

The clause of the composition deed by which the signing creditors agree to discharge Etter from all indebtedness, must be construed in connection with other parts of the deed, and we think must be limited so as to embrace only debts which are within the scope of the earlier parts of the deed, and are thus shown to be within the intention of the parties.

The scheme of the composition was to ascertain first the debts due the several creditors which they were willing to release and, as a preliminary to the deed taking effect, to give to each creditor notes of Etter indorsed by his wife, to the amount of thirty per cent of the several debts. The trustees were authorized to pay these notes, and nothing more. The part of the deed which creates the trust and indicates the purpose and scope of the settlement, clearly looks only to such debts as are specified against the several signatures of the creditors, for thirty per cent of which, notes had been given; and we are of opinion that, by the fair construction of the whole instrument, the agreement of the creditors to discharge the defendant from all indebtedness includes only the debts which come within the scope of the trust, and for the release of which the creditors have received the notes named in the composition deed.

It is not contended that there was any fraud or concealment on the part of the plaintiffs; and we are of opinion that the note in suit is not released or barred by the composition deed.

Exceptions overruled.

James McCANN

v.
William A. TILLINGHAST *et al.*

A declaration for damages for an assault committed by a servant of defendant is bad on demurrer, unless it alleges that the assault was committed by the servant while acting within the scope of his employment.

(Bristol—Decided November 2, 1885.)

ON demurrer to declaration. *Judgment for defendants.*

Action for damages. The material portion of the declaration is as follows: "And the plaintiff says that on the 28th day of December, last past, the defendants' servant, George Bailey, who was at the time watching and guarding the defendants' lumber yard and had charge thereof, without cause, made an assault upon him and beat and bruised him, and so injured the plaintiff that he hath been put to great pain and suffering."

Mr. W. Clifford, for defendants.

Mr. E. L. Barney, for plaintiff.

By the Court:

The defendants are not liable for the assault by Bailey upon the plaintiff, unless it was committed by Bailey while acting within the scope of his employment as a servant of the defendants. This fact is not sufficiently alleged in the declaration, and it is therefore demurrable.

Judgment for the defendants.

Fidelia E. DAVIS

v.
Inhabitants of CHARLTON.

1. A statutory notice of injury received on a highway stating that the injury occurred by reason of "a pile of timber and a pile of hay" sufficiently states the cause of the injury.
2. Where the evidence showed that the pile of timber was so situated that the court could not rule, as matter of law, that it did not render the road unsafe and defective, there was evidence that the way was defective, proper to go to the jury.

(Worcester—Decided January 6, 1886.)

ON defendants' exceptions. *Overruled.*

Action for damages, for injuries received through a defect in a highway which defendants were bound to maintain.

The questions raised by the exceptions are stated in the opinion.

Messrs. W. S. B. Hopkins and A. J. Bartholomew, for defendants.

Messrs. T. G. Kent and J. M. Cochran, for plaintiff.

The notice shall not "be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury," for the evidence here shows that there was no intention to mislead and that the town, the party entitled to notice, was not in fact misled thereby. Stat., 1882, ch. 86.

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The intent of the law is best expressed in the words of *Mr. Chief Justice Morton*: "A notice given under the statute ought not to be construed with technical strictness. It is sufficient if it give the officers of the town information with substantial certainty as to the time and place of the injury, and as to the character and nature of the defect which caused it, so as to be of aid to them in investigating the question of the liability of the town." *Welch v. Gardner*, 133 Mass. 529; *Lowe v. Clinton*, 133 Mass. 526; *Savory v. Haverhill*, 132 Mass. 824; *Bailey v. Everett*, 132 Mass. 441; *Spellman v. Chicopee*, 131 Mass. 443; *Aston v. Newton*, 134 Mass. 507.

This court has passed on this precise question in a case where the cause of the accident was described in the notice as "a post on Sheridan St.," and held the notice sufficient. *Taylor v. Woburn*, 130 Mass. 494, 498.

The evidence, showing that the horse was startled by the cover upon the hay cock flapping in the wind; the position of the team in the traveled part of the way; the distance from the planks and timber; and that by reason of the horse being so suddenly startled and caused to "dodge," whereby the wagon was brought in contact with the planks and timber upon the side of the road, were all questions of fact to be decided by the jury, under proper instructions from the court. *Taylor v. Woburn*, 130 Mass. 502.

The jury would be justified in finding upon this evidence, that the plaintiff's loss of control of her horse was momentary and partial. *Titus v. Northbridge*, 97 Mass. 258; *Babson v. Rockport*, 101 Mass. 93.

That the "dodging" of the horse under these circumstances was an accident. *Pulmer v. Andover*, 2 Cush. 600.

And that upon this evidence the Town was liable. *Cushing v. Bedford*, 125 Mass. 528.

The town is as much bound to remove obstructions, caused by the owners of the soil over which the road is laid, as any other obstructions. *Snow v. Adams*, 1 Cush. 443.

The case is clearly one which should be governed by the principles laid down in *Cushing v. Bedford*, 125 Mass. 526; *Stone v. Hubbardston*, 100 Mass. 49; *Coggswell v. Lexington*, 4 Cush. 307.

W. Allen, J., delivered the opinion of the court:

The notice, in stating that the injury occurred by reason of a pile of timber and a pile of hay, sufficiently stated the cause of the injury, although the timber alone constituted or caused the defect in the way. P. S., ch. 52, § 19; Stat. 1882, ch. 86.

It is argued that there was no evidence that the way was defective; and that, for this reason, the court should have ruled that the plaintiff could not recover. The pile of timber was so near to the traveled path and so situated with relation to it, that the court could not rule, as matter of law, that it did not render the road unsafe and defective. There was evidence that the way was defective, proper to submit to the jury. *Snow v. Adams*, 1 Cush. 443; *Coggswell v. Lexington*, 4 Cush. 307; *Warner v. Holyoke*, 112 Mass. 862; *Barnes v. Chicopee*, 138 Mass. 67.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.
Richard PREECE et al.

1. A confession to be admissible in evidence must be the free and voluntary confession of the defendants. The question as to whether it is voluntary is to be decided primarily by the court and submitted to the jury, with the instruction that they may consider all the evidence, and that they should exclude the confession if, upon the whole evidence, they are satisfied that it was not the voluntary act of the defendant.
2. A confession, wormed out of young boys in custody and suspected of crime, apart from parents and friends, and without warning them that they are not obliged to criminate themselves, as matter of law, is not inadmissible, but must be left to the jury to be weighed and considered.

(Hampshire—Decided October 26, 1885.)

ON defendants' exceptions. *Overruled.*

Indictment alleging that the defendants, Richard Preece, Erick Guerin and James Burns, on October 27, 1883, set fire to the warehouse of the New Haven & Northampton Co., a corporation duly established by law, and having a usual place of business in Northampton, Hampshire Co. Mass., which building had been leased to the Williams Manufacturing Co., a corporation duly established and having a usual place of business in said Northampton.

At the trial in the Superior Court there was evidence tending to show that said Erick Guerin was fifteen years of age at the time of the fire, and that said Preece was thirteen years old May 1, 1883, and Burns was thirteen years of age August 16, 1883.

The jury returned a verdict of guilty against each defendant, and the defendants being aggrieved at the rulings and refusals to rule, they excepted. Their exceptions were allowed.

Mr. John B. O'Donnell, for defendants :

The blaze described may have been from the waste. The charring of the boards as described was no such burning as would make the defendants liable on the indictment. *Commonwealth v. Van Schaack*, 16 Mass. 105; *Same v. Betton*, 5 Cush. 427.

The testimony of Ansel Wright as to the ownership of the building was incompetent, and it should not have been admitted. *Goddard v. Pratt*, 16 Pick. 412; *Commonwealth v. Kinison*, 4 Mass. 646; *Hackett v. King*, 6 Allen, 58.

The building was personal property; therefore if the ownership of the land was proved, it would not necessarily prove the ownership of said building to set up on sticks and blocks. *O'Donnell v. Hitchcock*, 118 Mass. 401; *Hinckley v. Baxter*, 13 Allen, 139.

Some ground should have been laid for the introduction in evidence of a registered copy of said deed. The Commonwealth represented the said company. In this case there was no reason given why the said copy should be admitted. It should have been rejected. *Commonwealth v. Emery*, 2 Gray, 80; *Andreus v. Hooper*, 13 Mass. 472.

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There was no evidence of the incorporation of the said New Haven and Northampton Co. This was a material allegation, and it should have been strictly proved. *Commonwealth v. Wellington*, 7 Allen, 299; *Gott v. Adams Exp. Co.* 100 Mass. 320; *Hungerford Nat. Bank v. Van Nostrand*, 106 Mass. 559; *Commonwealth v. Mahar*, 16 Pick. 120.

The incorporation of said company should have been proved by some record evidence. *Commonwealth v. Bakeman*, 105 Mass. 58; *Whiton v. Albany & N. Ins. Co.* 109 Mass. 31.

The ownership of said building was not properly proved. A variance between the name of the owner of the building, as alleged and as proved, is fatal. *Commonwealth v. McAvoy*, 16 Gray, 235; *Same v. Pope*, 12 Cush. 272; *Same v. Perris*, 108 Mass. 1.

Neither was there an attempt made to prove the incorporation of the Williams Manufacturing Co. The rule is strictly adhered to in civil cases. It should not be relaxed in criminal cases. *Gott v. Adams Exp. Co.* 100 Mass. 320.

The boys, if they attempted to set the fire, simply joined in the general joy and celebration of the evening. On the evidence of Munyan, if allowed to stand, the children had no malicious motive or intent, and they might have considered it no harm. They did it only "for the fun of it." Burns and Preece, each only thirteen years old at the time, should have been acquitted on the evidence. *Commonwealth v. Mead*, 10 Allen, 398.

The confession of Burns should not have been admitted. The state detective, the two deputy sheriffs and Burns only being in the room. Burns was in the custody of the officers clearly. They controlled his every movement. He "was brought in" and imprisoned, both in the office and in the closet. Mr. Wright told him "he had better tell the truth." To a child of tender years this was enough to excite a hope of favor or benefit to tell the story, and it was not humane to use it against him. *Commonwealth v. Taylor*, 5 Cush. 605; *State v. Walker*, 34 Vt. 302; *State v. Grant*, 22 Me. 171; *Roscoe, Cr. Ev.* 40; *Commonwealth v. Curtis*, 97 Mass. 575.

In *Commonwealth v. Tuckerman*, 10 Gray, 178 at page 198, the court says: "The accompanying circumstances are never to be lost sight of in determining whether proof of confessions alleged to have been made shall be received." And see, *Commonwealth v. Nott*, 135 Mass. 269.

Taking into consideration the age of the defendants, the parties present, the place where, and the circumstances under which the confessions were procured, and their natural and probable effect upon those young minds, said confessions could not have been free and voluntary within the meaning of the law. "It is better to err on the side of humanity, and reject confessions so obtained." *State v. Phelps*, 11 Vt. 116; *Commonwealth v. Curtis*, 97 Mass. 575; *Rez v. Mills*, 6 Car. & P. 146; *People v. Phillips*, 42 N. Y. 200; *State v. Due*, 7 Foster, N. H. 256; *State v. Grant*, 22 Me. 171.

The English courts fully sustain the doctrine of our own court, and reject confessions obtained under the slightest threat or inducement. *Rez v. Dunn*, 4 Car. & P. 548; *Reg. v. Hearn*, 1 Car. & M. 109; *Rez v. Partridge*, 7 Car. & P. 551; *Reg. v. Taylor*, 8 Car. & P. 738.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth :

It is not necessary, to constitute arson, that any part of the house should be wholly consumed, or that the fire should have any continuance. It is sufficient if it be charred in a single place, so as to destroy its fiber; if any of the fiber of the wood work is wasted by the fire, it is immaterial how small the quantity. *Commonwealth v. Van Schaack*, 16 Mass. 105 and note; *Mead v. Boston*, 3 Cush. 407; *Commonwealth v. Betton*, 5 Cush. 427; *Same v. Tucker*, 110 Mass. 408; *Reg. v. Parker*, 9 C. & P. 45; *Reg. v. Russell, Car. & Marsh.* 541; *Taylor's Case*, 2 East, P.C. 1020; 1 Hale, P.C. 568; *People v. Haggerty*, 46 Cal. 354; *People v. Simpson*, 50 Cal. 304; *State v. Sandy*, 3 Ired. 570; *State v. Mitchell*, 5 Id. 350.

It is not essential that the wood work of the building should blaze. *Rez v. Stallion*, 1 Moody, C. C. 398.

The sufficiency of the burning is a question of fact for the jury. *Commonwealth v. Betton*, 5 Cush. 427.

Between the ages of seven and fourteen there is only a *prima facie* presumption in favor of the child's incapacity to commit crime. This presumption decreases with the increase of age. The question of the capacity of the defendants to commit the crime, in this particular case, was one of fact and properly left to the jury. The evidence shows that the defendants, Preece and Burns, comprehended the criminal nature of their act. *Rez v. Wild*, 1 Moody, C. C. 452; *Reg. v. Reeve*, 12 Cox, C. C. 179; *S. C.* 1 Green, Cr. Rep. 398, and note; *Reg. v. Jarvis*, 10 Id. 574; *State v. Guild*, 5 Halst. (N. J.) 168; *State v. Bostick*, 4 Harr. (Del.) 563.

The confessions of the defendants were properly admitted. *Commonwealth v. Cuffee*, 108 Mass. 285; *Same v. Morey*, 1 Gray, 461; *Same v. Smith*, 119 Mass. 305; *Same v. Holt*, 121 Mass. 61; *Same v. Mitchell*, 117 Mass. 431, and cases *ubi supra*.

The ownership of the property was properly laid in the indictment, and proved by the evidence. P. S. ch. 214, § 14.

Morton, Ch. J., delivered the opinion of the court :

The principal question in the case is as to the admissibility of the confession of the defendant Burns. The rule is well established that, to be admissible, a confession must be the free and voluntary confession of the defendant. If it is induced by any promises or threats of one in authority over the defendant, it is incompetent. When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admissible; otherwise, it should be excluded.

When there is conflicting testimony, the humane practice in this Commonwealth is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession, if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant. *Commonwealth v. Cuffee*, 108 Mass. 285; *Same v. Nott*, 135 Mass. 269; *Same v. Smith*, 119 Mass. 305.

In the case at bar, the defendant Burns was taken into the presence of three officers. Munyan, one of the officers, testified : " I did not tell him he had better tell about it. I think Mr. Wright, one of the other officers, said he had better." Wright testified, that " he did not say to Burns that he had better tell the truth, but that he might have told him to tell the truth." If either officer had said to Burns, " You had better tell the truth," or " You had better tell about it," we should be of opinion that the confession would be incompetent, because such language, in the connection in which, according to their testimony, it was spoken, would naturally convey to the mind of Burns the idea that he would gain some advantage if he confessed his guilt. *Commonwealth v. Nott, ubi supra*.

But, on the other hand, if the officer merely asked him to tell the truth, this would not imply that the officer promised any advantage if he confessed.

As the evidence was conflicting, we cannot say, as matter of law, that the decision of the presiding Justice of the Superior Court, admitting the evidence, was erroneous.

Nor can we see any evidence that the defendant Burns was induced by any acts of the officers to make a confession through fear. The kind of fear must be something more than the fear which is produced by the fact that the defendant was accused of a crime, and was arrested, or taken into custody. *Commonwealth v. Smith, ubi supra*; *Same v. Mitchell*, 117 Mass. 431.

There was no evidence of any threats made by the officers, or of any acts on their part to induce him to confess that he was guilty when in fact he was not guilty. The bill of exceptions does not show what instructions were given, and it is to be presumed that the presiding Justice properly left it to the jury to determine whether the confession was voluntary, with instructions to disregard it if it was not.

The evidence does not show any promises or threats made to the other defendants. They at first denied their guilt; but upon being confronted with Burns and hearing his statement, they confessed. Whether it is just and humane to take into custody young boys suspected of a crime, and, apart from their parents and friends, and without warning them that they are not obliged to criminate themselves, to worm out of them a confession, is not for our consideration. A confession obtained in this manner cannot be said, as matter of law, to be inadmissible, but must be left to the jury to be weighed and considered.

The registered copy of the deed to the New Haven and Northampton Co. was competent evidence, as the deed was not in the control of the Government, nor of the defendant, so that it could be produced on notice. *Commonwealth v. Emery*, 2 Gray, 80.

This deed, together with the testimony that the New Haven and Northampton Co. had orally leased the building to the Williams Manufacturing Co. was sufficient proof of the ownership and possession of the building alleged in the indictment.

Exceptions overruled.

George F. WILSON

NEW HAMPSHIRE FIRE INS. CO.,

Where plaintiff employed an agent to procure insurance for him on his property to a certain amount, the agent having done so, to the acceptance of plaintiff, his agency is accomplished, and he had no authority to surrender the policy, or make further insurance for plaintiff.

(Hampden—Decided October 24, 1885.)

ON agreed facts. Judgment for defendant.

On or about the 12th day of April, 1883, Homer C. Strong, at attorney at law at Palmer, in said county, and an insurance broker, in accordance with instructions from his client and employer, George F. Wilson, also of Palmer, applied to one S. C. Warriner. Said Warriner had transacted considerable insurance business for said Strong, who obtained risks at Palmer, in the same manner as this was obtained, and had authority from said Strong to make any changes of insurance placed in other companies, if any risks so placed by him, from any cause, were declined or became inoperative. Warriner acted only under his general authority, as the local agent of defendant in the usual course of business as such, but Warriner was the duly authorized agent of both of said insurance companies, with full power and authority to bind both companies in the making, issuing and delivering of policies, and taking of risks.

Messrs. Homer C. Strong and George M. Stearns, for plaintiff:

The acts of an attorney or general agent will bind his client or principal. Story, Agen. 73, 105, 106; 1 Pothier, Oblig. Evans, ed. n. 79.

Where an insurance agent tells the insured that the risk is accepted, even if in fact it is not, the company is held. Wood, Ins. § 15.

In this case all deliberation was over; the defendant had done an act amounting to an actual agreement to undertake the risk, and liability attached. *Hallock v. Com. Ins. Co.* 26 N. J. L. 238; Wood, Ins. § 2; Pars. Cont. 407; *White v. Conn. F. Ins. Co.* 120 Mass. 330.

The policy is simply the evidence of a contract of insurance, not the contract itself. The policy not being the contract, other evidence is admissible to show what the contract is. *Sanborn v. Firemans Ins. Co.* 16 Gray, 448; *Kennebec Co. v. Augusta Ins. & Bank. Co.* 6 Gray, 204; Wood, Ins. §§ 3, 4, 36.

An agreement to renew a policy of insurance from year to year, in consideration of a premium to be annually paid, is good, even if premium should not be paid. *First Bap. Ch. v. Brooklyn Ins. Co.* 19 N. Y. 305; *Com. Mut. Marine Ins. Co. v. Un. Mut. Ins. Co.* 19 How. 318 (60 U. S. bk. 15, L. ed. 636); *Plimpton v. Curtiss*, 15 Wend. 336; 2 Pars. Cont. 316, and note.

The defendant's policy was written five days before the fire, and was practically in possession of the plaintiff when fire occurred. It was beyond control of defendant, for, in the usual course of business, it was impossible for defendant to learn of the loss until after the policy was mailed to and received by plaintiff's attorney. *Lightboy v. N. Am. Ins. Co.* 23 Wend. 18.

If such act was necessary, the circumstances attending the exchange of policies and that exchange by plaintiff were a complete ratification of what Warriner and Strong had done. Wood, Ins. § 24; *Excelsior F. Ins. Co. v. Royal Ins. Co.* 55 N. Y. 343; *Mackie v. European Assur. Soc.* 21 L. T. N. S. 102; *Giffard v. Ins. Co.* 5 Bennett, Ins. Cas. 226; *Hagedorn v. Oliverson*, 2 Maule & S. 485.

Messrs. Wiggan & Faunce, for defendant:

By the terms of the contract the Union Company could cancel its policy only after giving ten days' written notice to the insured, and to any mortgagee to whom the policy should be made payable, and tendering to the insured a ratable proportion of the premium. None of these provisions had been complied with at the time when the loss occurred, nor had the plaintiff or his agent at that time received any intimation of a desire on the part of the Union Company to cancel its policy. *Massasoit Steam Mills Co. v. Western Assur. Co.* 125 Mass. 110; *Van Valkenburgh v. Lenox Ins. Co.* 51 N. Y. 465.

To constitute a valid contract, the minds of the insurer and insured must meet upon all of the following particulars, to wit: the subject matter, the risk, the amount, the duration of time and the amount of premium; and the absence of either or any of these requisites is fatal to the contract. Both parties to the agreement must be bound, or neither can be held liable. Wood, Ins. §§ 5, 6; *McCulloch v. Eagle Ins. Co.* 1 Pick. 278; *Thayer v. Middlesex M. F. Ins. Co.* 10 Pick. 326; *Strohn v. Hartford Ins. Co.* 33 Wis. 650; *Neville v. Merchants Ins. Co.* 19 Ohio, 452; *Wood v. Poughkeepsie Ins. Co.* 32 N. Y. 619.

The policy under which the plaintiff seeks to recover in this suit remained in defendant's possession and under its control until after the loss occurred, and the liability of the Union Company had become fixed. *Massasoit Steam Mills Co. v. Western Assur. Co. supra*; *Stebbins v. Lancashire Ins. Co.* 60 N. H. 65.

It is clearly beyond the scope of an insurance agent's authority to act at one and the same time for two companies having adverse interests, to the extent of transferring a fixed liability from one to the other, even though the assured may consent to such transfer. Story, Agen. § 165; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345.

The property having been burned and the liability of the Union Company fixed, it was beyond the power of the agent, Warriner, either to transfer that liability to defendant Company or to insure property which had already been destroyed. *Massasoit Steam Mills Co. v. West. Assur. Co. supra*; *Stebbins v. Lancashire Ins. Co. supra*; *Wood v. Poughkeepsie Ins. Co. supra*.

W. Allen, J., delivered the opinion of the court:

The contract between the plaintiff and the Union Insurance Company was complete on April 18. Strong's authority was to procure insurance to the amount of \$2,000 in some good company; and having done that to the acceptance of the plaintiff, his agency was accomplished, and he had no authority to surrender the policy or to make further insurance in behalf of the plaintiff. Warriner could have no

authority to act for the plaintiff, except what Strong was authorized to give him. When Warriner, on April 28, received instructions from the Union Company to cancel the policy, he did not give the ten days' notice, which was the only way in which the company could cancel the policy without the consent of the plaintiff; but he attempted to procure the surrender of the policy by the plaintiff, and the acceptance of a policy in the defendant Company in the place of it. His letter of April 27 was a proposal to the plaintiff, which neither Warriner nor Strong had authority to accept. It was for the plaintiff alone to say whether he would retain the policy he held, or surrender it in exchange for the other. Until he should consent, the first policy would remain in force, and the second would not become operative. There was no acceptance of the proposal, and no contract between the plaintiff and the defendant Company, before the interview between Warriner, Strong and the plaintiff, on April 28. Before that time, the authority of Warriner to make the contract and deliver the policy for the defendant had been revoked, not only by the letter of April 26, which had before then been received by him, but by the loss of the property to be insured; and an acceptance of the defendant's policy by the plaintiff would not bind the defendant. *Massasoit Steam Mills Co. v. West Assur. Co.* 125 Mass. 110; *Stebbins v. Lancaster Ins. Co.* 60 N. H. 65.

Judgment for the defendant.

Ruel W. CARTER

v.

Edward H. GOFF.

Where the whole evidence goes to negative a fact relied on and there is no ground for anything more than a mere surmise of the existence of such fact, it is **proper to instruct the jury that there is no evidence** legally sufficient to establish the issue.

(Suffolk—Decided February 24, 1886.)

ON defendant's exceptions. *Overruled.*

Action against the indorser of a promissory note.

The only question raised by the exceptions is, whether the presiding Judge was right in excluding the evidence of the defendant, and ordering a verdict for the plaintiff, upon the ground that there was no evidence to go to the jury that one Haldeman was the agent of the plaintiff to procure the indorsement of the defendant.

The defendant was called to testify to the conversation that took place between him and Haldeman, who called upon him for the purpose of procuring his indorsement at the plaintiff's suggestion; and upon the strength of which conversation the defendant claimed to have indorsed the note for the accommodation of both Haldeman and the plaintiff.

Mr. E. W. Burdett, for defendant :

In rare and exceptional cases only are courts justified in withdrawing evidence of agency from the consideration of the jury. The rule is, that if there be no proof whatever, the act may be excluded, but if there be any evidence then the act cannot be excluded. *McClung v. Spotswood*, 19 Ala. 165; *Irvine v. Buckaloe*, 12 Serg. & R. 36.

However slight such evidence may be, the weight and effect of it must be referred to the jury, and be judged of exclusively by them. *Flemming v. Marine Ins. Co.*, 4 Whart. 59.

In this Commonwealth a court is not justified in withdrawing evidence from the consideration of the jury, except in cases where the evidence is so insufficient in law that the court would feel bound to set aside any number of verdicts rendered upon it, *toties quoties*. If, however, the second, third or any subsequent verdict founded upon the evidence would be allowed to stand, the evidence should be submitted. *Denny v. Williams*, 5 Allen, 1, 5.

Even though the presiding judge be clearly of the opinion that a verdict founded on the testimony offered ought to be set aside, he can do nothing more than state to the jury that the facts proved do not sustain the allegations, or that the evidence is insufficient for the purpose for which it is offered, and advise a verdict accordingly. *Davis v. Maxwell*, 12 Met. 286, 289.

If the evidence was sufficient to have founded a presumption upon, it should have been submitted. Although not conclusive or such as would satisfy the court, it might have satisfied the jury, and the jury should have been permitted to consider and weigh it. *Aylwin v. Ulmer*, 12 Mass. 22.

The fact of agency may be proved by circumstantial evidence; and if there is any such evidence, even though slight, it should be submitted to the jury. *Reed v. Ashburnham R. R. Co.*, 120 Mass. 45, 47.

Mr. L. W. Clifford, Jr., for plaintiff.

C. Allen, J., delivered the opinion of the court :

The point on which the defendant relied, was that Haldeman was acting as the agent of the plaintiff in procuring the defendant's name upon the note for the plaintiff's accommodation. There was no evidence to show such agency. The plaintiff was seeking to collect his debts in money or in notes which he could use. But there was nothing to show that he was seeking to obtain anybody's name upon paper for his own accommodation, or that his relations with the defendant were such as to make it probable that he would seek accommodation from the defendant. The mere fact that he had had one of the defendant's notes before, does not raise any such inference. So far as appears, this may have been received from Haldeman in payment of a debt. Where the whole evidence goes to negative a fact relied on, and there is no ground for anything more than a mere surmise of the existence of such fact, it is proper to instruct the jury that there is no evidence, legally sufficient to establish the issue. *Chase v. Breed*, 5 Gray, 441; *Pay v. Alliance Ins. Co.*, 16 Gray, 461; *Denny v. Williams*, 5 Allen, 1; *Commonwealth v. Fitchburg R. R. Co.*, 10 Allen, 189; *Brightman v. Eddy*, 97 Mass. 481.

Exceptions overruled.

John F. DAHILL

v.

William BOOKER.

1. In an **action of trover** brought by the mortgagor of personal property **against a third person** for the conversion of such property, where the **mortgagees took the property for breach of the condition of the mortgage, it was an application of the property for the benefit of plaintiff and should be considered by the jury in mitigation of damages; and plaintiff would be entitled to damages only for the taking of the property and its detention up to the time of the taking.**
2. In such case, the **mortgagor cannot maintain trover** for a subsequent sale of all the mortgaged goods together, by the mortgagee; **and even if a portion of the goods was retained by the mortgagee, this fact alone would not change the result, where plaintiff had shown no desire to redeem.**
3. Where plaintiff made a **second mortgage** after the date of the writ, it was **not an act inconsistent with his claim nor would it operate as an abandonment; the owner of chattels does not lose the right to sell or mortgage them, by the fact that they are in the wrongful possession of another.**

(Franklin—Decided November 30, 1886.)

ON defendant's exceptions. *Sustained.*

Action of trover brought by mortgagor for the conversion of certain personal property. Writ dated June 7, 1883. At the trial in the Superior Court, it appeared that the property alleged to be converted was subject to a mortgage given by the plaintiff to one Wheeler, dated July 8, 1882, to secure a note of \$500, payable on demand, given by the plaintiff to Wheeler. It also appeared that, August 6, 1883, the plaintiff gave to Wheeler another mortgage of the same property, to secure another note of \$300, payable on demand, given by the plaintiff to Wheeler, and signed by the plaintiff's father as surety. It appeared that the second mortgage was given at the request and demand of Wheeler for additional security for the note for \$300 and that Wheeler has since begun a suit for the collection of said note.

There was a question in the trial whether, on the 21st of May, 1883, in a transaction between the plaintiff and the defendant, the plaintiff sold and delivered the property alleged to be converted, situate in a saloon rented by him of the defendant, not including an orchestration and pool table there, absolutely or conditionally, and whether, if that sale was conditional, upon the failure of the condition, the plaintiff demanded of the defendant the property sold.

The defendant claimed that the giving of the second mortgage by the plaintiff to Wheeler tended to prove that there had been no such demand, or that, if there had been such demand, it was regarded by the plaintiff as insufficient, or that it tended to prove that the plaintiff had waived his claim for conversion. And the defendant asked the court to instruct the jury that the giving of the second mortgage was an

abandonment by the plaintiff of any claim for damages, except for the taking of the property and its detention up to the time of giving the second mortgage; and also to instruct the jury that the giving of the second mortgage was an act inconsistent with the claim of the plaintiff that the property was converted, and should be considered by them on the question of conversion.

The court declined to give either of the foregoing requests and gave the jury no instructions as to the second mortgage.

It also appeared that Wheeler, in the month of November, 1884, took possession of the property, for breach of the condition of his mortgage; that he disposed of the pool table at private sale, and removed the orchestration, and transferred the remainder of the property to the defendant to pay him for storage of the mortgaged property for about a year ending November, 1884, and after notice to him by the defendant to remove said property. There was no evidence that the value of any of said mortgaged property had ever been indorsed on either of said mortgage notes.

It appeared that Wheeler had filed, less than sixty days before the trial, in the proper town clerk's office, notice of intention to foreclose said mortgages.

The defendant asked the court to instruct the jury that the taking of the property by Wheeler, for breach of the condition of his mortgage, was an application of the property for the benefit of the plaintiff, and should be considered by the jury in mitigation of damages; and that the plaintiff was entitled to damages only for the taking of the property and its detention up to the time it was taken by Wheeler, for breach of the condition of his mortgage.

The court declined so to rule, and instructed the jury as follows:

If the defendant, by the permission of the plaintiff, took possession of the saloon and its contents, notwithstanding the condition of the bargain for the sale to the defendant, of the goods in the saloon, there could be no conversion of the goods in the saloon until the plaintiff demanded them of the defendant and he withheld them on that demand, and there would be no conversion of any property of the plaintiff in the saloon not demanded by the plaintiff. If the demand of the plaintiff was for the goods only to which the uncompleted bargain between the plaintiff and the defendant related, and did not extend to the orchestration and pool table, then there would be no evidence of the conversion of those articles; and damages could be recovered for the conversion of the other articles only; and those damages would be the value of those articles, with interest from the conversion, irrespective of the fact that they were mortgaged.

The jury found \$285 damages for the plaintiff. Defendant alleged exceptions, which were allowed.

Mr. John A. Aiken, for defendant:

"The general rule of damages in actions of trover is, unquestionably, the value of the property taken at the time of its conversion. But there are exceptions and qualifications of this rule, as plain and well established as the rule itself. Wherever the property is returned and received by the plaintiff, the rule does not apply.

And when the property itself has been sold and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, the reason of the rule ceases and justice forbids its application. In all such cases the facts may be shown in mitigation of damages. These principles are supported by many adjudications and are founded in equity and practical convenience." *Pierce v. Benjamin*, 14 Pick. 356, 361.

Such is the law in Vermont, New Hampshire and Connecticut. *Stewart v. Martin*, 16 Vt. 397; *Cooper v. Newman*, 45 N. H. 389; *Curtis v. Ward*, 20 Conn. 204.

In *Squire v. Hollenbeck*, 9 Pick. 551, it was held that, in trespass *de bonis asportatis*, the defendant might prove in mitigation of damages that the goods did not belong to the plaintiff and that they had gone to the use of the owner, although in taking them the defendant acted without authority.

In *Kaley v. Shed*, 10 Met. 317, an action of trespass for taking and carrying away goods, which the plaintiff, before action brought, demanded to be returned to him and which the defendant promised to return, but which were attached on a writ against the plaintiff while the defendant was preparing to return them, the measure of damages was held to be the same that it would have been if the defendant had returned the goods.

In the last named case and in *Curtis v. Ward*, *supra*, in which, subsequent to the conversion, there was an attachment of the converted property, the court places stress upon the fact that by the attachment, the property is in the custody of the law, by process which the defendant cannot resist or control.

Messrs. John B. O'Donnell and Frederick L. Greene, for plaintiff:

The second mortgage, not having been recorded within fifteen days after its date, was void as to all persons but the parties thereto. P. S. chap. 192, § 1.

Unless, as a matter of law, the second mortgage was an absolute defense to this action, or unless it operated as an absolute abandonment by the plaintiff of any claim for damages, except for the taking of the property and its detention up to the time of giving the second mortgage, it was within the discretion of the court to refuse to instruct the jury as to the effect of this mortgage, although it was evidence to be considered on the question of conversion. The defendant had no right to require the Judge to single out this particular part of the evidence for remark, and a refusal by the court to give an instruction on a part only of the evidence not decisive of the case is no ground for exception. *Littlefield v. Huntress*, 106 Mass. 121; *Packer v. Hinckley Locomotive Works*, 122 Mass. 484; *Green v. Boston & L. R. R. Co.*, 128 Mass. 221; *Delaney v. Hall*, 130 Mass. 524; *Bugbee v. Kendrick*, 132 Mass. 349; *Murphy v. Boston & Alb. R. R. Co.*, 133 Mass. 121.

As against third persons who have taken the mortgaged property from the custody of the mortgagor, when he has the right of possession by the terms of the deed, he alone can maintain an action for the recovery of it. The mortgagee cannot maintain such an action because he has no present right of possession. *Jones, Mort.* § 440; *Fenn v. Bittleston*, 7 Wels. Hurl. & Gord. 212

Exch. 152; *Fairbanks v. Bloomfield*, 5 Duer, 434; *Hamilton v. Mitchell*, 6 Blackf. 131.

The mortgagor may recover more than nominal damages, to wit: the value of the property. *Tallman v. Jones*, 18 Kan. 438; *Cram v. Bailey*, 10 Gray, 87.

The taking was only for purposes of security. Until a sale of the property and an application of the proceeds on the plaintiff's debt, the defendant does not bring himself within the rule of damages laid down in *Pierce v. Benjamin*, 14 Pick. 356.

Wheeler disposed of the greater part of the plaintiff's property without right, in payment of a trumped up claim of the defendant's. This was a second conversion, if that was possible, of the plaintiff's property. *Spaulding v. Barnes*, 4 Gray, 330.

The defendant, as a party to the taking and to this act, cannot claim that it relieves him of the consequences of his previous conversion. *Higgins v. Whitney*, 24 Wend. 379.

The defendant's return of the property after suit brought was too late. *Hanmer v. Wiley*, 17 Wend. 91.

Wheeler's receipt of the property without the consent of the plaintiff cannot prejudice the latter's rights. *Cram v. Bailey*, *supra*; *Hanmer v. Wiley*, *supra*.

The instruction of the court, as to damages stated in the bill of exceptions, excepts the pool table and orchestration from its operation. The instruction, as to damages for the conversion of the pool table and orchestration, will be assumed by this court to have been correct. *Townsend v. Hargraves*, 118 Mass. 325.

Holmes, J., delivered the opinion of the court:

This was an action of tort in the nature of trover. The defendant put in evidence to disprove the conversion. It also appeared that one Wheeler, a mortgagee of the goods, took possession of them, nearly a year and a half after this action was begun, for breach of condition, and transferred all but certain articles to the defendant, to pay him for storage of the same for the previous year. Wheeler did not file notice in the town clerk's office of his intention to foreclose until some time afterwards, and within sixty days of the trial, so that the foreclosure was not then complete. "The defendant asked the court to instruct the jury that the taking of the property by Wheeler for breach of the condition of his mortgage was an application of the property for the benefit of the plaintiff, and should be considered by the jury in mitigation of damages; and that the plaintiff was entitled to damages only for the taking of the property and its detention up to the time it was taken by Wheeler for breach of condition of the mortgage. The court declined so to rule;" and the defendant excepted.

The instructions requested embodied, more or less accurately, familiar propositions of law and, unless the transfer from Wheeler to the defendant took the case out of their operation, they should have been given in substance. For, apart from that transfer, the property necessarily came back to the plaintiff or was applied to his use, as the result of Wheeler's taking. See. *Kaley v. Shed*, 10 Met. 317.

If the plaintiff redeemed, he regained his possession, which, of course, would go in mitigation of damages, although after action brought. See, *Moon v. Raphael*, 2 Bing. N. C. 310; *Hammer v. Wilsey*, 17 Wend. 91.

On the other hand, if the mortgage was foreclosed, the property went in satisfaction of the plaintiff's debt, and thus was applied to his use by his consent, irrevocably given in the mortgage. *Pierce v. Benjamin*, 14 Pick. 356, 361; *Squire v. Hollenbeck*, 9 Pick. 551. See, *Higgins v. Whitney*, 24 Wend. 379.

It was not suggested that there was any diminution in the value of the property, between the times of the conversion and of Wheeler's taking, so that we need not consider whether the second ruling requested would have been quite accurate in form, if that question had arisen. The sum paid to regain possession by redeeming is not to be treated as such a diminution. The liability to pay this sum was independent of the conversion and was not like a reward paid to recover the goods in consequence of the defendant's conduct, as in *Greenfield Bank v. Leavitt*, 17 Pick. 1. See, *Cutting v. Grand Trunk R. Co.*, 18 Allen, 381, 388.

The case is not affected by the transfer from Wheeler to the defendant. The plaintiff's possession and right of possession were put an end to by the breach of condition and Wheeler's seizure. Under such circumstances, it is settled that a mortgagor cannot maintain trover for a subsequent sale of all the mortgaged goods together, by the mortgagee. Such a sale does not of itself import a repudiation of the mortgage, or determine the title under it. *Landon v. Emmons*, 97 Mass. 37; *Wells v. Connable*, 138 Mass. 513. See further: *Halliday v. Holgate*, L. R. 3 Ex. 299; *Donald v. Suckling*, L. R. 1 Q. B. 585, 617; *Mulliner v. Florence*, L. R. 3 Q. B. 484.

It is true, that in this case the goods seem to have been separated and a portion retained by the mortgagee, although the distinction left open in *Landon v. Emmons* was not adverted to in argument, and does not appear to have been before the mind of the parties, so that the bill of exceptions is somewhat obscure upon this point. But we do not think that this fact, if it be a fact, without more, can change the result. Such a separation may make the redemption more difficult when the plaintiff desires to redeem, which he does not seem to have done in this case. But we think that it would be going too far to say that this, in and of itself, necessarily amounted to a repudiation of the mortgage and mortgage title, if indeed it is possible to repudiate a vested legal title in like manner as a simple bailment may be repudiated, it is said, by acts inconsistent with its terms. 2 Rolle, Abr. 558, pl. 9; *Commonwealth v. James*, 1 Pick. 375, 386.

This is not a case where, the goods being worth more than the mortgage debt, a foreclosure sale, purporting to be under the power, is made of a portion sufficient to satisfy the debt, and then the residue is returned to the hands of the wrong doer. Such a case might present different questions from those dealt with here.

The fact that the defendant was reinstated in possession by Wheeler's transfer to him cannot

affect the rule of damages. For, even on the extravagant supposition that, for the purpose of preserving his claim against the defendant undiminished, the plaintiff should attempt to insist on redeeming without receiving back possession, the answer would be that, although it is a plaintiff's undoubted right to refuse to receive back converted goods from a defendant, if he prefers full damages, *Stickney v. Allen*, 10 Gray, 352, yet, if he should attempt to exercise a right under the mortgage, the defendant would be entitled to decline to receive the money, except upon the terms of the mortgage, and that it is as much the defendant's right to restore the goods as it is the plaintiff's to receive them, when the mortgage debt is paid. See, *Warfield v. Fisk*, 136 Mass. 219, 220.

The plaintiff made a second mortgage after the date of the writ. The defendant asked the court to instruct the jury that this was an abandonment of any claim for damages, except for the taking of the property and its detention up to that time; and also that it "Was an act inconsistent with the claim of the plaintiff, that the property was converted, and should be considered by them on the question of conversion." The court rightly declined to rule as requested. As a previous mortgage would not affect the amount of damages recovered, *Cram v. Bailey*, 10 Gray, 87, we do not see why a subsequent one should operate as an "abandonment." If the word is to be taken literally, the transaction was *res inter alios*, and could not have had that effect. On the question of conversion, the mortgage, if it tended to prove anything, tended to prove that the defendant was then in wrongful possession of the goods by its description of them as "Now in my saloon which William Booker occupies without right." But as the owner of chattels does not lose the right to sell or mortgage them by the fact that they are in the wrongful possession of another, *Hubbard v. Bliss*, 12 Allen, 590, and *The Sarah Ann*, 2 Sumn. 206, 211, his doing so does not tend to prove that they are not in such wrongful possession. Moreover, the evidence was in, and the defendant, whatever he had a right to argue, could not require the Judge to single it out for remark. *Littiefield v. Huntress*, 106 Mass. 121, 127; *Bugbee v. Kendricksen*, 132 Mass. 849, 354.

Exceptions sustained.

Hiram B. EDDY

v.

James T. CHASE et al.

1. In an action against the heirs of decedent grantor for a breach of warranty contained in the deed of conveyance of land made in his lifetime; the objection that the declaration did not set out that the estate of deceased had been settled and that defendant had received any estate from him, should be taken by demurrer; it comes too late at the trial.
2. It is the province and duty of the court to construe a deed offered in evidence in an action.
3. The owner of an easement, as a mill

privilege, may abandon it, but mere non-user does not show abandonment; to produce this effect, the non-user must originate in or be accompanied by some decided and unequivocal acts of the owner inconsistent with the continued existence of the easement, and showing an intention to abandon it.

(Bristol—Decided January 8, 1886.)

ON defendants' exceptions. *Overruled.*
The facts are sufficiently stated in the opinion.

Mr. J. M. Wood, for defendants:

The denial in the answer of each and every allegation in the declaration makes it incumbent on the plaintiff to prove all his material averments. *Boston Relief & Sub. Co. v. Burnett*, 1 Allen, 410.

The plaintiff must bring himself within the statute. The answer denies that he can recover on his declaration as alleged. It is equivalent to saying that the declaration does not state facts that would make the defendants liable, and being apparent, need not be specified, and were not required by the court. P. S. chap. 187, § 26, 27; *Grow v. Dobbins*, 128 Mass., 271; 124 Mass., 560.

In the last case it does not appear whether the defendants did or did not in the answer specify any defects in the declaration. Besides, the declaration does not comply with the Practice Act. P. S. chap. 187, § 2; *Turbell v. Gray*, 4 Gray, 446.

The plaintiff must state specially every fact required, under the statutes on which the action is brought. *Williams v. Hingham, etc., Turnpike Corp.*, 4 Pick., 341.

The boundary line in the deed of Sam'l Chase to Hiram B. Eddy, the plaintiff, running "thence southerly by the highway to land of William Mitchell, 'mill privilege,' thence southerly by William Mitchell's land to the highway, was in substance a recital in the deed telling the plaintiff in so many words, that there was a grant of a 'mill privilege' with the Mitchell lot." If there was any latent ambiguity, parol evidence would be admissible to prove what "mill privilege" was intended. *Bond v. Fay*, 12 Allen, 86; *Waterman v. Johnson*, 13 Pick., 261.

Even in *Cook v. Babcock*, 7 Cush. 529, the court presumed that the parties knew the line.

But in the present case the plaintiff says he knew what "mill privilege" was referred to in his deed. See, *Stockwell v. Couillard*, 129 Mass. 232.

The deed of the defendant to plaintiff clearly pointed out that Bowen had an interest in the land conveyed, and a reference to the public record would have disclosed the character and extent of that interest.

There is nothing in the wording of the descriptive part of the deed, preventing the application of the rule as stated by the court in *Frost v. Spaulding*, 19 Pick. 446.

The covenant of warranty was of only what was included in the descriptive part of the deed and in the language of the court in *Piper v. Richardson*, 9 Met. 158.

The refusal of the third request for rulings, and the ruling that admitted the evidence of

non-user merely, with evidence of adverse possession, deprived the defendants of all evidence tending to show abandonment, except such as showed non-user.

The case of *French v. Braintree Mfg. Co.* 28 Pick., 216, has some bearing on the fact of non-user.

Suppose, for instance, that there had been a non-user for 150 years, that fact would be competent to corroborate other evidence of an intention of abandonment. *Hurd v. Curtis*, 7 Met., 95.

Messrs. A. J. Jennings and J. M. Morton, for plaintiff.

Morton, Ch. J., delivered the opinion of the court:

This is an action brought under the Public Statutes, chap. 136, §§ 26, 27, against the heirs of Samuel Chase, deceased, to recover a breach of the covenants in a deed of land from said Chase to the plaintiff. At the trial the defendants objected that the declarations did not formally set out that the estate of said Chase had been settled, and that the defendants had received any estate from him; and asked the court to rule that the plaintiff could not maintain his action. The objection should have been taken by demurrer, and it was too late to take it at the trial. *Commonwealth v. Dracut*, 8 Gray, 455.

In the deed to the plaintiff, two of the boundaries are as follows: "Thence southerly by the highway to land of William Mitchell's mill privilege, thence southerly by William Mitchell's land to the highway." The defendants contended and asked the court to rule that "The deed of Chase did not convey the premises free from the mill privilege granted in his deed to Joseph Hooper; but the plaintiff was fully notified of every incumbrance by reference to the land of William Mitchell's mill privilege in his deed; and also, 'that it is competent for the jury to say whether upon the evidence any warranty against the mill privilege was intended or expressed in the deed.'" These requests were properly refused. It was the province and duty of the court to construe the deed from Chase to the plaintiff. This deed contains general covenants, that, "I am lawfully seised in fee of the above granted premises; that they are free from all incumbrances;" and that, "I will, and my heirs, executors and administrators shall warrant and defend the same to the said Hiram B. Eddy, his heirs and assigns forever, against the lawful claims and demands of all persons." The descriptive part of the deed refers to "land of William Mitchell's mill privilege" merely as monument or boundary of the land conveyed, and cannot, by any rule of construction, be held to take the mill privilege, or any of the other privileges or rights granted by the deed from Chase to Hooper, out of the operation of the general covenants of the deed. The grantor does not convey the land described, subject to these rights and privileges; he conveys it free from all incumbrances, and expressly covenants that he will warrant and defend it against the lawful claims and demands of all persons.

There was evidence tending to show a non-user of the Mitchell mill privilege for many

years, and the defendants asked the court to rule, that, "If the owner or owners of the mill privilege ceased to use the same for an unreasonable length of time, the privilege is thereby lost, and the entire and continued disuse of such privilege for twenty years is strong *prima facie* evidence of a nonuser for an unreasonable length of time, and, unless rebutted by clear and satisfactory proof, is conclusive." The court rightly refused the ruling.

Mere non-user of an easement like the one in question, though continued for more than twenty years, will not extinguish it. The owner of an easement may abandon it, but mere non-user does not show an abandonment; to produce this effect, the non-user must originate in or be accompanied by some decided and unequivocal acts of the owner, inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it. *Barnes v. Lloyd*, 112 Mass., 224; *King v. Murphy*, 1 New Eng. Rep. 434.

There was no evidence in this case of any such unequivocal acts of the owners of the easement; and the court therefore rightly ruled, that the easement "did not appear, upon the evidence, to have been lost by abandonment."

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

Andrew J. EVERSON.

1. On a motion to quash the complaint and proceedings under it, in the Superior Court, because no duly certified and proper copy of conviction of the defendant had been transmitted to the court, the decision of the trial justice is not subject to revision by this court.
2. Where there is an entrance to licensed premises through a gate upon a street on which there is a school house within the limit prohibited by statute, the connection of such premises with the street, so as to avoid the license, depends upon whether the gate is used for a special purpose or for the use of all persons going to and from the licensed premises. It is a question of fact for the jury.

(Franklin—Decided January 7, 1886.)

ON defendant's exceptions. *Sustained.*
The case is stated in the opinion.

Mr. H. Winn, for defendant.

Mr. Edgar J. Sherman, Atty-Gen., for plaintiff.

It is required by Pub. Stats. ch. 155, § 60, that "The trial justice shall on such appeal make a copy of the conviction and other proceedings in the case," not that he make and certify it to be a copy.

It is only required that the magistrates shall certify at the end of the record. *Commonwealth v. Barry*, 115 Mass. 146; *Same v. Wait*, 131 Id. 417; *Same v. Ford*, 14 Gray, 399.

It was competent for the jury, on the evidence to find that there was at least one back entrance to the defendant's premises from Monroe Street and that the premises were on that street within the meaning of the statute. St. of 1882, ch. 220; *Commonwealth v. Heaganev*, 137 Mass. 574.

The evidence was conflicting concerning the husband's presence and conduct when the sales were made, and therefore it was submitted to the jury under proper instructions. *Commonwealth v. Carroll*, 124 Mass. 30; *Same v. Barry*, 115 Mass. 146; *Same v. Wood*, 97 Mass. 225; *Same v. Pratt*, 126 Mass. 462; *Same v. Kennedy*, 119 Mass. 211.

Gardner, J., delivered the opinion of the court:

1. Duly certified copies of the complaint and warrant were sent by the trial Justice to the Superior Court. Copies of the officer's return, certificate of witnesses, memorandum of recognition, conviction or judgment, costs and proceeding of appeal, were upon one paper purporting to be a true copy of record, attested by the signature of the trial Justice.

The defendant contended in the Superior Court that this paper had upon it marks of cancellation in ink; and moved to "Quash the complaint and all proceedings under the same because no duly certified and proper copy of conviction of the defendant" had been transmitted to the court. This motion was overruled; and to this ruling no exception lies. It was a question of fact for the presiding Judge to determine, upon inspection of the paper, whether the marks in ink upon it operated as an erasure and cancellation of the words, "A true copy, Attest: Samuel D. Bardwell, Trial Justice," and his decision thereon is not subject to revision by this court. *Learnard v. Bailey*, 111 Mass. 160.

2. One of the questions raised at the trial was whether the building or place of the defendant was on Monroe Street, upon which it was conceded that there was a building used as a public school within 400 feet of an alleged entrance to the defendant's premises.

The bill of exceptions shows that the front of defendant's house was on Liberty Street; and that between Monroe Street and the defendant's premises was land of one Thayer, bounding the defendant's premises on the entire easterly side. About twenty feet west of Monroe Street, and nearly parallel therewith, a fence had been erected throughout the entire length of the Thayer lot, leaving that part upon Monroe Street unfenced.

In this fence was a picket gate, to which a footpath proceeded from a door on the east side of the licensed tenement across land of the defendant and of Thayer to the gate, and thence across the other land of Thayer to Monroe Street.

The Government contended that the premises of Thayer west of the fence were used and occupied by the defendant; and that his lot east of the fence had been used by the public to pass over on foot and with horses and carriages, so as to become practically a part of Monroe Street.

The presiding Judge instructed the jury that if they were satisfied that Monroe Street, as used and occupied by the public, adjoined these

premises, and there was an entrance thereto from Monroe Street, they should find that the defendant had no license; that it made no difference as to the legal title to the land adjoining the street; "if it adjoined the street as used by the public, and as used by school children going to and from school, the defendant ought to have no license."

We think, in these instructions, there is an important omission. Whether the picket gate through the fence afforded such an entrance from the defendant's building and place to Monroe Street as to make them on the same street with the building occupied as a public school, depended upon its use, whether it was fastened, or open to anyone who might want to go through to the defendant's premises. The attention of the jury should have been called to this question. If the entrance through the gate was used for a special purpose, and not for the use of all persons going to and from the licensed premises, then it may not have had such a connection with Monroe Street, that the defendant's premises can be said to be on the same street as the school house. *Commonwealth v. Jenkins*, 137 Mass. 572.

This was a question for the jury to determine, under proper instructions.

The latter part of the instructions given make no reference to any access to the defendant's premises from Monroe Street, and, for the reason before given, are in this respect defective.

Exceptions sustained.

COMMONWEALTH of Massachusetts v.

Certain GAMING IMPLEMENTS; William P. HIGGINS, *Claimant*.

1. **Claimant** in an *in rem* proceeding against **gaming implements**, after appearing and pleading in the court below, **cannot**, for the first time in the Supreme Court, **object** that **notice** was **not properly served**.
2. **Evidence** that the **rooms** in which the implements were found were **resorted to for unlawful gaming**, prior to the seizure, tends to prove that at the time of seizure the implements were kept for use in unlawful gaming, and is **competent**.

(Suffolk—Decided January 23, 1886.)

ON claimant's exceptions. *Overruled.*

The questions presented by the exceptions are stated in the opinion.

Mr. D. F. Fitz, for claimant.

Mr. Edgar J. Sherman, Atty-Gen., for the Commonwealth:

The evidence offered as to the use to which the rooms were put prior to the date of the seizure was properly admitted; it tended to prove their unlawful use on that day. *Commonwealth v. Stoehr*, 109 Mass. 365.

By the Court:

The evidence offered by the claimant, "for the purpose of showing that no true and attested copy of the order of notice issued by the court, was even posted on the building," was

properly rejected. The claimant having appeared and pleaded in the municipal court, could not for the first time in the Superior Court, upon appeal, object that the notice of the information was not properly served. *Commonwealth v. Gregory*, 7 Gray, 498; *Commonwealth v. Hurvey*, 111 Mass. 420.

One of the issues was whether the apparatus and implements seized by the officers were used or kept, and provided to be used in unlawful gaming or any place resorted to for the purpose of unlawful gaming. P. S., ch. 212, § 2, cl. 7.

Evidence that the rooms in question were resorted to for unlawful gaming at times previous to August 18, 1885, the day of the seizure, tended to prove that on that day the implements were kept for use in unlawful gaming and was competent.

Exceptions overruled.

COMMONWEALTH of Massachusetts v.

Harrison G. O. BOWERS.

1. A **complaint** for having in one's possession, with **intent to sell**, milk containing less than 13 per cent of milk solids, **need not allege** that there had been an **analysis**.
2. It is **immaterial in what manner** the quantity of **milk solids** has been **reduced**, if intent is to sell as pure and not as skimmed milk.

(Suffolk—Decided January 8, 1886.)

ON defendant's exceptions. *Overruled.*

The case is stated in the opinion.

Mr. James D. Thomson, for defendant:

It was held in *Commonwealth v. Evans*, 132 Mass. 11, that P. S. § 9 of chapter 57 is not a rule of evidence, but a definition of a new offense. Unless then we strike out the first part of this section entirely, the thing forbidden is "milk shown on analysis to contain," etc. If so, the complaint should have been quashed for not so describing it.

The deficiency of solids in this milk was wholly due to absence of fat; that is, a portion of the cream had been removed, and the complaint should have been under § 3.

Mr. Harvey N. Shepard, Asst. Atty-Gen., for the Commonwealth:

The motion to quash was properly overruled. *Commonwealth v. Keenan*, 139 Mass., March 2, 1885.

The refusal of the court to give the instruction asked for by the defendant, was correct. P. S. ch. 57, §§ 5-7.

Field, J., delivered the opinion of the court:

The complaint is in form like that which was held sufficient in *Commonwealth v. Keenan*, 139 Mass. 193. The offense charged consists in the defendant's having in his possession, with intent to sell, milk which contained less than 13 per cent of milk solids. That this fact is shown by an analysis is a matter of proof, but it is not a constituent element of the offense that there was an analysis, and it need not be alleged in the complaint.

The motion to quash was rightly overruled. It is immaterial in what manner the quantity of milk solids has been reduced below thirteen per cent if the intent is to sell the milk as pure milk, and not as skimmed milk. P. S. ch. 57, §§ 6, 7.

The instruction requested was rightly refused. *Exceptions overruled.*

John T. RICHARDS

v.

Milton G. BARLOW *et al.*

A promissory note containing a power of attorney to confess judgment without process in favor of the "holder" at any time, even if a non-negotiable instrument in form, imports that it was drawn on the assumption that it would be negotiable, the word "holder" being used in a sense which embraces an indorsee; hence, judgment by confession taken by an indorsee of the payee is valid and will sustain an action thereon, although the judgment by confession was taken in another State.

(Hampden—Decided October 31, 1885.)

ON plaintiff's exceptions. *Sustained.*

This was an action to recover on a foreign judgment obtained in a suit upon a promissory note, upon a stipulation contained in the note authorizing any attorney to appear for the holder at any time and confess judgment thereon on the part of the makers; the note is as follows:

\$4,480.14. Chicago, Ill., Dec. 15, 1882.

Ninety days after date, for value received, we promise to pay to the order of Jno. B. Jeffery four thousand four hundred thirty and fourteen one hundredths dollars, at the Chicago National Bank, with interest at 8 per cent per annum after due until paid. And to secure the payment of said amount we hereby authorize, irrevocably, any attorney of any court of record to appear for us in such court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and \$100 attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that said attorney may do by virtue thereof.

Barlow, Wilson & Co. [Seal.]
Geo. Wilson. [Seal.]

Indorsed by Jno. B. Jeffery.

For a defense, defendant pleaded that the note was a non-negotiable instrument and, as such, judgment by confession thereon under the power could not be enforced by any party other than the payee, and that plaintiff being the assignee of a non-negotiable chose in action could not enforce the power of attorney therein contained, and the court so ruled.

Plaintiff thereupon produced a duly authenticated copy of a judgment by confession taken in Illinois, under the power of attorney

contained in the note, and demanded judgment on such foreign judgment by confession; but the court refused the rule, upon the ground that an action would not lie on such judgment so taken by the indorsee of the payee.

Exceptions were thereupon taken by plaintiff, and the case brought up on appeal to this court.

Mr. Gideon Wells, for plaintiff:

The note sued on was negotiable. The warrant of attorney which accompanies the note is not an essential part of it.

It did not modify the absolute promise contained in the note; it merely gave to the holder a special means of obtaining security in the event of his wishing to avail himself of it. *Towne v. Rice*, 122 Mass. 67; *Arnold v. Rock River R. R. Co.* 5 Duer, 207; *Brill v. Crick*, 1 Mees. & W. 232; *Odiorne v. Sargent*, 6 N. H. 401; *Hodges v. Shuler*, 22 N. Y. 114; *Knipper v. Chase*, 7 Iowa, 145.

Promissory notes with warrant of attorney to confess judgment are in general use in many of the States and are held negotiable, independent of statute provisions. *Osborn v. Hawley*, 19 Ohio, 180; *Keep v. Klaus*, 5 Nel. 24.

The early case of *Overton v. Tyler*, 3 Barr, 846, has not been followed in other States, and is practically overruled in Pennsylvania. *Zimmerman v. Anderson* 67 Pa. St. 421.

Leading law writers hold the better opinion to be that such notes are negotiable. 1 Dan. Neg. Inst. 47, 48, 49; Pars. Bills & N. 147.

There was a time when, if the holder did not avail himself of this right, the note would certainly be due. There was less uncertainty in this note than in *Cota v. Buck*, 7 Met. 588; *Charlton v. Reed*, 61 Iowa, 166; *Capron v. Capron*, 44 Vt. 410; *Carlton v. Kenealy*, 12 Mees. & W. 189; *Ernst v. Steckman*, 74 Pa. St. 13; *Dinemore v. Duncan*, 57 N. Y. 573; *Cook v. Horne*, 29 L. J. 369.

Adding attorney fee, in event of taking judgment, does not introduce such an element of uncertainty as to affect the negotiability of the note. *Nickerson v. Sheldon*, 33 Ill. 372.

The fact that the word seal was printed on the note after the names of the signers, does not make it a sealed instrument, so as to render it non-negotiable. *Bates v. Boston & N. Y. C. R. R. Co.* 10 Allen, 251; *Jackson v. Myers*, 43 Md. 452; *Irwin v. Brown*, 2 Cranch, C. C. 314.

The note is that of a firm, found by the facts to have been executed by one member of it. The seal, therefore, would be of no effect. *Russell v. Annable*, 109 Mass. 72.

It would, therefore, have to be treated as a simple contract. *Tapley v. Butterfield*, 1 Met. 515; *Jackson v. Myers*, *supra*; *Hunter v. Parker*, 7 Mees. & W. 322; *Worrell v. Munn*, 5 N. Y. 229; *Wood v. Auburn & R. R. Co.* 3 N. Y. 160-167.

Had he desired to take advantage of the misjoinder of causes of action, he should have demurred. *Barlow v. Leavitt*, 12 Cush. 488.

The defendant, having consented to go to trial upon both counts, and taken a ruling that plaintiff could not maintain an action against either defendant upon either count, cannot now take advantage of any error in pleading. *Brown v. Waterman*, 10 Cush. 117; *Dorman v. Kane*, 5 Allen, 38.

There was nothing in the case to show that the attorney who represented Wilson had not full authority to do so; and until evidence was introduced by the defendant, the presumption was in favor of the jurisdiction of the court. *Biswell v. Wheelock*, 11 Cush. 277; *Buffum v. Stimpson*, 5 Allen, 591.

The Illinois court was the proper tribunal to determine that question. *Guthrie v. Lowry*, 84 Pa. St. 583.

The Superior Court could not know that such contracts were not made assignable, and the assignee authorized to sue in his own name in Illinois, which is, in fact, the case. R. S. Ill. chap. 98, § 405.

A person would be bound by the appearance of an attorney authorized after action brought. There would seem to be no reason why the same authority could not be given with like effect in anticipation of a suit. Such would seem to be the law. Judgments so recovered have been held conclusive upon defendants, without service or other appearance. *Hendrickson v. Fries*, 45 N. J. 555; *Harness v. Green*, 19 Mo. 323; *Warren v. Lusk*, 16 Mo. 102; *Randolph v. Keiler*, 21 Mo. 557; *Baker v. Stonebraker*, 34 Mo. 172; *Coleman v. Waters*, 18 W. Va. 278.

The right to enter judgment upon such warrants of attorney is recognized as a common-law right in *Sweeney v. Kitchen*, 80 Pa. St. 160; *Manf. & Mech. Bank v. St. John*, 5 Hill, 497; *Keith v. Kellogg*, 97 Ill. 147; *Bush v. Hanson*, 70 Ill. 480.

The fact that judgment was rendered before the note by its terms was due does not impair its validity. It was in accordance with the authority given. *Adam v. Arnold*, 86 Ill. 185; *Sherman v. Braddely*, 11 Ill. 622.

Mr. Alfred Hemenway, for defendant.

Holmes, J., delivered the opinion of the court:

In the absence of any evidence to the contrary, we must assume that the question whether the note in suit was negotiable is governed by the common law, as amended or declared by the Statute of 3 & 4 Anne, chap. 9. See, *Commonwealth v. Leach*, 1 Mass. 59, 61; *Goodwin v. Roberts*, L. R. 10 Ex. 387, 350.

And we must assume that that law is as declared by the Massachusetts decisions. It has been decided in Massachusetts that a note payable at a future day certain, or earlier at the option of the holder, is not negotiable. *Mahoney v. Fitzpatrick*, 133 Mass. 151. See, *Stultz v. Silva*, 119 Mass. 137.

The obligation to be gathered from the four corners of the present instrument is similar. The promise, taken by itself, is absolute, to pay in ninety days from date; but the power of attorney on the face of the note authorizes a confession of judgment "at any time hereafter," and we must construe these words as meaning at any time after the date. See, *Adam v. Arnold*, 86 Ill. 185. We cannot distinguish such a case from *Mahoney v. Fitzpatrick*; for this reason, without considering whether there are any others, we must decide that the note was not negotiable. We do not rely upon the fact that it seems to have been under seal, because there was some difference between counsel as to the meaning of the bill of exceptions.

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The ruling that an action could not be maintained against Wilson on the judgment recovered against him in Illinois was erroneous. The form of the ruling shows that it was not made on the technical ground that there was a misjoinder of counts against Wilson alone and against Barlow and Wilson jointly. No such objection seems to have been made at the trial, and no attempt is made to support the ruling on that ground. But it is argued that the jurisdiction of the Illinois court depended on the power of attorney contained in the note; and that, if the note was not negotiable, the scope of the power "to confess a judgment without process in favor of the holder of this note," was confined to Jeffery, the payee. But we think it clear that the word "holder" was used in a sense which embraces any indorsee of the note. See, *Ransom v. Jones*, 1 Scam. 291.

The form of the instrument plainly imports that it was drawn on the assumption that it would be negotiable; and, even if this assumption was erroneous, it must be taken into account none the less, if necessary, in interpreting the meaning of the power. It is not argued that the power of attorney was invalid, or that we are not to assume proceedings in accordance with its terms to have been regular. *Keith v. Kellogg*, 97 Ill. 147.

The jurisdiction of the Illinois court being established, we should be bound to respect the judgment, even if there were error of law apparent on the face of the record. But we cannot say that there is any such error, because, apart from other reasons, we cannot say that Illinois may not have statutes authorizing the assignee of a chose in action not negotiable to recover in his own name, although no such statute was put in evidence. Ill. R. S. chap. 98, § 4; chap. 110, § 66.

If there is a statute as supposed, the jurisdiction might perhaps be supported, even if the word "holder" were confined to Jeffery, the original payee; for we are not prepared to say that if, for any reason, he found it convenient to take a judgment in the name of an agent, that would not still be a judgment in his favor within the meaning of the power, and it does not appear that the plaintiff was not acting on his behalf.

Exceptions sustained.

John W. PHELON

Inhabitants of GRANVILLE.

1. The statute, Pub. St. chap. 27, § 90, requiring the appointment of a town collector *pro tempore*, is not satisfied by a writing signed with the names of all the selectmen, done by one of their number in the absence of the others, and with no authority, other than that implied by their having agreed that the party should be appointed.
2. Such appointee is not an officer *de jure*; and a warrant issued to him under such an appointment, does not confer upon him authority as such officer.
3. A party is not an officer *de jure*, as against the town, until the statutory

conditions are complied with; and the town is not estopped to deny his title as an officer *de facto* in a suit by him for services rendered, if he claims compensation by virtue of his office.

(Hampden—Decided January 5, 1886.)

ON plaintiff's exceptions. *Overruled.*

Suit for commission for collections made by an appointee as town collector.

Mr. John L. Rice, for plaintiff :

The elected collector having failed to give the requisite bond, it became the duty of the selectmen to appoint another collector. P. S. ch. 27, § 91.

Thereupon, as the case finds, the selectmen made choice of the plaintiff as their appointee. This was sufficient to authorize the chairman of the selectmen to sign the names of the other two to the writing required by the statute. *Burt v. Dimmock*, 11 Pick. 855; *Hunter v. Giddings*, 97 Mass. 41; *Greenfield Bank v. Crafts*, 4 Allen, 447, 454; *Merrifield v. Parritt*, 11 Cush. 590, 597; *Richardson v. Moses*, 31 Mo. 430; *Forsyth v. Day*, 41 Me. 382; *Dresel v. Jordan*, 104 Mass. 407; *Chase v. Kittredge*, 11 Allen, 49, 59.

That choice was the essence of the appointment, of which the writing called for by the statute is designed to be merely the evidence, like the ordinary commission. *Johnston v. Wilson*, 2 N. H. 202; *Marbury v. Madison*, 1 Cranch, 137, 157 (5 U. S. bk. 2, L. ed. 60, 67); *Wright v. Lanckton*, 19 Pick. 288; *Gardner v. Gardner*, 5 Cush. 483.

Reference to other statutes which are strictly *in pari materia* shows that the Legislature did not intend the writing to be the definitive act of appointment, but only a convenient mode of giving the act notoriety. P. S. ch. 12, §§ 79, 80.

The appointment may be proved by evidence *aliunde* the writing. 1 Greenl. Ev. 921; *Edwards v. Buchanan*, 8 B. & Ad. 788; *Reg. v. Carter*, 1 Carr & K. 741.

If the act of appointment must be in writing, the case does not find that it was not so, and the presumption is that it was. *Omnia rite esse acta presumuntur*. *Berlin v. Bolton*, 10 Met. 115, 120; *Flagg v. Worcester*, 8 Cush. 69; *Wilcox v. Smith*, 5 Wend. 281.

This presumption is not overcome by mere failure to produce the writing, since the statute fails to provide for its delivery to the plaintiff, and such delivery is not essential to the appointment. *Marbury v. Madison*, *supra*.

The presumption is strongly aided by the subsequent conduct of the selectmen in fixing the penal sum of the plaintiff's bond, approving his sureties, committing the tax warrants to him and paying him for collecting the school district taxes. *Souhegan Factory v. McConihe*, 7 N. H. 809; 830; *Gould v. Monroe*, 61 Me. 544.

The plaintiff's incumbency and performance of the duties of the office, under color of title and with the acquiescence of the public, are sufficient proof of a valid title, there being nothing in the case to control it. 1 Greenl. Ev. 38, 92; *Bowley v. Barnes*, 8 Ad. & Ell. N. S. 1037; *Bunbury v. Matthews*, 1 Car. & K. 880; *Butler v. Ford*, 1 Crompt. & M. 662; *McGahey v. Alston*, 2 Mees. & W. 206; *McMahon v. Len-*

nard, 6 H. L. Cas. 970, 1000; *Johnson v. Stedman*, 8 Ohio, 94; *Delphi School Dis. v. Murray*, 53 Cal. 29.

The plaintiff was duly sworn. The certificate, signed "William Wells, Justice of the Peace," sufficiently shows this. *Scammon v. Scammon*, 28 N. H. 419; *Clapp v. Watson*, 8 Pick. 449.

The title to a public office is not to be tried in an action against the municipality for the compensation attending it. *Hunter v. Chandler*, 45 Mo. 452; *Desmond v. McCarthy*, 17 Iowa, 525; *Hull v. Super. Court*, 63 Cal. 174; *Commonwealth v. Fowler*, 10 Mass. 290, 301; *Sudbury v. Stearns*, 21 Pick. 148, 155; *Coolidge v. Brigham*, 1 Allen, 323, 336.

To pass upon the title in such a case would often conclude the rights of a contestant unheard, contrary to the policy of the law. *Fowler v. Hebee*, 9 Mass. 281; *Commonwealth v. Smith*, 9 Mass. 531.

Moreover, the defendants are estopped to deny the plaintiff's title by their acceptance of his bond, his services and the moneys collected by him. *Radford v. McIntosh*, 8 T. R. 632; *Reg. v. Ossett*, 16 Ad. & Ell. N. S. 975; *Pritchard v. Walker*, 3 Car. & P. 212; *Peacock v. Harris*, 10 East. 104; *Wendell v. Fleming*, 8 Gray, 613; *Arlington v. Peirce*, 122 Mass. 270.

The State may be estopped. *A fortiori*, a town may be. *People of Vermont v. Gospel Soc.* 2 Paine, C. C. 545.

If it be conceded that plaintiff was only collector *de facto* he may still recover. The right to compensation grows primarily out of the incumbency and rendition of services in a public office, and not out of the strict legal title to the office. *Reg. v. Mayor of Cambridge*, 12 Ad. & Ell. 702; *Butler v. Pennsylvania*, 10 Howard, 402, 416 (51 U. S. bk. 13, L. ed. 472-8); *Connor v. Mayor*, 5 N. Y. 285; *Smith v. Mayor*, 37 N. Y. 518; *McVeany v. Mayor*, 80 N. Y. 185; *Hoboken v. Gear*, 8 Dutch. (N. J.) 265, 280; *Stuhr v. Curran*, 15 Vroom, (N. J.) 181; *Steubenville v. Culp*, 38 Ohio St. 18; *Auditors of Wayne Co. v. Benoit*, 20 Mich. 176; *Lawlor v. Alton*, 8 Ir. Rep. C. L. 160.

Courts depart from this rule only in suits between rival claimants or in suits against the municipality after the title to the office has been settled in a proper proceeding. *Arris v. Stukely*, 2 Mod. 260; *State v. Tate*, 70 N. C. 161; *Powell v. Milbank*, 1 T. R. 899, *note*; *Boyle v. Dodsworth*, 6 T. R. 681; *U. S. v. Addison*, 6 Wall. 291 (73 U. S. bk. 18, L. ed. 919); *Petit v. Rousseau*, 15 La. Ann. 239; *Hunter v. Chandler*, 45 Mo. 452; *Christian v. Gibbs*, 58 Miss. 814; *People v. Potter*, 63 Cal. 127; *Glascock v. Lyons*, 20 Ind. 1; *Mayfield v. Moore*, 58 Ill. 428; *Comstock v. Grand Rapids*, 40 Mich. 97.

The reason for such departure is said to be "That the officer *de jure* who has been ousted from his place by an intruder has a property interest in the emoluments of the office, of which he cannot be deprived by one having no title thereto." *McCue v. Wapello Co.*, 56 Iowa, 698.

Matthews v. Supers. of Copiah Co., 58 Miss. 715, holds the contrary doctrine, but the case is without weight. It is based wholly on three New York cases, which are not law in that State, and a case in 1 Taunton, which contains

only a *dictum* and a vague reference, as is supposed, to *Howard v. Wood*, 2 Lev., 245. But this latter case never reached a decision. See, *Stuhr v. Curran*, *supra*.

Riddle v. Bedford, 7 Serg. & R. 386, an apparent authority against this position, was a suit to recover fees from a private individual to whom services were rendered expressly against his will, and who at the time denied the officer's title.

Also in *Burt v. Dimmock*, 11 Pick. 355, the court did not deny the right of compensation to a *de facto* officer, but his right under a statute to sue a third person for a penalty.

In *Commonwealth v. Stifer*, 25 Pa. St. 23, which follows *Riddle v. Bedford*, the *de facto* officer had filed no bond; and under a statute making such filing an indispensable preliminary to entering upon his duties, the court held that he had not, in law, rendered any service.

From the earliest times provision has been made by law for the compensation of tax collectors. 1 Prov. Laws, St. 1699, 1700, ch. 26, § 10; St. 1785, ch. 70, § 1; R. S. ch. 8, §§ 39, 47; G. S. ch. 12, §§ 53, 55; P. S. ch. 12, §§ 80, 88.

Letting the collection of taxes to Wm. C. Phelon at the town meeting did not fix the compensation of the collector other than him. *Rosenthal v. Mayor*, 6 Daly (N. Y.), 187.

P. S. ch. 12, § 88, is directory merely, and failure to comply with it cannot deprive a collector of all compensation. The Town not having availed itself of the power to fix the rate, must be deemed to have assented to a reasonable rate. *Rand v. Wilder*, 11 Cush. 294, 297; *Ripley v. Gifford*, 11 Iowa, 367.

To enable the plaintiff to maintain his action, the relation between him and the defendants may be regarded as one of contract, as intimated in *Alford v. Collin*, 20 Pick. 418, 428.

Attempting to make an express contract with the selectmen, which they had no power to make, does not bar a recovery on the contract implied from the rendition of the services. *Neuman v. Steamship Co.* 118 Mass. 362.

The tax warrant need not be returned. Neither the warrant itself nor any statute or decision of this court requires a return. *Howard v. Proctor*, 7 Gray, 128, 132.

Messrs. Whitney & Dunbar, for defendants:

A collector of taxes, *pro tempore*, can be appointed only in accordance with the provisions of the P. S. ch. 27, §§ 90, 91, by which it is enacted that if a collector fails to give the bond required by law, "The selectmen may by writing, under their hands, appoint a collector, *pro tempore*."

To be valid, the appointment must be made in literal compliance with the provisions of chapter 27, § 90, by the individual signatures of the selectmen "under their hands."

The case of *Reynolds v. New Salem*, 6 Met. 340, is directly in point, in which it is held that the provision of P. S. ch. 27, § 54, that "Every town meeting shall be held in pursuance of a warrant under the hands of the selectmen," etc., must be strictly complied with, and the warrant receive the individual signatures of a majority of the selectmen, to render the meeting held in pursuance thereof of any validity.

The selectmen are public officers, having their duties prescribed by law, for the general welfare, and are guided by the law in the exercise of their duties. Therefore, the defendants are not estopped to deny the validity of their acts. *Rossire v. Boston*, 4 Allen, 57; *Walcott v. Swampscott*, 1 Id. 101; *Hafford v. New Bedford*, 16 Gray, 297.

There was no ratification of the invalid appointment.

Upon the principle last stated, the selectmen could not ratify the pretended appointment by Carpenter by their own subsequent acts, so as to bind the defendants. Neither could the treasurer do so by the receipt of taxes collected by plaintiff. Nor would the receipt of the money and the acceptance of the treasurer's report, by the defendants, have any such effect. They are entirely consistent with the belief on the part of the treasurer and the Town that plaintiff was legally appointed collector. *Perley v. Georgetown*, 7 Gray, 464; *Buttrick v. Lowell*, 1 Allen, 172.

The plaintiff, if legally appointed, could only recover such compensation as the Town should determine. P. S. ch. 12, § 83; *Farnsworth v. Melrose*, 122 Mass. 268; *Sikes v. Hatfield*, 13 Gray, 347.

In *Johnston v. Wilson*, 2 N. H. 205, it is held that the neglect by a collector to take the oath of office after his appointment will invalidate his acts as such collector.

Holmes, J., delivered the opinion of the court:

The statute requiring the appointment of a collector *pro tempore* to be made by a writing under the hands of the selectmen, is not satisfied by a writing signed with the names of all by one selectman, in the absence of the others, and with no other authority than what is implied by their having agreed that the party should be appointed. P. S. chap. 27, § 90; *Reynolds v. New Salem*, 6 Met. 340, 344.

It is found as a fact, that there was no other authority in this case, and it is therefore unnecessary to consider whether a writing signed in the same way would have been valid, even if the signatures had been authorized. *Reynolds v. New Salem*, *ubi supra*.

It is equally unnecessary to consider whether such a writing could be ratified effectually, or whether there was evidence of ratification in this case, because, putting it at the lowest, a ratification after the oath of office was taken would come too late.

The statute clearly requires that the oath shall be taken after the collector has been appointed, not while his appointment is in suspense, if it is possible that it should be in suspense. P. S. ch. 27, §§ 87, 90.

The last consideration also prevents our regarding the warrant issued after the oath was taken as a sufficient appointment, although that was under the hands of the selectmen.

There is also the further obstacle, that the warrant was issued by the selectmen in their capacity of assessors, no assessors having been elected; P. S. ch. 27, § 101; ch. 12, § 1; and that the statutes of course do not contemplate the assessors issuing a warrant until after the selectmen have made their appointment. P. S. ch. 27, §§ 62, 68; ch. 12, §§ 79, 80.

It is argued that the plaintiff is entitled to recover for services actually rendered as collector *de facto*. The objections to collaterally impeaching the title of an officer *de facto* in a proceeding to which he is not a party, and where the rights of third persons are in question; *Fowler v. Bebee*, 9 Mass. 231, 234 and *Bucknam v. Ruggles*, 15 Mass. 180, 182; do not apply when the officer himself seeks to recover on the strength of his title.

The services rendered are statutory services. The statutes require that they shall be performed by an officer appointed in a certain way, and provide for his compensation. P. S. *ubi supra*, and ch. 12, §§ 80, 88.

The plaintiff is not an officer *de jure*, as against the Town, until the statutory conditions are complied with. There is nothing, therefore, to hinder the Town from denying his title, if he claims compensation by virtue of his office. Or, if he sets up a contract express or implied, the answer is, that it is a contract which the statutes do not intend shall be made. The statutes exclude other and more informal methods of binding the Town than the one which they point out, on grounds of public policy.

Under circumstances like the present, the current of authority elsewhere is, that no action can be maintained. *Riddle v. Bedford*, 7 S. & R. 386; *Commonwealth v. Slifer*, 25 Pa. St. 23, 31; *People v. Hopson*, 1 Denio, 574, 579; *Dolan v. Mayor of New York*, 68 N. Y. 274, 279; *Matthews v. Super.* 53 Miss. 715; *People v. Pitter*, 63 Cal. 127; *Samis v. King*, 40 Conn. 298, 310. See, *Burt v. Dimmock*, 11 Pick. 355, 357.

The more difficult questions, which have given rise to some conflict as to the rights of an officer *de jure* against an officer *de facto*, who has been paid, or against the town for the period covered by such payments, do not arise. *Glascock v. Lyons*, 20 Ind. 1; *Hunter v. Chandler*, 45 Mo. 452, 456; *McQue v. Wapello*, 56 Iowa, 698; *Petit v. Rousseau*, 15 La. An. 239; *U. S. v. Addison*, 6 Wall. 291 [73 U. S. bk. 18, L. ed. 919]; *Comstock v. Grand Rapids*, 40 Mich. 397. Compare *Auditors of Wayne Co. v. Benoit*, 20 Mich. 176; *Stuhr v. Curran*, 15 Vroom, 181. See, 1 Dill. Mun. Corp. 3d. ed. § 235, n. 2.

Exceptions overruled.

James P. MILLER
v.
Thomas KELLOUGH.

Where there was evidence which justifies the finding that defendant was induced to give the note in controversy by false and fraudulent representations of material facts, the credibility and weight of testimony is exclusively for the determination of the trial judge, when the case is tried without a jury.

(Suffolk — Decided January 12, 1886.)

ON plaintiff's exceptions. *Overruled.*

This was an action of contract on a promissory note payable to the plaintiff and signed by the defendant. The defendant filed counts of general denial, want of consideration and fraud-

ulent representations made by the plaintiff to the defendant. The case was tried by the court, jury trial having been waived.

Mr. T. Curley, for plaintiff.

Mr. Harvey N. Shepard, for defendant:

The representations as to the working of the mine, the shafts, and the coal, were of material matters of fact, and not of opinion, and were made as of the plaintiff's own knowledge. *Hazard v. Irwin*, 18 Pick. 95; *Fisher v. Mellen*, 103 Mass. 508; *Litchfield v. Hutchinson*, 117 Mass. 195; *Savage v. Stevens*, 126 Mass. 207; *Jewett v. Carter*, 132 Mass. 337.

The defendant had never seen the mine, while the plaintiff was born near there, and the representations were not of a kind upon which the defendant could exercise his own judgment. *Nowlan v. Cain*, 3 Allen, 261.

Since these representations materially influenced the defendant's purchase, and were made with this intent, it is immaterial whether or not there were other inducements. *Collins v. Dennison*, 12 Met. 549; *Matthews v. Bliss*, 22 Pick. 48.

At the time of the sale it was not practicable for the defendant to visit the mine, and he used due diligence to ascertain the falsity of the assertions and in repudiating the sale. *Savage v. Stevens*, *supra*.

By the Court:

The plaintiff does not insist upon his objection to the ruling of the court that the defendant could testify as to the appearance of the mine.

There was evidence on the part of the defendant, which, if believed, justified the finding that the defendant was induced to give the note in suit by false and fraudulent representations of material facts by the plaintiff. The credibility and weight of the testimony was exclusively for the determination of the presiding Justice of the Superior Court, who tried the case.

No other question is raised by this bill of exceptions.

Exceptions overruled.

Simeon P. HUBBARD *et al.*

v.

City of TAUNTON. *et al.*

In the statute which authorizes city councils to appropriate not over one fiftieth of 1 per cent of the valuation of the year, for armories, for the celebration of holidays and for other public purposes; the word "other" may include concerts in the open air. If the purpose is within the Act, there is no reason why the city council may not create the occasion.

(Bristol — Decided January 8, 1886.)

ON petition for an injunction. *Dismissed.*
This was a proceeding on petition seeking to obtain an injunction to restrain the municipal corporation from appropriating public moneys for the purpose of maintaining open air concerts.

The case is sufficiently stated in the opinion.

Mr. L. E. White, for petitioners.

Mr. F. V. Fuller, for respondents:

Prior to the passage of the Statute of 1861, no city in this Commonwealth had power to legally appropriate money for the celebration of holidays or any kindred purpose. *Hood v. Mayor of Lynn*, 1 Allen, 103.

The Statutes of 1861, ch. 165, did not enlarge the powers of towns, but simply gave to cities the power to appropriate money from its treasury "for armories for the use of military companies, for the celebration of holidays and other public purposes," with certain limitations. The power of cities was and the power of towns now is limited by the phrase "and for all other necessary charges." P. S. ch. 27, § 10; P. S. ch. 28, § 13.

It is a matter of common knowledge that band concerts are given universally in the cities and large towns of this Commonwealth during the summer months, and in construing statutes applicable to public corporation, courts will attach no slight weight to the uniform practice under them, if the practice has continued for a considerable time. *Sherwin v. Bugbee*, 16 Vt. 444; 1 Dillon, § 94, 3d ed.

Holmes, J., delivered the opinion of the court:

The only question presented to us is whether the Public Statutes, chap. 28, § 13; St. 1861, chap. 165, can be interpreted to authorize a city to appropriate money for public concerts by a band. The statute was passed just after the decision in *Hood v. Mayor and Aldermen of Lynn*, 1 Allen, 103, that the celebration of the Fourth of July was not among the "other necessary charges" for which towns were authorized to expend money. Pub. Sts. chap. 27, § 10. It provided that, by a ye and nay vote of two thirds of the members of each branch present and voting, city councils might appropriate a comparatively small sum, not over one fiftieth of 1 per cent of the valuation for the year, for armories, "for the celebration of holidays, and for other public purposes."

The word "other" implies that the celebration of holidays is a public purpose within the meaning of the Act, and indicates that purposes which are public only in that sense are included within its scope, although they look rather more obviously to increasing the picturesqueness and interest of life than to the satisfaction of rudimentary wants, which alone we generally recognize as necessary. We know of no simple and merely logical test by which the limit can be fixed. It must be determined by practical considerations. The question is one of degree. But, in reply to the petitioner's argument, we may say that, if the purpose is within the Act, we do not see why the city council may not create the occasion. Taking into account the history and language of the Act, the safeguards attached to the exercise of the power, the smallness of the sum allowed to be expended, and the fact that it has long been assumed to be within the power of cities to give such concerts in the open air, we are not prepared to say that a case is presented for an injunction.

Petition dismissed

Quail THORNELL

v.

City of BROCKTON.

1. Where one part of the description of a deed requires a lane at a certain distance to be taken as a boundary and another part calls for a lane at another distance as the same boundary and two lanes are shown to have been in existence at the date of the deed but neither is designated therein by name, there is a latent ambiguity, to explain which parol testimony is admissible.
2. Which of the two lanes was intended as the monument was a question for the jury.

(Plymouth—Decided February 24, 1886.)

ON tenant's exceptions. *Overruled.*

This is a writ of entry. The demandant put in his deed from Edwin H. Kingman to one Cornelius Creeden *et al.* and a deed from Isaac Kingman and others to said Creeden, and proved and put in his plans and called one Howland, a surveyor. The tenant then called several witnesses and put in a copy of the will of Cornelius Creeden, its deed, a copy of the inventory of the estate of said Creeden and a plan; and rested its case.

At the trial it was admitted that both parties claimed under said Cornelius Creeden, and that he had a good title to the demanded premises.

The tenant, when the evidence was all in, requested the court to rule that, upon the evidence, the demandant could not maintain his action, which the court refused to do.

The tenant then requested the court to rule that "The boundary or monument at the north-westerly corner of the land conveyed by Cornelius Creeden to the demandant is a lane or traveled way and must be such a lane or traveled way as conforms to all the descriptions thereof, in the demandant's deed, to wit:

It must be a lane or traveled way which, at the time of the execution and delivery of said deed, would be met by following the line of land of Patrick Mahoney westerly and before leaving said Mahoney's land.

It must also be a lane or traveled way, which then extended southerly from Grove Street.

It must also be a lane or traveled way, which at that time did not extend so far south as Spring Street.

If the jury find that at the time of the execution and delivery of the deed of Cornelius Creeden to the demandant, the lane or traveled way called East Main Street did extend all the way from Grove Street through to Spring Street, they must find a verdict for the tenant.

Upon the evidence the demandant cannot maintain his action."

Which several rulings the court refused to give.

Neither party excepted to the instructions as given. The jury retired and returned a verdict for the demandant. To these refusals to rule as requested, the tenant took exceptions.

The description in the deed from Creeden to demandant is as follows: "All that lot of land in said North Bridgewater, bounded: beginning at Spring Street at the corner of land of

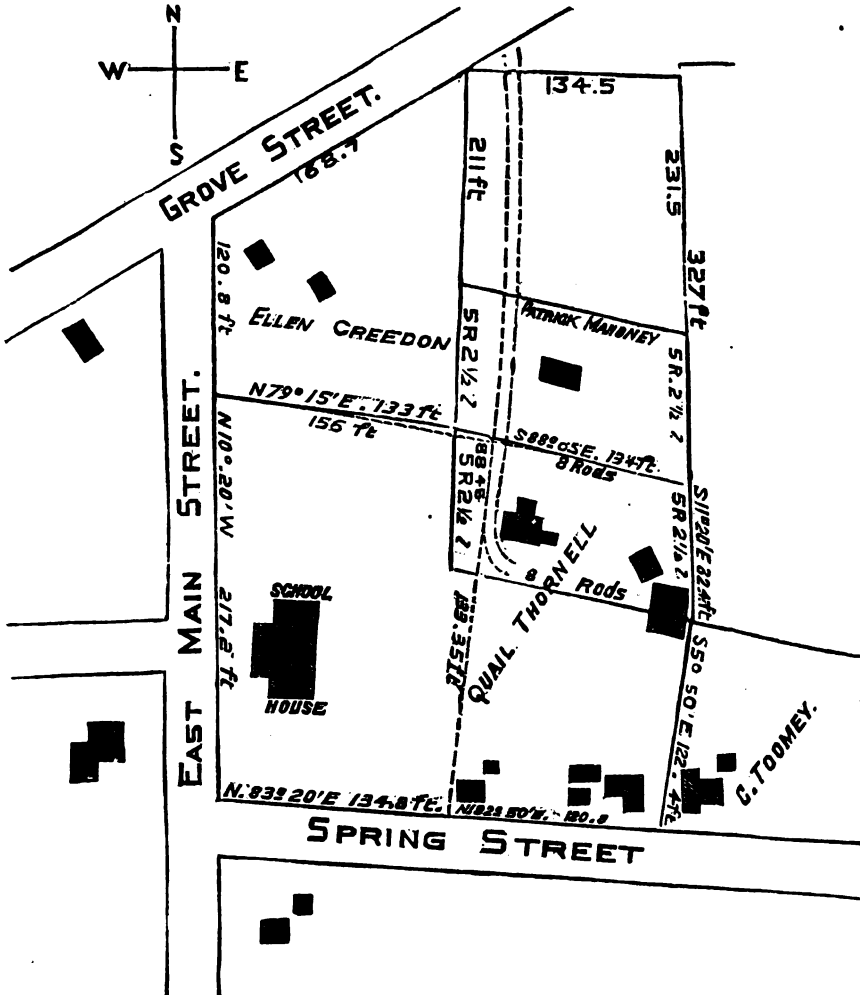
Catharine Toomey; thence northerly by land of said Toomey and land of Edwin H. Kingman, about ten rods, to land of Patrick Mahoney; thence westerly by land of said Mahoney about fifteen rods to a lane or traveled way leading from Grove Street southerly; thence southerly by said lane in part and same course to Spring Street, being about ten rods; and thence easterly by Spring Street, about fifteen rods to the corner and bound first mentioned, with all rights of way appurtenant thereto."

Demandant's plan, referred to in the opinion, is here given :

Messrs. Edson & Harris, for demandant.

Morton, Ch. J., delivered the opinion of the court:

The rights of the parties depend upon the construction of the deed from Cornelius Creedon to the plaintiff, dated May 24, 1872. In the deed, the land conveyed begins at Spring Street at the corner of land of Catharine Toomey; thence northerly by land of said Toomey and land of Edwin H. Kingman, about ten rods, to land of Patrick Mahoney; thence westerly by land of said Mahoney about fifteen



Mr. Hosea Kingman, for tenant :
No rule is better established than that monuments control courses and distances. *Pernam v. Wead*, 6 Mass. 183; *Frost v. Spaulding*, 19 Pick. 446; *Morse v. Rogers*, 118 Mass. 572.

The westerly monument being proved and identified, no testimony as to length or course of line or acts or declarations of parties is admissible to control it. *Howe v. Bass*, 2 Mass. 382; *Cook v. Babcock*, 7 Cush. 528; *Bond v. Fay*, 12 Allen, 88; *Hannum v. Kingsley*, 107 Mass. 360; *Henshaw v. Mullens*, 121 Mass. 147.

rods to a lane or traveled way leading from Grove Street southerly; thence southerly by said lane in part and same course to Spring Street, being about ten rods, and thence easterly by Spring Street about fifteen rods to the corner and bound first mentioned.

When this description is applied to the land it is at once shown that there is a false demonstration somewhere in it. There are two lanes or traveled ways, both running southerly from Grove Street. One of them is named East Main Street on the plan used at the time; and the

other, situated easterly of the former and running only to the house of the plaintiff and not extending to Spring Street, has no name. It is proper to note that the plan is somewhat deceptive. It indicates to the eye East Main Street as a well defined street, while the other is shown as a private lane or way. But, at the date of the plaintiff's deed, both were alike ordinary cart paths.

Each of these ways is consistent with some parts of the description in the deed, and each is inconsistent with other parts. The question is: which of these two lanes was intended at the "lane or traveled way" mentioned in the deed?

The defendant claims that it is the more easterly lane; the plaintiff claims that it is East Main Street. The second line runs "Westerly by land of said Mahoney about fifteen rods to a lane or traveled way leading from Grove Street southerly." If this line runs to East Main Street, it will not run wholly by land of Mahoney, but partly by land of Ellen Creeden. The third line runs "Southerly by said lane in part and same course to Spring Street." This indicates that the lane intended was the easterly one and is inconsistent with the theory that the northerly line ran to East Main Street. This is the strength of the defendant's claim.

On the other hand, the deed calls for a northerly line of about fifteen rods, which would carry it to East Main Street; while if the line stops at the other lane the length would be about eight rods; and the last line is described as being about fifteen rods on Spring Street; whereas, if the defendant's claim is maintained, the plaintiff would have a line on Spring Street of only about eight rods.

We can derive no aid from the general rule that monuments govern courses and distances. This rule applies where the monument is one fixed and certain. Here the monument is not fixed, but the question is: which of the two lanes was intended as the monument? One part of the deed calls for the easterly lane as the monument, but other parts of the deed cannot be answered unless East Main Street is accepted as the monument.

There is no rule of law which requires that one should be adopted rather than the other. Upon applying the deed to the land, a latent ambiguity is found to exist, and we are of opinion that the Superior Court rightly admitted parol testimony and referred to the jury the question: which of the two lanes was intended as the monument?

Without discussing the evidence in detail, it is sufficient to say that in our judgment it justified the finding of the jury. There was much conflicting evidence. The credibility of the witnesses, the weight to be given to the facts that the northerly and southerly lines of the plaintiff were to be fifteen rods in length, to the consideration of the deed and to the other evidence in the case, was for the jury and not for the court to determine.

Exceptions overruled.

Lucy S. CANTERBURY

City of BOSTON.

In an action against a municipal corporation, for damages for personal injuries sustained from a defective highway, the notice required by statute is not for the purpose of setting out in writing the legal ground of liability: but for the purpose of calling the attention of the proper authorities to the physical objects in or condition of the highway; and where it describes the immediate cause of the injury, the question was properly submitted to the jury.

(Suffolk—Decided February 25, 1883.)

ON defendant's exceptions. *Overruled.*

This was an action of tort, brought to recover damages sustained by falling on the sidewalk on Mount Vernon Street, in said City. The accident happened on the 28th day of February, 1883; and on March 6, 1883, the plaintiff served a notice on the said City of Boston, of which the following is a copy:

"To the City of Boston:

You will please take notice that on the evening of Feb. 28, 1883, between 9 and 10 o'clock, P. M., I received bodily injury, by reason of a defect in a highway in said City, to wit: a defect on the sidewalk in front of the houses and premises occupied by Samuel D. Warren, on Mount Vernon Street, Wards 9 and 10, in said Boston, said premises being numbered 87 on said street; and said defect being an accumulation of snow and ice on said sidewalk, which accumulation of snow and ice

NOTE.—Municipal corporations must see that sidewalks are kept reasonably clear of ice and snow, and permitting its accumulation for an unreasonable time renders them chargeable with negligence. *Todd v. City of Troy*, 61 N. Y. 506.

The duty of a city is only to see that its streets are reasonably safe for persons exercising ordinary care and caution in using them. *Perkins v. City of Fond du Lac*, 34 Wis. 435.

The decisions are uniform that abutting owners are under no obligation to make repairs or remedy defects resulting from natural causes. *Keokuk v. Independ. Dist.* 53 Iowa, 352; *Fulton v. Tucker*, 3 Hun. 529; *Eustace v. Jahns*, 38 Cal. 3; *Jansen v. Atchison*, 16 Kan. 358; *Dill. Mun. Corp.* 3794.

On this principle the owner is not liable for injuries resulting from failure to remove snow and ice from the sidewalk, even although required by ordinance to do so. *Kirby v. Boylston Market Assn.*, 14 Gray, 249; *Flynn v. Canton Co.*, 40 Md. 312; *Heeney v. Sprague*, 11 R. I. 486; *Hartford v. Talcott*, 45 Conn. 525; *Moore v. Gadsden*, 37 N. Y. 84; *Vandyke v. Cincinnati*, 1 Disney, 532; *Taylor v. Lake Shore, etc.*, R. R. Co., 45 Mich. 74.

But a company operating a street railroad is not at liberty, in removing snow from its track, to allow the snow removed to accumulate in heaps or ridges along the track, so as to make it dangerous to persons using the track. *Dixon v. Brooklyn City & N. R. R. Co.*, 1 Cent. Rep. 293.

A sidewalk in a city, wholly covered with ice, uneven and irregular on the surface, but in spots smooth and slippery, and for a week in this condition.

caused me to slip and fall while traveling on foot on said sidewalk; and I look to the City of Boston for compensation for such damages."

The plaintiff's declaration, filed with the writ, at the entry day of the action, set forth that Mount Vernon Street had been suffered by the defendant to become out of repair, unsafe and dangerous, by reason of the accumulation of ice and snow on the sidewalk thereof, and that the plaintiff, while using due care, suffered great bodily damage by slipping on said ice and snow.

At the trial, the plaintiff's evidence tended to show that there was an accumulation of ice and snow on the sidewalk in front of said 67 Mount Vernon Street, and that by reason of said accumulation the plaintiff fell. The defendant's evidence tended to show that what ice there was on the sidewalk was not more than one eighth to one quarter of an inch in thickness, and was smooth and slippery. The plaintiff, in putting in her case, introduced no evidence of any defect in the construction of the sidewalk.

After the close of the testimony, the plaintiff asked leave to file an additional declaration.

The defendant's counsel, having suggested that he was surprised by the plaintiff's claim under her amended declaration, was offered a postponement or continuance of the case, by the court, but he elected to proceed with the trial without delay; and the jury rendered a verdict for the plaintiff.

To the ruling and refusal to rule in regard to the plaintiff's right to recover, under her notice, the defendant excepted.

Mr. T. M. Babson, for defendant:

A statement of a wrong cause is not only of less use than a general notice, but positively

misleading and injurious to the defendant. *McDougall v. Boston*, 184 Mass. 150.

Proof that police officers and other citizens were informed that an accident had happened and examined or looked at the spot, and that what were claimed to be the defects in the sidewalk were apparent and might have been seen by such officers and citizens, is no evidence that the City was not misled by a notice given a week after that time. *Kenady v. Lawrence*, 128 Mass. 818; *Mooney v. Salem*, 180 Mass. 402; *Roach v. Somerville*, 181 Mass. 189.

The defendant contends that such ice is not a defect, unless there is an excessive or unusual slope to the sidewalk, whether there be some special reason for the formation of such ice in a particular locality or not. *Gilbert v. Roxbury*, 100 Mass. 185; *Nason v. Boston*, 14 Allen, 508; *Billings v. Worcester*, 102 Mass. 329; *McAuley v. Boston*, 113 Mass. 508; *Montes v. Lynn*, 121 Mass. 442.

Messrs. George A. Torrey and Thomas F. Nutter, for plaintiff:

The notice must, to be sufficient, be so reasonably specific as to time, place and cause as to be of substantial assistance to the proper authorities, in investigating the question of their liability. *Noonan v. Lawrence*, 180 Mass. 163.

This clause is quoted with approval in *Bailey v. Everett*, 182 Mass. 442.

The present Chief Justice uses similar language in *Spellman v. Chicopee*, 181 Mass. 448. *Mr. Justice Devens*, also, in *Savory v. Haverhill*, 182 Mass. 824; *Whitman v. Groveland*, 181 Mass. 555.

The object of the statute, in requiring notice to be given of the cause of the injury, is to

renders the city liable for injury caused thereby. *Dooley v. Meriden*, 44 Conn. 117.

But in Iowa the city is not liable, unless the ice is uneven and rounded. *Broburg v. Des Moines*, 63 Iowa, 522.

The mere slipperiness of a sidewalk, occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not negligence without proof of actual notice. *Todd v. Troy*, 61 N. Y. 506.

It is not such a defect as will make the city liable for damages occasioned thereby. *Stanton v. Springfield*, 12 Allen, 506; *Nason v. Boston*, 14 Id. 508; *Cook v. Milwaukee*, 24 Wis. 270; *Ward v. Town of Jefferson*, Id., 342; S. C., 27 Id., 191.

A municipal corporation is not liable for injury sustained by one falling on the icy surface of cobble stones laid between flat stones of a street crosswalk, slightly higher than the flat stones, *Borough of Mauch Chunk v. Kline*, 100 Pa. St. 119, by reason of the plan of construction of the street. See, *Urquhart v. Ogdensburg*, 91 N. Y. 67.

Where a party passes over a road and knows its condition, and then passes over it a second time, his knowledge is not a conclusive bar to his recovery. *Horton v. Inhab. of Ipswich*, 12 Cush. 482. And see, *Reed v. Inhab. of Northfield*, 13 Pick. 94.

The measure of care required from one walking on a sidewalk is what a man of ordinary prudence would use under the circumstances. *Monahan v. Cohoes City*, 14 Week. Dig. 112.

In Ohio it is held, if he voluntarily attempts to pass over it, he cannot be regarded as exercising ordinary care and prudence, where he might easily have avoided it. *Schaefer v. Sandusky City*, 38 Ohio St. 246.

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In such case the question of contributory negligence should be submitted to the jury. *Thomas v. Mayor*, 28 Hun, 110; *Parkhill v. Town of Brighton*, 61 Iowa, 108.

One knowing that there is ice on the sidewalk, is not necessarily negligent in attempting to cross over it in the night time; he is bound only to use ordinary care and prudence. *Evans v. Utica*, 60 N. Y., 186.

In Michigan it is held that where the city ordinance requires citizens to keep their streets free from ice, no action lies in favor of an individual against the city, for injury occasioned by the breach of duty. *Taylor v. Lake Shore, etc.*, R. R. Co., 45 Mich. 74, citing *Atkinson v. Waterworks Co.*, Law. Rep. 6 Exch. 404.

In an action against both an individual and a city, it is no answer to say that the causes of action are not separately stated. *Kelly v. Newman*, 62 How. Pr. 156.

Where the evidence showed that a few days before snow had fallen, water was allowed to flow across the sidewalk from a leader, contrary to a city ordinance, which water froze and thawed as the weather changed, and there was ice there a few days prior to the accident, the question of sufficiency of notice was properly submitted to the jury. *Reich v. Mayor, etc.*, 17 N. Y. Week. Dig. 140. See, *Kenney v. City of Cohoes*, 16 N. Y. Week. Dig. 206; See, *Wenzlick v. McCotter*, 87 N. Y. 122.

That there was a broken stone and depression in the sidewalk and that it had been icy for several days, are questions for the jury. *Kenney v. Cohoes*, 1 Cent. Rep. 505.

direct the attention of the town officers to the particular thing or condition which caused the injury, so that they can see whether it is a defect or not. *Bailey v. Everett*, 182 Mass. 441.

The case of *Dalton v. Salem*, 186 Mass. 278, is substantially decisive of the case at bar. The court says in that case: "The purpose of the notice was to give the city such information as would enable it to investigate the cause relied upon; and if it was sufficient for this purpose, it was sufficient as a condition precedent to maintaining the action."

Similar language is used by Morton, *Ch. J.*, in *Lyman v. Hampshire*, 188 Mass. 75. See also, *Sargent v. Lynn*, 188 Mass. 599.

Our statute is copied from a similar provision in the Employers' Liability Act of England, 43, 44 Vict. chap. 42, and the very point under discussion here was decided in the case of *Clarkson v. Musgrave*, L. R. 9 Q. B. D. 886.

For another instance of the liberality of the English courts in construing this statute, see, *Stone v. Hyde*, L. R. 9 Q. B. D. 76.

Field, J., delivered the opinion of the court:

The exceptions relate only to the sufficiency of the notice.

The notice given in this case accurately described the time and place of the injury. The defendant contends that the jury may have found for the plaintiff, on the ground that the defendant was liable; not because there was any accumulation of snow and ice which was in itself a defect, but because the sidewalk was so improperly constructed that it occasioned the formation of smooth and slippery ice, in a manner other than would occur from natural causes if the sidewalk had been properly constructed; and that the notice did not state the improper construction of the sidewalk, as a cause of the injury.

The existing condition of the law upon defects in highways, caused by accumulations of snow and ice, need not be described.

If it be assumed, as the defendant contends was the view of the law taken at the trial, that smooth and slippery ice, formed upon an improperly constructed sidewalk by reason of the construction, would, in connection with the faulty construction, constitute a defect, when the same formation of ice upon a properly constructed sidewalk would not, we still think the sufficiency of this notice, in stating the cause of the injury, was properly submitted to the jury.

The notice is required, not for the purpose of setting out in writing the legal ground of liability of the city or town, but for the purpose of calling the attention of the proper authorities to the physical objects in or to the physical condition of the highway, which caused the injury, that they make the necessary investigation. *Bailey v. Everett*, 182 Mass. 441; *Dalton v. Salem*, 186 Id. 278.

This notice did describe the immediate cause of the injury which, in connection with the faulty construction of the sidewalk, constituted a defect in the street, as the jury have found, under instructions of the court not excepted to.

Under any view of the law, the actual cause of the injury was at least partially described, and if not described with complete accuracy, the jury have found that in giving the notice

there was an intention to instruct the defendant and that the defendant was not in fact misled thereby, and the case is clearly within Stat. 1882, chap. 86, even if before this statute it could have been held insufficient. See, *Spellman v. Chicopee*, 181 Mass. 448.

Exceptions overruled.

Reuben CARPENTER

Otis WALKER *et al.*

A portable boiler and engine, not attached to the realty, except that they were belted to the main shaft, but not removable, except by removing a shed built over them or by taking off some boards to enlarge the opening into the factory, the machines being fastened to the floor by cleats, screws or nails, are not, as matter of law, permanent improvements to the building.

(Worcester—Decided, January 5, 1891.)

ON defendants' exceptions to master's report. *Decree affirmed.*

The case is stated in the opinion.

Mr. J. M. Cochran, for defendants:

Upon an examination of the master's report it will be seen that it was so framed that the questions might be raised in the same manner as they were raised in the agreed statement in *McConnell v. Blood*, 128 Mass. 47.

Where facts are so clearly stated in a report as necessarily to involve a particular consequence, it is for the court to act upon the facts so reported and apply the law. *Dan. Ch. Pr.* 4th ed. 1810; *Adams v. Claxton*, 6 Ves. 226; *Adams*, Eq. 886.

The practice generally is to prepare the objections in the form of the intended exceptions, and to convert them afterwards into exceptions. *Dan. Ch. Pr.* 4th ed. 1816.

A steam engine boiler, with the appurtenances belonging to them, used for furnishing the motive power to a mill, and the shafts and pulleys connected with the engine, are fixtures, even if annexed after the making of the mortgage. *Winslow v. Merch. Ins. Co.* 4 Met. 306; *McKin v. Mason*, 3 Md. Ch. Dec. 186; *Rice v. Adams*, 4 Har. (Del.) 332.

The machinery of the motive power, whether a steam engine or a water wheel, is, as a general rule, a fixture. *Powell v. M. & B. Mfg. Co.*, 3 Mason, 459; *McConnell v. Blood*, *supra*.

The boiler and engine here were put in to furnish power and were belted to the main shaft, and were to improve the property. All these facts combined are sufficient to establish the further finding, that they thereby became fixtures, as a matter of law. *McConnell v. Blood*, *supra*; *Richardson v. Copeland*, 6 Gray, 536; *Clary v. Owen*, 15 Gray, 522; *Southbridge Sav. Bank v. Eleeter Mach. Works*, 127 Mass. 542.

The master finds that all this machinery named is connected with the power, and thereby that such power is necessary to drive the same. It is not like machinery in a shoe shop, not necessarily needing artificial power to drive the same, but more like saw mills, shingle mills.

etc., which have all been held to be realty and fixtures. *Corliss v. McLagin*, 29 Me. 115; *Trull v. Fuller*, 28 Me. 545; *Burnside v. Twitchell*, 43 N. H. 890; *Johnston v. Morrow*, 60 Mo. 839.

The facts found by the master in this case are similar to those of *Pierce v. George*, 108 Mass. 78. And the law should be applied as it was in that and the following cases: *Southbridge Sac. Bank v. Stevens Tool Co.*, 180 Mass. 547; *Clary v. Oren*, 15 Gray, 522; *Smith Paper Co. v. Scrvin*, 130 Mass. 515.

Mr. A. J. Bartholomew, for plaintiff:

The master found that the defendants did not sustain, by evidence, the allegation that plaintiff's mortgage was fraudulent as against creditors. Upon this showing, how can this court say that the master erred in his findings in the absence of the evidence on which he based them? The excepting party is always bound to lay before the court sufficient grounds of the error he assigns, to satisfy the court, which has not even been attempted here. *Aldrich*, Eq. Pl. & Pr. 154.

The rule of law as to fixtures stated by Shaw, C. J., in *Winslow v. Merch. Ins. Co.*, 4 Met. 314, as between grantee and grantor, is that whatever the owner has actually fastened to the realty for its permanent improvement, and convenient use, designed and adopted to such use, becomes a part of it and passes with it by deed or mortgage.

In a case reported where, by the report alone, the property might be held either real or personal property, the finding of the court of the fact, will be conclusive, as was held in *Turner v. Wentworth*, 119 Mass. 459, as a question depending upon the intention of the parties.

This court can see nothing here of the evidence on which the master found his conclusions; and it is submitted, as this court says in *Towne v. Pike*, 127 Mass. 181, that it would be error for the court to rule upon these exceptions as matter of law that as against the master's report, the chattels in dispute were a part of the realty.

In the case of the *Southbridge Sac. Bank v. Stevens Tool Co.*, 180 Mass. 551, all the facts were reported, and this court reversed the decision of the single Justice.

The master found that the machinery and property were temporarily attached and not for permanent use; then furniture, as was held in *McConnell v. Blood*, 123 Mass. 47.

What do defendants allege to show that the case was not on its facts within the rule, in *Hubbell v. East Cambridge Sac. Bank*, 132 Mass. 448? We submit nothing at all. The conclusion is that the defendants had no ground of exception for the reason assigned.

Holmes, J., delivered the opinion of the court:

Perhaps it would have saved perplexing questions, if, as between vendor and purchaser, or mortgagor and mortgagee, the rule of the common law had been adhered to more strictly, that whatever is annexed to the freehold by the owner becomes a part of the realty, and will pass by a conveyance of it. *Y. B. 21 Hen. VII. 26, pl. 4*; *Elwes v. Maw*, 3 East, 88; *S. C. 2 Sm. Lead. Cas. 8th Am. ed. 191*; *Fisher v. Dixon*, 12 Cl. & Fin. 312, 328 *et seq.*; *Mather v. Fraser*, 2 K. & J. 536; *Walmesley v. Milne*, 7 C. B. (N.S.)

115; *Gibson v. Hammermith R. Co.*, 32 L. J. Ch. 337, 340; *Climie v. Wood*, L. R. 4 Ex. 328; *Holland v. Hodgson*, L. R. 7 C. P. 828; *Mear v. Jacobs*, L. R. 7 H. L. 481, 490.

The right of a tenant to sever chattels which he has attached to the realty might be admitted, and yet the property might be regarded as land until severed, as it seems to be in England.

The language of *Hellawell v. Eastwood*, 6 Exch. 295, which looked the other way, has been criticised in the later cases, some of which we have cited.

But the later decisions of this Commonwealth establish that machines may remain chattels for all purposes, even though physically attached to the freehold by the owner, if the mode of attachment indicates that it is merely to steady them for their more convenient use, and not to make them an adjunct of the building or soil. *McConnell v. Blood*, 123 Mass. 47; *Hubbell v. East Cambridge Sac. Bank*, 132 Mass. 447; *Maguire v. Park*, 140 Mass. 21.

It is more important to respect decisions upon a question of property than to preserve a simple test, and, for this reason, the decree of the Superior Court must be affirmed.

The master reports that he finds the article in controversy to be personal property, and we cannot go behind this finding, unless the facts found specially require a different conclusion, as matter of law.

The special facts are, that the boiler and engine were portable and not attached to the realty, except that they were belted to the main shaft; but that they could not be removed except by removing a shed, built over them to protect them from the weather, or by taking off some boards to enlarge the opening into the factory. The machines were fastened to the floor by cleats, screws, or nails.

We cannot say, as a matter of law, that these facts are inconsistent with the master's finding, in view of the cases cited. We must take that finding to exclude the idea of the articles having been put where they were as a permanent improvement to the building, whatever conjecture we might have formed, but for the master's general conclusion.

Decree affirmed.

James H. WILSON

v.

Nathaniel M. WHITMORE.

Where plaintiff, a surety on the promissory notes of a bankrupt, pays money to the creditors of such bankrupt and to the owner and holder of the notes, and receives back an agreement by which defendant as principal, and the other owner and holder of the notes as sureties, agreed to indemnify and save harmless the plaintiff, from the notes and from any judgment on the same, it being expressly agreed that the sum paid is not in part payment of said notes nor to be applied in any manner to diminish or affect them, but the amount paid was to be a consideration of the indemnity; plaintiff cannot maintain an action to recover back the money; notwithstanding

ing the **assets** of the bankrupt estate were more than **sufficient to pay its debts in full**. In such a transaction **plaintiff is concluded by the terms of the document which he accepted from defendant.**

(Decided January 8, 1886.)

ON report. *Verdict for defendant sustained.*

Action of contract for money had and received.

In October, 1877, the Sagamore Mills, a corporation situated and established in Fall River, made and delivered to C. W. Whitmore two promissory notes, one of \$5,000, and one of \$10,000, and to this defendant Nathaniel M. Whitmore, one of \$85,000. The plaintiff and others signed all of said notes as sureties. The plaintiff offered to show that said notes were, on or about February, 1878, duly indorsed and delivered to John A. Whitmore, who held the same for the benefit of the defendant, C. W. Whitmore, and afterwards assigned his claim under the proofs against the mills, as herein-after recited and according to agreement to said defendant and C. W. Whitmore. The plaintiff also offered to show that April 26, 1878, said John A. Whitmore at the instance of, and for the benefit of the defendant and said C. W. Whitmore, brought suit against said Sagamore Mills and other parties to said notes for the accrued interest, and attached the property of the plaintiff in said suit. On the 16th day of May, 1878, said Sagamore Mills was on its own petition duly adjudged bankrupt by the District Court of the United States for the District of Massachusetts. The creditors elected to have the bankrupt estate wound up and distributed by trustees under the direction and control of a committee of the creditors, as provided in the laws relating to bankruptcy. Trustees and a committee were duly chosen by the creditors and confirmed by the court, and all the property, assets and effects of said bankrupt corporation were duly assigned and conveyed to said trustees, who took possession thereof and proceeded in the execution of their trust to wind up and distribute, under the direction of said committee, the bankrupt estate. In all the above proceedings the defendant took an active part in favor thereof.

On or about May 14, 1879, the trustees and advisory committee of said bankrupt corporation filed a petition in the United States District Court for the District of Massachusetts, representing that they were unable to find a purchaser for the property and assets of said bankrupt corporation, except at a great sacrifice; that in order to protect the interest of the creditors of said bankrupt corporation they recommended the formation of a corporation to be composed of such creditors as chose to join, for the purpose of buying the property and assets of the bankrupt corporation in the possession of said trustees; that all the known creditors had been invited to join in such a corporation, and creditors to the amount of \$668,000, out of an aggregate of \$701,000, had signified their desire to join and sign articles of agreement to form a corporation to purchase the aforesaid property and assets for the sum of \$250,000, and had taken steps to form such a corporation, and praying that the trustees aforesaid be duly au-

thorized to sell at private sale to the corporation formed or to be formed, as aforesaid, or to trustees on behalf of the same, all the property and assets aforesaid for the sum of \$250,000.

Pursuant to said petition and a newspaper publication of the pendency thereof, said trustees were, on the 31st day of May, 1879, authorized by a decree of said United States District Court for the District of Massachusetts to sell said property at private sale for the sum of \$250,000, when they should see fit.

The plaintiff was not a party to said proceedings and was not consulted with regard to the same by either of the said Whitmores, though he knew of the proposed sale and did not appear to object thereto.

Afterwards, on or about December 1, 1879, by virtue of said petition and decree and for the purpose of carrying out the plan set out in the petition aforesaid, the trustees and advisory committee delivered and conveyed said property and assets, which included a large sum in cash, to a new corporation called the Sagamore Manufacturing Company, and formed as proposed in said petition by the creditors of said bankrupt corporation, with a few others. In which corporation by reason of his claim against said bankrupt on said three notes under assignment, or otherwise, the defendant became a stockholder to the extent of 189 shares of the capital stock of said new corporation, and C. W. Whitmore to the extent of sixty shares.

The capital stock of said new corporation was \$250,000, and the basis of apportionment of the same among the creditors of said bankrupt corporation was, as recommended by the trustees and advisory committee and accepted by the creditors, including the defendant, one share of stock for every \$258 of proved claims.

The plaintiff claimed and offered to show that the property and assets of the bankrupt corporation were worth very much more than the sum of \$250,000, at which they were transferred by the trustees to the new corporation, the Sagamore Manufacturing Company aforesaid, and claimed the right to introduce evidence of that fact for the purpose of showing that the defendant by means of dividends from the trustees and stock in the new corporation has received from the bankrupt estate more than 100 cents on the dollar and interest on the three notes aforesaid, exclusive of the sum of \$6,618, received by him from the plaintiff as aforesaid, and the sums received by him from other sureties or their estates.

And thereupon by agreement of parties it was ruled *pro forma* that the plaintiff could not recover, and a verdict was directed for the defendant. If, in any view of the case, the plaintiff is or is not entitled to recover, the verdict to stand or to be set aside accordingly.

Messrs. James M. Morton, Hugo A. Dubuque and Edward Higginson, for plaintiff.

The plaintiff was entitled to have a jury determine whether or not the defendant received over 100 per cent and interest on the notes proved against the Sagamore Mills in bankruptcy. If the jury had found that the defendant received over 100 per cent and interest on the notes, the plaintiff was entitled to recover out of the surplus the sum of \$6,618, which he paid on account of the same. *Selfridge v. Gill*, 4 Mass.

95; *Dearth v. Hide & L. Bank*, 100 Mass. 540; *Watkins v. Otis*, 2 Pick. 88.

Because when the creditor is paid in full, the surplus received by him inures to the benefit of a surety:

Whether the surety has paid the note in full. *Ex Parte Turner*, 8 Ves. Jr. 248; *Ex Parte Mills*, 2 Id. 295.

Whether the principal debtor has paid in full. *Ex Parte Rushforth*, 10 Ves. Jr. 422; *Paley v. Field*, 12 Ves. Jr. 435; *Ex Parte Brook, re Watson*, 3 Rose, 384.

Or whether the surety has only paid a part of the amount due on the note, and comes in to be reimbursed for the sum he has paid. *Re Souther*, *Ex Parte Talcott*, 2 Lowell, 320; *Ex Parte Balch re Elliot Felt. Mills*, Id. 440; *Re Ellerhorst*, 5 N. Bank. Reg. 144; *Downing v. Traders Bank*, 11 Bank. R. 871; *Ex Parte Harris*, 16 Bank. Reg. 432; *Dearth v. Hide & Leather Bank*, 100 Mass. 540.

If the defendant has received more than his claim and interest, he is liable in an action at law; for the plaintiff may recover what he has paid as surety on the notes; whether the defendant (creditor) is considered as trustee of the plaintiff, or is obliged to pay the plaintiff by reason of the equities existing between the holder and the surety. *Selfridge v. Gill*, 4 Mass. 95; *Dearth v. Hide & L. Bank*, 100 Mass. 540; *Watkins v. Otis*, 2 Pick. 88; *Re Souther*, *Ex Parte Talcott*, *supra*; *New Bedford Bank v. Union Mill Co.*, 128 Mass. 28.

Equitable *assumpsit* is the proper remedy. *Randall v. Rich*, 11 Mass. 494; *Arms v. Ashley*, 4 Pick. 71; *Rogers v. Daniell*, 8 Allen, 349; *Johnson v. Johnson*, 120 Mass. 465; *Davis v. Coburn*, 128 Mass. 380; *Hunt v. Nevers*, 15 Pick. 500; *Cott v. Clapp*, 127 Mass. 476.

The fact that the plaintiff paid the note and mortgage given to pay a part of the \$6,618 received by the defendant, cannot prevent a recovery, because the money was paid to prevent foreclosure. *Cazenove v. Cutler*, 4 Met. 246; *McMurtrie v. Keenan*, 109 Mass. 185; *Nichols v. Bucknam*, 117 Mass. 488.

The proceedings in the U. S. District Court cannot be a bar to the present action.

1. Because they are *res inter alios*.

2. Because the questions and issues raised here have not been passed upon in that court. *Eastman v. Cooper*, 15 Pick. 279; *Gilbert v. Thompson*, 9 Cush. 848; *Burken v. Shannon*, 99 Mass. 200; *Lea v. Lea*, Id. 493.

It makes no difference whether the same notes were connected with the proceedings of the District Court. *Eastman v. Symonds*, 108 Mass. 567.

The notice to come in and present claims similar to those of Job T. Wilson and J. C. Blaisdell was only to enable the trustees of the Sagamore Mills, bankrupt, to marshal the assets in their hands according to the equities of the parties to those proceedings. *Downing v. Traders Bank*, 2 Dill. 136; *Ex Parte Harris*, 16 Bank. Reg. 432; *Re Souther*, *Ex Parte Talcott*, *supra*.

The decree did not necessarily conclude the equities of the several parties to the notes, as between themselves or as between the sureties, holder or maker. *Carpenter v. King*, 9 Met. 511; *Murphy v. Manning*, 184 Mass. 488, 489.

Courts will never allow those standing in the relation of trustees to take advantage of a *cestui*

que trust. And if a trustee (a creditor in this case) buys the trust property at an unfair price, he must account to the parties in interest, and he is bound to act with good faith and honesty in all his transactions. *Re Souther*, *Ex Parte Talcott*, *supra*; *Re Ryan*, 6 Bank. Reg. 235; *Tommey v. White*, 8 Ho. Lords. 49; *Re Troy Woolen Co.*, 8 Blatchf. 465; *Darove v. Fanning*, 2 Johnson Ch. 252; *Hayward v. Ellis*, 13 Pick. 276; *Jackson v. Ludeling*, 21 Wall. 616 (88 U. S. bk. 22, L. ed. 492); *Montague v. Dawes*, 14 Allen, 369; *Brown v. Covell*, 116 Mass. 461; *Brandt, Sur. & Guar.* § 384, ed. 1878.

The transaction in this case was in effect a distribution of the property of the principal debtor among the creditors; and the new corporation was formed to enable them to do this, and as a convenient method to make the distribution.

This case however differs from *Stafford v. New Bedford Sac. Bank*, 132 Mass. 815, in that the sale was private and was not made, as the plaintiff claims, at a fair price.

Whatever the form of the agreement, it is plain that the money was in effect paid by the plaintiff to the defendant on account of his liability as surety on the three notes.

The court should look at the substance of the transaction. *Breeze v. Schuler*, 48 Ill. 329; *Downer v. Dana*, 17 Vt. 518; *Cooke v. Graham*, 8 Cranch, 229 (7 U. S. bk. 2, L. ed. 420).

A creditor should not be allowed to retain more than his due. *New Bedford Bank v. Union Mill Co.*, 128 Mass. 28.

"Where any act has been done * * * that may injure the surety, the court is very glad to lay hold of it in favor of the surety." *Lavo v. East Ind. Co.*, 4 Ves. Jr. 882; *Ex Parte Balch* 2 Lowell, 440.

When the instrument was given it was not intended to prevent the plaintiff from looking to the maker of the notes to be reimbursed for what he had paid. *Brandt, Sur. & Guar.* § 176, 1878 ed.

Courts will not help creditors to be paid twice over to the prejudice of a surety. *Ex Parte Burrell*, 1 Ch. Div. 587; *Ex Parte Brook*, 2 Rose, 384; *Re Souther*, *supra*; *Heyman v. Dubois*, L. R. 13 Eq. 158; *Ex Parte Turquand*, 3 Ch. Div. 445.

The payment of the creditor in full was a *casus omissus* in the instrument. *Higginson v. Gray*, 8 Mass. 385.

The instrument was prepared by the defendant and given to the plaintiff. It should therefore be construed in favor of the plaintiff and more strongly against the signers. *Noonan v. Bradley*, 9 Wall. 394 (76 U. S. bk. 19, L. ed. 757); *Barney v. Newcomb*, 9 Cush. 46.

The instrument should be "Construed in the light of surrounding circumstances, and in view of the subject matter * * * the acts of the parties and their relations to each other;" and so construed it is clear that the sum paid was a payment on the notes. *Farnsworth v. Boardman*, 181 Mass. 116; *Sumner v. Williams*, 8 Mass. 214; *Merriam v. United States*, 107 U. S. 437 (bk. 27, L. ed. 581); *Reed v. Ins. Co.*, 95 U. S. 23 (bk. 24, L. ed. 848).

Mr. H. K. Braley, for defendant.

Holmes, J., delivered the opinion of the court:

This is an action of contract brought by a

surety to compel the creditor to reimburse him to the extent of a payment made by the surety, on the ground that the defendant has received that amount in excess of his debt.

The facts admitted or offered to be proved which are material to our decision, are as follows: the plaintiff was surety in three promissory notes made by the Sagamore Mills amounting to \$50,000, in which the defendant was beneficially interested. A suit had been begun upon them and the maker having gone into bankruptcy, they had been proved against its estate. The plaintiff after some previous talk with the defendant about a compromise and settlement of his liability, paid \$6,618, and received back an agreement, by which the defendant as principal, and the other owner and the holder of the notes as sureties, agreed to indemnify and save harmless the plaintiff from the notes, and from any judgment upon the same.

The agreement continued: "It is expressly agreed that said sum paid by said Wilson is not in part payment of said notes, or either of them, and is not to be applied in any manner to diminish or affect said notes, or the liability of said principal or sureties, but the same is paid by said Wilson and received by said Nathaniel Whitmore as the consideration of the indemnity."

Subsequently, the creditors of the maker formed a corporation, and purchased its business by leave of court. The details of the proceedings and the defense based upon them need not be gone into, in the view we take of the above agreement. It is enough to state that the plaintiff says that the result of the transaction, and of his payment just stated, has been to give the defendant enough more than the full amount of his debt to enable him to reimburse the plaintiff. The court below ruled that the plaintiff could not recover; directed a verdict for the defendant; and reported the case. In spite of the able argument of the counsel for the plaintiff, we think it clear that the plaintiff is concluded by the terms of the document which he accepted from the defendant. We do not doubt that the purpose of the plaintiff's payment was to relieve him from liability upon these notes. But the mode in which and the terms upon which it should do so were subject to the agreement of the parties. They made their bargain, and we cannot make a new one for them.

That bargain was, that the plaintiff would pay a fixed sum, much less than his liability, for a covenant that he should not be troubled further. By the express terms of it, the money was not paid or received upon the notes, but as the consideration of the defendant's covenant for indemnity.

Verdict to stand.

COMMONWEALTH of Massachusetts

v.

George M. SAWTELLE.

1. Evidence is not to be rejected because it fails to be conclusive; it is sufficient if it fairly tends to prove a point sought to be established.
2. Objection to testimony, not taken at the trial, cannot be considered here.
3. Testimony in reference to similar

transactions is **admissible to show the criminal intent of a party**, when other transactions of the same general character and connected therewith are investigated.

4. A **confession**, which relates to a course of conduct pursued by defendant during his whole employment in the service of the person whose property he is alleged to have embezzled, and necessarily has reference to and characterizes all his acts charged to have been done within that time, is **admissible to show criminal intent**, although it does not, in terms, refer to the specific matters charged in the indictment.

(Middlesex—Decided February 23, 1886.)

ON defendant's exceptions. *Overruled.*
Indictment for embezzlement.

The nature of the evidence is stated in the opinion.

Messrs. W. N. Davenport and Samuel J. Elder, for defendant:

The fact that several books went to the jury without objection does not put their entire contents in evidence. *Hunt v. Roylance*, 11 Cush. 117; *Abbott v. Pearson*, 180 Mass. 191.

The confession should have been excluded. The only ground upon which testimony of other similar offenses is admissible is to prove intent, and then the jury must be instructed that it is admissible for that purpose only. The testimony was not introduced for such purpose and no such instructions were given. *Commonwealth v. Shepard*, 1 Allen, 575; *Same v. Eastman*, 1 Cush. 189-216; *Same v. Tuckerman*, 10 Gray, 178.

Mr. Edgar J. Sherman, Atty-Gen., for the Commonwealth.

Devens, J., delivered the opinion of the court:

The defendant testified that all the money which Mrs. Sawin paid him he put into the money drawer or handed to the book and cash keeper, rolled up as he received it. The entry made by defendant in his own handwriting credited Mrs. Sawin with \$50 only, as paid by her on the day on which one of the acts of embezzlement was alleged to have been committed, the payment made by her, according to her testimony, having been \$61.

The defendant objected to the inquiry of the cash keeper whether his cash overran that day. It obviously would have done so, if the defendant had actually deposited the sum testified by Sawin to have been received by him. If this question involved a single transaction, as if the money in the cash drawer had been counted immediately previous to the deposit by defendant and then immediately afterwards, the amount of the sum deposited would be clearly shown. It would not seriously be contended that such evidence was not admissible, when the amount was in dispute. The fact that the question involves the business of an entire day, and thus that, by reason of the number of transactions that had taken place, there was an opportunity for mistake as to the amount received, counted or deposited, in connection with such other transactions, so that it was

possible that the discrepancy between the amount which should have been found in the drawer, if Sawin's evidence were true, and the amount actually found might be attributable to error in such other transactions, constitutes an argument as to the weight and not an objection to the competency of the evidence. Evidence is not to be rejected because it fails to be conclusive; it is sufficient if it fairly tends to prove a point sought to be established.

The defendant further contends that if the fact that the cash balanced upon the basis that \$50 only was paid in by him was competent, it could have been proved only by the books. This objection does not appear to have been taken at the trial and can hardly be considered open. But it was not a question of what the books contained, but whether the amount on hand in the morning, adding thereto the amounts received during the day, equaled the amounts paid out during the day, adding thereto the balance on hand at the close of business. If the cashier was able to state as a matter of fact, that these amounts included the sum received from Sawin as the defendant had entered it, he might do so even though the statement covered the several minor facts of other receipts and payments.

In a conversation subsequent to the alleged acts of embezzlement, there was evidence that defendant admitted that he had been taking money from his employer, Pope, whose property was alleged to have been embezzled, all along ever since he began to work for him, but could not say how much he had taken. It appeared that no allusion was made to the specific matters charged in the indictment, by words or figures. The Judge instructed the jury that they should not consider the confession, unless it had reference to some of the specific matters charged in the indictment. This was certainly sufficiently favorable to the defendant, as testimony in reference to similar transactions is admissible to show the criminal intent of a party, when other transactions of the same general character and connected therewith are investigated. *Commonwealth v. Shepard*, 1 Allen 575; *Same v. Eastman*, 1 Cush. 189-216; *Same v. Truckerman*, 10 Gray, 178.

Nor is the admission of this evidence open to the objection that it was not competent for the jury to say that the confession related to the specific matters charged in the indictment. Even if those were not mentioned by name or other particular designation, a confession which related to a course of conduct pursued by the defendant during his whole employment in the service of the person whose property he was alleged to have embezzled, necessarily had reference to and characterized all the acts and matters charged to have been done within that time.

Exceptions overruled.

COMMONWEALTH of Massachusetts
v.
John MOINEHAN.

On trial of a complaint charging the sale of intoxicating liquors, the question "Don't you think it was lager beer?"

was properly allowed, on the principle that the application of a class name to an object perceived by the senses is generally the expression of an inference, and testimony would be impossible if such inferences could not be stated.

(Bristol—Decided January 8, 1886.)

ON defendant's exceptions. *Overruled.*

Complaint charging a single sale of intoxicating liquor to Warren F. Smith.

At the trial one Elmer C. Lincoln testified that Warren F. Smith, in the kitchen of the defendant, called for some beer; that the defendant brought a bottle of beer from an adjoining room, and that he and one Herbert Smith, brother of Warren, drank it from two glasses, and Warren paid for it. That Warren drank none, but took a flask of whisky, which he had brought there, from his pocket and drank from it. Warren and Herbert testified substantially to the same facts, and Herbert testified that the beer was of a strength of not more than 8 per cent of alcohol, and Warren said he did not taste it and did not know its quality.

Elmer C. Lincoln, a boy of fifteen years and a son of the complainant, further testified in chief that he did not know whether it was lager beer or not. Cross examined by defendant's counsel, he said it was a weak beer and had no intoxicating effect on him. Herbert Smith was then examined as a witness and, at the conclusion of his testimony, Elmer was recalled by the district attorney, and upon being questioned closely by him repeated substantially what he had before stated. The witness, appearing to the court to be hostile, was allowed to be cross examined by the district attorney, and he thereupon, against the defendant's objection, was permitted to put the following question to him: "Don't you think it was lager beer?" He replied, "I couldn't say whether it was lager beer." He then inquired, "Was it strong beer?" This was objected to, but the defendant answered, "Yes." He was then further cross examined by the defendant and he said he did not know what strong beer was, that he did not understand the attorney's question as to strong beer, that he did not know what was meant by it. The district attorney then asked him whether or not at the trial of this complaint in the district court he testified that he thought it was lager beer. On objection made, his attention was called to the time, place and circumstance of his there testifying and the question was repeated. It was again objected to, but allowed against the defendant's objection, and he replied that he had no recollection of so testifying; that he did not so testify.

Then, against the defendant's objection, H. J. Fuller testified as a witness that he was present at said trial as counsel for the prosecution, and that the witness there testified that "he thought it was lager beer."

A verdict of guilty was returned, and defendant excepted to the several rulings and exceptions allowed.

Mr. J. Brown, for defendant:

The question by the district court, "Don't you think it was lager beer?" was incompetent, immaterial and inadmissible, and was erroneously allowed. A witness may testify to facts,

and in some cases give his opinion or judgment, but not what he at one time thought. There is no way of refuting such evidence. Suppositions or thoughts of a witness are not evidence. *Ives v. Hamlin*, 5 Cush. 534.

What the witness thought was incompetent, irrelevant and immaterial, and the admission of evidence to contradict it by showing what he testified in the district court was erroneous. *Ryerson v. Abington*, 102 Mass. 526; *Force v. Martin*, 122 Mass. 5.

Mr. Edgar J. Sherman, *Atty-Gen.* for Commonwealth.

Holmes, J., delivered the opinion of the court:

The question, "Don't you think it was lager beer?" was properly allowed to be put. The application of a class name to an object perceived by the senses is generally the expression of an inference, and testimony would be impossible if such inferences could not be stated. If the witness had said that it was lager beer, his testimony would only have meant that he confidently thought or inferred from the qualities directly perceived by him that the substance had the other qualities denoted by the name. As he would have been allowed to testify to such a confident inference, he could be asked, on cross examination, if he did not draw that inference, although with less than absolute certainty. Even if the question had been inadmissible, the answer made it harmless, as the witness replied that he could not say.

The witness having testified that the beer was a weak beer, it was open to the prosecution to show that he had previously testified that he thought it was lager beer, for the purpose of contradicting his present testimony, if for no other purpose. Pub. Stats. chap. 169, § 22; *Day v. Cooley*, 118 Mass. 524; *Brooks v. Weeks*, 121 Mass. 433.

The exceptions do not disclose any attempt to use this testimony as substantive evidence that the beer was lager beer, and there is no question of the sufficiency of the whole evidence raised; nor does it appear that all the evidence is before us.

Exceptions overruled.

Bridget SULLIVAN, Admrx.,

v.

NEW BEDFORD INST. FOR SAVINGS;
Edward Sullivan, Claimant.

Until some unauthorized order or judgment adverse to the claimant is entered, he is not aggrieved, and no ground exists for arrest of judgment.

(Bristol—Decided October 28, 1885.)

ON claimant's exceptions. *Overruled.*

This was an action of contract, to recover the sum of \$1,000 deposited with the defendant Corporation by Thomas H. Sullivan, deceased, the former husband and intestate of the plaintiff. The deposit was made in this form, viz.: "Thomas H. Sullivan in trust for Edward Sullivan." The said Edward having claimed said deposit as belonging to him, was

upon due proceedings, as appears by papers in the case, made a party defendant in this suit. There was no controversy as to the amount the plaintiff was entitled to recover, if she could recover anything; that amount was \$1,000. The only issue tried was whether the plaintiff or the claimant was entitled to the fund, the \$1,000.

The fund was in possession of the defendant Corporation at the time of the trial and still is in its possession. The case was committed to the jury, with instructions not objected to, on Friday; and they, not having agreed at the hour of adjournment, were instructed, when they did agree, to seal up their verdict and return it into court at the hour to which the court was adjourned the following Monday. The jury did agree and were allowed to separate. On the coming in of the court on Monday morning, the clerk inquired of the jury if they had agreed upon their verdict, and the foreman replied they had, and passed to the clerk a sealed envelope containing a verdict in the following words and figures, viz.:

"Bristol, Superior Court, }
December Term, 1884. }^{ss.}

No. 717. Bridget Sullivan, Admx. v. New Bedford Ins. for Savings. Edward Sullivan, Claimant.

The jury find for the plaintiff and assess damages in the sum of — dollars."

The court, finding the jury had in their verdict so returned omitted to state the amount of the damages, and as there had been no controversy about the amount, directed the foreman to fill the blank after the words "sum of" by inserting the words "one thousand," and the verdict, thus amended, was read to the jury by the clerk, and in that form was assented to by them and affirmed in the usual manner. All this was done in open court and in the presence of the counsel of all parties to the suit. The claimant's counsel made no objection to what was thus done in his presence and took no exception thereto; he subsequently filed a motion to set the verdict aside on the ground of alleged irregularities on the part of the jury, and also a motion in arrest of judgment. Both motions were overruled; to which the claimant excepted and appealed from the order of the court overruling the motion in arrest of judgment.

Mr. J. Brown, for Edward Sullivan, claimant.

Mr. T. F. Desmond, for plaintiff:

The paper sealed up by the jury was not, technically, a verdict. Such a paper is not a verdict until it is affirmed and recorded. *Fuller v. Chamberlain*, 11 Met. 508.

It was the verdict which they proposed to render. *Roberts v. Rockbottom Co.* 7 Met. 46.

The practice of sending out a jury, when they return a finding that is absurd or defective, has existed more than four hundred years. *Pritchard v. Hennessy*, 1 Gray, 294.

It was a defect of the most informal character which cannot be allowed to defeat the plaintiff and the manifest intention of the jury. *Chaffee v. Pease*, 10 Allen, 537.

There was no such irregularity in the proceedings of the jury in finding the verdict, as makes it necessary to interfere with or disturb it. *Chapman v. Coffin*, 14 Gray, 454.

It is a well settled and long established practice that when a jury have returned a finding that is incomplete and defective, they may be sent out again in order to correct the error, even although they had separated after their first finding, before coming into court. *Mason v. Mass.* 122 Mass. 477.

Before a verdict is recorded the jury may be required to reconsider it, if it appears to be a mistake. *Brown v. Dean*, 123 Mass. 254.

These decisions are conclusive upon the question of irregularities on part of the jury, and do not conflict with the recent decision in *Kenney v. Habich*, 137 Mass. 421.

Were it otherwise, as the defendant's counsel made no objection to what was thus done in his presence and took no exception thereto, he waived the irregularity, if any, and the objection is not open to the defendant. *Blake v. Rayley*, 16 Gray, 532.

By the Court:

The Superior Court has power, under the Public Statutes, chapter 116, § 31, to enter all necessary orders and judgments, to secure the rights of the parties. Until some unauthorized order or judgment adverse to the claimant is entered, he is not aggrieved. No ground whatever exists for sustaining his motion in arrest of judgment, and it was rightly overruled.

Exceptions overruled.

William L. Wood *et al.*
v.

Inhabitants of WESTBOROUGH *et al.*

1. The right in equity of a mortgagee, to have the damages received for the taking of the mortgaged land for public purposes applied to the liquidation of his debt, is not taken away by force of the Act of 1881, ch. 110, providing a statutory proceeding by either or both the mortgagor and mortgagee, unless he has been made a party to the proceeding by which the damages have been appropriated to the mortgagor.
2. Such statutory proceeding does not exclude the assignee of the mortgage from his remedy in equity against the mortgagor.

(Worcester—Decided January 5, 1886.)

ON report from the Superior Court. Decree dismissing bill, reversed.

Bill in equity, the material portions of which are as follows:

By a deed of mortgage dated April 6, 1877, and recorded in the registry of deeds for Worcester County, defendant Aldrich conveyed to W. B. Wood, the father of the plaintiffs, a certain lot of land with the buildings thereon, containing two acres more or less and situated in that part of Southborough called Southville upon Sudbury River, which river furnished a water privilege to the factory building upon said premises; and said water privilege formed a valuable part of said premises and said mortgage secured the note of said Aldrich to said W. B. Wood for \$3,140 in semi-annual pay-

ments of \$100 each, the first payment to be made in six months from said April 6, 1877, the date of said note.

Plaintiffs are now and have been since September 28, 1882, the holders and owners of said mortgage and the said note secured thereby, upon which note there is now due about the sum of \$2,500.

Said Inhabitants of Westborough being duly authorized by law, under chap. 77 of the Acts of 1873 of this State have since the date of said mortgage diverted from said Sudbury River, and from said mortgaged premises the waters of Picadilly Brook, so called, a tributary of said river by means of a dam across said brook within said Town of Westborough, whereby said mortgaged premises were greatly injured and damaged and the value thereof greatly impaired.

Said Aldrich being duly authorized thereto by said Act about March 5, 1883, brought in the Superior Court for said Worcester County his petition against said Inhabitants of Westborough for the assessment of the damages caused to said mortgaged premises by the diversion from said river of said brook; and at the December Term of said Court, 1883, a verdict was duly obtained by said Aldrich upon his said petition against said Inhabitants of Westborough for the sum of \$621.28, but no judgment has been entered up thereon.

Plaintiffs are informed that one Abner Prentiss of said Westborough has brought suit against said Aldrich, returnable at the next March Term of this court, and have summoned said Inhabitants of Westborough as the trustee of said Aldrich therein.

The plaintiffs insist and claim that they as owners of said mortgage are entitled to receive said sum of \$621.28 from said Inhabitants of Westborough, to be applied upon said mortgage.

The plaintiffs pray that said Inhabitants of Westborough may be enjoined from paying over said sum of \$621.28 to any person or persons except the plaintiffs, and that they may be decreed to pay the same over to these plaintiffs; that said Aldrich be enjoined from collecting said sum from said Town, or from assigning his rights under said verdict; that said Prentiss may be enjoined from collecting said sum of said Westborough in said trustee process. The defendants answered, and the issues having been closed, the case came on to be heard and thereupon it was ordered, adjudged and decreed that the complainant's bill be dismissed with costs. The Justice of the Superior Court who heard the case, made the following report:

"Upon the facts found by me at the hearing, I found and ruled that there had been no such laches on the part of the complainants or of the preceding holders of said mortgage as ought to bar the complainants, from seeking equitable relief in the premises and also that there had been no actual or intentional waiver on the part of the complainants, or of those under whom they took and hold said mortgage, of the right to claim to have said damages applied on part payment of said damages, and ruled that I was not required in law to find any waiver from the facts above stated. I further ruled that chapter 110 of the Statute of 1881 (reenacted in § 110 of chapter 49 of the Public Statutes) was remedial,

and applicable to any petition for the ascertainment of damages claimed for the taking of Picadilly Brook by the Inhabitants of Westborough, instituted after April 18, 1881; and that undersaid statute the complainants had a plain, adequate and complete remedy at law under said statute and had no right in equity to the relief sought in their bill in this cause, and ordered a decree for the defendants dismissing the bill with costs, to which rulings and order the complainants excepted."

Messrs. P. C. Bacon, W. S. B. Hopkins and Henry Bacon, for complainants.

Mr. L. E. Denfield, for Inhabitants of Westborough, defendants.

Mr. Charles R. Johnson, for Charles Aldrich, defendant.

Messrs. Frank P. Goulding and Chas. R. Johnson, for Abner Prentiss, defendant.

The Statute of 1881, ch. 210, P. S. ch. 49, § 110, is merely remedial, and applies to proceedings begun after its passage, although the land may have been taken before. *Simmons v. Hanover*, 23 Pick. 189; *Kempton v. Saunders*, 130 Mass. 236; *Upham v. Raymond*, 182 Mass. 186.

The remedy afforded to mortgagees by the Statute of 1874, ch. 372, §§ 76, 77, P. S. ch. 112, §§ 108, 109, is plain, adequate and complete; and the obvious purpose of the statute is to substitute this remedy for the remedy the mortgagee could pursue before in equity alone. *Farnsworth v. Boston*, 126 Mass. 1; *Pond v. Eddy*, 113 Mass. 149; *Ballard v. Ballard Vale Co.* 5 Gray, 408; *Breed v. Eastern R. R. Co.* 5 Gray, 470, note; *Paine v. Woods*, 108 Mass., 160.

The facts disclose such laches on the part of the complainants and their predecessors as to deprive them of the equitable remedy they seek. They meant to slumber on their rights until the diligence of others had overcome all difficulties, and then ask a court of equity to aid them in reaping what they had not sown. *Plymouth v. Mills*, 7 Allen, 488; *Pom. Eq.* §§ 418, 419; *Tush v. Adams*, 10 Cush. 252; *Fuller v. Melrose*, 1 Allen, 166; *Peabody v. Flint*, 6 Allen, 52; *Merchants Bank v. Stevenson*, 7 Allen, 489; *Veazie v. Williams*, 3 Story, 611; *Ends v. Williams*, 4 De Gex, M. & G. 674, 691; *Southcomb v. Bishop*, 6 Hare, 213; *Watson v. Reid*, 1 Russ. & M. 286.

Devens, J., delivered the opinion of the court:

As the Statute of 1881, chap. 110 (P. S. ch. 49, § 110), was remedial in its character and was not intended to change any rights of parties who, as mortgagors or mortgagees, had interests in land which had been taken for public purposes, but only to provide a more convenient mode of adjudicating and adjusting them, it would be applicable to proceedings begun after its passage, even if the land to which they related had been previously taken. One remedy may be taken away and another substituted therefor, although such legislation operates incidentally on existing rights. *Simmons v. Hanover*, 23 Pick. 188; *Upham v. Raymond*, 182 Mass. 186.

Nothing was added to the burden of the party who had taken the land, and nothing was taken away from the rights of the landowner, but the statute simply provided for the distribution of the damages in accordance with the equitable interests of those interested. Before the enactment of this statute, the only remedy which a

mortgagee not in possession had, when any portion of the land was taken for public purposes, was in equity against the mortgagor. The latter was recognized as the owner; he alone could maintain a petition for damages; and it was only by a proceeding against him, the taker of the land being made a party thereto, when deemed necessary, that the mortgagee was able to have such damages as might be recovered devoted to the payment of the mortgage debt. *Farnsworth v. Boston*, 126 Mass. 1; *Breed v. Eastern R. R. Co.* 5 Gray, 470.

The Statute of 1881 provides a remedy for mortgagors and mortgagees, by adapting for them, in all cases, the statutes which had previously applied only in cases where land had been taken by railroad corporations. St. 1874, ch. 372, §§ 76, 77; P. S. ch. 112, §§ 108, 109.

Under these sections, the mortgagors and mortgagees may join in the petition, or such petition may be initiated by either party. All petitions are to state all mortgages known to exist in the premises, and the tribunal to which the petition is presented "shall order the petitioner to give notice thereof to all parties interested as mortgagors or mortgagees." In the case at bar, the presiding Judge ruled that the plaintiff had a complete and adequate remedy at law under the statute, and had no right in equity to relief against the mortgagor, to whom the whole damages had been awarded. This was, in effect, a ruling that the remedy given to a mortgagee by the Stat. of 1881, is to the exclusion of any other, and that by reason of the fact that he may begin a petition himself he can make no claim to the damages recovered by the mortgagor.

It does not appear in the case at bar that the plaintiffs were made parties to the petition of the mortgagor, or that any such notice was given to them as the statute contemplates, or that they or either of them had any actual notice of its pendency before the hearing upon the petition. It may well be, that if a mortgagee, made a party to a petition and properly notified thereof, should see fit not to take part therein and should thus avoid the responsibilities and expenditures belonging to him as a party, it could properly be held that he had waived any claim to the damages which the mortgagor might recover. In such case, it would be a reasonable construction of the statute that the proceeding excluded him from the equitable remedy against the mortgagor which he formerly had. But it should not go further than this. The mortgagee out of possession cannot be expected to have that full knowledge of the condition of the mortgaged premises possessed by the mortgagor; to construe the statute as excluding him from any remedy except that which it provides, because it authorizes him to begin a petition himself, might often do him serious injustice. The sections of the statute under consideration give to the mortgagor and mortgagee the rights there conferred in express terms, "in addition to their rights under the mortgage;" and the right in equity which the mortgagee had, to have the damages received from the taking of the land applied to the liquidation of his debt, should not be taken away unless he has been made a party to the proceeding by which they have been appropriated to the mortgagor.

The proceedings in the case at bar do not, therefore, exclude the assignees of the mortgage

from their remedy in equity against the mortgagor.

There remains the question whether the facts disclose such laches on the part of the plaintiffs that they cannot properly maintain the equitable remedy they seek. It was found and ruled by the presiding Judge, that there had been no such laches as would bar the plaintiffs from seeking equitable relief; that there had been no actual or intentional waiver by the plaintiffs or those under whom they claimed, of any right to have the damages applied to the satisfaction of the mortgage. The Judge was, on the facts, authorized thus to find that Newton the administrator held the mortgage unforeclosed on account of the controversy between Aldrich and Prentiss. W. L. Wood knew of the taking of the brook, but was not then an owner of the mortgage. It does not appear that either of the other owners did so. Neither of the plaintiffs is shown to have known of any rights which they had to collect damages, and, although W. L. Wood was informed of Aldrich's petition, it was when the case was actually on trial, no opportunity of preparation therefor being given to him.

Decree dismissing bill reversed.

Henry W. COWLES *et al.*

Maryetta MERCHANTS.

Where there was **no improper intermeddling with the juror and no misconduct on the part of the juror, a casual remark, accidentally overheard by a juror on the street and not calculated to influence his mind, is no ground for a new trial.**

(Hampshire—Decided January 5, 1886.)

ON demandants' exceptions. *Overruled.*

Writ of entry for a tract of land, etc., in Amherst.

After a verdict for the tenant, demandants filed a motion to set it aside and grant a new trial, on account of alleged misconduct of jurors.

A hearing was had before the presiding Judge, who made a written report thereon and of the evidence on which the motion was based; and being requested by demandants' counsel to make certain rulings, as matters of law, upon the facts found, the presiding Judge declined to make such rulings but made certain other rulings, to which demandants, feeling aggrieved, excepted, and the exceptions were allowed.

Messrs. Conant & Conant, for demandants:

If a juror during the trial permits himself to be addressed by an outside party in a conversation relative to the merits of the case then on trial before him, the natural and reasonable effect of which would be to bias his mind in favor of the prevailing side, his verdict, as matter of law, should be set aside. *Knight v. Freeport*, 13 Mass. 218; *Commonwealth v. Morrison*, 184 Mass. 190; *McDaniels v. McDaniel*, 40 Vt. 374.

It need not appear that the mind of the juror was influenced. *Knight v. Freeport and McDaniel v. McDaniel*, *supra*.

If the conversation listened to or a paper

read is capable of influencing them, the verdict must be set aside, if the purity of the verdict might have been affected by it. *Hare v. State*, 4 How. (Miss.) 187; *Commonwealth v. Wormley*, 8 Gratt. 712; *Cohen v. Robert*, 2 Strob. Law, 410; *Hix v. Drury*, 5 Pick. 296; *Whitney v. Whitman*, 5 Mass. 405; *Woodward v. Leavitt*, 107 Mass. 462; *Johnson v. Root*, 2 Cliff. 108; U. S. Dig. 1870, 528; *Johnson v. Witt*, 188 Mass. 79.

The intent or motive of either the juror or the persons who converse with him is immaterial. *Munde v. Lambie*, 125 Mass. 367; *Hix v. Drury and McDaniel v. McDaniel*, *supra*.

This court has set aside the verdict because a copy of the statutes was with the jury. *Merrell v. Nary*, 10 Allen, 416.

The presiding sheriff answered a question by the jury with the word "no." *Read v. Cambridge*, 124 Mass. 567.

The presiding Judge wrote a note to the foreman of the jury about the case. *Sargent v. Roberts*, 1 Pick. 337.

It is provided by statute in Connecticut: "If any juror shall converse with any person concerning the case, except his fellows, while it is under consideration, or shall voluntarily suffer any other person to converse with him, such verdict, on motion, may be set aside and a new trial granted." *Stone v. Stevens*, 12 Conn. 232; *Brown v. Congdon*, 50 Conn. 308.

The law seems to be settled in Connecticut that if the court finds that the conversations may have had an effect unfavorable upon the party moving for a new trial, the verdict ought to be set aside. *Bennett v. Howard*, 3 Day, 219; *Pettibone v. Phelps*, 18 Conn. 445; *State v. Watkins*, 9 Conn. 47; *Hamilton v. Pease*, 38 Conn. 115; *Tomlinson v. Derby*, 41 Conn. 268.

When fraud and secrecy are charged, every fact and circumstance connected with the transaction and with the principal actors, from which the jury might rightly draw an inference, is material. 1 Greenl. Ev. § 449.

An opinion is defined to be: "An inference or conclusion drawn by a witness, as distinguished from facts known to him as facts." Bouv. L. Dic.

"A mental conviction of the truth of some statement founded on a low degree of probable evidence." "Belief stronger than impression, less strong than positive knowledge." Webster's Dict.

"Opinions," "suppositions," "impression," "beliefs," are used as synonyms in *State v. Wilson*, 38 Conn. 138.

The opinion as to the mental condition of the grantor at the date of the deed, founded upon facts and circumstances within his own personal knowledge, together with said facts and circumstances, was competent evidence. *Conn. Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612, (bk. 28, L. ed. 536); *Ins. Co. v. Rodel*, 95 U. S. 282 (bk. 24, L. ed. 433).

The mental condition of an individual, as sane or insane, is a fact. *Conn. Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 620 (bk. 28 L. ed. 536.)

Insanity "Is a condition which impresses itself as an aggregate upon the observer," and the opinion of one cognizant of all the minute circumstances making up that aggregate, and which are detailed with that opinion, is in its essence only "fact at short hand." 1 Whart. & S. Med. Jur. § 257.

This court has held that a non-expert witness might be asked "whether he ever observed any fact which led him to infer that there was any derangement of intellect." *May v. Bradlee*, 127 Mass. 421.

That such a witness might state "That he observed no incoherence of thought in the testator, nor anything unusual or singular in respect to his mental condition." *Nash v. Hunt*, 116 Mass. 251.

That such a witness might be asked "Whether six years ago he (an aged man) had failed," mentally and bodily. *Commonwealth v. Brayman*, 136 Mass. 488.

That it was competent to ask such witness, in regard to an aged person, "Did you notice any want of coherence in his remarks?" *Barker v. Comins*, 110 Mass. 487.

The opinions of non-experts, upon the question of mental condition, when founded upon facts and observations within their own personal knowledge, by persons of intelligence, are held competent, by the ecclesiastical courts in England, the civil law of Europe, the United States Supreme Court and by the courts of last resort in all the States of the United States, except Texas, Maine and perhaps Massachusetts. *Conn. Mut. Life Ins. Co. v. Lathrop*, *supra*, and cases there cited; *Newton v. Carbery*, 5 Cranch, C. C. 628; *Hardy v. Merrill*, 56 N. H. 227, 232 and a multitude of cases there cited; *State v. Pike*, 49 N. H., 408, dissenting opinion by Doe, J., afterwards adopted in 56 N. H.; *Lawson, Exp. & Op. Ev.* 476, and many cases cited there; *Redf. Wills*, ch. 4, pt. 2, 145, n. 24; *Whart. Ev.* 510 *et seq.*; 1 Bish. Cr. Pro. § 386, 340.

In a recent case in Maine, it is plainly intimated that the rule contended for here will be adopted there. *Robinson v. Adams*, 62 Me. 869, 410.

Mr. D. W. Bond, for tenant:

In a civil case, the court is not obliged, as a matter of law, to set aside a verdict, because of any intermeddling by strangers with a portion of the jury. *Barbour's Admrs. v. Archer*, 3 Bibb. 8; 3 U. S. An. Dig. 566, § 425; *Bishop v. Williamson*, 2 Fairf. 495; *Stewart v. Small*, 5 Mo. 525; 5 U. S. An. Dig. 436, § 142; *People v. Boggs*, 20 Cal. 438; 28 U. S. An. Dig. 421, § 16; *Collier v. State*, 20 Ark. 36; 20 U. S. An. Dig. 689, § 40; *Pettibone v. Phelps*, 13 Conn. 445; *Hilliard*, New Tr. 208, § 11; *Johnson v. Witt*, 138 Mass. 79.

The decision of the court to which the petition was addressed in this case, "That the interests of justice did not demand that the verdict should be set aside or a new trial granted, cannot be revised in this court on exceptions. *White v. Wood*, 8 Cush. 413; *Shea v. Lawrence*, 1 Allen, 167; *Leach v. Wilbur*, 9 Id. 212; *Johnson v. Witt*, *supra*.

In this State, experts only and subscribing witnesses to wills have been permitted to give opinions upon questions of sanity or mental capacity, and only persons of scientific training upon the subject and physicians have been regarded as experts. *Poole v. Richardson*, 3 Mass. 330; *Needham v. Ide*, 5 Pick. 510; *Commonwealth v. Wilson*, 1 Gray, 339; *Hubbell v. Biswell*, 2 Allen, 200; *Commonwealth v. Fairbanks*, Id., 511; *Ashland v. Marlborough*, 99 Mass. 47; *Hastings v. Rider*, Id. 624; *Barker v. Com-*

ins, 110 Id. 487; *May v. Bradlee*, 127 Id. 414; *Commonwealth v. Brayman*, 136 Id. 488.

W. Allen, J., delivered the opinion of the court:

The only question relating to the motion for a new trial is, whether the Judge properly ruled that he was not required, as matter of law, to set aside the verdict, on account of the remarks made to or in the presence of the juror Searle. The remarks were made by a person not in any way connected with the case, who did not know that he was speaking in the presence of a juror, and who was well known as a person whose faculties were much impaired by his advanced age.

There was no improper intermeddling with the juror and no misconduct on the part of the juror; it was hardly more than a casual remark accidentally overheard by a juror in the street, and not calculated to influence his mind. The ruling of the Judge was right. *Johnson v. Witt*, 138 Mass. 79.

The question put to Mrs. Dickinson, a witness to the deed, if she had not said anything about making the deed to anyone except her husband, was immaterial and could not be contradicted. The fact that, two days after the deed was executed, she conversed about it with the insurance agent and requested him to say nothing about it, was immaterial, and evidence of it was properly excluded. The tenant could not be affected by these mere declarations of the witness. The question put to the witness Geares was excluded, in accordance with the well settled law in this Commonwealth, recently reaffirmed in *Commonwealth v. Brayman*, 136 Mass. 488. See, *May v. Bradlee*, 127 Id. 414; *Hastings v. Rider*, 99 Id. 622 and cases cited.

Exceptions overruled.

NATIONAL UNION BANK

v.

Charles W. COPELAND *et al.*

1. Where an assignment by deed of trust for the benefit of creditors contained a provision for an extension of time, within which creditors may become parties and make proof of their claims, to carry out the objects of the trust, so long as the trust remained unfulfilled, even if the original instrument had expired, the trustees were entitled to make successive extensions; provided the same were reasonable, under all the circumstances.
2. Where power to extend the time of proof was given, to achieve the intention of the assignor, the mere accidental failure of the trustees to indorse in writing the extension allowed would not destroy their power.

(Suffolk—Decided February 26, 1886.)

IN Equity.

Charles W. Copeland & Co., Steadman & Co., and Copeland individually, failed in August, 1883, with liabilities of about \$1,800,000. August 27, 1883, they made an assignment of

their property for the benefit of such of their creditors as should become parties thereto.

This instrument was tripartite in form; contained a release from all liabilities and was under seal. It purported to be an indenture in three parts between the debtors, their assignees and such creditors as should execute it within a limited time.

Creditors were allowed to execute the instrument within sixty days, "or within such further time, if any," as the assignees should "allow in and by a writing hereon signed by them."

The original assignment was in two parts, executed by the debtors, their assignees and by many of the creditors.

Besides these, there were many printed copies signed only by creditors.

The amount of funds applicable to the trust in the hands of the assignees, was about \$300,000.

This suit of the National Union Bank was brought in behalf of all the creditors against the assignees and the debtors, for an administration of the trust and distribution of the trust fund, but more particularly to determine who the beneficiaries are.

April 24, 1885, by a decree of court, the case was referred to a special master, to find what creditors had executed the trust deed and, "So far as practicable, when each creditor executed the same, and the amount of the claim of each, and what action had been taken by the trustees named in said deed to extend the time for executing the same."

The master by agreement has made his preliminary report, from which it appears that the assignees had, at the time the report was made, assumed to extend the time for executing the instrument five times, the last extension expiring December 26, 1885; and that creditors to the amount of \$1,300,000 have assumed to execute the assignment.

The first extension was executed just prior to the expiration of the first sixty days, and extended the time to January 24, 1884.

No other extension was indorsed upon the instrument until after May 5, 1884, and nothing whatever was done by the assignees towards an extension during the *interim*; no notice was sent to creditors, and none undertook to become parties in this *interim*.

The counsel representing various interested parties requested the special master to make such a report as would enable the court to determine "Whether those who became parties on or before January 24, 1884, are entitled to any preference over creditors who signed thereafter."

Many of the creditors, however, have assumed to execute the assignment subsequently to May 5, 1884. The interveners claim that the power of extension expired January 24, 1884, and that attempted extensions subsequently are invalid, both for want of authority and for non-compliance with the terms of the instrument of assignment and with the law.

The case now stands upon the pleadings, and upon the master's preliminary report of such findings as shall enable the court to determine, as a matter of law, whether the creditors who have become parties to said assignment should be classified, and particularly whether those who became parties on or before January 24, 1884,

are entitled to any preference over creditors who signed thereafter.

The questions for discussion arise out of that portion of the trust deed which provides that the several persons, firms and corporations, creditors "who shall execute these presents within sixty days from the day of the date hereof, or within such future time, if any, as said parties of the second part," the trustees, "shall allow in and by a writing hereon signed by them," shall be the parties of the third part, among whom the net proceeds of the property of the debtors should be divided ratably in proportion to the respective amounts of the creditors' claims, and without preference or priority.

1. Had the trustees power under the deed to "allow * * * further time" in and by more than one writing, to wit: in and by a number of writings?

2. If the trustees had the power to make a number of extensions, were the extensions which they attempted to make, valid?

Mr. Lauriston L. Seafie, for Globe National Bank, intervener:

1. Had the trustees power under the deed to allow further time in and by more than one writing, to wit: in and by a number of writings? 2. If the trustees had the power to make a number of extensions, were the extensions which they attempted to make, valid?

The answer to these questions depends upon the construction which the court shall give to the clause quoted above; which construction is a judicial determination of the intent of the creators of the trust, as expressed in said clause. *Smith v. Faulkner*, 12 Gray, 255.

The settled principles of construction permit us, in attempting to ascertain such intent, to look to the following sources of knowledge and information:

To the language of the clause itself. *Chit. Cont.* 11th Am. ed. 113.

To the remainder of the instrument. *Id.* 117.

To the circumstances surrounding the creation of the instrument. *Knight v. New Eng. Worsted Co.* 2 Cush. 271; *Burr. Assign.* 4th ed. 457.

To the acts of the parties at and subsequent to the time of making the instrument. *Smith v. Faulkner*, 12 Gray, 255; *Chit. Cont. supra*; *Knight v. New Eng. Worsted Co. supra*.

As especially relating to intention of the creator of a power, see also: *Jackson v. Veeder*, 11 Johns. 169, 171; 1 Lead. Cas. Eq. 435; 2 Perry, Tr. 39.

The field of contention on this point is thus limited to the words, a writing.

We use one, when we speak numerically, and wish to signify that there are not more than one; whereas, we use either a or an when we wish to emphasize not the number, but the description of the thing spoken of. Moon, *Dean's English*, 99.

"It is easy to see that we must not divide terms into those which are general and those which are collective, because it will often happen that the same term is both general and collective, according as it is regarded." *Jevons' Lessons in Logic*, 18, 19.

The facts shown by the remainder of the deed and by other admitted circumstances show to a reasonable certainty, *Chit. Cont.* 11th Am. ed.

105, that the true construction is, that the trustees were empowered to allow further time in and by a number of writings.

Where the deed is ambiguous in its terms and admits of two constructions, that interpretation should be given to it which will render it legal and operative, rather than that which will render it illegal and void. Burrill, Assign. 4th ed. 457.

This is an application of the rule stated in Chit. Cont. 11th Am. ed. *supra*.

This construction is further aided by the general practice of courts of equity in regard to powers.

Although at law, powers are construed strictly, in equity they are construed liberally in favor of creditors; and whenever a trust is created coupled with a power, the power is construed, if possible, in such way as to carry out the trust. *Hale v. Hale*, 137 Mass. 168; *Sewall v. Wilmer*, 132 Mass. 131; *Smith v. Kinney's Exrs.* 38 Tex. 283; *Pearce v. Gardner*, 10 Hare, 287; *Cuff v. Hall*, 1 Jur. (N. S.) 973.

A power to perform an act may be a power to perform such act from time to time, as occasions require, and is not necessarily extinguished by having been once executed.

"A power is not necessarily extinguished by having been once executed. Thus, a power to lease may be exercised from time to time, as occasions require." Farwell, Pow. 26.

So a power to trustees to lend £2,500 to the tenant for life was held not to be extinguished by one loan, but it was held that after repayment the sum might be again loaned. *Versturm v. Gardiner*, 17 Beav. 338.

So, if an alternative power be given to raise money by sale or mortgage, and it is raised by mortgage, money can afterwards be raised by sale to pay off the mortgage. *Omerod v. Hardman*, 5 Ves. Jr. 722, 731.

If the trustees had the power to make a number of extensions, were the extensions which they attempted to make, valid?

It is permissible to show by the context that the words are used, not in their plain, ordinary and popular sense but in some other special sense. Chit. Cont. 11th Am. ed. 113.

If the power did expire before May 6, 1884, it must, therefore, have expired because of some rule of law. I have not found any such rule of law. *Per contra*, see, Perry, Tr. 3d ed. § 490 and cases cited; also, *Hale v. Hale*, *supra*.

It may be urged by the contesting defendants that the creditors who became parties to such a trust deed within the time limited therein obtained vested rights; and in support of such claim, the cases of *Phenix Bank v. Sullivan*, 9 Pick. 410; *Battles v. Fobes*, 21 Pick. 240, may be cited.

Since the case of *Dunch v. Kent*, 1 Vern. 260, the doctrine in England has been that the time limited by such a deed for the creditors to come in is not of the essence of the deed. *Whitmore v. Turquand*, 3 DeGex, F. & J. 107.

It is a general rule to lean strongly in favor of the whole body of creditors and against preferences, even where preferences are not prohibited. *Boardman v. Halliday*, 10 Paige, 224; *Oram v. Mitchell*, 1 Sandf. Ch. 251; *Webb v. Daggett*, 2 Barb. 10. See also, note on *DeCaters v. DeChamont*, 2 Paige, 490.

The object of limitations of time in such

deeds of trust is evidently, as stated by Wilde, J., in *Andrews v. Ludlow*, 5 Pick. 32, and by Lord Chancellor Campbell in *Whitmore v. Turquand*, 3 DeGex, F. & J. 107, to hurry the creditors and produce a prompt settlement of the debtor's affairs.

In the present case the power is not a naked one; but is found in a conveyance of property upon certain trusts. This court has often had occasion to extend such powers, by implication, beyond the literal meaning of the words, where the scope of the trust made the implication necessary. *Purdie v. Whitney*, 20 Pick. 27; *Goodrich v. Proctor*, 1 Gray, 567; *Nugent v. Cloon*, 117 Mass. 221; *Bradford v. Monks*, 132 Mass. 407; *Alger v. Fay*, 12 Pick. 322; *Chandler v. Rider*, 102 Mass. 268.

"If a creditor feels confident that he must receive twenty shillings in the pound, and for this reason consents to execute the deed, he has a right only to blame himself for being ignorant of the law which he ought to have known. *Whitmore v. Turquand*, 3 DeGex, F. & J. 112.

Although in this Commonwealth the English cases are not followed and limitations of time are held to be of the essence of the deed, see, *Dedham Bank v. Richards*, 2 Met. 113; *Battles v. Fobes*, 21 Pick. 240; yet, in these cases, there was no power of the trustees to allow further time.

Wherever the formalities required by a power are not strictly complied with, courts of equity will, in favor of creditors or a wife or young children, aid a defective execution, on the ground that it is every man's duty to pay his debts and provide for his wife and children. *Tollet v. Tollet*, 1 White & T. Lead. Cas. Eq. 365, reported 2 P. Wms. 489.

The intention to execute the power must, of course, be shown. Such intention has been held to be shown where the donee of the power entered into an agreement to execute it, *Mortlock v. Buller*, 10 Ves. Jr. 292, even although he keep the agreement in his own possession. *King v. Roney*, 5 Ir. Ch. Rep. 64, 77.

Or if a deed or will is by a power required to be executed in the presence of a certain number of witnesses, and it is executed in the presence of a smaller number; or if it is required to be signed and sealed, and sealing is omitted, equity will supply the defect. *Wade v. Paget*, 1 Brown, Ch. Rep. 363.

The same doctrine has been recognized in this country. *Barr v. Hatch*, 3 Ohio, 527; *Bradish v. Gibbs*, 3 Johns. Ch. 523.

It is true that the court will not aid the non-execution of a power, even where that non-execution is occasioned by a disability arising from gout. *Buckell v. Blenkhorn*, 5 Hare, 131.

It might well be held in those cases that the mere unexpressed intentions to execute, or such intentions expressed only by parol, were not defective executions but non-executions, as in *Carter v. Carter*, 1 Mos. 386-370; *Johnson v. Cushing*, 15 N. H. 298.

But that is because the deed or will or something, although defective yet in writing and in the nature of a deed or will, is not a mere formality but a part of the essence of the power itself, without which there could not be said to be any execution or attempt at execution whatever.

If a trust has been imposed with the power

and it is the duty of the donee to execute it, equity will not allow the person intended to be benefited to suffer from the negligence, mistake or ignorance of the trustee, or other circumstances. *Brown v. Higgs*, 8 Ves. 574; *Gibbs v. Marsh*, 2 Met. 248.

Mr. Geo. W. Morse, for William Quinn et al., interveners:

No creditor is a beneficiary unless he executed the assignment according to its terms.

Creditors must actually execute the instrument, according to its terms and within the time therein limited, as was held in *Battles v. Fobes*, 21 Pick. 239; *S. C.* 2 Met. 93; *Dedham Bank v. Richards*, 2 Met. 105; *Phenix Bank v. Sullivan*, 9 Pick. 410; *Easton Bank v. Smith*, 133 Mass. 26.

All the above cases are cases under tripartite assignments, exacting releases and limiting the time for executing them.

Brewer v. Pitkin, 11 Pick. 298, was a case of an assignment by deed poll, but it required the creditors to express their assent in writing.

The same rule applies where the release required to be executed within the limited time is not in the assignment itself. *Pearpoint v. Graham*, 4 Wash. C. C. 233; *Cheever v. Imlay*, 7 Serg. & R. 510.

Numerous cases have held that where creditors have not actually executed the assignment or the release prescribed therein, they are debarred from all benefit under the assignment. *Hewlett v. Cutler*, 137 Mass. 285; *Mather v. Pratt*, 4 Dall. 224 (4 U. S. bk. 1, L. ed. 223); *Soearingen v. Slicer*, 5 Mo. 241; *Baker v. Freeman*, 35 Me. 485; *Agnew v. Dorr*, 5 Whart. 131; *Stoddart v. Allen*, 1 Rawle, 258; *Wilson v. Kneppley*, 10 Serg. & R. 489; *Garrard v. Lauderdale*, 3 Sim. 1.

Even those who sign but do not seal indentures are held not to be parties. *Baker v. Freeman* and *Agnew v. Dorr*, *supra*.

The English cases which hold that creditors may, under certain circumstances, execute an assignment limiting the time, after the time has expired, viz.: *Broadbent v. Thornton*, 4 DeGex & S. 65; *Raworth v. Parker*, 2 Kay & J. 163; and those cases which have held that assent was equivalent, under circumstances, to an actual execution, viz.: *Nicholson v. Tutin*, 2 Kay & J. 18; *Re Baber's Trusts*, L. R. 10 Eq. Cas. 554; *Whitmore v. Turquand*, 1 Johns. & Ham. 444; *Biron v. Mount*, 24 Beav. 642, are all cases which do not apply in Massachusetts, and which rest upon principles which do not prevail in Massachusetts.

Certain English judges have held the Massachusetts doctrine that the creditors would not have had any right to enforce the deed, inasmuch as they did not, by signing and sealing that deed, make themselves parties to it. *Garrard v. Lauderdale*, 3 Sim. 13; *Raworth v. Parker*, 2 Kay & J. 172; *Collins v. Reece*, 1 Coll. 678.

A creditor signing after the time limited is not a party. An expressed intention to become a party did not make him a party. *Battles v. Fobes*, 2 Met. 93, 95.

In *Brewer v. Pitkin*, 11 Pick. 298, 300, the trust was specially limited to those who should express their assent in writing. Not having thus expressed their assent, they cannot claim as creditors.

By the terms of the assignment, no creditor's claim can be allowed, unless he became a party thereto within the time stipulated for that purpose. *Dedham Bank v. Richards*, 2 Met. 105.

In *Phenix Bank v. Sullivan*, 9 Pick. 410, 411, the court says: "We are of opinion that the plaintiffs have no right to become parties to the indenture, the six months having expired before they made application for that purpose."

Hewlett v. Cutler, 137 Mass. 285, held that the property was to be distributed among such creditors only as should become parties to the assignment by signing it.

In *Bank of Easton v. Smith*, 133 Mass. 26, 31, Justice Devens points out the distinction between the English and American decisions, showing that the liberality of the English courts does not prevail here.

The persons named are his (meaning assignor's) agents until the creditors sign the instrument. *Ingraham v. Geyer*, 18 Mass. 146.

Similar opinions have been expressed by Wells, J., in *May v. Wannemacher*, 111 Mass. 202, and by Parker, J., in *Hastings v. Baldwin*, 17 Mass. 552, 556.

An execution after the expiration of time, *dehors* the contract, can upon no principle be said to be a performance of the condition upon which alone they could claim the benefit under the assignment. *Pearpoint v. Graham*, 4 Wash. C. C. 241.

The time fixed for the release was an essential circumstance. *Cheever v. Imlay*, 7 Serg. & R. 513.

The terms under which the preference is to be received are prescribed by the assignor as the lawgiver, in his deed of assignment; and a compliance with them on the part of him who is to have the benefit of the preference is required. *Stoddart v. Allen*, 1 Rawle, 263; *Todd v. Bucknam*, 11 Me. 41.

No extension of time is valid, unless indorsed upon the assignment, according to its terms.

The declaration of trust is the law prescribed by the maker of the trust, to govern his trustee or assignee. *Butler v. Duncomb*, 1 P. Wms. 455; *Stoddart v. Allen*, 1 Rawle, 263.

In carrying out the purposes of the trust, if the settlor of the trust has expressly provided a special manner therefor, that method must be strictly followed or the exercise of the power will be void. Hill, Tr. 4th Am. ed. § 488; 4 Kent, Com. 13th ed. §§ 390, 391; Farwell, Pow. §§ 247, 250; Boone, Real. Prop. § 194.

These forms are incapable of admitting any substitution and of receiving any equivalent. *Hawkins v. Kemp*, 8 East, 410.

Every circumstance required by the instrument creating the power to accompany the execution of it must be strictly observed. Farwell, Pow. 106.

If a deed or writing be required, that direction must be complied with. Hill, Tr. 4th Am. ed. § 488.

If, therefore, a writing is required, a disposition by parol will be invalid. 1 Sugd. Pow. § 253.

A striking example of the strictness of the rule is given in *Montague v. Smith*, 13 Mass. 396, which was an action of covenant broken for rent upon a lease. This lease, a sealed lease

for 999 years, provided for an award of the amount of rent to be indorsed upon the lease. The amount of the lease was written upon detached papers, but was not indorsed upon the lease. The court held that the conditions had not been complied with and the plaintiff could not recover.

The requirement of an act of extension by the board and a written indorsement thereof was essential, to enable creditors to ascertain their rights by inspecting the assignment.

Even if it could be inferred that the trustees or other parties thought or assumed that there had been an extension from January 24, 1884, it could not affect the case, in view of the language of the instrument and the authorities. *Battles v. Fobes*, 2 Met. 98; *Pearpoint v. Graham*, 4 Wash. C. C. 241.

In *Brewer v. Pitkin*, 11 Pick. 298, and in *Pearpoint v. Graham*, *supra*, the assignees themselves were held not to be entitled to participate as beneficiaries, although they had actually accepted the trust and entered upon its execution, because they had not indorsed their acceptance in the prescribed manner.

In *Baker v. Freeman*, 35 Me. 485, a creditor affixed his name and seal by an attorney previously authorized. The authority, however, was not under seal, and it was held that the creditor was not a party.

In *Dedham Bank v. Richards*, 2 Met. 118, a schedule creditor professed to be ready and willing to execute it, but the court would not allow him to do so, and held that he was not a party and could receive no benefit under the assignment.

A limitation of the power of extension is essential to the validity of the assignment.

If the time limited for accepting an assignment exacting releases be too long or too short, it will invalidate the assignment. *Bump, Fraud. Conv.* 3d ed. 440; *Burr. Assign.* 4th ed. § 217; *Ang. Assign.* 123; 2 Kent, Com. 18th ed. 533; *Halsey v. Whitney*, 4 Mason, 206, 225; *Pearpoint v. Graham*, 4 Wash. C. C. 232, 235; *Fox v. Adams*, 5 Greenl. 245; *Ashurst v. Martin*, 9 Port. (Ala.) 566; *Henderson v. Bliss*, 8 Ind. 101; *Green v. Trieber*, 3 Md. 11; *Mayer v. Shields*, 59 Miss. 107.

The more usual periods of time limited in Massachusetts are thirty, sixty and ninety days, and two, five and six months.

In *Pingree v. Comstock*, 18 Pick. 46, it was twenty days, or ten days from the date of seeing the assignment and having an opportunity to execute it; in *Am. Bank v. Doolittle*, 14 Pick. 128, thirty days; in *Hastings v. Baldwin*, 17 Mass. 552, and *Battles v. Fobes*, 21 Pick. 239, sixty days; in *Bradford v. Tappan*, 11 Pick. 76, ninety days; in *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81, three months to creditors in the United States, six months to those without; in *Lupton v. Cutter*, 8 Pick. 298, five months; in *Dedham Bank v. Richards*, 2 Met. 105, not to exceed six months; in *Phenix Bank v. Sullivan*, 9 Pick. 410, and *Beach v. Viles*, 2 Pet. 675 (27 U. S. bk. 7, L. ed. 559), six months; *Easton Bank v. Smith*, 133 Mass. 26, two months.

It is laid down as unquestionable law, in *Burrill*, *Bump* and *Kent*, without a hint of any local exceptions, and it has been repeatedly adjudged by courts and enforced by many strong dicta of judges, that assignments exacting re-

leases and not prescribing limitation of time for accepting them are fraudulent. *Burr. Assign.* § 217; 2 Kent, Com. 533; *Bump, Fraud. Conv.* 3d ed. 440; *Benjamin*, in 31 Am. L. Reg. 269; *Henderson v. Bliss*, 8 Ind. 101; *Lawrence v. Norton*, 4 Wood, C. C. 406; *The Watchman*, 1 Ware, 232, 244; *Mayer v. Shields*, 59 Miss. 107; *Green v. Trieber*, 3 Md. 11, 36; *Wakeman v. Grover*, 4 Paige, 23, 41; *Pearpoint v. Graham*, 4 Wash. C. C. 232, 235; *Brooks v. Marbury*, 11 Wheat. 78 (24 U. S. bk. 6, L. ed. 75); *Hatch v. Smith*, 5 Mass. 42; and *Nat. Mech. and Traders Bank v. Eagle Sugar Refinery*, 109 Mass. 38, are not exceptions.

Those authorities which sustain the right of the debtor to require a release hold that the assignment must fix the time within which it must be executed. *Henderson v. Bliss*, *supra*.

Wakeman v. Grover, 4 Paige, 41, condemned the assignment in those jurisdictions where releases were allowed, saying: "In the first place, no time is limited within which the creditors of the second class are to come in, to entitle themselves to a share of the surplus."

In condemning an assignment for creditors in *Lentilhon v. Moffat*, 1 Edw. Ch. 468, the court said: "If the creditors should all refuse, the effect of the assignment would be to lock up the property or its proceeds, if not forever at least for an indefinite period."

If no time is fixed within which the release must be executed, the deed is void. *Bump, Fraud. Conv.* 3d ed. 440.

It is also essential that such an assignment should fix the time within which creditors must make their election. If it fixes no time within which the release must be executed, it is void. See, *Lawrence v. Norton*, 4 Woods, C. C. 406.

It is well settled that assignments containing fraudulent provisions, if these provisions are severable from the other provisions without injury to the assignment, may be sustained in part and condemned in part. It was so held in *Market Nat. Bank v. Hofheimer*, 23 Fed. Rep. 18; *Billups v. Sears*, 5 Gratt. 81; *Harris v. DeGraffenreid*, 11 Ired. Law, 89; *Anderson v. Hosks*, 9 Ala. 707.

In *Foster v. Saco Mfg. Co.* 12 Pick. 451, the assignment contained a fraudulent provision, yet the court sustained it.

In each case bonds or other deeds are void as to such conditions, covenants or grants which are illegal, and are good as to all others. *U. S. v. Bradley*, 10 Pet. 848 (35 U. S. bk. 9, L. ed. 841.)

The common law makes void only where the fault is, and preserves the rest. *Norton v. Simmes*, Hob. 48.

The rule that a single fraudulent provision makes void the whole instrument does not apply to different and independent covenants and conditions in the same instrument, which may be good in part and bad in part. *Kerrison v. Cole*, 8 East, 236.

In *Woodward v. Marshall*, 22 Pick. 468, *Morton, J.*, said that the discretionary powers granted in that assignment were such as the law would imply, and that in the proper action, if such discretionary powers were abused, the court would restrain the abuse. *Halsey v. Whitney*, 4 Mason, 206, expressed similar views.

The court cannot substitute its own discretion for that with which the assignor has, in

express terms, invested the assignee. The discretion of the latter in such a case would be absolute and beyond the control of the court, if honestly exercised. *Jessup v. Hulse*, 21 N. Y. 168, 171.

The governing words in the provision for extension, being singular, limit the power of the assignees to a single exercise.

It is a familiar rule that the generality of words employed in agreements should be restrained, if that should become necessary. *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81. General words in an assignment were held to have a limited meaning, to save the instrument.

The power to extend the time could not include the power to reopen it after it had once expired.

It is well settled that a court having once made a final determination in a cause cannot reconsider its judgment after the term has passed. *Wells, Jur.* § 184; *Milam Co. v. Robertson*, 47 Tex. 222; *De Castro v. Richardson*, 25 Cal. 52; *Daniels v. Daniels*, 12 Nev. 121; *Davies County Court v. Howard*, 18 Bush (Ky.) 102.

Where an insolvency court has allowed a claim to be proved, it has exhausted its discretion and cannot at a subsequent term expunge it, unless it has special statutory power. *Hall v. Marsh*, 11 Allen, 568.

If the court has made a decree granting or refusing a debtor's discharge, it has exhausted its discretion and cannot subsequently annul the decree. *Marsh v. McKensie*, 99 Mass. 64; *Rice, App.* 7 Allen, 112.

This principle, that discretionary powers when once exercised are exhausted, is illustrated also by the decisions which hold that corporations, granted by charter the right of eminent domain, cannot take additional lands after they have completed their roads. *Green, Brice, Ultra Vires*, 893, note a; *Peavey v. Calais R. R. Co.* 80 Me. 496; *Morris & Essex R. R. Co. v. Cent. R. R. Co.* 81 N. J. L. 205, 209; *Moorhead v. Little Miami R. R. Co.* 17 Ohio, 340; *Blake-more v. Glamorganshire Canal Nav.* 1 Mylne & K. 154.

As a rule, this power when once exercised is exhausted. *Green, Brice, Ultra Vires, supra.*

The company may do, at its option, one or more things. It does the act or acts and thus signifies its election, and this is final. *Morris & Essex R. R. Co. v. Cent. R. R. Co. supra.*

In *Marbury v. Madison*, 1 Cranch, 187, 157 (5 U. S. bk. 3, L. ed. 61), this rule applied to the President of the United States, and Chief Justice Marshall said: "When he has made an appointment he has exercised his whole power and his discretion has been completely applied to the case."

All cases recognize the fact that no reconsideration can be had, after the meeting at which the election was held is past. *State v. Foster*, 7 N. J. L. (2 Hals.) 101; *Baker v. Cushman*, 127 Mass. 106; *Putnam v. Langley*, 133 Mass. 204; *Wood v. Cutter*, 138 Mass. 149.

The exercise of discretionary powers differs from that of those which are purely ministerial. *Wells, Jur.* § 5.

Devens, J., delivered the opinion of the court:

The case presented involves the discussion of two questions:

MASS.

1. Whether the trustees, under the deed of assignment made to them for the benefit of C. W. Copeland & Co., had power to allow further time for creditors to become parties thereto, by more than one writing indorsed on the deed.

2. If they had such power, was it well exercised, after the first extension had been made to January 24, 1884, by the further extension of time until August 25, 1884, indorsed in writing on the deed on May 5, 1884?

Since this time the subsequent extensions have been made, each before the expiration of the time previously limited, so that there can be no question as to their formal regularity if the second extension was proper.

It is the contention of the creditors who executed the deed on or before January 24, 1884, and who have been allowed here to intervene, that the power of extension expired on that date and that the attempted extensions subsequently made are invalid, both for want of authority to extend and by reason of non-compliance with the terms of the deed of assignment, in the mode adopted.

It cannot be controverted that where the terms of an assignment of the nature of that here in question explicitly confined its operation to those creditors only who shall become parties thereto within a limited time, the disposition of the courts in this Commonwealth has been more strict than that of the English courts, in treating the time thus fixed as of the essence of the contract and in refusing to creditors the privilege of acceding to or executing the deed after such time has elapsed.

While this is conceded in *Easton Bank v. Smith*, 138 Mass. 26, which is the latest case in which the subject is adverted to, the decision of the case is, however, put wholly on the ground that it was then impossible for the creditor, who had filed his bill four years after the deed of trust was made, praying to become a party thereto, was entirely unable then to give the consideration which the deed called for. *Phenix Bank v. Sullivan*, 9 Pick. 410; *Battles v. Fobes*, 21 Pick. 239; *Dedham Bank v. Richards*, 2 Met. 105; *Dunch v. Kent*, 1 Vern. 260; *Spottiswoode v. Stockdale*, 1 Cooper, Ch. 102; *Col-lins v. Reece*, 1 Coll. 678; *Watson v. Knight*, 19 Beav. 369; *Raworth v. Parker*, 2 K. & J. 168; *Whitmore v. Turquand*, 1 Johns. & H. 444.

In the United States, also, where there is more conflict of opinion, it would appear that the weight of authority is in accordance with the views expressed in the English cases. *Bank v. Partee*, 99 U. S. 325 [bk. 25, L. ed. 390]; *De Cuters v. De Chaumont*, 2 Paige, 490; *Owens v. Ramadell*, 33 Ohio St. 439; *Pfeifer v. Dargan*, 14 S. C. 44; *Pearpoint v. Graham*, 4 Wash. C. C. 232; *Coe v. Hutton*, 1 Serg. & Rawle, 398.

We have no occasion in the case at bar to review our cases on this subject or compare them with those which have been elsewhere decided. The assignment in question contained a provision for an extension of time, the construction of which must control its operation.

It is contended that the right to allow further time by a writing imports only a single act and no more, and that the time having been extended to January 24, 1884, this right, on the part of the trustees was entirely exhausted; and further, that if even an extension by such single act might have been made, of sufficient length

to include the last extension as actually made, if such extension was reasonable, it could not be done by a succession of acts.

If such be the strict grammatical construction of the phrase "in writing," it might properly be said that such construction is not to be followed when it would lead to a result at variance with other and apparently controlling provisions or objects of the deed. But the particle "a" is not necessarily a singular term; it is often used in the sense of "any" and is then applied to more than one individual object.

There is no reason why a construction so limited should be adopted as that which would deprive the trustees of the power to make extensions which the exigencies of the business intrusted to them should require and would compel them to determine arbitrarily and in advance when the time should finally expire.

The limitation of time is usually inserted to prevent, on the part of creditors, unreasonable delay and to facilitate the closing up of the estate.

It is important to observe, therefore, that the assignment did not contemplate an immediate distribution of the property.

The trustees were permitted to carry on the business of manufacturing and selling boots and shoes, as long as they deemed prudent, and for this purpose to use the trust funds and trust property.

They were further authorized to compromise any debts against the assignors in money, goods or other property held in trust by them under the deed, and no limitation was placed upon the time within which this might be done.

Unless imperatively demanded, no such construction should be given to the provision, in regard to the extension of time, as should prevent the trustees from doing this by permitting the creditors to prove their claims, so long as the fund is not distributed.

It can hardly be necessary to effect such a compromise that the trustees should be compelled, themselves, to withdraw from the fund a sum equal to the dividend and pay it to such creditor upon obtaining a release from that, and instead of permitting time to prove their claim, when they are willing to be satisfied with the dividend. The largest powers are confided to the trustees in protracting the business and managing the funds, property and goods confided to them.

It was the object of the assignors that all creditors should become parties who were willing to release their debts and accept their proportion of the property assigned in settlement thereof.

It is certainly not consistent with this object that a single extension of time alone could be granted by the trustees, when it was reasonably to be anticipated that contingencies would arise which would postpone any final adjustment of the claims against or disposition of the property of the estate.

It now appears that many complications arose as to the estate and the property assigned; that creditors might well be confused in determining whether the plan proposed could be carried through, or whether the estate would be settled finally by some different compromise or through the court of insolvency; that the various extensions of time have not exceeded what

was reasonable, under all the circumstances.

The intervening creditors contend that if the provision on this subject is construed as authorizing repeated extensions, it is fraudulent and void, and that, being an independent clause, it may and should be rejected, while in all other respects the assignment may be sustained.

But the right given to the trustees to extend the time within which creditors may become parties, even if it may be exercised more than once, is not indefinite nor unlimited but is a right thus to extend for a reasonable time, having regard to all the circumstances of the case.

It is not a purely arbitrary power, but one with which the trustees are invested that they may accomplish the objects of the trust.

If they persistently continued to extend the time after all creditors had ample opportunity, with full knowledge of the condition of affairs, to become parties, and practically refused to close the trust when its objects were accomplished and to distribute the assets, we do not think the creditors who had assented would be without remedy, on proper application to this court.

Even if, in the first instance, the expediency or propriety of measures to be adopted in the management of a trust are to be determined by the trustees, yet an abuse of their powers may be inquired into and remedied by a court of equity. *Woodward v. Marshall*, 22 Pick. 468.

To exercise, arbitrarily and without regard to the rights of the creditors, a power to extend the time of proof of claims, conferred upon the trustees in order to carry out the objects of the trust and only as incident to this, would be to abuse it.

It is further urged that if it be conceded that the time might be extended repeatedly, this could not imply a power to reopen the extension after it had once expired without any additional extension having been made; that the extensions must be made continuously, and that the power is exhausted if a break therein occurs.

It is found that both creditors and trustees after January 24, 1884, when the first extension expired, treated the right to become parties to the assignment as still existing and the time to do so as extended, although no indorsement in writing to that effect was made on the assignment deed until May 5, 1884.

It would be unfortunate if we were compelled to hold, under such circumstances, that the failure to indorse this extension would operate to deprive those creditors who subsequently signed the deed, of their right to do so. Nor can it be said, upon these facts, that the creditors who became parties before January 24 present any strong equitable claims to appropriate the entire trust fund assigned to the amount, at least, of their respective debts.

But the duty and authority of the trustees to indorse the extension in writing is intended, not so much to prescribe the mode in which the extension shall be made, as to prescribe the method by which it shall be shown that the trustees have assented that the creditors shall be allowed to prove, notwithstanding the time originally provided for has passed.

We have heretofore called attention to the fact that the trustees may, at any time while their trust is unfulfilled, compromise with cred-

itors, as tending to show that they may extend the time for proof to any reasonable period.

It equally indicates that if the time limited by an extension has actually expired and has proved insufficient for the proof of claims, in the judgment of trustees, reasonably exercised in view of all contingencies of the case, they may still further do so, in order to accomplish the object of the trust.

While the cases in this Commonwealth give force to the limitation of the time prescribed in a deed and treat it as essential, where a definite time is fixed within which a creditor must come in, that he should assent within that time, this affords no reason for any strict construction of a provision giving to trustees the power to extend, but rather the reverse. *Phenix Bank v. Sullivan*, 9 Pick. 410; *Battles v. Fobes*, 21 Pick. 240; *Dedham Bank v. Richards*, 2 Met. 118.

In the cases referred to, it is decided that the creditors, by their assent within the time limited, have vested rights to share the assigned property without further participation, as their agreement *inter sese* and with other parties to the instrument is that the property shall be divided between those who come in within the time limited. But where the agreement authorizes an extension, it is also true that they have agreed to share with all those who may come in within the time as it may be extended by the trustees, in the proper exercise of their authority.

It is found that the failure to indorse the second extension before May 5 was inadvertent; that it has always been the desire and intention of the trustees and debtors, whenever they have had the subject in mind, to keep the trust indenture open to admit all the creditors who might wish to come in and participate; and that, from the date of the trust deed up to the time of hearing by this master, in dealing with creditors relative to becoming parties thereto, the trustees and debtors have always acted on the assumption that it was open for this purpose, and believed that it was so open.

Where power to extend the time of proof was given to carry out the objects of the trust and to achieve the intention of the assignor, we should be reluctant to hold that an accident, such as, in the case at bar, was the failure of the trustees to indorse in writing the extension, should destroy their power and thus actually injure or wholly disappoint those entitled to the benefits intended.

But we are not disposed to place the matter upon so narrow a ground. So long as the trust remained unfulfilled, even if the original instrument had expired, the proper construction of the provision relating thereto, in view of the objects of the deed and the other powers conferred thereby, entitled the trustees to make a further extension, provided the same was reasonable, under all the circumstances. The petitioning creditors were, therefore, entitled and were properly permitted to become parties to the trust, although after the first extension of time, and are entitled to participate in the distribution of the trust fund. The questions, whether the trust shall be declared closed and whether the trustees shall be ordered now to distribute the fund, are not presented upon the allegations of the bill as they now stand or upon the evidence as it has been taken, and

there is no reason why the bill should be retained for further instructions.

Decree accordingly.

Gustavus B. WILLIAMS, Trustee, *Pff.*,
v.

Charles P. CLARK, Receiver of N. Y. & N.
E. R. CO.

Where a conveyance of land to a railroad company provided that grantee was to furnish grantor, his heirs and assigns, with two convenient crossings over its railroad, the location to be thereafter designated by grantor, one of which, the one now in question, to be a crossing at grade; and a crossing was built by the railroad at a point selected by the grantor adapted to the grade of the road as then fixed, any obstruction, by gates or bars subsequently placed at such crossing, or any changes of grade of its road entitles the grantor, or his assigns, to nominal damages; but plaintiff is not entitled to demand from defendants the expense of changing the grade of the approaches to the crossing.

(Worcester—Decided October 26, 1885.)

ON agreed facts. *Judgment for nominal damages.*

This is an action of contract also, containing a count in tort for the interruption of a right of way over the railroad of the defendant.

The parties agree to the following facts: the plaintiff is the grantee of a portion of the land on both sides of the railroad track owned by Dan Hill, at the date of the deed hereinafter mentioned.

The defendant is the receiver of the New York & New England R. R. Co. which owns all the property of the Southbridge & Blackstone R. R. Co. and took title to the same with constructive notice of the deed from Dan Hill hereinafter mentioned. May 14, 1853, said Dan Hill conveyed by deed to said Southbridge & Blackstone R. R. Co., certain land described therein being the land covered by the location of its road to be used for the construction and maintenance of a railroad.

In said deed was the following proviso, to wit: the said railroad company are to furnish the said Hill with two convenient crossings over said railroad and over the last piece of land herein above described and conveyed, the one to be a grade crossing at or near station 123, and the other to be a crossing with a bridge 20 feet in width at or near station 18, the precise spots to be hereafter designated by said Hill; these crossings are to be constructed entirely within the limits of the land herein conveyed and are forever hereafter to be maintained by said railroad company for the benefit of said Hill, his heirs and assigns and for the public in case the said Hill, his heirs and assigns shall at any time determine to dedicate these crossings or either of them to public use.

The said railroad company are to fence both these pieces of land the same as railroad companies are by law required to fence land taken

by them for the purpose of constructing a railroad.

The crossing in question is the first named above; and the said Dan Hill indicated the place where said grade crossing should be located soon after the date of said deed, and said company built a crossing at said place adapted to the grade of the railroad as then fixed, on its own land.

From 1855 to 1863 this crossing was not used. In 1859 Mr. Dean the occupant of the land on the north side of the railroad put up bars across this way, which bars were maintained by him until 1865, the grade of the land adjoining the railroad being such that cattle could cross only at the crossing. In 1863-4, he made a foot passage way beside the bars. In 1863 houses were built on the south side of the track on land purchased of Hill; after that time this crossing was used by the occupants of these houses on foot and occasionally by teams. It was very little used although there was no other access to these houses and the plaintiff's land on the south side of the railroad. In 1867 the railroad from Boston to Millville and beyond was fenced for the first time, and bars were then placed by the railroad authorities at this crossing on both sides of the track and were maintained by them until 1878, although they were repeatedly left down by persons using the crossing. In 1878, the bars were taken down by the towns people and were not replaced by the company. In 1880, the company put up a gate on the south side of the railroad which was removed by the plaintiff.

The plaintiff owns the fee in private ways leading to the railroad crossing and town ways; a right of using said private ways is in the owners of the several parcels of the adjoining land.

The most convenient access from the Village of Millville to most of the above land is over the railroad crossing provided for in the deed of Dan Hill. Said crossing is near a railroad station and near a large manufacturing village and the plaintiff's land is divided into and suitable for building lots; and on one of these lots stands a dwelling house.

The grade of the approaches to said crossing during said time was suitable and convenient for all passing. July 2, 1884, the defendant altered the grade on his land at said crossing by filling on the northerly side of his tracks, within his location and laid a spur track over said land so filled or raised. The railroad at this point was built upon and along a steep side hill and the said crossing by raising the grade was rendered inconvenient and impracticable for loaded teams and more difficult for all crossing. The defendant, after said filling, made the surface of his own land suitable for crossing but no actual crossing which was convenient could be made, without raising the grade of the embankment on the plaintiff's land outside of the railroad location forming the approaches to the crossing to correspond with the raised grade of the railroad. The plaintiff requested the defendant to so raise the grade of his (plaintiff's) embankment, but defendant declined so to do, and thereupon the plaintiff raised the grade of the embankment on his own land and made the crossing substantially as good as before and it is agreed that this was necessary and proper to restore said crossing. The expense of this work and material was \$109.25.

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The embankment constituting the approaches was made by stone and gravel taken out of a neighboring cut of the railroad and deposited on the plaintiff's land outside of the location by the railroad *employees* at the time the railroad was constructed. Beyond this it is not known who bore the expense of the approaches to the crossing situated on the plaintiff's land outside of the side lines of the railroad location.

Upon the agreed facts, the court adjudged that the plaintiff recover nominal damages, and also the amount expended by him in the matter of the necessary approaches, being in all the sum of \$110.25; from which decree defendant appealed.

Messrs. Kent & Dewey and G. B. Williams, for plaintiff:

The defendant at common law had no right to obstruct the crossing or way by gates. *Welch v. Wilcox*, 101 Mass. 162; *Tudor Ice Co. v. Cunningham*, 8 Allen, 139.

The Statute of 1846, ch. 271, which was the earliest statute on this subject, provided that railroad corporations should fence their roads whenever it was "reasonably required," and this was the law in force when the deed was passed. Neither the plaintiff nor the public authorities are found to have required this crossing to be fenced up, and this statute was intended to impose a duty, rather than to confer a privilege on the railroad company. *B. & W. R. R. Co. v. O. C. R. R. Co.* 12 Cush. 605-609; *Eames v. Worcester & N. R. R. Co.* 105 Mass. 198.

The protection of highways, etc., crossing railroads at grade, was provided for as early as 1835, and in the R. S. ch. 39, §§ 79, 80, 81.

The Statute of 1849, chap. 222, makes these sections applicable to all crossings by railroads of any highway, turnpike, town or traveled place, and further provides as to traveled places, that the corporation shall provide a gate or bars as the county commissioners shall order.

Under this statute the court held in *Whittaker v. B. & M. R. R.* 7 Gray, 96, that an open and traveled street in Lawrence, although not so laid out and established that the city would be responsible for damages occasioned by defects therein, yet would be a traveled place within the meaning of this statute.

General Statutes chap. 68, § 85, provide that if the selectmen of a town, wherein a traveled place is crossed by a railroad, decide that it is necessary to have a sign board at such place, they may take means to provide for it. Section 86 provides for further security at such crossings in accordance with R. S. and Statute of 1849.

Since the General Statutes, there has been no substantial change, so far as relates to this question, the Statutes of 1874, 872, 125, and R. S., 112, §§ 165, 166, containing in substance the same provisions.

Mr. Wm. C. Loring, for defendant.

Devens, J., delivered the opinion of the court:

In 1853, Dan Hill, from whom the plaintiff derives title, conveyed land to the Railroad Company by a deed which provided that the grantee was to furnish Hill, his heirs and assigns, with two convenient crossings, the precise spots to be thereafter designated by Hill, over its railroad, one of which, that now in question, was to be

a crossing at grade. Soon after the date of the deed, Hill indicated the spot where this should be located, and a crossing was there built on its own land by the Railroad Company, adapted to the grade of the road as then fixed. It was not obstructed by gates or bars, either then or for many years thereafter; and it is on account of such obstruction, erected in 1884, that the plaintiff seeks in this action sufficient damages to establish his right to an unobstructed passage.

While, in terms, it was not provided that this crossing should be unobstructed by gates or bars, yet the facts that it was to be "convenient," and that the Railroad Company itself constructed and for many years permitted the existence of such a one, sufficiently show that what it intended to grant was a free right of passage. No usage or circumstances such as are shown where one grants a way or right of way over a field devoted to agricultural or other purposes, indicating that the right granted is to be subordinate to the rights of the grantor, or the use made by him of the premises, here exist. *Welch v. Wilcox*, 101 Mass. 162; *Tudor Ice Co. v. Cunningham*, 8 Allen, 189. That a crossing obstructed by gates or bars is far less convenient to those entitled to use it is fully conceded by defendant's argument.

Unless the Railroad Company is released from its obligation by reason of the peculiar character of the business it conducts, or by the general laws, especially those imposing on it certain duties as to maintaining fences, the plaintiff has just ground of complaint for the obstruction.

The defendant objects that, if a gate cannot be put at a private crossing, the Railroad Company cannot protect itself against such private crossing becoming *de facto* a public one; that since 1857 a public grade crossing can only be made upon the adjudication of the county commissioners that the public necessity so requires, and since 1876 only, in addition to such adjudication, by the consent of the railroad commissioners; and that the efficacy of these statutes is destroyed if every owner of a private way may force the railroad to make it *de facto* public. That every free and open private way tends to become a public one, or to subject those who maintain it to responsibility for its condition by reason of the apparent invitation to travel thereon which it holds out, may be true; but a party entitled thereto is not, on that account, to lose the benefit of the contract which his predecessor in title has made.

The statutes, by the ample powers given to the public authorities in regard to a "traveled place" in towns or cities, have provided carefully for protection to those who travel either on the railroad or on public or private ways connected therewith. P. S. ch. 112, §§ 163-166. An extremely broad term has been used, that every description of way might be included.

Such authority might make, without doubt, entirely different provision for the use of a private way crossing a railroad from that agreed on by the railroad corporation and an individual, if they deemed the public safety required it. Whether, if such use were much less convenient to an individual than that for which he had contracted, he would have a remedy therefor in damages need not be now considered. Even if the crossing here in question is to be deemed a "traveled place," or tends to become one by

the use made of it by the plaintiff, so that the railroad corporation may be ultimately compelled, or that there is reasonable ground to believe that it may be compelled by the public authorities to erect signboards, ring the bells of its locomotives, erect and maintain gates or bars, station agents, or flagmen, etc., this cannot entitle the railroad corporation itself to obstruct a free and open private crossing, if it has granted such a crossing.

The Statute of 1846, ch. 271, was in force when the contract with Hill was made; by it, all railroad corporations were obliged to fence their ways at such places as may "reasonably be required." The statute at present in existence imposes the duty of fencing their railroads, omitting the words "reasonably required." While both require a highway or other public way to remain open, under each statute these fences are to be constructed "with convenient bars, gates or openings" therein, so far as private ways are concerned, barriers to prevent the entrance of cattle thereon being provided where it is necessary or practicable to do so. P. S. chap. 112, § 115.

Because a railroad corporation may employ either of these three means to render a private crossing available, it cannot be inferred that when it has lawfully agreed to employ one of them, it may of its own volition employ another. If it deemed that public safety required a different use of the crossing, or that it should cease to exist as an unobstructed and open crossing, the Corporation could itself have invoked the action of the public authorities. For these reasons, we are of opinion that the plaintiff is entitled to nominal damages for the obstruction complained of by him.

The question remains, by whom the expense of raising the approaches to the crossing, rendered necessary by the change in the railroad grade, shall be borne. The defendant was bound to make a crossing "entirely within the limits of the land herein conveyed" to it, which was "forever after to be maintained" by it. The duty imposed on the defendant was carefully limited by words which do not include the approaches to the crossing. If the contingency that there might be thereafter a change in the grade of the railroad, lawfully made, occurred to the contracting parties, it is reasonable to believe that the plaintiff himself should prepare his approach thereto, having regard to that which he deemed most suitable in the use then made by him of his premises. No authority was given to the Railroad Corporation to enter by its servants on any land of the plaintiff there to raise the grade thereof, or to perform any act therein. While the crossing was to be made "convenient," it was to be so within the limits stated. The fact that, by its workmen, the Corporation actually constructed the approaches originally made, without evidence upon the question who bore the expenses, cannot be important. The plaintiff is not, in our view, entitled to demand from the defendant the expenses of changing the grade of the approaches.

Judgment for \$1 damages.

Frank CASSIDY

OLD COLONY R. R. CO.

The right of a railroad company to the use of the land condemned for its right of way is a continuing right to all uses necessary and incidental to the safe and beneficial occupation of its roads, by raising or lowering grade, cutting down hills, and removing trees; and where it is owner of the fee by deed of conveyance from the original owners, it has all the rights that any other owner of the fee would have, so long as it does not infringe any common land rights of adjacent owners, without being liable to further damages for cutting off natural drainage, discharging surface water from its road bed, and shutting off the view, light and air from adjoining premises.

(Suffolk—Decided February 25, 1886.)

ON petitioner's exceptions. *Overruled.*

Petition in Superior Court for a jury to assess damages incurred in the use and occupation of land and dwelling house by reason of respondent's elevating its road bed adjoining petitioner's land.

In 1845 the defendant Company located its railroad over a strip of land owned by one Wolkins, who afterwards conveyed the strip covered by the location to the Company. In 1882 the Company raised the grade of its railroad on this strip, and interfered with the natural flow of the surface water from the adjoining land upon it, and also caused surface water from the location to flow upon the adjoining land, and shut off the view, light and air therefrom. It is conceded that this change of grade "did not interfere with any drainage or flow of water other than surface water."

The owner of the adjoining land, holding under a conveyance from Wolkins, brought a petition against the Company for damages caused to that land by change of grade of the railroad upon the strip located upon by the Company, and conveyed to it by Wolkins. The Superior Court ruled that the petition could not be maintained, and the question is whether that ruling was wrong.

Messrs. N. C. & J. K. Berry, for petitioner:

As the respondent built its road bed at a grade of two feet above the marsh, we can assume that was the grade represented to Wolkins and others, and in consideration of such grade they released to the respondent for the small damages of ten cents per foot, being about the market price of the land at that time, with no expectation that any substantial change of grade would thereafter be made without additional damages. *Ham v. Salem*, 100 Mass. 351; *Hazen v. Boston & M. R. R. Co.* 2 Gray, 574; *Strang v. Beloit & M. R. R. Co.* 16 Wis. 635; *Cleveland & F. R. R. Co. v. Prentice*, 13 Ohio St. 373, 381.

A culvert and water course were provided for across said strip at the time of the original construction of the road; which easement the petitioner and his grantors from Wolkins and

others enjoyed over thirty years; and petitioner claims that he had acquired a prescriptive right to drainage of surface water through respondent's ditch and sluiceway. *White v. Chapin*, 12 Allen, 516, 518, 520; *Barnes v. Haynes*, 18 Gray, 188, 192, 193; *Louisville & N. R. R. Co. v. Hays*, 14 Am. & Eng. R. R. Cas. 284; *Grand Rapids & Ind. R. R. Co. v. Horn*, 41 Ind. 479, 484, 485; *Robbins v. Milwaukee & H. R. R. Co.* 6 Wis. 636; *Ross v. Clinton*, 46 Iowa, 606; *Raleigh & A. A. L. R. R. Co. v. Wicker*, 74 N. C. 220.

Whether the damages were settled by the jury or by the release, the title the respondent took in either case was the same. It could acquire only an easement. *Brainard v. Clapp*, 10 Cush. 9; 1 Redf. R. R. 4th ed. § 69, notes 1-8, 7, 8, 11; *Great West. R. Co. v. Fletcher*, 5 Hurl. & N. Ex. 688, 697; *Fletcher v. Great West. R. Co.* 4 Hurl. & N. Ex. 242; *Hazen v. Boston & Me. R. R. Co.* 2 Gray, 580.

Nor could respondent even erect a high fence along its line without special exigency and payment of damages. *Boston & W. R. R. Corp. v. Old Col. R. R. Corp.* 12 Cush. 605.

The respondent, by right of eminent domain, could elevate its road bed whenever an exigency required, for the proper maintenance of its road, and such exigency occurred when it became necessary to cross D Street; and for that purpose proceeded under the statute, by filing a plan and profile of such elevation in the clerk's office of the City of Boston; and was liable to pay damages for such change unforeseen at the original location in 1845. *Brainard v. Clapp*, 10 Cush. 10, 11; *Parker v. Boston & Me. R. R. Co.* 8 Cush. 118; *Props. of Locks & Canals v. Nashua & L. R. R. Corp.* 10 Cush. 391; P. S. ch. 112, § 95; Stat. 1862, ch. 19, § 2; R. S. 1836, ch. 39, § 56; *Boston & Roxbury Mill Corp. v. Gardner*, 2 Pick. 33; *Bradley v. N. Y. & N. H. R. R. Co.* 21 Conn. 294, 304; *Eaton v. B. C. & M. R. R. Co.* 51 N. H. 504; *Little Miami R. R. Co. v. Hambleton*, 14 Am. & Eng. R. R. Cas. 126; *Buckner v. Chicago M. & N. W. R. Co.* 14 Id. 447, 488; *Boston & W. R. R. Corp. v. Old Col. R. R. Corp.* 12 Cush. 605; *Lancashire & Y. R. Co. v. Evans*, 15 Beav. 322, 328.

Damages paid for taking forty feet strip in 1845 did not include unforeseen damages to adjoining land by a change of grade of the railroad's location nor bar a claim for such unforeseen damages under statute. *Canandaigua & Niagara Falls R. R. Co. v. Payne*, 16 Barb. 273; *Bertsch v. Lehigh Coal & Nav. Co.* 4 Rawle, 180.

The law provides for a railroad changing the grade of intersecting highways, and settling damages therefor, as maintaining of the road under R. S. ch. 89, § 56; P. S. 112, § 95; P. S. ch. 112, § 121; *Parker v. Boston & Me. R. R. Co.* 8 Cush. 111; *Gardiner v. Boston & W. R. R. Corp.* 9 Cush. 1; *Walker v. Old Col. & Newport R. Co.* 108 Mass. 10, 14; *Conn. R. R. Co. v. Franklin Co. Comrs.* 127 Mass. 50; *Worcester v. R. R. Comrs.* 118 Mass. 174; *Wheder v. Worcester*, 10 Allen, 604; *Pierces v. Drew*, 136 Mass. 83, 85, 89; *Storcy v. N. Y. El. R. R. Co.* 90 N. Y. 122; *Burrill v. New Haven*, 42 Conn. 174.

Since the Statute 1825, chap. 171, § 5, the case of *Callender v. Marsh*, 1 Pick. 418, cited by the

respondent, in the Superior Court, has been obsolete; so that when highways have been materially excavated or lowered, damages have been awarded. P. S. ch. 49, §§ 14, 16; *Drury v. Boston*, 101 Mass. 439, 442; *Whitney v. Lynn*, 122 Mass. 338, 343; *Hartshorn v. Worcester County*, 118 Mass. 111, 114; *Plympton v. Woburn*, 11 Gray, 415; *Cavanagh v. Boston*, 139 Mass. 426; *Pierce v. Drew*, 136 Mass. 89; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 (36 U. S. bk. 9, L. ed. 778).

Whenever a railroad company materially changes its grade from its original grade made according to plan filed, the abutters have a right to recover for damages sustained. *Lancashire & Y. R. Co. v. Evans*, 15 Beav. 322, 328; *Little Miami R. R. Co. v. Hambleton*, 14 Am. & Eng. R. R. Cas. 126; *Beckett v. Midland R. Co. L. R. 3 C. P. 82*; *Buckner v. Chicago, M. & N. W. R. Co.* 14 Am. & Eng. R. R. Cas. 447, 453; *Ross v. Clinton*, 46 Iowa, 606; *Damour v. Lyons City*, 44 Iowa, 276; *Bertsch v. Lehigh Coal & Nav. Co.* 4 Rawle, 180; *Brine v. Great West. R. Co.* 2 Best & S. 402.

Case finds that structure of respondent, built in the latter part of 1882, turned surface water back upon petitioner's land, and that said land was also subjected to surface water from said railroad's bed, which had never occurred before. For this, petitioner has damages. *Walker v. O. C. & N. R. Co.* 103 Mass. 10, 15, 16, and cases there cited; *Presbrey v. O. C. & Newport R. Co.* 103 Mass. 5; *Boyd v. Conklin*, 30 Alb. L. J. 511; Mich. S. C. Sept. 23, 1884; *Drake v. Chicago R. I. & P. R. R. Co.* 17 Am. & Eng. R. R. Cas. 45; *Little Rock & Ft. Sm. R. Co. v. Chapman*, 17 Id. 51, 58; *Un. Pac. R. R. Co. v. Dyehe*, 14 Id. 272; *Curtis v. Eastern R. R. Co.* 14 Allen, 57, 58; P. S. 112, § 118.

Respondent having, without right except under its power to raise its grade and maintain its roadway, erected the structure complained of, it is liable to petitioner in damages, for thereby depriving his premises of their light and air, and rendering them less valuable and tenantable. *Story v. N. Y. El. R. R. Co.* 90 N. Y. 122; *Boston & Worces. R. R. Corp. v. Old Colony R. R. Corp.* 12 Cush. 605; on the whole case see, *Mills, Em. Dom.* § 110, *et seq.*

Although by *Brainard v. Clapp*, 10 Cush. 10, respondent Railroad, by charter, had the right to raise its road subsequent to original construction; still, the Act of 1882, chapter 19, is sufficiently broad to be called an enabling Act for that purpose, and specially providing the remedy for which petitioner seeks.

Petitioner therefore contends that such regrading of the road was a new location, as it were; and that it was so considered by the respondent; refers to the fact that on March 23, 1882, it filed a location in the city clerk's office of Boston. Petitioner has proceeded for his remedy under the following statutes, viz.: P. S. ch. 112, § 95; 1882, ch. 19; P. S. ch. 49, § 84; ch. 112, § 2; ch. 49, § 86; ch. 112, §§ 96, 99, 100, 121.

Remedy is against railroad company instead of against the city. *Gardner v. B. & W. R. R. Corp.* 9 Cush. 1.

Mr. J. H. Benton, Jr., for respondent:

When the Company located over this strip, afterwards conveyed to it by the owner, it took the right to do thereon whatever was necessary to construct, maintain and operate a railroad

upon it, including changes of grade and building of walls or embankments, or other changes which it deemed necessary for the maintenance and operation of its railroad. Damages for this right accrued to the land owner, at the time the location was filed in 1845, and have either been paid or the right to compensation barred by the statute limitation. *Gannon v. Hargadon*, 10 Allen, 106; *Bates v. Smith*, 100 Mass. 181; *Babcock v. Western R. R. Corp.* 9 Met. 553; *Rathke v. Gardner*, 134 Mass. 14; *Parks v. Newburyport*, 10 Gray, 28.

If the Company has done nothing which it did not take the right to do by the original location, the right to maintain the petition for damages resulting therefrom is long since barred. If it has done what was not within that right, then the remedy is by an action of tort and not by petition. *Perry v. Worcester*, 6 Gray, 547; *Sprague v. Worcester*, 18 Gray, 195.

The claim for the obstruction of the flow of surface water stands like a claim for the land located upon. *Walker v. Old Colony & N. R. Co.* 103 Mass. 16.

No damages can be assessed against the railroad for change of grade. *Callender v. Marsh*, 1 Pick. 432.

There is no statute permitting such assessments against railroads as there is in case of change of grade on highways. P. S. § 15, ch. 52.

Holmes, J., delivered the opinion of the court:

The taking of land for a railroad "is an appropriation of the land to all the uses of the land for the road, necessary and incidental. * * * Practically the damages are commonly equal to the value of the land." "The rights and power of the company to use the land within their limits may not only be exercised originally, when their road is first laid out, but continues to exist afterwards; and if, after they have commenced operations, it is found necessary in the judgment of the company to make further uses of the land assigned to them for purposes incidental to the safe and beneficial occupation of the road by raising or lowering grade, cutting down hills and removing trees, they have a right to do so to the same extent as when the railroad was originally laid out and constructed." *Brainard v. Clapp*, 10 Cush. 6, 8, 10; *Callender v. Marsh*, 1 Pick. 418, 432.

Thus the law stood at the time of the location of this railroad in 1845, and thus it still stands, unless special provision for further compensation is made by statute. *Boston v. Richardson*, 13 Allen, 146, 159; *Pierce v. Drew*, 136 Mass. 75.

It follows that the defendant must be presumed to have paid for the damage now sought to be recovered for, at the time of its original location, so far as such damage was proper to be considered. And even if the statutes now provided proceedings to recover damages against railroads in case of a subsequent change of grade, it would require a pretty strong argument to convince us that they were intended to give further damages in a case where full compensation had been paid originally. No such statute, however, has been called to our attention.

Again; the claim stated by the petitioner, which the court ruled was for cutting off all natural drainage of surface water from the ad-

jacent lands, discharging surface water from the respondent's road bed upon the adjoining land of the petitioner and shutting off the view, light and air from the petitioner's premises. None of these acts infringed any common land rights of the petitioner. They would have been perfectly lawful on the part of any other adjoining owner. *Gannon v. Hargadon*, 10 Allen, 106; *Franklin v. Fisk*, 18 Allen, 211; *Bates v. Smith*, 100 Mass. 181; *Rathke v. Gardner*, 184 Mass. 14; *Keats v. Hugo*, 115 Mass. 204.

And we are not aware that it has been decided in this Commonwealth that they form a substantive ground of recovery under the Railroad Acts, although if land was taken, as it was from the petitioner's predecessor in title, at the time of the original location some portion of this kind of damage to the remaining land might be considered according to *Walker v. Old Colony & N. R. Co.* 103 Mass. 10; see, *Morrison v. Bucksport & B. R. R. Co.* 67 Me. 358.

However this may be as against a railroad exercising such rights, only as it acquires by its location and subject to the duties imposed by Statute, in the present case the respondents owned the fee by conveyance from the petitioner's predecessors in title, and had all the rights as against the petitioner that any other owner of the fee would have had. The petitioner treats the deed as if it were a mere release of the damages then due for the original location. But it is a conveyance in ordinary form, and it had the same effect that a like deed to any other person would have had.

It is suggested that the petitioner had acquired an easement of draining through the sluiceway built under its road by the respondent. No such claim appears to have been made at the trial. But if it had been made, it could not have been maintained. For no lapse of time gives a man a right to drain surface water in its natural state upon his neighbor's land, and the fact without more, that after it reaches that land it escapes by a ditch, makes no difference. If the petitioner had had a ditch upon his own land and the discharge from which would have been a wrong and actionable, acquiescence in the discharge for twenty years would have given him a right. But that is not this case.

Exceptions overruled.

Royal GILKEY

Town of WATERTOWN.

1. In proceedings to define the boundaries of and locate anew an old town way, if the angles produced in following out the courses and distances, as described in the report of the commissioners, would show discrepancies between their intention to locate and describe the highway according to a plan which is referred to and made part of the description, and the description, it is a mere error of description which will not render the location invalid. The record itself furnishes the means of correcting such errors.
2. Objections which go to the formality and regularity of the proceedings and

record and do not affect the jurisdiction of the commissioners may be cured on petition for *certiorari*, on which the whole proceedings may be questioned. By the statute, an entry for the purpose of constructing any part of the way shall be deemed a taking of possession of all the lands intended in the laying out or alterations made upon the same petitions. Hence, where the town surveyor began to build the road within the two years as required by statute, and the executive officers of the town have since then provided from time to time to complete other parts of the way with the knowledge and acquiescence of the town, there was a sufficient entry for the purpose of its construction.

(Middlesex—Decided March 2, 1886.)

BILL to have an old town way defined and located anew. *Dismissed.*

The facts are stated in the opinion of the court.

Mr. Wm. B. Durant, for plaintiff :

Twenty years' maintenance of fences would have been sufficient, as the master finds that the boundary lines of the original turnpike road cannot be accurately determined. P. S. ch. 54, § 1; *Cutter v. Cambridge*, 6 Allen, 20; *Winslow v. Noyson*, 118 Mass. 411, 421.

Neither party having moved to have an issue framed, for the submission to a jury of the question of the amount of such damages, they may be assessed by a master unless the parties agree upon the amount. Upon such agreement, or the return and acceptance of the master's report, the plaintiff will be entitled to a final decree with costs. See also, *Wood v. Quincy*, 11 Cush. 487-496; *Hollenbeck v. Rowley*, 8 Allen, 478-474.

The defendant concedes in its answer, that it is building a wall on land claimed to belong to the plaintiff and within ancient fences. Inasmuch as the highway was never actually constructed and the ancient fences have never been moved, but maintained in the same position for more than forty years prior to July 22, 1878, the proceedings of the special commissioners in 1859 cannot now avail the defendant, as a justification for its acts. *Winslow v. Noyson* and *Wood v. Quincy*, *supra*.

The defendant must justify its acts, if it can, under the return of the county commissioners, of July 22, 1878. The location of 1878 is void for want of jurisdiction, apparent on the face of the record. This objection is open to the plaintiff, even if he be considered as a party attempting to avoid a judgment collaterally, by plea and proof. *Witchburg R. R. Co. v. Witchburg*, 121 Mass. 133; *Mercier v. Chace*, 9 Allen, 242; *Penobscot R. R. Co. v. Weeks*, 53 Me. 456; *Parish v. Parish*, 82 Ga. 653; *Bruce v. Cloutman*, 45 N. H. 87; *Hess v. Cole*, 3 Zab. (N. J.) 116.

Judgments of inferior courts or courts not proceeding according to the course of the common law may be collaterally impeached for want of jurisdiction. *Rowley v. Hazard*, 23 Cal. 401; *Clark v. Bryan*, 16 Md. 171; *Simons v. DeBare*, 4 Bosw. 547; *Steen v. Steen*, 25 Miss. 518; *Gray v. McNeal*, 13 Ga. 424; *Crawford v.*

Howard, 80 Me. 422; *Penobscot R. R. Co. v. Weeks*, 52 Me. 456.

The jurisdiction cannot be presumed, but all the facts necessary to give the court jurisdiction must be shown affirmatively upon the face of the record. *Clark v. Bryan*, 16 Md. 171.

Acts prescribed by the public statutes or some of them named in the sections below cited, are essential and necessary prerequisites to obtaining jurisdiction by county commissioners. P. S. ch. 49, § 8.

The county commissioners could not make their adjudication until "after the hearing;" and as such hearing never took place, their adjudication made in June, 1871, without notice of any meeting at that time, or any adjournment of the previous meeting, was unauthorized by law and void. *Fitchburg R. R. Co. v. Fitchburg*, 121 Mass. 182.

The return of the county commissioners or their written location, was made July 22, 1873, more than two years after the view and the adjudication.

Conceding that "many of the provisions of the statutes, relative to the laying out of highways, are directory only, and that a failure to comply with them does not render the proceedings void," *Commonwealth v. Boston & Lowell R. R. Co.* 12 Cush. 254, the foregoing objections affect the jurisdiction of the county commissioners and so are not within the rule laid down in these cases. See, *Brimmer v. Boston*, 102 Mass. 19.

Such proceedings are not "according to the course of the common law." *Warner v. Franklin Co.* 131 Mass. 848.

The location by the county commissioners must be so definite that an engineer can apply it to the soil with precision and certainty; otherwise it will be void. *Hinckley v. Hastings*, 2 Pick. 162.

The appropriation of private property to the public use, which is one of the highest acts of sovereign power, should not be accomplished by ambiguous or uncertain language. The presumption is in favor of the owner of the land, and any act done by public authority should be clear and intelligible. *Glover v. Boston*, 14 Gray, 282, 283; *Wilson v. Lynn*, 119 Mass. 174, 178; *Shelton v. Derby*, 27 Conn. 414; *State v. Reed*, 38 N. H. 59.

The master's conclusions of fact upon this point, made from voluminous testimony of engineers and surveyors, not reported, have substantially the weight of a verdict of a jury, and will not be revised by this court without good reason. *Pratt v. Lamson*, 6 Allen, 457; *Trow v. Berry*, 118 Mass. 189; *Newton v. Baker*, 125 Mass. 30; *Richards v. Todd*, 127 Mass. 167.

The master finds that the lines of the street "Cannot be determined with accuracy from the location alone, that the plan and location do not agree, and that the two are irreconcilable; the location and plan together cannot be applied to the land." *Hinckley v. Hastings*, 2 Pick. 162; *Jeffries v. Swampscot*, 105 Mass. 535; *Lewiston v. Co. Comrs.* 30 Me. 19; *Brantree v. Co. Comrs.* 8 Cush. 546; *Beardslee v. French*, 7 Conn. 125.

Assuming that the plan produced is the same as the one designated in the location and is properly referred to therein, it cannot be allowed to contradict or vary the location, but

only to explain and illustrate it. *Hazen v. B. & M. R. R. Co.* 2 Gray, 574; *Hayes v. Shackford*, 8 N. H. 10; *Wilson v. Lynn*, 119 Mass. 174, 178; *Williams v. Boston Water Power Co.* 184 Mass. 406, 416; *Pinkerton v. B. & A. R. R. Co.* 109 Mass. 527, 539.

The selectmen and the highway surveyor had no authority to commence to build the road without a vote of the Town; and their acts could not bind the Town or avail the Town as a defense in this case. *Todd v. Rowley*, 8 Allen, 51; *Reed v. Scituate*, 5 Allen, 120; *Clark v. Russell*, 116 Mass. 455; *Keyes v. Westford*, 17 Pick. 273.

As against so inequitable a proposition as taking plaintiff's land without a hearing, the doctrine of laches should not be applied against the plaintiff with severity; especially as the defendant, in any event, will not be placed in any worse position than that of having to pay for the land taken, as provided by law. Story, Eq. Jur. 12th ed. § 1521 and notes; Bisp. Eq. 3d ed. § 260; *Michoud v. Girod*, 4 How. 561 (45 U. S., bk. 11, L. ed. 1108); *Gresley v. Mousley*, 4 DeGex & J. 78.

Where the location of the way is not distinctly defined in the location, it is material upon the question of notice; and to contend that a land owner must wait and watch for two years, to find out whether any return is to be made, and then, at the end of that time, impute to him laches for not acting before in the matter is hardly in accordance with natural justice, and suggests, at least, the question whether a court of equity could not, under such circumstances, grant relief, under its jurisdiction in cases of accident or mistake. Bisp. Eq. 3d ed. §§ 187-190; Story, Eq. 12th ed. 128, 130, notes, and § 140; *Allore v. Jewell* (94 U. S. bk. 14, L. ed. 262); *Williams v. Champion*, 6 Ohio, 169.

Messrs. J. B. Goodrich and J. J. Sullivan, for respondent:

The statement of the size of the angle at "B" in the description must be treated as a clerical error and discarded, and all difficulty disappears. *Wright v. Tukey*, 3 Cush. 290; *Henshaw v. Hunting*, 1 Gray, 208.

The town took possession of the land covered by the location within the time required by law. P. S., ch. 49, § 88.

The respondent had until February 1, 1876, to make the entry. P. S., ch. 49, § 88; *Commonwealth v. Boston & L. R. R. Co.* 12 Cush. 254.

A specific vote of the town that an entry should be made, was not necessary; an entry by the proper executive officers was sufficient. *Rutland v. Worcester Co.* 20 Pick. 71.

The building of a portion of the highway in 1874, with the other acts of construction reported by the master, were presumably subsequently adopted and ratified by the town. The contrary does not appear from the master's report certainly. *Thayer v. Boston*, 19 Pick. 511; *Hawkes v. Charlemont*, 107 Mass. 414.

Immediately upon the adjudication that the public convenience and necessity required the laying out, and the location in pursuance of it, the land within the lines of the street as located to its full width was appropriated to the public use, and the right to use the whole of it as a highway became vested in the public, although the right to exercise this easement was suspended until after February 1, 1874, to give an oppor-

tunity to occupants of abutting land to remove their fences, etc. *Commonwealth v. Boston & L. R. R. Co.* 12 Cush. 254.

After February 1, 1884, it became the duty of the town, about which it had no option, to remove obstructions from, and to widen and complete the way as ordered. If the town neglected within a reasonable time to do this, it was liable to indictment. *Nichols v. Salem*, 14 Gray, 490; *Colburn v. Kittridge*, 181 Mass. 470.

The statute makes it the duty of the surveyor of highways to remove all obstructions within the limits of the highway, which is a necessary part of the process of construction. *Colburn v. Kittridge*, *supra*; P. S., ch. 52, §§ 6, 10.

The fact that the town had not completed the construction of the highway by February 1, 1876, or within the time allowed by the commissioners' order, did not deprive the town of the right to complete the highway in 1882. *Nichols v. Salem*, *supra*.

In case the town does not complete the way as ordered, it simply becomes the duty of the county commissioners to see that it is completed; the town is not thereby relieved of its duty and obligations to construct the way. P. S., ch. 49 § 60.

The plaintiff, at any rate, cannot legally object to the construction of the road, by the town, after the time within which it was ordered to construct it; this is a matter that concerns the town and county only. *Blake v. Co. Comrs.* 114 Mass. 588.

Constructive notice is sufficient and is to have the force and effect of actual notice. *Taylor v. Co. Comrs. of Hampden*, 18 Pick. 309.

Because the laying out includes property of plaintiff is not of itself sufficient to set aside the location, if it is a valid one. 12 Cush. *supra*.

His remedy was by a petition for a jury to assess his damages. P. S., ch. 49, § 79; 14 Gray, 490, *supra*.

It was not necessary that damages should be awarded, or that his name or the names of other abutters should appear in the commissioners' order. *North Reading v. Co. Comrs.* 7 Gray, 109; *Monagle v. Co. Comrs. of Bristol*, 8 Cush. 360.

If the commissioners made mistakes in their mode of proceeding, or failed to comply with statutory requirements, this cannot be taken advantage of by plaintiff in this suit; his remedy is by *certiorari*. *Brimmer v. Boston*, 102 Mass. 19; *Tabor v. New Bedford*, 135 Mass. 162; 12 Cush. 254, *supra*.

The plaintiff cannot complain, as it does not appear that he paid any attention to the notices given by the commissioners, and consequently suffered no damages on account of their not meeting, if, in fact, they did not meet. *Hancock v. Boston*, 1 Met. 122; *Rutland v. Worcester Co. Comrs.* 20 Pick. 71.

Commissioners have a right to dispose of the question of adjudication of the public convenience and necessity, at a meeting subsequent to the meeting for the purpose of viewing the premises and hearing the parties. *New Marlborough v. Co. Comrs.* 9 Met. 423.

There is nothing in the statute or in the reason of the thing to prevent the commissioners from completing the laying out at an adjourned or subsequent meeting and entering it of record. *Westport v. Co. Comrs.* 9 Allen, 203.

Many of the statutory requirements relating to the laying out of ways are merely directory and not conditional, and a failure to comply with them does not invalidate such laying out. *Monterey v. Co. Comrs. of Berkshire*, 7 Cush. 394; *Blake v. Co. Comrs. of Norfolk*, 114 Mass. 588; *Commonwealth v. Boston & L. R. R. Co.*, 12 Cush. 254.

The location which the county commissioners make will be construed, if it can be, in such a way as to sustain its validity. *Hobart v. Plymouth*, 100 Mass. 159.

If the party who seeks to set it aside has unreasonably neglected to institute proceedings after he has had notice or information, no matter from what source, sufficient to apprise him of what the town was doing and might reasonably be expected to do in reference to such location. *Pickford v. Lynn*, 98 Mass. 491; *Rutland v. Comrs.* 20 Pick. 71; *Hancock v. Boston*, 1 Met. 122; *Tabor v. New Bedford*, 135 Mass. 162.

Morton, Ch. J., delivered the opinion of the court:

It is doubtful whether a bill of this character can be maintained against a town; but the parties have agreed that the bill may be regarded and treated as amended so as to be a bill to restrain the officers and agents of the defendant Town from entering upon the plaintiff's land and appropriating it for a highway. Thus treating it, we preferred to consider the case upon its merits.

In June, 1873, the county commissioners, upon the petition of the Town of Watertown, relocated Arsenal Street in the said Town, the location including in the highway the land of the plaintiff which is in dispute. If this location was valid, the plaintiff cannot maintain his suit. He objects, that the location is indefinite and uncertain.

Looking at the record of the commissioners, it is clear that they intended to locate and describe the highway according to a plan made by Joseph Crafts, which is referred to and made part of the description. If the plan is followed there is no difficulty in laying out the way on the land, and the location is definite and certain.

But there are found to be some discrepancies between the description and the plan, so that the two are not reconcilable. For instance: by the description, the southerly line starts at a fixed point H, in said plan, and runs two hundred and ninety-three feet and forty-three hundredths to a point marked B, on said plan; thence it turns and runs eastwardly, forming an angle of one hundred and seventy degrees and twenty-two minutes with the last described line, two thousand and forty-nine feet, to a point marked C, on said plan; thence by other lines to the points marked D and E, on the plan. If this angle is to be regarded as controlling, the line from point B will not strike the point C, but will run many feet to the south of it, and the continued lines could not strike the points D and E. Indeed the angle, as defined, is inconsistent with all the other points of the location, and is also inconsistent with the purpose which the commissioners had in view. They were not laying out a new highway, but were defining the boundaries of and locating anew an old way. If the angle is followed, the highway

will in a few rods depart entirely from the old way and create a new road. Looking at the whole record it is clear that the description of the angle was an accidental error.

There are one or two other discrepancies of a similar character. But it has been held that if, taking the whole location together, the description and the plan, the way intended can be identified, and constructed on the ground, with reasonable certainty, misdescriptions will not avoid or vitiate the laying out of the way any more than what is called false descriptions in a deed will avoid the deed. *Wright v. Tukey*, 3 Cush. 299; *Henshaw v. Hunting*, 1 Gray, 203.

In this case it is clear that the county commissioners intended in describing the lines of the way to follow the plan; they made errors in the description, but taking the whole record there is no real difficulty in ascertaining the way they intended to lay out. The record itself furnishes the means of correcting the errors, and we are of opinion that the discrepancies relied on by the plaintiff do not render the location invalid.

The plaintiff contends that the location is invalid because the record of the commissioners does not show that there was sufficient notice of the meeting held for adjudicating upon the question of the common convenience and merits of the way, and of the meeting for locating it. Mere objections go to the formality and regularity of the proceedings and record, and do not affect the jurisdiction of the commissioners. It has been repeatedly held that their adjudications cannot be impeached collaterally for such errors, but that the proper remedy is a petition for *certiorari*, upon which any omissions or errors of form may be cured by amendment, and in which the whole proceedings can be questioned if the errors are such as to demand it. *Rutland v. County Comrs. Worcester*, 20 Pick. 71; *Brimmer v. Boston* 102 Mass. 19; *Blake v. County Comrs.* 114 Mass. 533; *Taber v. New Bedford*, 135 Mass. 162.

Without considering whether these objections would be of any avail to the plaintiff on *certiorari*, we think they are not open to him on these proceedings.

The plaintiff further contends that the location is void as to time because the Town did not take possession for the purpose of constructing the way within two years from the time when it had the right to take such possession. St. 1869, ch. 303; P. S. chap. 44, § 88.

By the statutes, "an entry for the purpose of constructing any part of the laying out or alterations shall be deemed a taking of possession of all the land intended in the laying out or alterations made upon the same petition."

The master has found that the surveyor of highways of the Town, by order of the selectmen began to build the road within the two years, and built a part of the easterly portion thereof; but that the Town never authorized by any express vote specifically, the building of the way as laid out by the county commissioners. The executive officers of the Town have since then and up to the time this bill was filed, provided from time to time to complete other parts of the way. All of this was done with the cognizance of the Town. At a meeting of the Town held December 29, 1873, the return of the commissioners was read before
MASS.

the Town, and the selectmen were instructed to obtain estimates of the cost of grading the way "according to the instructions of the county commissioners in their report thereon and to report to the Town at its next town meeting." For some reason they did not report until April, 1882, when it was "voted to grant the sum of \$5,000 to be expended in repairing the street, not having reference to settling any land damages for widening the same if any should arise" upon the location for the purpose of constructing the alterations, by the officers and agents of the Town acting on behalf of the Town. The alterations were made upon the petition of the Town; upon the return of the commissioners it was the duty of the Town to enter upon and construct it according to the directions of the return, a duty which it could not escape. The vote of December, 1873, recognized this duty; the vote of 1882 granted money for the purpose of performing this duty. Although there has not been any formal vote directing the completion of the alterations according to the orders of the commissioners, all the facts of the case show that the Town recognized their duty to do so and acquiesced in and approved the acts of its officers in entering upon and constructing the way. These officers have been continuously completing the road on behalf of the Town, expending the money of the Town and there is nothing to show that their accounts have not been approved by the Town.

The Town does not repudiate their acts and does now insist and always has insisted that they were the acts of the Town.

It has adopted and ratified the acts as the acts of the Town.

We are of opinion that there was a sufficient entry for the purpose of construction to prevent the location over the plaintiff's land from being avoided. Upon the whole case, therefore, we are of opinion that the plaintiff cannot maintain his bill.

Bill dismissed.

COMMONWEALTH of Massachusetts

v.

William HOGARTY *et al.*

If all the elements of the charge contained in an indictment are well supported by the evidence, a conviction may be had, although it appears that another offense would be equally well shown by the evidence. This rule applied to an indictment under a statute which defines the offense of gaming and being present as a spectator.

(Suffolk—Decided February 23, 1886.)

ON defendants' exceptions. *Overruled.*

The question raised by the bill of exceptions is, whether the offense of playing an unlawful game and the offense of being present at an unlawful game are distinct and separate offenses under the statute.

The Statute of 1884 was the original Act regarding the matter and was as follows: St. 1884, chap. 172. "Upon complaint on oath by any person * * * that he suspects, or hath cause to suspect, that any house or other building is used as and for a common gaming house, for the purpose of gaming for money, and that any idle and dissolute person or persons resort to the same, with that design, whether the names of such person or persons are known to such complainant or not, it shall be the duty of such justice of the peace to issue a warrant commanding the sheriff (and others) to enter into such building, and there to arrest all and every person who shall be there found playing for money or otherwise, and the keeper or keepers of the same; and also to take into their custody all the materials for gaming and the person or persons so arrested, to keep so that the same may be forthcoming before such justice, to be dealt with and disposed of according to law."

No specific penalty was imposed in this statute. The evident purpose was the suppression of common gaming houses as public nuisances, as its title indicates. At this time the Legislature did not regard mere presence at a game as of sufficient magnitude to call for notice. Without such enactment as to them, those merely present were not liable to punishment, because mere presence was not enough to make them principals, which they must have been, if anything, since the gaming itself was only a misdemeanor; in other words, mere presence, if the gaming itself had been a felony, would not have made them either principals in the second degree or accessories before the fact. The above statute became in substance, R. S. ch. 50, § 19.

In 1857 another statute was passed. It was (in substance) as follows:

St. 1857, ch. 194, § 4: "Such justice shall issue a warrant commanding the sheriff to enter such house or building, and there to arrest all persons who shall be there found playing for money or otherwise, or aiding or abetting those playing for money or otherwise, and also the keepers or owner of the same; and to keep said persons, so that they may be forthcoming before such justice, to be dealt with according to law; and any person who shall be there found playing for money or otherwise, or aiding or abetting those playing for money or otherwise, shall forfeit, for every such offense, a sum not exceeding fifty dollars, to the use of the city or town."

The main point of interest in this statute is that those persons aiding and abetting were expressly declared guilty; but so they were before the statute was passed, because such presence and action combined made them principal offenders in the game itself. The penalty imposed in this statute on aiders and abettors followed this principle, for it was the same as that imposed on the players themselves.

Meers. Horatio E. Swasey and Geo. R. Swasey, for defendants.

It is quite well established in this Commonwealth that mere gaming is not a crime. But gaming in certain public places is: P. S. ch. 99, § 4; also the winning of money or goods to the value of \$5 or more, at one time of sitting; *Id.* § 8; also keeping a gaming house, and playing therein. *Id.* § 10.

But apart from such provisions it is not a crime to merely game. 1 Bish. Cr. L. §§ 504, 252

1185; *Commonwealth v. Stahl*, 7 Allen, 804; *Same v. Tilton*, 8 Met. 232.

Up to the Statute of 1857, ch. 194, § 4, it is clear that the Legislature intended to punish only those who were technically guilty as principals, on common-law principles.

In G. S. ch. § 8, the provisions relative to those present aiding and abetting were omitted.

In 1869, a statute was passed which went beyond the Statute of 1857, and which first made it a crime to be present, although nothing else was done. It was as follows:

St. 1869, ch. 364, § 1. "The provisions of § 8, ch. 85, Gen. Stats., shall apply to all persons who are found present at any game or sport played for money or other thing of value, at a common gaming house; and such persons may be arrested and punished in like manner as persons there found playing."

P. S. ch. 99, § 10, omitted the penalty imposed upon those present, and reads as follows:

P. S. ch. 99, § 10. * * * "And there to arrest all persons who are there found playing. * * * And all persons who are found present at any game or sport there played for money, or other thing of value. * * * And to keep said persons and implements so that they may be forthcoming * * * to be dealt with according to law; and whoever is there found playing shall forfeit for every such offense, a sum not exceeding \$50." But this omission was supplied by St. 1883, ch. 120.

Mr. Harvey N. Shepard, Asst. Atty-Gen., for Commonwealth:

The ruling of the court was correct. Section 10 ch. 99, P. S., under which the complaint in this case was found, was amended by ch. 120, Acts of 1883, so that whoever is found there, in a gaming house, so playing or so present shall, etc., thereby making the being present at or playing at a game prohibited by statutes, one offense. *Commonwealth v. Dolan*, 121 Mass. 374; *Same v. Atkins*, 136 Mass. 160.

C. Allen, J., delivered the opinion of the court:

The history of the legislation, as given upon the defendants' brief, sufficiently shows that the offenses of playing an unlawful game are not in all cases to be treated as identical, but that they may be distinct and separate offenses. St. 1884, ch. 172; R. S. ch. 50, § 19; St. 1857, ch. 194, § 4; G. S. ch. 85, § 8; St. 1869, ch. 364, § 1; P. S. ch. 99, § 10; St. 1883, ch. 120.

There may be such a state of facts that either offense would not be proved by evidence which would be sufficient to prove the other. For example: if one were indicted for being present, and the evidence showed that he procured the game to be played by others in his absence, the charge would fail, although he might be convicted of actual playing, since in misdemeanors all are to be treated as principals. So, on the other hand, if one were indicted for playing and the evidence showed that he was merely present as a voluntary spectator in no way participating in or aiding or encouraging the game, the charge would fail, although he might be convicted of being present. It does not follow from this that a person would be guilty of two separate offenses who should be present at an unlawful game, and actually take part in it. It may well be questioned whether the Legisla-

ture intended to provide a double punishment in such case, or whether an indictment would be bad for duplicity, which should charge in one count the being present and playing as part of one continuous act. See, *Commonwealth v. Eaton*, 15 Pick. 278; *Same v. Nichols*, 10 Allen, 199; *Same v. Brown*, 14 Gray, 430.

Still less does it follow that the defendants could not be convicted of being present upon evidence showing that they were also playing. In such case, their acts being simultaneous, the Government may well elect upon which charge it will proceed. If the defendants were actually playing, that fact only shows that less was charged against the defendants than might properly have been charged, if the Government was confident of being able to prove the fact. It still remains true that upon the evidence they were guilty of everything that was charged against them, and it is not for them to object that their offense had in it another element which might have been charged and which was of a somewhat graver character. In this Commonwealth it has often been held that if all the elements of the charge which are contained in the indictment are well supported by the evidence a conviction may be had, although it appears that another offense would be equally well shown by the evidence, and the possible difficulty of procuring a conviction if the rule were otherwise, was clearly pointed out by *Mr. Justice Dewey* in *Commonwealth v. McPike*, 3 Cush. 181, 186, 187. See also, *Commonwealth v. Burke*, 14 Gray, 100; *Same v. Bakeman*, 105 Mass. 58; *Same v. Walker*, 108 Id. 309, 314; *Same v. Dean*, 109 Id. 349.

Exceptions overruled.

Lewis COWLES

v.

Sarah A. DICKINSON and
Edmund N. Dickinson

1. The sale under execution, following upon an attachment, of "the real estate, and all right, title or interest," of the defendant in execution, is **not rendered invalid by the omission** to attach, levy and sell, as such, the defendant's **equity of redemption** from an outstanding mortgage upon the premises.
2. The interest of the mortgagor in the mortgaged premises, the **equity of redemption, is a legal estate, and the purchaser of his interest can maintain a real action** for the premises.

(Hampshire—Decided January 5, 1886.)

ON report from the Hampshire Superior Court. *Judgment for defendant.*

This was a writ of entry to try the title to a tract of land situated in Amherst.

It appeared that the land was conveyed by E. N. Dickinson, through one Pease, to Sarah A. Dickinson, his wife, by a conveyance which it was claimed was fraudulent as against Dickinson's creditors. This conveyance was completed by deed acknowledged on May 11, 1882, and recorded, one on the 12th, and the other on the 18th of the same month.

It appeared that Sarah A. Dickinson mort-

gaged the premises to L. D. Hills for \$1,500, by deed dated April 22, 1884, and acknowledged and recorded on the same day, and there was evidence tending to show that Hills paid the consideration to Sarah A. Dickinson, and it was not claimed by the demandant that there was any knowledge by or notice to Hills of any fraud in the conveyance from E. N. Dickinson, or of any defect in the title.

The premises were attached by special attachment as the property of E. N. Dickinson, on a writ in favor of Lewis Cowles against Dickinson, dated April 24, 1884. The attachment was made April 24, at 6:30 P.M. and was recorded on the 25th.

Judgment in \$748.48 was recovered on said suit, Nov. 8, 1884. Execution issued thereon on the 18th of the same month, and by virtue of said execution G. B. Gallond, a deputy sheriff, sold said premises at auction in Amherst, on January 28, 1885, to Lewis Cowles for the sum of \$785.10.

Said premises were conveyed by Gallond to Cowles by sheriff's deed, dated and acknowledged January 29, 1885, and recorded on February 12, 1885.

The tenants claimed and asked the court to rule that the demandant is not entitled to recover because of the insufficiency of the attachment, levy and sale, because of the failure of the demandant to attach, levy and sell as such, the right to redeem said premises from the mortgage to Hills.

The court refused so to rule, and found as a fact that the conveyance by E. N. Dickinson was fraudulent as against his creditors; gave judgment for the demandant and reported the case to the Supreme Judicial Court.

Messrs. W. Hamlin and F. E. Paige, for demandant.

An attachment of all the right, title and interest of the debtor in any land in a given town or county, is the usual form of attachment, and creates a lien upon all his real estate within the town or county. *Taylor v. Mixer*, 11 Pick. 341; *Dennis v. Sayles*, 11 Met. 235.

And this was sufficient to hold real estate fraudulently conveyed by debtor by deed duly recorded, prior to the passage of the Statutes of 1844 and 1845. *Pratt v. Wheeler*, 6 Gray, 520.

A levy on an equity of redemption carries no other legal interest which the debtor may have in the land, and such levy is void unless a right of redemption existed at the time of the levy. *Laflin v. Crosby*, 99 Mass. 446; *Gardner v. Barnes*, 106 Mass. 505; and cases therein cited.

A levy by extent upon the land of a debtor as an estate in fee simple, unincumbered, conveys whatever interest the debtor has in the land, although it be an equity of redemption or some other estate less than the fee. *White v. Bond*, 16 Mass. 400; *Mechanics Bank v. Williams*, 17 Pick. 438; *Root v. Colton*, 1 Met. 345; *Castle v. Palmer*, 6 Allen, 401; *Pettee v. Peppard*, 125 Mass., 66.

Chapter 188 of Laws of 1874 provides a *new method* of levying upon an estate in fee simple, but does not change the *effect* thereof.

Had the sale been of an equity of redemption, the right of the creditor or purchaser to contest the mortgage would be barred. *Russell v. Dudley*, 8 Met. 147. Digitized by Google

Under the Statute of 1874, chapter 188, the right, title and interest of a debtor in land may be sold on execution, and such sale will pass such estate as the debtor had at the time of the attachment. *Woodward v. Sartwell*, 129 Mass., 210.

Such a description in an extent would have the same effect. *Atkins v. Bean*, 14 Mass., 408.

Mr. J. J. Cooper, for tenants:

The mode of levying the execution depends upon the nature of the debtor's interest at the time of beginning the levy. *Gardner v. Barnes*, 106 Mass., 505; *Capen v. Doty*, 13 Allen, 262, 265; *Freeman v. M'Gaw*, 15 Pick. 82.

As the mortgage to L. D. Hills (a bona fide purchaser for good consideration without knowledge of the fraud) is valid, *Green v. Tanner*, 8 Met. 411; *Morse v. Aldrich*, 180 Mass. 578, and the same was recorded two days before Cowles' attachment and existed at at time of levy, the entire interest of the judgment debtor, E. N. Dickinson, at the time of beginning said levy, was the right in equity to redeem the premises from said Hill's mortgage, and should have been sold as such. *Webster v. Foster*, 15 Gray, 82; *Pease v. Bancroft*, 5 Met. 90; *Litchfield v. Cudworth*, 15 Pick. 23, 27; *Perry v. Hayward*, 12 Cush. 344. 350; *Howard v. Wilbur*, 5 Allen, 220.

It is immaterial what right of curtesy initiate exists, as it, like dower, is not liable to execution and levy. *Staples v. Brown*, 18 Allen 64.

Under Pub. Stats. ch. 172, § 27, the creditor Cowles could elect to levy upon the debtor's interest either by set-off or by sale. He preferred the latter, and is bound to conform to the requisites of sale, not extent.

The creditor might be allowed to extend upon the mortgaged estate without regard to the incumbrance, because such levy is a kind of statutory conveyance from the debtor to the creditor. *Baker v. Baker*, 125 Mass. 7, 9.

A right to redeem a mortgage is a specific and distinct legal interest and must be regarded as an entire subject or *res* in all proceedings where derivative rights are to be created under it by sale on execution. *Webster v. Foster*, *supra*.

A sale is made at what a purchaser will give; is necessarily influenced by the existence of prior incumbrances and is entirely distinguishable from cases of levy by set-off. *Pease v. Bancroft*, *supra*.

Had the creditor sold an equity, a purchaser at the sale could not deny the validity of Hill's mortgage. *Russell v. Dudley*, 3 Met. 147. To admit its validity and refuse thus to sell was good faith neither to mortgagee, purchaser nor debtor.

The Statute of 1874, ch. 188, prior to which no interest in land but rights of redemption could be sold on execution, only extended this method of levy to other interests; it made no change in regard to the sale of equities of redemption. *Mansfield v. Dyer*, 138 Mass. 374; and no case seems to decide that when the debtor's entire interest in an equity ceases and the creditor elects to levy, by sale, he can describe that equity as "the real estate and all right, title and interest in the same."

The demandant Cowles, on the evidence, concedes that he is entitled, not to a fee but to an equity; such evidence does not sustain his

action, *Breed v. Osborne*, 118 Mass. 318; *Nugent v. O'loon*, 117 Mass. 219; *Raymond v. Holden*, 2 Cush. 264, and this point is properly before the court. *Slater v. Rawson*, 1 Met. 450.

Devens, J., delivered the opinion of the court:

At the time of the levy by the sheriff upon the demanded premises, by sale thereof, there was a valid mortgage thereon. The sheriff offered for sale and sold "The real estate, and right, title and interest in the same that said Edmund N. Dickinson had on the 24th day of April, 1884." The record title was in the name of Sarah A. Dickinson, and the conveyance to her by Edmund N. Dickinson was claimed to be fraudulent as against his creditors.

The tenant requested the Judge to rule: that the demandant was not entitled to recover because of the insufficiency of the attachment, levy and sale, by reason "of the failure of the demandant to attach, levy and sell, as such, the right to redeem said premises from said mortgage," which was to one Hills.

Notwithstanding the provision for the sale of the equity of redemption in mortgaged lands, on execution, it has long been settled that a mortgaged estate may be levied upon and set off by metes and bounds in the same manner as if it were not so incumbered; provided the creditor is contented to take it subject to the incumbrance, no deduction being made on account of its existence, but the entire estate being appraised and set off at its full valuation towards the satisfaction of the execution. *White v. Bond*, 16 Mass. 400; *Pettee v. Peppard*, 125 Mass. 66.

Such a course might sometimes be conveniently adopted when the execution creditor believed the mortgage to have been paid or, for any other reason, desired to contest its validity. By making a sale of the equity of redemption, the validity of the mortgage would be conceded, and the creditor or purchaser could not contest it, as he had purchased subject to it. *Russell v. Dudley*, 3 Met. 147. He could not claim an estate or interest larger than that which he had purchased. If a levy was made upon an estate as if unincumbered, and the mortgage proved to be valid, there was no reason why the levy should not be good for such estate or interest as the debtor had at the time therein. The debtor was the gainer to the amount of the mortgage, by reason of the fact that its value had not been deducted, and could have no possible ground of complaint.

By the Pub. Stats. ch. 172, § 27, St. 1874, ch. 1831, the right which had long existed to sell the equity of redemption in mortgaged lands was extended, in favor of any creditor where the land itself was taken to satisfy his execution, and such land might be sold "in like manner as the right to redeem mortgaged lands is now sold." "The land itself may be conveyed," says *Mr. Justice* Endicott, "Or the right, title and interest of the debtor in the same may be conveyed; and if the latter form of deed is used by the officer, such estate as the debtor had in the premises at the time of the attachment would pass." *Woodward v. Sartwell*, 129 Mass. 210.

In the case at bar, the creditor caused "the

real estate, and all right, title or interest in the same," to be sold. He recognized in no way the existence of the mortgage. If it has proved a valid security, it is the loss of the purchaser and not of the debtor, whose property has been dealt with in the sale as if it were unincumbered. A levy by sale of an estate and of the debtor's interest therein, with no allowance for or notice taken of incumbrances, should certainly convey all the interest the debtor has, as completely as if there had been a levy by extent. *Woodward v. Sartwell*, ubi supra; *Bell v. Walsh*, 130 Mass. 163.

The tenant further contends that, as the demandant must concede, upon the case as it now appears, that he is entitled only to an equity of redemption, his evidence will not sustain this action, which is a writ of entry.

No such point was made at the trial, but the tenant's position is that, where an objection to the plaintiff's recovery appears which cannot be removed by further proof, the court will treat the objection as open. *Slater v. Rawson*, 1 Met. 450.

Without discussing this, if the tenant is entitled to the benefit of a hearing upon his contention, it is one that cannot be successfully maintained. The demandant in a real action must recover, indeed, on a legal and not a merely equitable title. *Raymond v. Holden*, 2 Cush. 204; *Packard v. Marshall*, 188 Mass. 301, 308.

The interest of a mortgagor is regarded as a legal estate, although termed an equity of redemption. As between the mortgagor and mortgagee, and so far as is necessary to give effect to the mortgage as a security for the performance of the condition, it is considered a conveyance in fee; but for all other purposes the mortgage is treated as a mere charge or incumbrance which does not divest the estate of the mortgagor. He is seised so that he can convey subject to it; he may make a second mortgage; his estate may be attached and levied upon; it is subject to dower or curtesy; the mortgagor may devise or lease it; and generally he has all the rights of an owner, except so far as is necessary to give effect to the mortgage. *White v. Whitney*, 3 Met. 81.

In *Wilmington v. Gale*, 7 Mass. 188, it was held that the purchaser of an equity of redemption, sold by the sheriff on execution, pursuant to the Statute of 1798, chap. 76, obtains by such sale a legal seisin of the land, and may maintain a real action against any stranger, unless such stranger had in fact disseised the mortgagor before the sale of the equity. His claim is subject to that of the mortgagee or his assigns, should they enter. In *Snow v. Stevens*, 15 Mass. 278, it is said by Chief Justice Parker, that an equity of redemption is in fact a legal estate, "against all but the mortgagee and those holding under him. For he that is seised of it may maintain his writ of entry, or his action of trespass, against any stranger."

Judgment for the demandant.

Orin M. TALBOT
v.
CITY OF TAUNTON.

1. A point not brought to the attention of the court at the trial cannot be raised here for the first time.

2. Where a street in a city was laid out and accepted by the city, it will be presumed, in the absence of evidence to the contrary, that the city council did all required by the statutes in the premises.

3. In an action against a city, for injury to an omnibus, by defect in a street, the question whether, at the time of the injury, the plaintiff was in the exercise of due care, is one of fact for the jury and not one of law for the court.

4. Where the passage way of a street under a bridge in a city was so low as to render travel unsafe, and it was proved that the grade of the street under the bridge could be lowered, the court could not be required to rule, as matter of law, that the city could not have removed the defect by the use of ordinary care.

(Bristol—Decided January 11, 1886.)

ON defendant's exceptions. *Overruled.*

Action for damages for an injury to plaintiff's omnibus, through a defect in a public street which the defendant was bound to keep in repair.

The questions presented by the exceptions are stated in the opinion.

Mr. F. V. Fuller, for defendant:

Does the evidence reported show that the plaintiff was in the exercise of due care?

Whether, upon the facts proved, there is any evidence tending to establish it is a question of law to be decided by the court. *Gilman v. Deerfield*, 15 Gray, 580.

The plaintiff must show affirmatively that he was in the exercise of due care. *Adams v. Carlisle*, 21 Pick. 146.

The alleged defect having been created by authority of law and the bridge having been duly located, it is not such a defect that the defendant could have removed by the use of ordinary care, and is not one for which it is liable. *Young v. Yarmouth*, 9 Gray, 886; *Wilson v. Boston*, 117 Mass. 511; *Wheeler v. Worcester*, 10 Allen, 604; *Swayer v. Northfield*, 7 Cush. 490; *White v. Quincy*, 97 Mass. 490; *Vinal v. Dorchester*, 7 Gray, 421.

Otherwise, if the agents of the defendant could have lawfully removed the defect. *Drake v. Lowell*, 13 Met. 292; *State v. Burlington*, 86 Vt. 521.

The City is not rendered liable by its acceptance of the street in 1870, nor by the acts of its highway department in filling up said street. The mayor and aldermen are not the agents of the City for any such purpose. *Wheeler v. Worcester*, supra.

Where the wrongful act of a third party contributes to the accident, the city is not liable. *Vinal v. Dorchester*, supra; *Kidder v. Dunstable*, 7 Gray, 104; *Lyons v. Brookline*, 119 Mass. 491.

The remedy, if any, is against the wrong doer or the one who maintains the nuisance. 2 Dill. Mun. Corp. §§ 660, 708; *Stetson v. Faxon*, 19 Pick. 152; *State v. Burlington*, supra.

The street was never legally laid out. There should have been an application by the City to the county commissioners. G. S. chap. 63, § 59.

Mr. L. E. White, for plaintiff.

Gardner, J., delivered the opinion of the court:

The case finds that Fourth Street, within the limits of which the injury to the plaintiff's omnibus happened, was a public highway which the defendant City was bound to keep in repair, and that the same was laid out and accepted as a public highway, by the city council of Taunton, December 14, 1870. After the evidence was closed the defendant asked the court to rule that upon the evidence the plaintiff could not recover. It is now claimed that the street was not legally laid out; that under the statute then in force, R. S. ch. 23, § 59, the mayor and aldermen, before laying out a way across a railroad, should apply to the county commissioners for permission to do so; and that, after certain proceedings by the commissioners, they might authorize the mayor and aldermen to lay out the way, etc. Inasmuch as it appears from the bill of exceptions that Fourth Street was a public highway which the City was bound to keep in repair, and as the point now raised was not brought to the attention of the court at the trial, it is too late to raise the question here for the first time. In addition: as this street was laid out and accepted by the City, in the absence of evidence to the contrary, we are to presume that the city council did all required by the statutes to properly lay out the highway.

The defendant contends, upon the evidence, that the plaintiff has failed to show that at the time of the injury he was in the exercise of due care. We think that the court should not determine this question, as a matter of law, and that it was properly left to the jury. The facts that the driver had never before been upon this street with the omnibus; that the night was quite dark, although not so dark but that he could see the bridge as he approached it; that the omnibus was loaded with passengers, with some of whom he was talking; that he paid no attention to the bridge; that he was driving in the middle of the street traveled way, at the rate of six miles an hour; that although he had driven ordinary carriages under this bridge, he had never noticed that it was too low, and that an ordinary carriage went through all right, together with the other evidence bearing upon the question of his due care, were facts and circumstances to be weighed by the jury in determining whether the driver in fact did use proper care in driving under the bridge, or whether in so doing he was reckless and careless. *Mayo v. Boston & Me. R. R.* 104 Mass. 187.

It is urged by the defendant that the evidence brings the case at bar within that of *Gilman v. Deerfield*, 15 Gray, 577. But there is a marked distinction between them. In the latter case,

the plaintiff Gilman knew of the defect; he had driven over it before, carefully and slowly because he did not consider it safe. The defect was plainly visible as he approached it, driving a quick and spirited horse; and as he approached the defect he did not think of it, as his mind was wholly absorbed in thought concerning his professional business. In the case at bar, the driver had driven over the road but had no knowledge of any defect therein. He was driving, apparently at a proper gait and with safe horses. The knowledge of the defect and of its danger and of driving into the defect without thinking of it marks the difference between the cases. The defendant also claims that it is not liable for the defect and that it is not such a defect that the defendant could have removed by the use of ordinary care. In 1865, upon the petition of the railroad, the county commissioners decreed that said Fourth Street should be passed by the railroad by a bridge, without any change in the grade of the street, and that the bridge "Be made eleven feet in the clear, above the grade of said road." In 1870, when the street was laid out and accepted as a highway by the City of Taunton, no change of grade was provided for. At the time of the injury the surface of the street was eight feet, eight and a half inches below the bridge. There was testimony from the superintendent of streets of defendant City, that the grade of the streets under the bridge could be lowered one foot and the water disposed of by a drain to the river. Upon this evidence the court could not have ruled as a matter of law that the height of the bridge over the surface of the way did not make the way defective. If the railroad bridge alone constituted the defect, the City was not liable. The City was responsible if the grade of the street under the bridge was raised, and the City had notice of it, so that passengers could not pass under it safely and conveniently. The raising of the surface of the street thereby rendered the way defective and out of repair, in view of the height of the bridge over it and would constitute a defect, under the P. S. chap. 52, §§ 1, 10. In such case, the bridge is not the defect, but the way itself becomes defective and out of repair, because its grade being raised, its surface is brought so near the bridge as to render travel in the street unsafe, inconvenient and dangerous. In view of the testimony of the superintendent of streets, the court was not required to rule that the defendant City could not have removed the defect by the use of ordinary care.

The court rightly declined to rule as requested. No exception was taken to the instructions given to the jury.

Exceptions overruled.

SUPREME COURT OF VERMONT.

John LEACH

v.

Dan P. PEABODY *et al.*

A judge of probate under the statute—Gen. Stats. ch. 48, § 15; R. L. § 2035—can lawfully cause an executor to be imprisoned, who willfully refuses to perform an order of the Probate Court, directed to him, to pay monthly, certain sums of money for the maintenance of the testator's widow and children during the settlement of the estate.

(Decided February 26, 1886.)

TRESPASS for false imprisonment. Heard on an agreed statement of facts, June Term, 1884, Bennington County. Judgment *pro forma* for the defendants. *Affirmed.*

The parties agreed on the following facts: the plaintiff, on November 19, 1874, was confirmed and appointed executor of the will of Ebenezer Leach. Said will was duly proved in the probate court, of which court the defendant, Bromley, was Judge. On January 25, 1875, the executor filed an inventory of the estate. The amount of claims allowed by commissioners was \$11.67. On October 10, 1876, the probate court, after due notice and hearing, ordered and adjudged that there should be added to the inventory certain bonds, mortgages, money, etc., in the possession of the testator, at the time of his decease, amounting to \$19,700. The widow, Rosina S. Leach, waived the possession of the will in her favor. On October 10, 1876, an order was also made by the probate court, after due notice and hearing, allowing to said Rosina, as the widow of the testator, and her two minor children, being also the children of the said testator and constituting his family, for their support during the settlement of said estate, the sum of \$12 per month, to be paid her by said executor out of the personal estate of the deceased, on the 10th day of each and every month thereafter during the settlement of said estate; and also allowing her the use of the homestead and eighteen acres of land; and requiring the executor to pay her the further sum of \$50 within one month to defray her expenses in procuring said allowance. Afterwards, on the 14th day of February, 1877, after due notice and hearing, a further like allowance of \$18 per month in addition to said former allowance, was made by the probate court; which said executor was ordered to pay said Rosina, as such widow, for her support and that of her family, during the settlement of the estate.

The executor appealed from both orders. The county court and the supreme court dismissed the appeal. See, *Leach v. Leach*, 51 Vt. 440.

On the 28d day of February, 1878, the said Rosina presented her petition to the probate court, praying that the executor be cited before the court to show cause why he had not obeyed said orders, and that he be punished for contempt in not obeying the same.

After due notice and hearing the evidence the

probate court adjudged that the executor willfully and without cause refused to obey said orders, and that he was guilty of contempt of said court in not obeying and complying with the same. And it was ordered thereupon "that he be committed for his said contempt to the common jail at Manchester or Bennington, and there to remain until he should obey and perform said orders and decrees, or be otherwise delivered by due course of law. And a warrant for his commitment was, by order of the defendant Bromley, acting as Judge of said probate court, issued" by the register of said court, dated March 3, 1879. The warrant was delivered by the register to the attorneys of said Rosina, and by them placed in hands of the defendant Peabody, a sheriff, for service. The defendant, Peabody, committed the plaintiff by virtue of said warrant to the keeper of the jail at Manchester, on June 25, 1879. The plaintiff remained in actual custody a portion of the time, and in nominal custody the remainder of the time, until he was released on a writ of *habeas corpus*. This imprisonment was the trespass complained of. See, *Re John Leach*, 51 Vt. 630. The probate court denied an application for an appeal from the order adjudging the plaintiff guilty of contempt.

Messrs. Burton & Munson and Martin & Eddy, for plaintiff:

The action of the defendant, Bromley, subsequent to the ordering of the payments, was without jurisdiction. The warrant was void upon its face. The order upon the plaintiff was a final one. *Leach v. Leach*, 51 Vt. 440. The statute R. L., § 2035, authorizing the probate court to enforce its orders by imprisonment, is held to refer only to the control of specific property, and to such interlocutory proceedings as are necessary to bring matters to a final decree. *Re Bingham*, 32 Vt. 829.

In the *Bingham Case* the relator was discharged on the express ground that the probate court had no jurisdiction of the process against the person to enforce a final decree for the payment of the money. The same view was taken by Redfield, J., in *Re Leach*, 51 Vt. 630.

The probate court has only special and limited jurisdiction. *Brown v. Sumner*, 31 Vt. 673; *Holden v. Seantlin*, 30 Vt. 180.

A judge of a court of limited jurisdiction, who exceeds his jurisdiction, is liable. There is a clear distinction between judges of inferior and superior courts. *Vaughn v. Congdon*, 56 Vt. 116; *Wright v. Hazen*, 24 Id. 146; *Miller v. Seare*, 2 W. Bl. 1141; *Taaffe v. Downes*, 8 Moore, P. C. 41; *Walbridge v. Hall*, 3 Vt. 119; *Bradley v. Fisher*, 18 Wall. 335 (80 U. S. bk., 20, L. ed. 646); *Lange v. Benedict*, 78 N. Y. 12; *Busteed v. Parsons*, 54 Ala. 393; *Houlden v. Smith*, 14 Q. B. 841; *Watson v. Bodell*, 14 M. & W. 57; *Dynes v. Hoover*, 20 How. 65 (61 U. S. bk. 15, L. ed. 888); *Clarke v. May*, 2 Gray, 410; *Grumond v. Raymond*, 1 Conn. 40; *Cooley*, Torts, 419.

There was no jurisdiction of the subject matter. The court could not issue an execution against property or person. The subject matter was what was presented by the petition; and that was a matter between the plaintiff and defendant in a common-law form.

The method adopted was, in effect, imprisonment for debt. The court, having no power to

enforce its final decrees, could not apply the process of contempt to accomplish what it is not authorized to do.

Messrs. Prout & Walker and J. B. Bromley, for defendants:

The allowance was a necessity. The court had exclusive jurisdiction; and the adjudication is final. *Richardson v. Merrill*, 32 Vt. 33; *Sawyer v. Sawyer*, 28 Vt. 245; *Meech v. Weston*, 33 Vt. 563.

If the widow's right to a maintenance is a debt against the estate, a remedy upon the executor's bond might be appropriate; but it is not a debt nor a claim in the nature of a debt. The order was only interlocutory, against a share of the property, which originated in no contract or implied liability. *Waples, Proceedings in Rem.* § 571; *Leach v. Leach*, 51 Vt. 440; *Adams v. Adams*, 22 Vt. 50; *Boyden v. Ward*, 38 Vt. 628.

The jurisdiction of probate courts is the same, in matters of this kind, as that exercised by ecclesiastical courts in England. 15 Am. L. Rev. 428; *Peters v. Peters*, 8 Cush. 529; *Waters v. Stickney*, 12 Allen, 12; *Bronson v. Ward*, 3 Paige, 189; 3 Bl. Com. 102.

In this State there is no need of resorting to the court of chancery for aid in compelling obedience to an order of the probate court, as that power is given to the probate court itself by statute. R. L. § 2035; Gen. Stats. ch. 48, § 15; *Seymore v. Seymore*, 4 Johns. Ch. 409; *Kimball v. Fisk*, 39 N. H. 110; 44 N. H. 258; 11 N. Y. 324.

This provision should be held to mean just what it says. It is not inconsistent with the non-imprisonment Act; for that Act applies only to process "issuing on a contract express or implied." Here was no contract obligation. 75 N. Y. 351; *Waples, Pr. Rem.* §§ 263, 548; *Brown v. Slater*, 16 Conn. 192; *Holcomb v. Holcomb*, 11 N. J. Eq. 281; 2 Barb. Ch. Pr. 271; *Patrick v. Warner*, 4 Paige, 397; 2 Jac. Fish. Dig. 2031; *Re Cooper*, 32, 253; *Park v. Park*, 80 N. Y. 156; *Quidneck Co. v. Shaffer*, 26 Alb. L. J. 356.

It is a court of record; and the Judge was acting in a judicial capacity. *Cooley, Torts*, 408; 2 Add. Torts, §§ 883, 890; *Lange v. Benedict*, 73 N. Y. 12; *E. R. Gaslight Co. v. Donnelly*, 93 N. Y. 557; 15 Am. L. Rev. 428; *Grove v. Van Duzyn*, 27 All. L. J. 86; *Davis v. Strong*, 31 Vt. 332; *Stearns v. Miller*, 25 Vt. 20.

Powers, J., delivered the opinion of the court:

If the orders made upon the plaintiff by the Judge of Probate created a debt against the plaintiff, his subsequent imprisonment for non-compliance with them was unlawful. *Re Bingham*, 32 Vt., 329. When brought up on *habeas corpus* he was released by Redfield, J., who seems to have regarded *Bingham's Case* as controlling. *Re Leach*, 51 Vt. 630.

The statute in force when these orders were made, Gen. Stat. chap. 49, § 29, reads: "All the estate of the testator, real and personal, shall be liable to be disposed of for the payment of his debts and the expenses of administering his estate; and the probate court may make such reasonable allowance as may be judged necessary for expenses of the maintenance of the widow and minor children, or either, constituting the family of the testator, out of his per-

sonal estate, or the income of his real estate, during the progress of the settlement of the estate; but never for a longer period than until their shares in the estate shall be assigned to them."

In case of intestate estates the language of the statute then in force, Gen. Stat. ch. 51, § 1, subsection 2, is: "The widow and children, constituting the family of the deceased, shall have such reasonable allowance out of the personal estate as the probate court shall judge necessary for their maintenance during the progress of the settlement of the estate, according to their circumstances."

In the Revision of 1880 no distinction is made between testate and intestate estates as to the allowance made to the widow and children, which leads to the inference that the Legislature regarded the two sections above quoted as identical in scope and spirit if not in letter. The two sections are not embodied in § 2109, R. L.

This court, in *Sawyer v. Sawyer*, 28 Vt. 245, construed these two sections as practically identical.

Although a testator is allowed to control the destination of his property after his decease, still it is to be done subject to certain restrictions made by the statute. Section 29 of chap. 49, Gen. Stats., declares that all the estate, real and personal, of a testator shall respond to debts and expenses of administration. The succeeding clause, under which these orders were made, subjects all the estate to the further burden of maintaining the widow and children so far as the probate court may judge necessary. In other words, the statute appropriates the assets to this purpose but leaves the amount to be fixed in the discretion of the probate court. Debts, expenses of administration and a reasonable allowance for the support of the family are preferred claims upon the assets, which the testator cannot ignore in his disposition of the estate.

In *Leach v. Leach*, 51 Vt. 440, being an appeal from one of these orders, this court said that the order "Appropriates the assets and property of the estate for present and current use and consumption, without return from anybody in any form or manner."

When the widow, then, applied in this case for an allowance for support, she was not making a claim which called for the litigation of any doubtful matters or the settlement of any contention with the executor or the estate he represented; but she made claim to an allowance which the law gave her, and it did not depend upon the executor's assent or dissent whether she should have it. The question was wholly between her and the probate court. The executor was no party to the inquiry and was entitled to no notice of the application. The probate court might properly of its own motion call him in to show the condition of the estate in aid of its discretion in measuring out the allowance; but he in no sense is an adversary party, against whom a judgment can be pronounced. The order made in the premises by the probate court operates upon the assets in the hands of the executor.

Now in all this there is no element of personal indebtedness existing against the executor. No judgment is rendered against him; no contract obligation of his is found. The executor is not ordered to pay a debt but to perform an ad-

ministrative act respecting the assets of the estate to which they are subjected by law. The order upon him to pay this allowance no more creates a debt against him than does the customary order made by the court to pay the claims allowed by commissioners. In this view of the statute it is clear that the plaintiff was not committed to jail for the non-payment of a debt; and so *Bingham's Case* is not in point.

Section 15, chap. 48, Gen. Stats. empowers probate courts to issue warrants for the imprisonment of persons refusing to perform its orders.

In *Bingham's Case* the court said: "We should not be inclined to question that it might have been the purpose of this statute to enable the probate court to require specific acts to be done by the officers and appointees for the furtherance of justice and equity and the due administration of the law in regard to matters pending in that court * * * and might enforce such decrees by process of contempt under the sections (of the statute) alluded to."

The order in this case imposed a new ministerial duty on the executor; and we can conceive of no case where this statute can have effect if this be not one.

We hold, therefore, that the imprisonment of the plaintiff was lawful, and the judgment is affirmed.

Heman A. WATERMAN, Admr.,
v.

Jed. P. CLARK and George Ashley.

SAME v. SAME.

1. Both parties claimed certain property; the plaintiff had taken possession, and the defendant had procured an injunction. Thereupon it was agreed that the defendant might retake possession; that the proceedings in chancery should be abandoned; that the rights of the parties should remain *in statu quo* and that they should attempt to negotiate a settlement. The attempt was made, but no settlement effected. Held, that neither party gained or lost anything pending the negotiations.

2. The law does not favor forfeitures; it will not declare one upon implication; strict proof is always required; thus, the plaintiff's intestate leased to the defendant's grantors one acre of land for the purpose of building thereon a cheese factory. The buildings were erected and the business of making cheese was continued for several years down to and including the season of 1875. The lease contained this clause: "If at any time said company wish to discontinue entirely and abandon said business, then I agree that for the space of one year said company, and after a vote of said company, may remove off of said premises all buildings." January 11, 1877, the company voted to sell the property; and February 22, that the directors be permitted to run the factory at the expense of the patrons. It was sold at auction in August, by a committee, one of which was the lessor, acting for the

company. Held, that the vote did not indicate a purpose to abandon the business; that there was no forfeiture; and that the defendants had one year from August, 1877, to remove the buildings.

(Decided February 20, 1886.)

TRESPASS for removing an ice house, hog house, whey vats, etc. The two cases were tried together, April Term, 1885, Chittenden County, Taft, J., presiding. Judgment for the plaintiff. *Reversed.*

The case is stated in the opinion.

Messrs. Roberts & Roberts and C. W. Witters, for defendants:

The rights of the defendants to remove the structures is to be determined as they stood January 26, 1878, when the plaintiff entered and excluded the defendants. A mere omission to occupy the premises, or cessation of the business for a year, cannot work a forfeiture under the lease; but only a "wish to discontinue entirely and abandon," etc., and that wish indicated by a vote. There was no such vote. *Cong. Soc'y. v. Stark*, 34 Vt. 248; *Patchin v. Stroud*, 28 Vt. 394; *Rob. Dig.*, 542.

Mr. P. K. Gleed, for plaintiff:

The plaintiff claims that when one year had elapsed after the vote to sell was taken, the defendant's right to remove the buildings had ceased. They were not fixtures. *Lee v. Risdon*, 7 Taunt. 188; *Quincy, Ex parte*, 1 Atk. 477; 2 Add. Cont. 431; 1 Chit. Cont. 495.

Walker, J., delivered the opinion of the court:

These two actions were for breaking and entering the same close on the 2d and 27th days of November, 1888, and removing certain structures and manufacturing fixtures erected thereon under the lease referred to, and the same principles of law are applicable to both cases.

The lease, under which the plaintiff claims that the lessee's right to remove the structures and fixtures sued for in these actions, had become forfeited by neglect to remove the structures and fixtures at some time earlier than January 26, 1878, was given by Horace L. Hoxsie, the plaintiff's intestate, running to the Milton Falls Cheese Factory Company and its assigns. By it the intestate demised a certain piece of land in Milton to be used for a site for a cheese factory or butter and cheese factory as long as said company and its assigns wished to use the same for such purpose. It contained the following agreement of the intestate, viz.: "If at any time said company wish to discontinue entirely and abandon said business, then I agree that for the space of one year said company, and after a vote of said company, may remove off of said premises all buildings and other property put thereon by said company," etc., and a corresponding covenant on the part of the company to remove, within one year after the company may vote to relinquish or abandon said business, all buildings or other property put upon said premises by the company, and then to surrender the peaceable possession to the intestate, his heirs, etc. Said lease was dated April 15, 1868, signed and sealed by the parties thereto, and duly acknowledged. Said Horace L. Hoxsie was a member of said company.

The said company went into possession of the demised premises under said lease and erected thereon certain buildings and manufacturing fixtures, which were used by it in the manufacture of cheese thereon, and occupied the same for several years following, including the season of 1875.

On the 30th of August, 1877, said Hoxsie and B. Fairchild, a committee of said company, sold at auction to Jed. P. Clark and G. W. Crown all the buildings, fixtures and all other property of the company, pursuant to a vote of the company passed at a meeting held January 11, 1877, to sell the factory and all its property. At the time of sale, said committee gave said purchasers a memorandum in writing of the sale of the factory and all the property of the company subject to the conditions of the lease, and subsequently said committee delivered to said purchasers a deed of the property sold them, signed by them as agents for the company. After their purchase said Clark and Crown took possession of the factory and other property and managed it.

This sale and conveyance embraced all the property of the company and included therein said lease; and all the rights of the company under it became vested in the purchasers as the assignees of the company; and for the remainder of the term demised, the rights of the purchasers in the premises were the same as those demised to the company and were controlled by the same covenants. At the time of sale, no notice was given to the purchasers by Hoxsie or other person of any claim that the company had abandoned the business for which the land was leased, and that to secure the structures and fixtures, which they were buying, from forfeiture the same must be removed within about four month's time. It is apparent that at the time of sale none of the original parties to the lease understood or claimed that there had been an abandonment of the business by the company.

Horace L. Hoxsie died in December, 1877, without having made any claim adverse to the rights of the purchasers to the property purchased of the company.

On the 26th of January, 1878, the plaintiff, having been appointed administrator of the estate of Hoxsie, took possession of the cheese factory and other structures on the premises and excluded Clark and Crown therefrom and informed them that he had taken possession under a claim of title, and insisted that the right of the company and of Clark and Crown to the property was forfeited. Thereupon, Clark and Crown brought a bill in chancery against the plaintiff, and procured from a Chancellor an injunction which was not served, by reason of an agreement made between them and the plaintiff that Clark and Crown might retake possession without prejudice to the claim of right set up by the plaintiff, with a view of making a settlement of the question in dispute. Thereupon, Clark and Crown went into possession of the property again and ran the factory during the season of 1878. Thereafter neither party occupied the property; but they insisted upon their respective claims and continued to negotiate in respect to the property down to November, 1888, when the efforts to settle proving ineffectual, the defendant Clark and defendant

George Ashley, who had become the owner of Crown's interest by purchase, removed the property in question under their claim of right, doing no unnecessary damage.

Had the injunction been served, and the rights of the parties to the property then in controversy and now involved in these suits been determined in due course in the court of chancery, the rights of the parties pending the proceedings in chancery, would have remained *in statu quo*. Instead of serving the injunction, the parties mutually stipulated that their respective rights should remain *in statu quo* pending their negotiations for a settlement and abandoned the proceedings in chancery. The agreement entered into by the parties, to remove the necessity of serving the injunction, was intended to take the place of and have the same effect as a writ of injunction duly served, to preserve the subject of controversy in its then condition, and prevent the doing of any act whereby the respective rights in controversy might be endangered. Under it the parties expected that, during their negotiations, their respective rights to the property would be preserved and continued as they were on the 26th day of January, 1878.

It was competent for the parties to so agree, and their said agreement had the effect of an injunction *pendente lite*. By it their rights to the property in issue were preserved *in statu quo* pending their negotiations.

Neither party gained or lost any rights in or to the property in issue pending the negotiations under their said agreement, and their rights in and to the property were the same when it was removed, by the defendants in November, 1888, as they were on the 26th day of January, 1877, and must be determined on the issue here as they stood at that time.

So the important question is: had the lessees or their assigns on the 26th day of January, 1878, forfeited their rights to the property in issue?

The law does not favor forfeitures. It will not declare one upon implication; strict proof is always required.

If the company or their assignees had then been divested of all right to remove the structures in question by reason of a forfeiture under the terms of the lease, it must clearly appear from their acts, either that the company had voted to relinquish and abandon the business for which the land was leased or done that which was equivalent to such a vote earlier by a year than the 26th day of January, 1878.

It is contended by the plaintiff, that the vote of the company passed on the 11th day of January, 1877, to sell the cheese factory and all the property belonging to the company was equivalent to a vote to relinquish or abandon the business for which the land was leased; and that the year in which the company and its assigns had to remove the structures and property put thereon by the company, began to run from that date and had expired before the plaintiff took possession, January 26, 1878. We do not think that was the intention of the company in passing the vote; nor do we think that a fair construction of the vote will uphold the plaintiff's contention. The vote expressed a desire to sell only. It was not a sale. It does not indicate a purpose to abandon the business. It looks

to a continuance of the business by an assignee if sold. It does not indicate a purpose of the company to go out of the business, if the property was not sold in pursuance of the vote. There is nothing in the record of the meeting of January 11, 1877, expressive of a determination to abandon the business.

The inference from the vote is more that the company intended to go on with the business if the sale was not accomplished; and that this was the company's purpose is made manifest by the record of the warning for the meeting, dated February 14, 1877, to be held February 22, 1877, to consider the propriety of running the factory the coming season, signed by H. L. Hoxsie and H. Caswell, directors, and the record of the vote of the meeting held February 22, under said warning, permitting the directors to run the factory at the expense of the patrons.

Previous to the sale of the property, August 30, 1877, the company had passed no vote indicative of a purpose to relinquish or abandon the business, nor taken any action which was equivalent to such a vote, so that the year in which the company or its assignees had a right to remove their property from the premises of the intestate did not begin to run earlier than August 30, 1877.

It is clear that no purpose to abandon the business on the part of the company antedates this sale. Assuming, then, that the sale was equivalent to a vote to abandon, which it is not necessary to decide, the year in which Clark and Crown, assignees of the company, would have to remove the buildings and other "fixtures for manufacturing" from the land of the intestate, did not expire until August 30, 1878. It follows, therefore, that on the 26th day of January, 1878, there had been no forfeiture of the structures and manufacturing fixtures in question in these suits at bar, and the plaintiff on the 26th day of January, 1878, had no right to the possession of them. His possession was premature and without right and against the right of said assignees.

And as we hold that the rights of the parties remained during the armistice for negotiations, the same as they were on the 26th day of January, 1878, the entry of the defendants upon the premises and removing said structures and manufacturing fixtures November 2, and 27, 1883, the trespasses complained of were lawful, and not against the right of the plaintiff.

Judgment reversed, and judgment for the defendants in each case.

McCLURE Bros.

v.

Thomas J. BRIGGS.

1. The defendant gave a written order to the plaintiffs through their agent for an organ. The agent seasonably carried an organ, substantially like the one ordered, to the defendant's house; but in the meantime he had bought another, and refused to receive the plaintiffs'. Negotiation ensued, and the agent gave the defendant to understand and he did understand that if he would let the or-

gan be set up, the trade should be at an end if he was not satisfied with it. Afterwards the defendant, without cause, thought that he was dissatisfied with its tone and so notified the agent. Held, in an action of book account, that the plaintiffs, by claiming a delivery, adopted a part of the agent's last transaction and thereby the whole of it.

2. While the vendee was bound to act honestly and give the instrument a fair trial, without feigning dissatisfaction, it was incumbent on the plaintiffs, in order to recover, to prove that the defendant was satisfied with the organ; and it was not enough to show that he ought to have been and that his dissatisfaction was without good reason.

(Decided February 20, 1886.)

BOOK ACCOUNT. Heard on an auditor's report, March Term, 1885, Rutland County. Judgment for the plaintiffs. *Reversed.*

The auditor found: "On the 9th day of May, 1884, one Bradley applied to the defendant to purchase a parlor organ. The negotiations resulted in the defendant giving Bradley an order. Bradley was the agent of the plaintiffs, to whom the order was directed, to sell organs and obtain such orders. There was no fraud in the transaction. The order was sent to the plaintiffs, and the organ was delivered to the defendant at his home in Poultney, within the time agreed by Bradley, and was charged to the defendant on book on the day of its delivery, May 24, 1884, at the price stated in the order, to wit: \$110. It was a Prescott organ. Before it was delivered, the defendant was made to believe by an agent for the sale of Estey organs that the Prescott organ ordered would not be satisfactory, and was induced to buy an Estey organ, and had then bought and received an Estey organ. When Bradley arrived with the Prescott organ, the defendant refused to receive it or allow Bradley to set it up in his house. He made this refusal before he had seen it or knew whether it was a good organ or corresponded with the representations made by Bradley when the order was given. The refusal was induced solely by the representations of the other agent. After some talk, the persuasions of Bradley overcame the defendant's objections, so that he allowed Bradley to set up the organ. I find that this organ was a good one and filled all the representations made, with one exception, which I find was immaterial. * * * The difference, if any, was a minimum.

Another ground of defense, and the one mainly relied upon was this: that, although the contract was fair and absolute and performed by the plaintiffs, yet, when the organ came as aforesaid and the defendant refused to receive it, he yielded the point and did receive it only upon the condition, then agreed to by Bradley, that if the organ was not satisfactory, he would take it away; and that the organ was not satisfactory and Bradley was so notified. I do not find that Bradley said that which by a strict and critical construction would bear the interpretation which the defendant put upon it; but I do find that the defendant did understand it as above stated, as claimed; and that Bradley in-

tended he should so understand it. It was a parley between an adroit, skillful and persistent organ agent and an uneducated, simple-minded, credulous farmer. The latter had allowed himself to be induced to repudiate his contract, by a rival agent, without cause, and without sharpness enough to see the wrong of the act, under the rosy tintings of the rival artist. The rival was ahead and had apparently got the field. But Bradley, although behind and nearly down, was not conquered. He had the advantage of being in the right. His rival was not present. The opportunity to turn the tables was irresistible. It was easy for him to say one thing that meant another to the artless and easily victimized farmer. Without saying exactly that the trade should be thrown up if the organ was not satisfactory, he made the defendant think he said that in substance; and that was his intention, as before stated. Under the circumstances, the fraud was about as nearly justifiable in a moral sense as any case that I can conceive of. The law may be more strict. The defendant afterwards thought he was dissatisfied with the tone of the organ. He had no ground for dissatisfaction."

The order was as follows:

\$110.00. Poultney, Vt., May 9, 1884.
Messrs. McClure Bros.

Please ship to me one Prescott organ to Poultney, Vt., Style, 142 cc, No. —. If received in good order, I hereby agree to pay for the same, as follows: cash on or before July 1, one hundred and ten dollars.

(Signed) T. J. Briggs."

Mr. D. E. Nicholson, for defendant:

Had the plaintiffs withdrawn when the organ was tendered and refused, and brought suit for goods bargained and sold, the order might have made the way comparatively clear for a recovery; but an action on book account could not then have been maintained on the transaction, and the charge on book was not then legally made, and has not been aided but impaired by the subsequent complications. To sustain book account, a delivery must have been made. *Hodges v. Fox*, 86 Vt. 74; *Read v. Burlew*, 1 Aik. 145; *S. C.*, 1 Vt. 97; *Bundy v. Ayer*, 18 Vt. 497.

Mr. J. C. Baker, for plaintiffs:

When this order was received and the organ set aside and shipped according to the terms of the contract, the sale was complete. The title in the organ passed to the defendant, and he became liable to the plaintiffs for the contract price. *Story, Sales*, § 300, n. 2; *Chit. Cont.* 519.

All that was required of the plaintiffs to complete this sale was to ship the organ to Poultney by the ordinary and usual common carrier. *Magruder v. Gage*, 33 Md. 344; *S. C.*, 3 Am. Rep. 177.

This written contract is free from ambiguity. It contains all the elements of a valid sale. Plaintiffs' agent was not clothed with authority to discharge written contracts or vary their terms, after the contract was completed by the plaintiffs. The defendant had no right to say arbitrarily and without cause that he was dissatisfied and would not pay for the organ. *Hartford Sorghum Mfg. Co. v. Brush*, 48 Vt. 528; *Duggett v. Johnson*, 49 Vt. 345.

Book account will lie. *Wilkins v. Stevens*, 8 Vt. 214; *Gassett v. Andover*, 21 Vt. 343; *Groot v. Story*, 41 Vt. 533; *Kent v. Bowker*, 38 Vt. 148; *Perry v. Smith*, 22 Vt. 301.

Rowell, J., delivered the opinion of the court:

Defendant gave a written order to plaintiffs, through Bradley, their agent, for a Prescott organ, to be paid for at a stipulated price, within a time named, if received in good order. Bradley seasonably carried an organ to the defendant's house, that was in all respects like the one ordered except in a slight and an immaterial particular; but defendant, having in the meantime bought and received an Estey organ from another vendor, refused to receive the plaintiffs' organ, or to let Bradley set it up in his house; whereupon, negotiation ensued between him and Bradley, wherein Bradley gave him to understand and he did understand that if he would let Bradley set up the organ, the trade should be thrown up if he was not satisfied with it. On this condition and this only defendant allowed Bradley to set up the organ. Afterwards defendant thought, though without cause, that he was dissatisfied with the tone of the organ, and notified Bradley of his dissatisfaction, but Bradley did not take away the organ; and plaintiffs now seek to maintain book account, on the score of the delivery thus effected, on the ground: 1, that the delivery must be taken to have been under the original order, as Bradley had no authority to vary it in the manner attempted; and, 2, if he had, that defendant, having no cause to be dissatisfied, was bound to be satisfied.

As to the first of these grounds, it is sufficient to say, that though when an agent exceeds his authority his principal may repudiate the transaction altogether, yet he cannot adopt one part of it and repudiate another, but his adoption of it in part is an adoption of it as a whole. Now, book account will not lie for goods sold and not actually delivered, and so the plaintiffs seek to avail themselves of the delivery effected by Bradley, in order to maintain this action; and by thus adopting that part of the transaction they adopt and must stand by the whole of it. As to the second ground, it is to be noted that defendant did not take the organ to see whether it answered the contract or not, for if he had and it did, he is bound to keep and pay for it whether satisfied or not; but he took it to see whether it was satisfactory to him or not. Neither he nor any of his family were competent to judge as to the quality of the organ, and so he called in an expert to test it, and he told him the tone of it was good and better than that of the Estey organ, which he seemed to like; but notwithstanding the opinion of the expert, he was so under the spell of the Estey organ vendor that he still thought he was dissatisfied with the tone of the organ, and if he really thought so he was so, for as a man "thinketh in his heart, so is he."

But it is said that he was bound to be satisfied, as he had no ground to be dissatisfied. He was bound to act honestly and to give the instrument a fair trial and such as the seller had a right, in the circumstances, to expect he would give it, and herein to exercise such

judgment and capacity as he had, for by the contract he was the one to be satisfied and not another for him. If he did this and was still dissatisfied, and that dissatisfaction was real and not feigned, honest and not pretended, it is enough, and plaintiffs have not fulfilled their contract; and all these elements are gatherable from the report. This is the doctrine of *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528, and of *Daggett v. Johnson*, 49 Vt. 845.

In the former case the defendant was required to bring to the trial of the evaporator only honesty of purpose and judgment according to his capacity, to ascertain his own wishes, and was not required to exercise even ordinary skill and judgment in making his determination. *Daggett v. Johnson* turned on an error in the admission of testimony; but Judge Redfield goes on to discuss the merits of the case somewhat, following substantially in the line of *Brush's Case*, and citing it as authority. But *Daggett v. Johnson* is distinguishable in its facts from *Brush's Case* and from this case, in that the defendant omitted to test the pans in the very respect in which he knew it was claimed their excellence consisted.

In *McCarren v. McNulty*, 7 Gray, 189, plaintiff agreed to make a bookcase for defendants, of a certain kind and dimensions, in a good workmanlike manner "to the satisfaction" of one of the defendants; and an action for work and labor in making it was held not to be maintained by proof that it was made according to the contract, without also proving that it was satisfactory to or accepted by that defendant. The court said that against the consequences resulting from his own bargain, the law could not relieve the plaintiff; that having assumed the obligations and risk of the contract, his legal rights were to be ascertained and determined solely by its provisions.

In *Brown v. Foster*, 113 Mass. 136, plaintiff agreed to make defendant a satisfactory suit of clothes, but defendant returned the suit as unsatisfactory. The court said the plaintiff could recover only upon the contract as made; that even though the clothes were such that the defendant ought to have been satisfied with them, it was yet in his power to reject them as unsatisfactory, and that it was not for anyone else to decide whether a refusal to accept was reasonable or not, when the contract permitted the defendant himself to decide that question.

In *Zaleski v. Clark*, 44 Conn. 218, plaintiff made a plaster bust of defendant's deceased husband, under a contract that she was not bound to take it unless she was satisfied with it. When it was finished she was not satisfied with it and refused to accept it. It was found that the bust was a fine piece of work, a correct copy of a photograph furnished by the defendant, and that it accurately portrayed the features of the subject, and that the only fault found with it was that it did not have the expression of the deceased when living, which was caused by no imperfection of the work but by the nature of the material. The court said plaintiff had not fulfilled his contract; that it was not enough to say that defendant ought to have been satisfied, and that her dissatisfaction was unreasonable; that she and not the court was entitled to judge of that; that a contract to make a bust, perfect in all respects and with which the de-

fendant ought to be satisfied was one thing, and an undertaking to make one with which she would be satisfied was quite another thing; that the former could be determined only by experts, and the latter could be determined only by the defendant herself.

Since the case at bar was decided, the very recent case of *Singerly v. Thayer*, in the Supreme Court of Pennsylvania, reported in 25 Am. L. Reg. N. S. 14, has fallen under my notice, with the learned note appended thereto. [S. C. 1 Cent. Rep. 52]. There the defendant in error agreed to put in an elevator for plaintiff in error, "warranted satisfactory in every respect." After trying it, defendant refused to accept it, and it was held that if he acted in good faith, he was, by the terms of the contract, the sole judge whether it was satisfactory or not. The cases are there largely reviewed and found almost unanimously to sustain the view taken by the court.

Substantially the same principle has been adopted in contracts for service, when the right to terminate the contract is reserved if the party is not satisfied, in which case he may terminate it, although his dissatisfaction is without cause. *Protost v. Harwood*, 29 Vt. 219; *Rossiter v. Cooper*, 28 Vt. 522; *Durgin v. Baker*, 82 Me. 273.

Judgment reversed, and judgment for defendant to recover his costs.

Henry L. JOHNSON

v.

George N. ROBERTS.

Audita querela will not lie to set aside the judgment of a justice of the peace in which more than legal costs were inadvertently allowed to the plaintiff, when the defendant was present, and had an opportunity to have the error corrected, but neglected to avail himself of it, and did not offer to pay what was legally due. (*Weed v. Nutting*, Brayt., 28, distinguished.)

(Decided January 21, 1886.)

AUDITA QUERELA. Plea, the general issue. Trial by Court, April Term, 1885, Chittenden County. Judgment for the defendant affirmed.

This action was brought to set aside the judgment of a justice of the peace. That judgment was made up as follows: damages, \$7; costs, \$10.85. The plaintiff in the justice action claimed that the defendant had injured his carriage by driving against it.

Mr. A. G. Safford, for the plaintiff:

The judgment attacked by this proceeding was within the prohibition of the Rev. Laws, § 1444.

Audita will lie. Statutes which give costs are not to be extended beyond the letter. Salk. 206; 2 Str. 1006; 3 Burr. 1287; 3 Bl. Com. 399; *Lewis v. Brainerd*, 53 Vt. 510; 2 Vt. 407; 28 Id., 578; 27 Id.

Messrs. J. J. Enright and Henry Ballard, for defendant.

Rowell, J., delivered the opinion of the court:

The remedy by *audita* is denied when the complainant has had opportunity to have the error complained of corrected but has neglected to avail himself of it. *Stanford v. Barry*, 1 Aik., 821; *Griswold v. Rulland*, 23 Vt., 324; *Goodrich v. Willard*, 11 Gray, 380.

In this case the justice allowed the plaintiff more costs than the statute permitted him to recover; but we must suppose, the contrary not appearing, that the excess was inadvertently allowed, and that the error would have been corrected if the justice's attention had been called to it within the two hours during which he had control of his record; and as the defendant and his counsel were present at the trial and had an opportunity to know, if they did not in fact know, that the error had been committed, and so had opportunity to move for its correction if they desired, and it not appearing that they availed themselves of that opportunity, nor that they have since tendered and offered to pay the legitimate amount of the judgment, the defendant has no standing for relief here. And although this was not the ground of the ruling below and that ruling may have been even erroneous, yet the whole record showing that the complainant is not entitled to judgment, he cannot have it.

The case of *Weed v. Nutting*, Brayt., 28, is much relied on as an authority for setting aside this judgment. That case is very imperfectly reported in two lines and a half, and holds that a justice's judgment and execution in which a larger sum is given in costs than the statute allows, will be set aside on *audita*. This case is sharply criticised in *Dodge v. Hubbell*, 1 Vt., 491, 499, where it is said that the injustice of wholly setting aside such a judgment is quite as apparent as letting it stand for a few cents or a few dollars too much by an incorrect taxation of costs. But whatever may be said as to the soundness of that case, it is distinguishable from this, in that, as appears from a certified copy of the original writ that I have before me, the complainant "tendered and offered to pay" to the officer having the execution the full amount of the damages and legal costs with his lawful fees, which was refused.

Judgment affirmed.

J. P. REA

v.

Joel HARRINGTON.

1. When a demurrer is overruled and the demurrant goes to trial on the general issue and is defeated, and then moves in arrest of judgment, his rights are only those afforded by his motion, and he takes nothing under his demurrer.
2. After verdict, every reasonable presumption is made in favor of the sufficiency of the pleading; thus, in an action of slander, where the defendant had charged the plaintiff with committing incest with his daughter, the declaration failed to allege that the defendant said that the plaintiff had carnal intercourse with his daughter, with knowl-

edge of the relationship, which knowledge was an essential element of the crime. Held, that the averment could be implied from other allegations, and from concessions made by the defendant the court having charged correctly as to what constitutes incest.

3. Words imputing a possible crime are actionable *per se*, although not believed by the hearer, and although the charge could not be true.
4. Evidence was admissible to prove that the defendant repeated the slanderous words subsequently to bringing the suit.
5. The plaintiff claiming exemplary damages, it was error to exclude the defendant's evidence, offered to prove that he was a man of no property. But as the error could only affect the exemplary damages, the judgment will be affirmed, if the plaintiff enters a remittitur of such damages.
6. It was proper to allow the plaintiff to testify as to his mental sufferings caused by the slander; in effect, that he could not sleep nights, could not work, etc.
7. The exceptions do not show error in excluding evidence of provocation.
8. The plaintiff's counsel, in his argument, stated a fact which was not in proof. It was but a single remark, and promptly dealt with by the court. Held, that an exception will not lie, although one will where counsel persistently travel outside the proof.
9. A request must be wholly sound, in order to make an exception to a refusal to comply with it available.

(Decided January 23, 1886.)

ACTION for slander. Plea, not guilty. Trial by jury, December Term, 1883, Caledonia County. Judgment on verdict of guilty. *Reversed.*

The defendant's third request, mentioned in the opinion, was: "That there could be no recovery as to the crime of abortion, or any attempt to commit abortion, because the declarations did not properly charge the crimes; that if any was committed it was outside the State; that the declaration did not charge the plaintiff knew or supposed the daughter to be pregnant."

The exceptions stated as to provocation: "To bear upon the question of damages and provocation the defendant offered to prove that for some time prior to March 28, 1883, and a few days before, the plaintiff had been accustomed to make slurring allusions to defendant's wife Mary; that he would ask about 'old Mary and the calves;' that he would allude to defendant's stealing cattle and sheep."

The exceptions stated as follows as to counsel going outside the proof: "No proof was permitted as to the ownership of the farm upon which the defendant lived in Walden. Upon his cross examination by plaintiff's attorney, defendant volunteered to say that he was a poor henpecked old man, who lived with his boy and wife, and could not pay a cent any way. The plaintiff's attorney, in closing his last argument said, if Harrington, defendant,

was poor and had no money to pay a verdict, he should not have deeded his farm to his wife to put it out of the way of creditors, as defendant had done. The presiding Judge was at this time in the adjoining room. The defendant's counsel tried to stop this speech of Mr. Lamson, but could not until the presiding Judge was called in. The presiding Judge informed Mr. Lamson and the jury, that he could not discuss the matter objected to, and must confine his argument to evidence properly in the case. The defendant duly excepted to this conduct of Mr. Lamson, and the same was allowed by the court. Mr. Lamson said no more as to this subject after this intimation of the court."

Meers, Bates & May, for defendant:

The crime of incest is incomplete without one of the parties at least having knowledge of the relationship. This knowledge must be alleged, or the defect is fatal on demurrer or motion in arrest. Townsh. Sland. & Lib. 190; Hill, Torts, 264; *Griggs v. Vickroy*, 12 Ind. 549.

We also question whether the crime of incest could be charged upon a married man under the statute law, which reads thus: "Persons between whom marriages are prohibited, etc., who intermarry or commit fornication with each other shall be punished as in case of adultery."

Fornication occurs only where there is no marriage. 2 Bish. Cr. Proc. § 728.

It has been questioned whether a charge of incest is slanderous. Townsh. Sland. & Lib. § 163, p. 230, n. 8.

It was error to permit the proof of speaking the slanderous words subsequently to bringing the suit. *Frazier v. McCloskey*, 60 N. Y. 337; *Root v. Lowndes*, 6 Hill, 518; *Keenholts v. Becker*, 3 Denio, 346; Sedg. Dam. 5th ed. 111; *Schenck v. Schenck*, 20 N. J. Law, 208; *P. W. & B. R. Co. v. Quigley*, 21 How. 202 (62 U. S. L. ed. bk. 16, L. ed. 73).

It was error to exclude the evidence as to the defendant's property. *Johnson v. Smith*, 64 Me. 553; *Stanwood v. Whitmore*, 63 Me. 209; *Brown v. Barnes*, 39 Mich. 211; *S. C.*, 38 Am. Rep. 375; *Bump v. Betts*, 23 Wend. 85; *Bennett v. Hyde*, 6 Conn. 24; *Kniffen v. McConnell*, 30 N. Y. 289; 2 Greenl. Ev.; 2 Phil. Ev. 258.

It was also error to allow the plaintiff's evidence as to his mental sufferings. *Boovee v. Danville*, 53 Vt. 183; *G. C. & Santa Fe R. Co. v. Levy*, 59 Tex. 542; *S. C.*, 46 Am. Rep. 269.

The defendant should have been allowed to show provocation. Townsh. Sl. & Lib. 688; *Thomas v. Dunaway*, 30 Ill. 373; *Whitmore v. Weiss*, 33 Mich. 348; *Botelar v. Bell*, 1 Md. 173; *Pugh v. McCarty*, 40 Ga. 444.

The fact that counsel went outside the evidence in his argument should be held fatal error. *State v. Hannett*, 54 Vt. 83; *Scrapps v. Beilly*, 35 Mich. 371; *S. C.*, 24 Am. Rep. 575; *Brown v. Swineford*, 44 Wis. 282; *S. C.*, 28 Am. Rep. 582; *Coble v. Coble*, 79 N. C. 589; *S. C.*, 28 Am. Rep. 338; *Cleveland Paper Co. v. Banks*, 15 Neb. 20; *S. C.*, 48 Am. Rep. 334.

Mr. J. F. Lamson, for plaintiff:

There was no error in admitting evidence that the defendant repeated the slanderous words. *Knapp v. Fuller*, 55 Vt. 311; *Driggs v. Burton*, 44 Vt. 144; *Cavanaugh v. Austin*, 43 Vt. 576.

The plaintiff had a right to state what effect the words spoken had on him. *Nott v. Stoddard*, 38 Vt. 25.

Veasey, J., delivered the opinion of the court:

The declaration is for slander. The defendant demurred, and the demurrer was overruled, to which the defendant excepted. The defendant was then allowed to plead the general issue and go to trial on the merits which resulted in a verdict for the plaintiff. Thereupon, a motion in arrest was filed which was overruled, and the defendant excepted. He now claims to test the sufficiency of the declaration under the exception to overruling the demurrer.

1. By pleading over and going to trial instead of submitting to judgment on the declaration the defendant waived his exception to the ruling on the demurrer. A verdict may cure defects which would render a declaration demurrable. After verdict every reasonable presumption is made in favor of the sufficiency of the pleadings. *Brown v. Hitchcock*, 28 Vt. 452; *Morey v. Homan*, 10 Vt. 565.

Moreover, on demurrer to any of the pleadings, which go to the action, the judgment for either party is the same as it would have been on an issue in fact, joined upon the same pleading and found in favor of the same party. Gould, Pl., ch. 9, § 42.

When cast upon his demurrer a defendant is not entitled of right to plead over. If the court extend the favor against the plaintiff's right to judgment, it would be unjust to put the plaintiff to the expense and risk of trial and then after favorable result subject him to the risk of the demurrer for defects that a verdict cures where there is no demurrer.

The sufficiency of this declaration can be tested only under the rules applicable to the motion in arrest.

2. The first assignment of error in the motion is as follows: "It is not alleged in the declaration nor proved on trial, that in speaking the alleged slanderous words as to the alleged incest, the defendant said the plaintiff had carnal intercourse with his daughter Sadie with knowledge of the relationship."

This assignment correctly assumes that incest is made a crime in this State. R. L. § 4246. It is undoubtedly true, that knowledge of the relationship is essential to constitute the crime. Such allegation is not in terms in the declaration; but it is alleged that the plaintiff was a married man, and had a daughter living in his family by the name of Sadie Rea * * *

who had arrived at the age of seventeen years. * * * It is also stated in the bill of exceptions that it was conceded that plaintiff was married in 1864; that his wife was still living; that the plaintiff was never divorced; and that Sadie was their daughter now eighteen years old. Defendant's first request to the court for instructions to the jury was to the effect that plaintiff's knowledge of the relationship was essential to create the crime of incest. The exceptions state that on the subject of the requests the court told the jury what was necessary to constitute a charge of the several crimes named in the requests. The charge of the court, therefore, must have included the element of knowledge of the relationship. Judgment will not be ar-

rested after verdict, for lack of an essential averment in the declaration which is contained by implication in the averment used, or which may be considered to have been proved as a part of what is alleged. *Morey v. Homan, supra; Curtis v. Burdick*, 48 Vt. 166.

The averment implied knowledge of the relationship, the concession tended to show it, and the charge must have included it as an essential element. This exception therefore cannot be sustained.

3. The second and third assignments of error in the motion in arrest may be treated together and were as follows: "There was no proof and no allegation in the declaration that the said Sadie was ever with child or had a child born alive, or that there could have been or was any attempt at abortion, or any murder of any person or any attempt to conceal any murder, or any person or child to murder."

"Third: There was no proof that Sadie was pregnant or had been, or that her father or anyone else supposed her to be pregnant, or that any person who heard the discourse believed or had reason to believe that she had been or was pregnant."

The defendant's second request to charge covered the same point.

The claim is that as there was no proof as to any murder or an attempt to commit murder, etc., and no hearer understood or believed there was any person to murder, the words charged did not constitute slander. The effect of the claim is, that because it was not true as charged in substance by defendant that plaintiff's daughter had a child begotten by the plaintiff, which he killed and threw to the pigs, it was not a slander to make the charge, especially, if the hearers did not believe it.

Although there is some qualifying authority, we think the sound rule is, that if the words impute a crime they are actionable *per se*, even though the charge could not be true. It is the obloquy of the charge that produces the damage, and not the exposure to punishment. *Eckart v. Wilson*, 10 S. & R. (Pa.) 44; *Carter v. Andrews*, 16 Pick. 1. In the case last cited, Shaw, Ch. J., says: "But it is no defense to this action that the charge could not be true."

Neither does the disbelief of the hearers destroy the actionable quality of the charge. If they had no right to believe or understand there was an imputation of crime, either by reason of the expression in the same connection, as he is a murderer, he killed my dog, or by reason of facts supposed to be in the minds of the hearers which would render the imputation of crime impossible, as a charge of stealing timber, the speaker having reference to growing timber which is not the subject of theft, and supposing the hearers understood to what he referred, in either case the charge is not actionable *per se*. *Smith v. Miles*, 15 Vt. 245; *Stark. Lib. ch. 3*. The things charged in this case were all possible crimes, and there was no express or implied qualification, and it was a slander to charge them because not true whether the hearers believed the charge or not.

We think there was no error in overruling the motion in arrest.

4. Against the defendant's objection and exception the county court allowed the plaintiff

to prove a repetition of the speaking of the slanderous words by the defendant subsequent to the bringing of this suit. The authorities differ on this question as on most others arising in slander suits, but in this State the rule has been adopted as held by the court below, on the ground that the evidence is admissible for the purpose of showing the *animus* of the defendant at the time in question. *Knapp v. Fuller*, 55 Vt. 311; *Odgers, Sland.* 271.

5. The court refused to permit the defendant to prove that he was a man of no property, to which ruling the defendant excepted.

The cases are not uniform, but the weight of authority is in favor of the admissibility of evidence by the plaintiff in actions of slander and some other actions, to show the defendant's pecuniary ability at the time the cause of action accrued; and this, on the ground that wealth is an element in man's social rank and influence and therefore proof of it tends to show the extent of the injury from the slanderous speech or other act of indignity and insult. See, authorities in Reporter's notes to *Brown v. Barnes*, 38 Am. Rep. 375.

The actual damage from a slander does not depend on the defendant's ability to pay; but the extent of the injury and consequent damage does depend in some measure on the defendant's rank and influence; and as rank and influence depend somewhat on wealth, evidence of wealth by general inquiry, not the detail, is pertinent to the issue. 2 Greenl. Ev. § 269.

So far, it is a question mainly of reputation for wealth. But when exemplary damages are also claimed, which are allowed in part in the nature of punishment of the defendant "on account of the malicious or oppressive character of his acts," *Earl v. Tupper*, 45 Vt. 275, his pecuniary ability must be considered in order to determine what would be a just punishment for him. In applying pecuniary punishment to a party, his ability to pay is a proper element for consideration. Actual means, not reputation, is then material. But it is claimed that as the plaintiff did not tender the issue of defendant's means or make any claim on that account, the defendant had no occasion or right to show he had no means.

On this claim the case of *Johnson v. Smith*, 64 Me. 553, is precisely in point. There, as here, the plaintiff offered no proof to show and claimed no damages by reason of the defendant's means, but did claim exemplary damages. The court said: "If the plaintiff really intended to admit that the defendant was without means, the testimony could have done him no harm; but such an admission was not distinctly made, and in the absence of it, the exclusion of the testimony would be injurious to the defendant. It certainly deprived him of a legal right." We hold this exception was well taken.

6. Exception was also taken to the testimony of the plaintiff himself as to the mental sufferings caused by the slander, to the effect that he was overcome and cried; could not sleep nights; could not work; did not feel like seeing anyone. It is not claimed in argument, as it could not well be, but that damages may be given for mental suffering occasioned by slander. *Treanor v. Donahoe*, 9 Cush. 229; *Goodin v. Corry*, 7 Mann. & Gr. 346; *S. C.* 8 Scott, N. R. 25.

The alleged error, in the language of the

brief, was in allowing the plaintiff "to narrate the outward signs of his inward anguish." In support of this claim *Stone v. Heywood*, 7 Allen, 118, is cited, where the court say: "Mental suffering cannot be directly proved as a fact by anyone besides the sufferer, but is a matter of inference from causes which naturally tend to produce it. It cannot be measured aright by outward manifestations; for there may be a show of great distress where little or none is felt. And great distress may be concealed and borne in silence with an apparently quiet mind."

It is not entirely clear what the court meant to indicate as to the right of the party to testify as to his sufferings. The evidence there was from other witnesses. Here it was from the party. The natural tendency of the alleged slander was to produce "pain and anguish of mind," the effect averred in the declaration. Being a proper allegation it was proper to prove by the plaintiff that the slander, in fact, had the effect alleged, and the extent of it. Loss of time by reason of not being able to work was not an element of damage, but the not being able to work would tend to show the severity of the mental suffering. "How great was your pain and anguish on account of charges so made by defendant." Suppose the answer had been, "They made me sick." The physical pain, expense and loss of time in that sickness, would not have been a kind of damage which forms a ground of action, but the fact of sickness would tend to show the extent of mental suffering occasioned by the defendant's wrong.

We think this exception cannot be sustained.

7. Upon the question of provocation, even on the defendant's theory of the law, we are unable to say there was error in the ruling below, owing to the meager presentation of the point in the bill of exceptions. Cases which hold that words in the nature of provocation on other occasions are admissible, surround the evidence with limitations and conditions on account of which the admissibility of the evidence must rest to some extent in the discretion of the trial court. In any view of the law the statement in the exceptions falls short of an affirmative showing of error.

8. Exception was taken by defendant to a remark of the counsel for the plaintiff in the closing argument to the jury. He made a statement of a fact to the jury which concededly was not in proof. The impropriety and wrong of counsel thus stating or assuming facts in argument which are outside of all evidence is perfectly manifest. If a deliberate act, its object can be only to have the jury consider a fact not in the case, and thus induce a verdict not warranted by the evidence. Legitimate argument elucidates the truth. Its power and usefulness in this behalf is very great. The largest latitude should therefore be allowed to counsel in argument fairly within the scope of the evidence. But it has been repeatedly held in other jurisdictions and recently in this, that when counsel persistently travel out of the record, basing argument on facts not appearing, and appealing to prejudice, irrelevant to the case and outside of the proof, it not only merits the severe censure of the court, but is valid ground for exception. See, authorities cited in defend-

ant's brief. But in this case the exception was to a single remark, not unlikely an inadvertence in the heat of debate, possibly, as now claimed, provoked by objectionable suggestions of opposing counsel, promptly dealt with by the court, and not persisted in by the erring counsel, and we think worked no injury to the defendant; therefore this exception should not be sustained.

9. The defendant is entitled to no benefit from his exception to the failure of the court to charge according to his third request. As repeatedly held, a request must be wholly sound in order to make an exception to refusal to comply with it available. The defendant was not entitled to a charge in compliance with the last clause in that request for reasons stated on another point in this opinion.

Assuming that the balance of the request was sound and therefore called for proper instructions upon the subject, no exception was taken to the charge as made; therefore the defendant has nothing on this point available to him here.

The foregoing covers all the points in the defendant's brief which are subject to review on this bill of exceptions.

On account of the error found in respect to the exclusion of evidence to show that the defendant was a man of no means, the judgment of the county court would be reversed; but as the ruling on that point bore only on the question of exemplary damages, it is proper to allow the plaintiff to remit that part of the damages, and thereupon affirm the judgment.

Therefore, if the plaintiff enters a remittitur of the \$60 exemplary damages included in the verdict within twenty days, the judgment is to be affirmed; otherwise, said exception is sustained, judgment reversed and cause remanded for new trial.

Wm. S. BROCK

Samuel BRUCE and Trustee.

1. The final oath taken by the listers, acting under the tax law of 1880, was in effect that they had estimated the value of the real estate at such sums as they "would appraise the same in payment of a just debt due from a solvent debtor." Held, that it was equivalent to stating that they had appraised it "at its true value in money," as required by the statute. (*Walker v. Burlington*, 56 Vt. 131, distinguished).
2. A lister's oath need not embody a statement of compliance with every detail of official duty; thus, it is presumed that the valuation relates to the time required by law, *i. e.*, April 1; also that it was made on the basis required by law; as, the current value of the property, etc.
3. The statute does not require the town clerk to minute the date of filing the personal list in his office.
4. The validity of the lists, when made in good faith, is always upheld, if the errors complained of are only the result of mistake of judgment. Here it was claimed that there were erasures in

some cases; but the court assumed that the listers acted in **good faith**, as it did not appear that they were in fault in not making the list more perfect.

5. A **school district collector** need not be sworn.
6. When a collector's **notice to a taxpayer** is too indefinite as to the time he would be at home to receive his taxes, it is **properly left to the jury** to say whether the taxpayer had refused to pay at all.
7. In an **action to recover a tax**, the **testimony** of an attorney, in effect, that he saw the defendant just before the suit was brought and that he refused to pay the tax, was **properly excluded**.
8. A **school committee's certificate** attached to the rate bill, showing for what purpose the tax was assessed, **may be contradicted**; and it was for the jury to determine whether anything was included that was not voted by the district; as, repairs of the schoolhouse.
9. The court declined to decide whether the **defense** could be made **under the general issue**, as the question was not raised in the exceptions.

(Decided January 21, 1886.)

ASSUMPSIT, under the statute, to recover a school tax. Plea, general issue, trial by jury, June Term, 1884, Caledonia County. Verdict ordered for the defendant. *Reversed.*

The plaintiff offered to prove by Stoddard, a witness referred to in the opinion, that, as attorney for the plaintiff and just before he brought this suit, he saw Bruce and told him that he had better pay this tax; that Bruce refused to pay it and said he never would. As to the notice, the plaintiff testified that he called upon Bruce for the tax two or three times, showed him the tax, and that Bruce refused to pay it; that he told him that he should be at home any day to receive it; that this notice was within a week or two after he got the tax bill; that Bruce had never paid the tax, nor offered to pay it; that he tried to find personal property upon which to levy the warrant, but was unable to do so, and so commenced this suit by trustee process. The parties lived in the same village.

Messrs. Bates & May, for plaintiff.

Messrs. Ide & Strafford, for defendant.

Rowell, J., delivered the opinion of the court.

The oath attached to the list of 1881 is in form like that prescribed by § 35, chap. 88, Gen. Stats. to be used in the years of the general appraisal of real estate.

No. 78 of the Statutes of 1880, provided that real estate should be appraised and set in the list in 1881, "at its true value in money" on the first day of April in that year, and that all taxable property should be appraised by the listers, at such sums as they would appraise the same in payment of a just debt due from a solvent debtor, "Having regard to the current value of such property and the sales thereof, other than auction sales, in the locality where it is situated." The oath contains a statement that the listers estimated the value of the real estate at such sums as they would appraise the same in

payment of a just debt due from a solvent debtor; but it does not state that they appraised it at its true value in money nor upon what basis they made their valuation, and for these omissions it is claimed that the oath is defective and the list void.

As to the omission to state that the real estate was appraised at its true value in money: it is sufficient to say that the statement contained in the oath is equivalent to that; for it is the statutory duty of appraisers, in appraising land to pay a debt, to appraise it at its true value in money. This is the view adopted in *Houghton v. Hall*, 47 Vt. 333.

In *Walker v. Burlington*, 56 Vt. 181, the form of the oath used was that prescribed by § 36, chap. 88, Gen. Stats. for annual lists, and contained neither of these equivalent statements. The case does not decide that it should have contained both.

As to the other omission complained of: we think it was not necessary for the oath to contain it. The General Statutes required listers, in the appraisal of real estate, to have reference to the value thereof on the first day of April of the year of their appraisal, and the Revised Laws required substantially the same thing; but it was never thought necessary for the oath to contain a statement of compliance with this requirement, although the same reason for it exists as is urged here, namely: that without it the oath would be perfectly consistent with the theory that their appraisal had reference to some other time. It is not the intention of the statute that the oath should embody a statement of compliance with every detail of official duty. The ordinary presumption of regularity that attaches to the official acts of public officers generally has some application here. Thus, a grand list, regular on its face and properly sworn to, is presumed to be correct until the contrary appears. *Wilson v. Seavey*, 38 Vt. 221. This involves the presumption that the valuation relates to the time required by law. Why may it not as well involve the presumption that it was made on the basis required by law? We think it does, and that the oath is sufficient, without stating the basis.

As to the personal list of 1882: the defendant objected to its admission, because the town clerk "Did not himself minute the date when it was filed in his office, and because in some cases there was no sum opposite the name of the person; in others, an erasure; and in others, the entry, in suspense." As to the first objection, the statute did not require the town clerk to minute the date of filing in his office. The statute required the listers to lodge it there on or before the 25th of April, and the time of such lodgment could be shown by parol. *Blodgett v. Holbrook*, 39 Vt. 336, 343.

As to the second objection: it does not appear how imperfect the list was in the respects complained of, nor why the imperfections existed, nor that the listers were in fault in not making it more nearly perfect; and we must assume therefore that they acted in good faith in the matter, and the defendant has not been injured, for as to him, no complaint is made but that his personal list was complete. Now, without deciding whether the personal list is essential to the validity of the grand list or not, or if it is, what imperfections therein will in-

validate the grand list, the case is one for the application of the doctrine laid down in *Wilson v. Wheeler*, 55 Vt. 448.

There the listers did not comply with the law in the ascertainment and appraisal of property, and they neglected to set in the list \$500 in money that should have been set to a ratable inhabitant; but it was held that the grand list was not thereby invalidated as a basis of taxation; and the court said that it had always upheld the validity of lists when made in good faith, and the errors complained of were the result of mistake in judgment of town officers; and that to require of listers a strict and technical compliance with all the requirements of the law in making lists, would invalidate most of the lists in the State and render it impracticable, if not impossible, to make lists on which taxes could be collected. We reaffirm this doctrine. It is salutary in the highest degree.

We have been cited to no statute, and we think there is none now, requiring school district collectors to be sworn. The court held in *Houston v. Russell*, 52 Vt. 110, that such a collector, appointed by the selectmen to fill a vacancy, must be sworn; but the case was put solely on the statute then in force, and not at all on the constitutional provision requiring every officer, whether judicial, executive or military, in authority under this State, before he enters upon the execution of his office to take and subscribe the oath of office.

But the course of legislation and judicial decision on this subject shows that this provision has never been regarded as applying to town and school district officers; and we understand the general practice to have been, not to require such officers to be sworn, in the absence of any statute making it necessary. They are not regarded as in authority under this State, within the meaning of the Constitution, but rather as in authority under their respective municipalities. The Legislature has from time to time enacted that certain town and school district officers should take the official oath; from which the implication arises that without such legislation the oath was thought not to be required. And section 14 of the Revised Laws seems to imply that this constitutional provision is not universal in its application; for it enacts that the word "sworn," when applied to public officers required by the Constitution to be sworn, shall refer to those oaths; and when applied to other officers, it shall mean sworn to the faithful discharge of the duties of their offices before a person authorized to administer oaths.

But we regard this question as settled by the decisions of this court. In *Lemington v. Blodgett*, 87 Vt. 210, it was expressly held, there being no statute requiring it, that selectmen need not be sworn.

In *Day v. Peaseley*, 54 Vt. 310, the same thing was held, although the contrary contention was based upon the Constitution, as shown by the brief of plaintiff's counsel. Of course, it cannot be contended that school district collectors come within the Constitution, if selectmen do not.

We do not think the plaintiff's notice to defendant was sufficiently definite as to the time when he would be at home to receive his tax; but we do think there was sufficient evidence of an absolute refusal to pay, to entitle

the plaintiff to go to the jury on that question, and to warrant the jury in finding that the defendant meant by what he said that he would not pay at all.

Stoddard's testimony was properly excluded.

The tax is said to be illegal because it includes an assessment for repairs, neither authorized to be made nor voted to be paid for. Whether the repairs were authorized or not is not material, for if they were, a tax could not be assessed therefore unless voted, because, as said in *Rouell v. Horton*, 57 Vt. 31, a vote of the district is the only authority for assessing a tax, and a tax assessed without a vote or beyond a vote is void; and here was no vote to raise a tax to pay for repairs, but only for "the expense of said schools." But the case shows that \$210.72 of public money were paid into the treasury in March, 1882, and that these repairs, \$165, were paid for on April 22, 1882, thus leaving an apparent balance in the treasury of \$45.72. On May 22, 1882, the committee paid in \$100 more, which the treasurer supposed to have been borrowed by the district that day. This would make the apparent balance in the treasury \$145.72. The whole amount of the tax assessed was \$434.60, being \$48.98 less than the whole expense of the schools for the year, which was \$478.58. Thus it appears that the tax and the \$45.72 would pay the expense of the schools, and \$1.79 more. It would seem, therefore, that nothing was included in the tax for repairs, although there may have been to pay the \$100 which may have been and probably was used by the district for some purpose; but how that was does not appear.

There was, then, evidence tending to show that the tax did not include anything for repairs or anything else but the expense of schools; and although the certificate of the committee attached to the rate bill shows that the tax was assessed for "painting the school house and other repairs" as well as for the "current expense of the schools," yet it is not conclusive and may be contradicted; *Read v. Jamaica*, 40 Vt. 629, and the fact shown, if it be a fact, that nothing was included for repairs or for any other improper purpose; and the plaintiff had a right to go to the jury on that question.

Some discussion was had at the bar about the defendant's right to make his defense under the general issue; but as the exceptions do not raise the question, we take no notice of it.

Judgment reversed and cause remanded.

Veasey, J., did not sit.

T. T. AMORY & CO.

Estate of James GREER.

Where several claims against a deceased person's estate have been purchased by one person, they should be allowed and an appeal taken in the name of the original owners; and an appeal in the name of such owners will not be dismissed, where the commissioners' report showed that the claim was presented

and allowed in the right name, although the aggregate allowance of the several claims was carried into the column of the balances, and although they intended to allow only what had been paid for the claims.

(Decided February 19, 1886.)

APPEAL from probate. Heard on motion to dismiss, September Term, 1885, Rutland County. Motion *pro forma* denied. *Affirmed*. The commissioners' report showed that several claims were presented and allowed, as follows:

"Names of Claimants.	Claims.	Allowed.	Disallowed.	Off-set.	Balance Against Estate.
T. T. Amory & Co.	\$161.40	\$50	\$111.40	\$ "	\$ "
(Several other claims)					\$584.30

NOTE.—On the above claims bought by Thomas Greer we intend to allow him what he paid and 10 per cent for interest and expenses."

The motion to dismiss the appeal was on the ground that the order of the court accepting the commissioners' report showed upon its face that no claim was presented to said commissioners by said T. T. Amory & Co.

Messrs. Geo. M. Fuller, W. H. Preston and W. C. Dunton, for plaintiffs.

Messrs. A. F. Walker and F. G. Swington, for defendant.

Rowell, J., delivered the opinion of the court:

It is claimed that it does not appear from the commissioners' report that Amory & Co. presented any claim to the commissioners, or that any sum was allowed to or against them; but that, on the contrary, it appears that the claim from the disallowance of which the appeal is taken was presented by and in the name of Thomas Greer, and the allowance and disallowance made to and against him. But we think the record shows that Greer presented this claim in the name of the appellants, with nine others in the names of different persons, as he well might if he was the equitable owner of them as claimed. No offset was presented to any of these claims, and the aggregate allowance on all of them is \$584 30, which is carried into the column of balances against the estate; but the amounts of each claim and of the allowance and disallowance on each, are placed in their appropriate columns, but only said aggregate allowance is carried into the column of balances; but this is not important, inasmuch as it plainly appears that of the claims presented in the names of the appellants, more than \$20, to wit: \$111.40, was disallowed, which entitles them to an appeal.

Judgment affirmed and cause remanded.

SPIRITUAL ATHENEUM SOCIETY v.

Selectmen of RANDOLPH.

A petition for a writ of *mandamus* will not lie in favor of a spiritual society.

against the selectmen of a town to compel them to allot to it an equal share of the public money given by law to religious societies, where the money had been divided before the petition was brought, as an order to allot would be nugatory; nor will it lie against their successors in office, as there is no person to whom to direct the writ, and no breach of duty, complained of as to them.*

(Decided February 20, 1886.)

PETITION for *mandamus*. *Dismissed*.

The petition set forth, in part, that the petitioner was a religious Society, organized according to law for the purpose of supporting the gospel and maintenance of public worship, located and holding regular meetings for the purpose aforesaid in the Village of West Randolph. The articles of association were also set out, commencing: "Spiritual Athenaeum Society. We, the subscribers, hereby associate ourselves together as a Corporation," etc. Then followed the purpose of the Association, its organization, and the names of the members. The petition also alleged that the Society, since its organization, had maintained public worship in said town "by regularly ordained ministers of the gospel, more than one fourth the number of Sabbaths," etc.; that it was entitled to receive its share of the rents of land granted to the ministry by virtue of the Revised Laws, § 2707; that the petitioner, by its officers, on the last Tuesday of March, 1884, appeared before the Selectmen, and asked to be considered in the division of said rents; and that the Selectmen declined to grant their request and wholly disregarded their legal rights. The prayer was, that the court would "Order and direct the said board of Selectmen, or their successors in office, for the year ending the Friday preceding the last Tuesday in March, 1884, and each succeeding year, so long as the petitioners shall maintain a legal religious organization, etc., * * * to consider and recognize the petitioners, or said Spiritual Athenaeum Society, in the division of the rents." The defendants admitted in their answer, that the petitioners had articles of agreement duly recorded; that they appeared before them, and claimed that they were entitled to a share of the rents, etc.; but denied that the petitioner was a religious Society. Evidence was taken.

* The further facts are sufficiently stated in the opinion of the court.

Mr. E. J. McWain, for petitioner.

Mr. N. L. Boyden, for defendants.

Powers, J., delivered the opinion of the court:

We have no occasion to decide whether the

*NOTE.—REV. LAWS, § 2707: "The rents of lands granted to the use of the ministry or social worship of God, and the rents of lands granted to the first settled minister, shall, on the Friday preceding the last Tuesday in March in each year, be equally divided by the selectmen among the different organized religious societies in town who maintain public worship at least one fourth of the Sabbaths in the year."

petitioner, on the facts, is legally entitled to share in the distribution of the public money given by law to religious societies who maintain stated preaching of the gospel for one fourth of the Sabbaths during the year.

The case shows that in March, 1884, the defendants, in fact, divided the public money among other religious societies. That money has gone beyond their control. An order, therefore, to allot its proper share of the same to the petitioner would be wholly nugatory. For this reason the writ of *mandamus* cannot be awarded as to that money. High, Ex. Legal Rem. 14.

Moreover, the petition for this writ was not filed until November 24, 1884, eight months after the claimed wrong was done, and no steps were taken to arrest the alleged wrongful distribution of the fund while it yet remained within the control of the defendants.

The petition also prays that the writ be issued against the "successors in office" of the defendants, directing them in the future, so long as the petitioner is entitled, to award to the petitioner its proper share of said fund. In other words, the court is asked, in advance of any neglect of duty by officers not yet elected and who, when elected, for aught that appears may do all that the petitioner may ask, to make a standing order that they divide this fund in compliance with the petitioner's claim. This plainly cannot be done. There are no persons in existence to whom to direct the writ. The presumption, in the absence of proof to the contrary, is that officials charged with the performance of an official duty will perform it properly. There is no neglect of duty, therefore, which in this class of cases, is the ground and reason for the issue of the writ.

Petition dismissed, with costs.

Charles M. SHERMAN

v.

Holton C. JOHNSON *et al.*

1. By **pleading** to the new counts, the defendants **waived their right** to move to **dismiss** them on the ground that they embraced a new cause of action.
2. In an **action** brought by a father to **recover for injuries** to his minor son caused by an assault and battery, which, it was alleged, **resulted in the death** of the son, whereby the father was deprived of his services, etc., the defendants requested the court to **charge** that no recovery could be had for pecuniary injury resulting to the plaintiff by the death of his son, although caused by the wrongful act of the defendants; but the court refused the request and charged that the plaintiff might recover for loss of services of his son until he would have been of age. **Held error; and that at common law the death of a human being affords no ground for an action for damages.**
3. In such case the father is not entitled to **exemplary damages.**

(Decided February 19, 1886.)

TRESPASS for an assault and battery, with a count in trespass *quare clausum*. Trial by jury, September Term, 1885, Rutland County. *Reversed.*

The plaintiff after the second term filed an amended declaration in four counts. The defendants pleaded separately, the general issue, special pleas, and notice of special matter. These pleas were filed July 15, 1885. On September 12, 1885, the defendants filed a motion that the first and fourth counts of the amended declaration be stricken out, because they were not for the same cause of action as the original declaration, and that the plaintiff be required to elect upon which of the counts of his original declaration he would go to trial.

The plaintiff thereupon gave notice that he abandoned his third count in the original declaration, and withdrew all claim for damages to his real estate. The court then overruled the motion as to the other branch thereof, and the defendants excepted.

The first count in the original declaration was for assaulting and beating the plaintiff; the second count was in trespass *quare clausum*, and for beating the plaintiff; third count was in trespass *quare clausum*, and for beating the plaintiff, and his minor son. The third count also alleged, that the plaintiff was compelled to expend \$200 in caring for his said son, and that he lost his labor, etc. In the first of the new counts it was alleged, that on August 25, 1884, the defendants assaulted and beat the plaintiff's minor son; that by reason thereof said son died on the first day of December, 1884; that he had been deprived of his said son's services; and that he expended large sums of money to cure his said son. In the second and third of the new counts there were allegations that the defendants assaulted and beat the plaintiff, and threatened to injure his property. The fourth count in the amended declaration was substantially like said first new count except that it was alleged that the defendants assaulted and beat both the plaintiff and his minor son. The plaintiff claimed and his evidence tended to show that while he and his minor son, Lensey R., were at work in his field, the defendants armed with stones and clubs came upon them, and beat and wounded them; and also what he paid on account of the sickness and death of his son. A prominent issue was whether he died of *meningitis*, caused by the blows received in the affray. The defendants pleaded self defense; and their evidence tended to prove it.

The defendants requested the court to charge:

"1. That the withdrawal by the plaintiff of the counts in trespass *quare clausum*, leaves nothing in the case as a ground of recovery, except the charge of an assault and battery of the plaintiff; and that no recovery can be had upon the counts, which charge an assault upon Lensey R. Sherman, or of an assault and battery of Lensey R. Sherman and the plaintiff jointly; but that this action is confined to the charges of trespass against the person of the plaintiff."

"16. If the death of Lensey R. Sherman was caused by the blow received in the affray upon the meadow, and the same resulted from an excess of force, or by the wrongful act of the defendants, no recovery can be had in this

action for such pecuniary injury, resulting from his death, to the plaintiff."

Messrs. W. C. Dunton and J. C. Baker, for defendants:

There was error in overruling the motion to dismiss, as the first and fourth counts in the amended declaration were for a new cause of action. *Brodek v. Hirschfield*, 57 Vt. 12.

The court erred in refusing to charge as requested that no recovery could be had in this action for damages resulting to the plaintiff from the death of Lensey R. Sherman, and in charging that the plaintiff was entitled to recover for expenses of medical attendance, etc., and for the services of his son. *Green v. H. R. R. Co.* 28 Barb. 9; *S. C.* 16 How. Pr. 280; *Hyatt v. Adams*, 16 Mich. 181; *Kearney v. B. & W. R. R. Co.* 9 Cush. 108; *Waldo v. Goodsell*, 38 Conn. 482; *Carey v. Berkshire R. R. Co.*; *Skinner v. Housatonic R. R. Co.* 1 Cush. 475; *Ins. Co. v. Brame*, 95 U. S. 754 (bk. 24, L. ed. 580).

There was also error in the charge as to exemplary damages. Sedg. Dam. 526; *Whitney v. Hitchcock*, 4 Den. 461; *Couden v. Wright*, 24 Wend. 429; *Stephenson v. Hall*, 14 Barb. 222.

Messrs. Redington & Butler, for plaintiff:

The amended declaration did not set out a new cause of action. *Luce v. Hoisington*, 56 Vt. 487.

But if it did, the defendants, by filing their pleas and justifying the assault, waived their right to claim under the motion. *Blodget v. Skinner*, 15 Vt. 716.

The allegation of assault upon the son is only a fuller statement of the "other enormities committed"—matter of aggravation. *Luce v. Hoisington*, 56 Vt. 487; *Earl v. Tupper*, 45 Vt. 275.

The gist of the action is not the death of the son. 23 N. Y. 465; 26 N. Y. 49; 20 Wend. 210; 16 Mich. 180; 8 Conn. 489; *Pa. R. R. Co. v. Kelly*, 81 Penn. St. 372; Sedg. Dam. 528, 636, 651.

The plaintiff can recover for medical attendance, funeral expenses, etc. *Roelee v. Ormsby*, 22 How. Pr. 270; 18 Abb. Pr. 334.

Rowell, J., delivered the opinion of the court:

By pleading to the first and fourth new counts the defendants waived their right to move to dismiss them as being for a cause of action not embraced in the original declaration.

Defendants requested the court to charge that no recovery could be had for pecuniary injury resulting to the plaintiff by the death of his son, though caused by the wrongful act of the defendants; but the court refused to charge as requested, but charged that plaintiff might recover for loss of services of his son until he would have been of age. In this there was error, for the authorities are numerous and well nigh uniform, that at common law the death of a human being, though clearly involving pecuniary loss, affords no ground for an action for damages. Cooley, Torts, 262; *Carey v. Berkshire R. R. Co.*; *Skinner v. Housatonic R. R. Co.* 1 Cush. 475; *Green v. Hudson R. R. Co.* 28 Barb. 9; *S. C.* 16 How. Pr. 280; *Ins. Co. v. Brame*, 95 U. S. 754 [bk. 24, L. ed. 580] and cases *passim*.

The court charged that the jury might give exemplary damages on the ground of the beating of plaintiff's son. This was also error. Such damages would have been recoverable by the son and are recoverable by his administrator, *Earl v. Tupper*, 45 Vt. 275, but they are not recoverable by the plaintiff; his recovery on this score is limited to actual damages. *Whitney v. Hitchcock*, 4 Den. 461. If the rule were otherwise, the defendants might be twice subjected to the payment of exemplary damages, and be liable to indictment besides.

Reversed and remanded.

John B. HUBBARD

Susan A. BUGBEE.

1. While the defendant was a married woman, her mother gave her by will a farm and personal property thereon, mainly live stock, which came into the possession of the defendant and her husband. The will was in general terms, with no words limiting the gift to "her sole and separate use," or excluding the marital rights of her husband. The personality being attached on the husband's debts contracted by him for carrying on the farm and supporting the family, she borrowed money to discharge the attachments, and gave her note therefor. Subsequently she renewed the note, and, after the decease of her husband, she being sole, promised in writing to pay it. Held, that the defendant had no separate estate in either the real or personal property; that the husband's rights were not affected by the statute, R. L. § 2322, as it was passed after the personality vested in him; that the note was void; and that there was not a sufficient consideration for the new promise. (*Hubbard v. Bugbee*, 55 Vt. 506, distinguished.)
2. A letter written by defendant offering to renew the note, etc., is held to amount to a new promise, sufficient, if for a legal consideration, to remove the bar of the statute.

(Decided February 20, 1886.)

ASSUMPSIT, general and special. Heard on the report of a referee, December Term, 1883, Caledonia County. Judgment for the defendant. *Affirmed*.

The special court set up the material facts, averred that the defendant had a separate estate, created the debt on its faith and credit, and when discovered promised to pay it. Pleas: general issue, Statute of Limitations and coverture at the time of making the alleged promises. The referee found: that the defendant was the daughter of John Bowen and Hannah B. Bowen, who lived on a farm in Concord, owned by Hannah B., who deceased sometime before November, 1855; that the will of said Hannah B. was duly probated in said November, and Joel Fletcher was appointed executor; that the defendant was married in 1858 to Edwin Bugbee, and lived with him as his wife

until his death in 1881; that at the time of the death of the defendant's mother, the defendant and her husband were living on said farm, and continued to live there and carry it on until the death of said Edwin, except that he was away some two years, and that the defendant still lives on the farm and owns it under the will.

The referee also reported: that at the time of the death of the defendant's mother there was on the farm, belonging to her, certain personal property, mainly live stock, which "Came into the possession of the defendant and her said husband upon the mother's death, the father living with them, not they with him, they carrying on the place, not he"; that, "the defendant's title to said live stock was such only as said will gave her"; that said husband "was not very thrifty and never had much property"; that "in the spring of 1858 said Edwin was owing several parties for goods and property bought by him before that time, for carrying on the farm, supporting the family and his general expenses"; and during that spring those creditors brought suits against said Edwin to recover their said debts, and attached the live stock aforesaid; that said Fletcher advised that money should be hired to pay off those debts; that Lucy M. Hubbard, defendant's sister, also advised it and offered to loan the money for that purpose; that it was finally decided to take the money and settle the suits, which was done; that the money was not delivered to defendant in person, but both she and said Lucy M. understood how the money was to be used; that the defendant alone gave her note for said money; that she signed without her husband because she was considered the responsible party, that is, that she owned the property as a separate estate; that it "was expected by all parties interested that Edwin would go on and carry on the farm, and take care of the stock, and be able from his earnings, or from the produce of the farm" to pay the borrowed money. It was further reported: that the defendant renewed the note June 10, 1864, by giving a new one; that a payment of \$80 was made August 1, 1864; that a second payment was made May 30, 1870; that May 16, 1876, the plaintiff, who became the lawful holder of the note, took a horse in part payment; that on April 14, 1882, the plaintiff wrote to the defendant urging payment; and on April 19th the defendant replied as follows, in part:

"Yours of the 14th came to hand last night * * * and in reply will say, I am willing to do all that I can. I thought when you was down that I should get something of Russell, and come up and make a payment; but he cannot let me have anything. If I can renew it, should like to; I do not know what else to do. * * * I could sell my farm and pay it. * * * I think it would be better if I can sell, and I could pay it. * * * Be sure and let me know what I can do."

The will was in part: "I give to my beloved husband, John Bowen, and my unmarried daughter, Amanda Bowen, jointly and for their use, the rents and profits of my estate, real and personal, during the life of my beloved husband, and so long to my daughter Amanda, as she remains unmarried; meaning to devise to her a home and bequeath to her a living and support while she remains single.

And if she should be married, it is my will that she be paid out of my personal estate the sum of \$100. * * * It is my will also that my said daughter Amanda be paid the sum of \$800 in annual payments of \$25 each, the first payment to be made in one year from my decease, and so on \$25 a year until the whole is paid; meaning also that after her marriage and departure from the homestead her rents and profits of the homestead shall cease, and on the payment of the above legacy all her claims shall cease. After the fulfillment of the above named devices and bequests to my beloved husband and daughter, Amanda, I give to my daughter, Susan Angeline Bugbee, the whole of my real and personal estate." The report only stated as to said Amanda: "The defendant's sister Amanda, named in said will, lived on the farm with the defendant until her marriage in December, 1860."

Messrs. Cahoon & Hoffman, for the plaintiff:

The defendant's letter after the death of her husband constitutes a promise to pay the note. The defendant contends that this money did not go for the improvement of her separate estate. The farm and stock vested in her by will. In the forum of conscience they were her debts; and she so understood it. The reasoning of Redfield, J., in *Hubbard v. Bugbee*, 55 Vt. 506, between these parties, fully sustains us in claiming that the defendant is liable upon her promise. The attachments, if followed by judgment and sale, would have depleted the separate estate, and it is fair to presume that they would have been. *Rawlins v. Rounds*, 27 Vt. 17.

The money was loaned upon faith in her credit and estate.

Messrs. Harry Blodgett and M. Montgomery, for defendant:

The contract proven was not such a contract that it could have been enforced against the defendant or her separate estate in a court of equity and, therefore, does not constitute a sufficient consideration to support a new promise. *Hayward v. Barker*, 52 Vt. 480; 1 Pars. Cont. 482; *Watkins v. Halstead*, 2 Sandf. 811; *Waters v. Bean*, 15 Ga. 858.

The money for which the original note was given went to pay the husband's debts. The defendant's separate estate in 1858 was worth nothing, charged as it was with the support of her father and maiden sister, etc.; so that the money was not loaned on the credit of that estate. *Dale v. Robinson*, 51 Vt. 20; *Yale v. Dedern*, 18 N. Y. 265; *Willard v. Eastham*, 15 Gray, 828; *Priest v. Cone*, 51 Vt. 495; *Brown v. Sumner*, 81 Vt. 671.

Powers, J., delivered the opinion of the court:

It has been assumed in the argument of this case that the defendant took and held, under the will of her mother, a separate estate in the farm and live stock in question.

The referee in his report says that "The defendant took and had such an interest in said farm as is given by said will; and there was no evidence that she ever had any other interest or title therein;" and that "the defendant's title to said live stock was such only as said will gave her."

If, therefore, the defendant had a separate

estate in the farm and live stock, it was created by the will of her mother. The clause of the will giving her this property is as follows: "After the fulfillment of the above named devises and bequests to my beloved husband and daughter Amanda, I give to my daughter Susan Angeline Bugbee the whole of my real and personal estate." Then follows a provision making it obligatory upon the defendant and her husband to live upon said farm during the lifetime of the testatrix and her husband, which condition was fully complied with.

The gift of the real and personal estate is in general terms, with no words limiting it to the separate use of the defendant. Such a conveyance does not create a separate estate, in the sense in which the term is used in the books.

There are two kinds of separate estates which married women may hold. One is the creation of courts of equity, the other is statutory.

An equitable separate estate can only exist, with the qualifications hereinafter noticed, when it is made such in the grant of the title by the use of unequivocal words showing an intent in the grantor to exclude the marital rights of the husband, such as the words "to her sole and separate use" or other words of like import. If such words are not used, the title will pass to the married woman; but the use will go to her husband, under the rules of the common law. In other words, inasmuch as a grant in general terms to a wife, at common law conveyed to her the title, and her husband, *jure uxoris*, at once became seised of the use. In order to create an equitable separate estate in the wife, it must appear from the terms of the grant that the grantor intended that the wife should take both the title and use. The intent to exclude the marital rights of the husband must be clear and certain. 2 Perry, Trusts, § 647.

"Separate estate in a married woman involves, as the characterizing fact, that she holds it to her sole use, in exclusion of the marital rights of the husband." *Frary v. Booth*, 37 Vt. 78.

As there are no words in the will signifying an intent to exclude the husband's common-law rights to this property, it is clear that the defendant had no separate estate under said will. Accordingly, when the will took effect, her husband, Edwin, became the absolute owner of the personal property in possession, and became entitled, during the life of his wife, to the rents, issues and products of her real estate.

But in many cases where the conveyance has lacked qualifying words limiting the estate to the wife's separate use, the husband himself has given to it such effect. Thus, unless the rights of creditors are prejudiced, the husband may himself convey an estate to his wife to be held to her separate use; or, by an antenuptial or postnuptial agreement, contract that his wife shall hold her property in exclusion of his right; or may allow her, without previous agreement, to manage and control it, holding herself out to the world as its sole owner, dealing and contracting on its faith and credit as owner; or he may renounce his marital right, abandon the possession to her, and thus compel her to use it in procuring her support. Other analogous instances might be cited. In all such cases equity has treated the wife's interest as an equitable separate estate, on the

ground that, although the grant of the title to the wife did not vest the sole use of the estate in her, nevertheless, as the husband was alone interested adversely to such separate use in the wife, he might supplement the grant of the title, by relinquishing his marital right, thus giving the wife the exclusive use. His act under such circumstances, may be properly regarded in substance as a grant by him of the use to the wife. Illustrations of this doctrine are found in *Richardson v. Merrill*, 32 Vt. 27; *Frary v. Booth*, 37 Vt. 78; *Dale v. Robinson*, 51 Vt. 20; *Priest v. Cone*, 51 Vt. 495, and many other cases in this and other States.

But the case at bar cannot be brought within the range of these cases. There is nothing to show that the husband was excluded from his marital rights, in the administration of the property; and the referee says the wife's title was such only as she took under the will.

Nor is there in the case a statutory separate estate in the defendant. We have no statute providing that married women shall hold land, conveyed to them during coverture, to their separate use; but § 2322 R. L. provides that "Personal property and rights of personal action acquired by a married woman during coverture, by inheritance or distribution, shall be held by her to her sole and separate use."

This statute was passed in 1867. The personal property conveyed by this will came to the defendant's husband before that time. The property being vested in him prior to the passage of the Act, his title was not and could not be divested by it.

As the defendant had no separate estate in either the real or personal property in question, she had no capacity, legal or equitable, to make contracts chargeable upon it.

If, as the plaintiff assumes, the defendant had had a separate estate in the property, her note, given for money to release her property from the clutches of the law, would be founded on good consideration and enforceable, during coverture, against such estate. It is universally held that as to those engagements which are enforceable against separate estates of married women, they contract as fully and freely as if *sole*. In other words, the disability of coverture as to such contracts is suspended or inoperative. The separate estate cannot be charged unless the *feme* has made a contract effectual to charge it. Such contract, therefore, is an essential factor in the creditor's right to enforce his debt. Such contracts then are valid. They are enforceable obligations to all intents, like contracts made by persons *sui juris*, except a resort must be had to a different forum for their enforcement, and no personal judgment can be rendered thereon. But these matters touch the remedy only and do not prove any inherent vice in the obligation itself.

Being thus obligatory, a moral obligation arises thereon sufficient in law, as a consideration, to uphold a new promise made when the woman is discovered to perform them. *Lee v. Muggeridge*, 5 Taunt. 36; *Flight v. Reed*, 1 H. & C. 703; *LaTouche v. LaTouche*, 3 H. & C. 575; *Goulding v. Davidson*, 26 N. Y. 604; *Fance v. Wells*, 8 Ala. 399; *Hubbard v. Bugbee*, 55 Vt. 506.

Lee v. Muggeridge, *supra*, though said not to be law, 1 Pars. Cont. 435, can be upheld

on its facts. The wife in that case had a separate estate. In England her general engagements are binding upon it; and by giving her bond, it is there presumed that she intended to bind it. Hence, her contract was not void, and the case is like *Hubbard v. Bugbee*, *supra*.

It follows logically that her distinct, unqualified written acknowledgment of a subsisting indebtedness upon such contracts, with an apparent willingness to remain liable therefor, made when she becomes discovert, is enough to raise an implied promise to pay, and thus remove the bar of the Statute of Limitations. And as by the great weight of authority, such new promise is a new cause of action based upon the original consideration, Ang. Lim. 245; *Bell v. Morrison*, 1 Pet. 351 [28 U. S. bk. 7, 175]; notes to *Whitcomb v. Whiting*, 1 Smith, Leading Cases, 858, there is no difficulty in maintaining the action of *assumpsit* upon a promise thus made, when the *feme* is discovert and capable of binding herself at law. The letter of April 19, written by the defendant fully warrants the implication of a new promise.

But in this case the defendant had no separate estate. Her note, therefore, was void. From her void contracts, no moral obligation arises, which can be a sufficient consideration for a new promise, express or implied, to perform them. *Hayward v. Barker*, 52 Vt. 429.

In this connection it is proper to say that this case was once before this court, on demurrer to the declaration and is reported, 55 Vt. 506. The declaration set forth that the defendant had a separate estate in the property in question and executed the note in question upon its faith and credit, and after the death of her husband promised to pay it. The demurrer admitted these facts; and the decision was expressly grounded upon these facts.

It was not intended in that case to question the doctrine advanced in *Hayward v. Barker*, 52 Vt. 429. In *Hayward v. Barker*, no binding obligation rested upon the wife during coverture, hence there was no moral obligation to support the subsequent promise made after coverture. In the case at bar, as it stood when formerly before us, the obligation was binding during coverture, and thus furnished a sufficient moral, if not valuable, consideration for the subsequent, new promise made after the coverture ended. Both cases, therefore, are sound in principle and rest upon abundant authority.

The judgment for the defendant is affirmed.

Nathaniel BRUCE, Admr.,

v.

CONTINENTAL LIFE INSURANCE CO.

1. Under § 780, R. L., the Supreme Court will not revise any error in admitting testimony by a master, unless an exception is taken thereto and filed in the court of chancery.
2. A "non-feiture," "paid up" policy of life insurance is not forfeited by reason of failure to pay annual interest on notes, which were given for part of the premiums, and which, it was found, were

regarded by the company as a loan to the assured.

3. One condition of the policy was, that on failure to pay the interest on the notes the policy should "cease and determine" "except as hereinafter provided." Then followed the condition, that if, after the company had received two or more premiums, there should be default, it would issue a paid up policy for as many tenths parts of the sum insured as premiums had been paid. The policy was issued for \$1,000. When four premiums had been paid, part in cash and part in notes which were overdue, except that interest had been paid, the assured claimed a paid up policy for four tenths. Held, (a) that there was no forfeiture, and that the orator was entitled to a decree for \$400, deducting the notes reduced by the dividends or profits, that belonged to the policy; (b) that the profits were such as the company had in fact earned; (c) that it was the duty of the company to preserve its solvency, and it had a right to change from the percentage to the contributive plan; (d) and that the circular issued by the company could be used in determining the meaning of the policy.

(Decided February 26, 1886.)

BILL IN CHANCERY. Heard on the report of a special master, June Term, 1885, Caledonia County. Decree for the orator. *Reversed.*

It appeared from the report, that the policy was dated December 30, 1870; that it was a "ten year endowment policy;" that the annual premiums were \$104.86; that, on the receipt of the policy, the assured paid \$62.92 in cash and gave his note for \$41.94, paying the interest on it in advance; that he paid his premiums in the same manner during the second, third and fourth years, paying the interest on all the notes in advance, "and all said premiums and interest were to the satisfaction of said Company;" that said M. T. Bruce, on November 1, 1875, made application to the Company for a paid up policy; that the Company changed from the percentage to the contributive plan on December 2, 1873; that said M. T. Bruce deceased January 20, 1883, and that the orator is administrator of his estate. The prayer of the bill was, that the defendant execute and deliver to the orator a paid up policy for the sum of \$400 with profits ascertained by accounting; and, to avoid circuity of action, that the defendant be decreed forthwith to pay the sum due upon said policy and said accounting, with interest.

The master found as to the dividends: "If the court are of opinion that the orator is entitled to such dividends as the Company paid on all endowment policies that have been in existence four years, from 1868 to 1873, inclusive, then the dividends would be 40 per cent of the premiums or just the amount of the notes; and the notes would be paid by the dividends and the orator would be entitled to \$400, as of December 30, 1882, without deduction. To this, interest added to June 2, 1885, gives the sum of \$458.12."

"If the court are of opinion that the notes are in part paid by dividends, but that the dividends are only such as the Company voted to pay in case the policy was renewed by successive payments, then the dividends would be four in number of \$24.57, and should have been indorsed and allowed upon the notes December 30, on each of the four years, 1874, 1875, 1876 and 1877. These deductions would make the notes amount to \$106.09, December 30, 1882, and that sum deducted from \$400, leaves \$293.91, due December 30, 1882, with interest since to June 2, 1885, in all, \$338.08."

The further facts are sufficiently stated in the opinion of the court.

Mr. C. W. Porter, for defendant:

The failure to pay the interest in advance upon the notes falling due December 30, 1874, avoided the policy and all payments thereon; and all dividends were forfeited to the Company. *Patch v. Ins. Co.*, 44 Vt. 481; *Atty-Gen. v. Ins. Co.*, 82 N. Y. 172; *Ins. Co. v. Robinson*, 40 Ohio St. 270; *Nettleton v. Ins. Co.*, 6 Ins. L. J. 426.

As the agreement was that dividends or profits should be applied to cancel the notes, they could not be applied in payment of interest. The Company had a right to change its plan of distribution of surplus. It was under no obligation to Bruce respecting the amount of dividends, as he was informed by Farr that the amount "depended upon the success of the Company."

Messrs. Ide & Stafford, for orator:

There has been no forfeiture of the policy. The defendant argues that we have not paid the premiums because we have not continued to pay the interest. But we have paid our premiums in the way directed by the defendant itself; and it is nowhere stipulated in the policy that a failure to pay interest shall work a forfeiture. Moreover, we have paid the interest on the premium notes for four years, and so have, even in that sense, made four complete annual payments. The profits held by the defendant, should be applied upon the notes; and when these have been applied, and the notes thus reduced have been deducted from the face of the paid up policy promised us, we are entitled to the balance as the amount of "the insurance paid for" by us. *Franklin L. Ins. Co. v. Wallace*, 98 Ind. 7; 4 Bigelow, *Ins. Cas.* 633; 5 *Id.* 187, 145, 559.

The defendant's contention would make nugatory and senseless those other parts of the contract and representations of the agent, which informed the insured that he would be entitled to a paid up policy, after the payment of two annual premiums. The dividends to be applied on the notes are those declared during the years in which the notes were given. These would be sufficient to pay the notes, as found by the master. *Currier v. Ins. Co.* 57 Vt. 496; *Brooks v. Ins. Co.* 8 Rep. 774; *S. C.* 16 Blatchf. 182; 20 Fed. Rep. 222.

The question as to the admission of evidence is not before this court, as no exceptions were taken. *Winship v. Waterman*, 56 Vt. 181

Powers, J., delivered the opinion of the court:

It is quite clear that much inadmissible evidence was received by the master in the hearing

before him. The testimony of Blodgett and Dewey and certain exhibits offered in connection therewith were objected to by the defendant, but the objection is not available in this court. Section 780 R. L. declares that "No questions in regard to the admission or rejection of evidence by the masters shall be heard in the Supreme Court, unless such objection is made by exception, duly filed to the report, in the Court of Chancery." No such exception was filed in this case and we must give effect to the statute as it reads.

The first question arising upon the master's report is whether the policy in question has been forfeited so that the right to a paid up policy has been lost.

The annual premium payable on Bruce's policy in advance was \$104.86. Under the rules of the Company this could be paid in cash or one half in cash and the other half by note running one year, the interest thereon being paid in advance.

Bruce paid his annual premiums on the half cash and half note plan for four years, and then claimed a paid up policy for four tenths of the sum insured.

It was represented to Bruce before taking his policy by Farr, the Company's agent, and by circulars issued by the Company, that the policy would be non-forfeitable after the payment of two annual premiums. In one of the circulars the Company uses this language: "Should future payments cease after not less than two have been made, the policy is not void but remains binding by its terms, without further payment of premiums for as many tenths * * * of the sum insured as there has been annual premiums paid. The non-forfeiture policies of the Company are so written that the payment of two annual premiums render them binding for the amount of the insurance paid for, without further attention on the part of the holder, thus obviating all possible danger of loss, either through inattention or inability to meet subsequent payments."

When the policy was issued it provided in its 8d condition, that "If the assured shall not pay the said annual premiums on or before noon of the several days hereinbefore mentioned for the payment of the same and the interest annually in advance on any outstanding premium notes which may be given for any portion thereof or shall not pay at maturity any notes or obligations given for the cash portion of any premium or part thereof, then and in every such case, this policy shall cease and determine, and said Company shall not be liable for the payment of the sum insured or any part thereof, except as hereinafter provided. The 4th condition then follows: "That if, after the receipt by this Company of two or more annual premiums upon this policy, default shall be made in the payment of any subsequent premiums when due, then, notwithstanding such default, this Company will convert this policy into a paid up policy for as many tenth parts of the sum originally insured as there shall have been complete annual premiums paid when such default shall be made."

The language of these conditions leaves no doubt as to the right of Bruce to a paid up policy for four tenths of the sum for which he was insured. If the language was ambiguous, Bruce had the right to construe it as the Com-

pany had declared its meaning in the circular above referred to. But we think it needs no extraneous aid in its construction.

The very end aimed at in offering and receiving the reduced or paid up policy is, as the Company's circular declares, to obviate "all possible danger of loss." The paid up policy issues as a redemption from a forfeiture of the original policy which otherwise would "cease and determine," for non-payment of premiums. It can issue only in case two full premiums have been paid and if so many have been paid, the right to it is given to the policy holder by the original policy itself. Thus his right to it is a contract right that inheres in the original policy. When issued it is not in itself subject to forfeiture for future non-payment of premiums. If any are payable in cash, notes or interest, the Company must stand for their collection on the promise of the policy holder to pay. If the paid up policy could be forfeited for future non-payment of premiums, it becomes a delusion and a snare. The policy holder is no better off than before, so far as the risk of forfeiture is concerned. May, Ins., §§ 348, 368.

The paid up policy issues for so many tenths of the sum insured as annual payments have been made and is based on the theory that insurance to such amount has been fully paid for.

When Bruce elected to stop his payments he was at once entitled to have his policy converted into a paid up policy freed of all risk of forfeiture for non payment of future premiums. Such paid-up policy would not mature, however, till the end of the ten years it had originally to run, unless Bruce sooner died. At maturity of the policy the Company had the right, by the terms of the policy, to deduct from the sum payable all indebtedness due the Company on account of the policy.

In the case of *Mary A. Coates v. This same company*, 1 New Eng. Rep. 247 [ante] the precise question here made arose upon the same kind of a policy. The Company claimed that the reduced or paid up policy had been forfeited by the non-payment of interest on three premium notes. Says Doe, Ch. J.: "The forfeiture clause qualified by the provision for a 'paid up' policy does not mean that the reduced 'paid up,' 'non-forfeiture' insurance is annually forfeitable for non-payment." And again: "The original contract did not make the non-payment forfeiture clause applicable to the promised 'paid up' policy into which the original could be converted." The master says that the Company regarded the sums given for part of the annual premiums as loans made to the policy holder. Upon its own theory then a failure to pay interest on such loans does not work a forfeiture. May, Ins. 345, a, and cases cited.

The case at bar is unlike *Patch v. Ins. Co.*, Vt. 481. There the question arose upon the construction of a paid up policy, issued in place of a former one surrendered, which contained an express stipulation that certain sums of interest could be paid in advance. The action was brought on the paid up policy and no question is made whether the paid up policy was such in form as the insured was entitled to. Such as was he accepted it, and the action was upon the form it was issued and accepted. The orator being entitled to a paid up policy, the question next arises as to its amount.

The time for the maturity of the policy having arrived, to avoid circuity of action a decree may be passed for the present payment of the amount of the policy to which the orator is entitled. Equity will treat that as already done which should have been done.

The defendant is entitled to deduct from the \$400, which the paid up policy should have issued for, the outstanding notes and interest thereon held by it, less any dividends or profits in its hands that properly belong to such policy. The policy itself is described in the margin as a "non-forfeiture endowment policy with profits." But the policy is silent respecting the meaning of "profits" in this indorsement, and we are left to ascertain the meaning from other sources.

Farr represented to Bruce that the profits to which he would be entitled would come in the way of dividends, which would be payable after four annual premiums had been paid, and that if he took a paid up policy the dividends would be applied when he took such policy. The question is not what profits the Company ought to have earned but what in fact it did earn. The Company was bound to conduct its business in a way to preserve its solvency. It owed this duty to all classes of its policy holders and Bruce, as one of them, had no right to share in any plan of distribution of profits that worked insolvency. When the Company then discovered that the percentage plan was disastrous to the common interest of its policy holders, it became a duty grounded in the very theory of insurance to adopt some other plan that would best subserve the interest of all persons for whom it acted.

The change to the contributive plan was warrantable and Bruce was entitled to dividends made under it, of \$24.57 for four years.

The decree is reversed and the cause remanded, with directions to enter a decree for the orator to the effect that he is entitled to a paid up policy on the life of his intestate for the sum of \$293.91 as of December 30, 1832; and, to avoid circuity of action, that the defendant be ordered to pay the orator said last mentioned sum with interest thereon from December 30, 1882, with costs of suit.

Rector GAGE, Admr. of Orin Hoyt, Deceased,
v.
Edwin HOYT.

In an action of assumpsit the plaintiff put in evidence a deed of a farm executed by his intestate to the defendant, in which deed was the following clause: "In consideration of our support during our natural lives and sixty dollars paid to us annually to our satisfaction." Held, that these words did not import that the annuity had been paid; and, as the grantor lived six years, that the plaintiff was entitled to recover \$360 and interest.

(Decided March 10, 1886.)

GENERAL ASSUMPSIT. Plea, general issue and notice. Trial by court, June Term, 1885, Addison County. Judgment for plaintiff affirmed.

The facts are sufficiently stated in the opinion of the court.

Mr. E. R. Hard, for plaintiff.

Messrs. Henry S. Foote and F. E. Woodbridge, for defendant.

Royce, Ch. J., delivered the opinion of the court:

This was an action of general *assumpsit*, brought to recover the amount named in a deed executed by the intestate and his wife on the 6th of October, 1876, to the defendant and Martin Hoyt.

The only evidence offered by the plaintiff in support of the claim made by him was said deed. The consideration for the conveyance is expressed in said deed in this words: "In consideration of our support during our natural lives and \$60 paid to us annually to our satisfaction;" and the only contention is as to the construction that should be given to that sentence.

It is claimed by the defendant that the words "paid to us annually to our satisfaction" mean that the annuity had then been paid up. If such had been the understanding of the parties, why was any mention made in the deed of the payment of a yearly sum? If it had been paid and its payment constituted a portion of the consideration for the deed, why was not its receipt evidenced by such words as are usually employed for such a purpose? We think the words "paid to our satisfaction" have reference to the future payments to be made, and cannot be construed as an acknowledgment that payment had then been made. This construction is, in our judgment, in accordance with the understanding of the parties to the deed.

The judgment is affirmed.

Orin HOYT'S Admr.

v.

Edwin HOYT *et al.*

Objection to the **capacity of a party to sue**, as that he is insane, must be made by plea and not by answer.

(Decided March 10, 1886.)

PETITION to foreclose a mortgage. Heard on petition, answer, replication, and master's report, June Term, 1884, Addison County.

Decree *pro forma* for the petitioner. *Affirmed.*

The case is stated in the opinion.

Messrs. Henry S. Foote and F. E. Woodbridge, for petitioner:

The insanity of the petitioner may be set up in the answer as a defense. 1 Dan. Ch. 8, 83; Heard, Eq. Pl. 9, 101; *Wade v. Pulsifer*, 54 Vt. 45; 2 Vt. 339; 34 Vt. 256; Adams, Eq. 621; Story, Eq. Pl. 61, 261; *Coppell v. Hall*, 7 Wall. 542 (74 U. S. bk. 19, L. ed. 244); 23 Wall. 466 (60 U. S. bk. 23, L. ed. 70); *Squires v. Squires*, 53 Vt. 208.

Mr. E. R. Hard, for defendant:

If the plaintiff's imbecility could be made available as a defense under any circumstances, it could be only by special plea. 1 Dan. Ch. 84; Story, Eq. Pl. §§ 722, 725; *Collard v. Crane*, Bratt. 18; *Livingston v. Story*, 11 Pet. 351, 393; (36 U. S. bk. 9, L. ed. 746, 763).

Royce, Ch. J., delivered the opinion of the court:

This was a petition in the ordinary form to foreclose a mortgage. The petition was taken as confessed by all of the defendants, except Edwin Hoyt. After his answer was filed, it was referred to a master, who found and reported the amount due, for which a decree was entered. No exception or motion to recommit the report was filed; so that the case stands for hearing upon the bill, answer and report.

It is found that the mortgage sought to be foreclosed was executed on the 6th day of October, 1876, and that the mortgagee, Orin Hoyt, became insane and imbecile in 1878, and has so continued ever since; that since the commencement of this suit, but just when does not appear, Daniel C. Smith, who now appears as the administrator of Orin Hoyt, was appointed as his guardian.

The mortgage and the notes secured thereby were given by Julius Hoyt, who has since deceased, and Daniel C. Smith was appointed his administrator and was made a party defendant in this suit. It is not stated in the answer or found by the master, when he was appointed, or whether he had been discharged before he was appointed administrator of Orin Hoyt. The only allusion that is made to the relation that Smith sustains to this suit is found in the allegation in the answer: that he is informed and believes that he has been appointed administrator of Julius Hoyt. The title to the land which constituted the consideration for the notes and mortgage so executed by Julius Hoyt has vested in the defendant, Edwin Hoyt.

The fact of Orin Hoyt's insanity and imbecility was first brought to the attention of the court by the allegation in the answer: that the said Orin Hoyt is and was at the time of filing this bill of complaint and for a long time previous thereto has been a person of unsound mind, entirely incompetent to consent to the commencement of this action, and entirely incompetent to the transaction of any business.

It is claimed by the orator that the only way in which the question of the competency of the orator to commence the suit could be made, was by plea.

Objections to the competency of a party to maintain a suit are in the nature of pleas in abatement of the process, Mitf. Eq. Pl. 184; and, viewed in that light, it is obvious that the objection should be presented as a preliminary question, so that it may be disposed of before the parties are put to expense in further litigation.

If it appear upon the face of the bill that the orator is incapable of instituting the suit, the defendant may demur; but if the incapacity does not so appear, the defendant must take advantage of it by plea. 1 Dan. Ch. 53, 84; Story, Eq. Pl. § 725.

In *Wade v. Pulsifer*, 54 Vt. 45, it was held that the objection of multifariousness must be taken by demurrer, and could not be made by answer. The objection to the competency of the orator should have been made by plea and before answer, and not having been so made, it cannot now be considered.

This holding renders it unnecessary to decide whether the objection would have been fatal if it had been properly made or not.

The decree is affirmed and the cause remanded.

SUPREME COURT OF CONNECTICUT.

Elliott M. BEARDSLEY, Exr.,

v.

Selectmen of BRIDGEPORT *et al.*

1. A bequest for "the special benefit of the worthy, deserving, poor, white, American, protestant, democratic widows and orphans residing in the Town of Bridgeport, Connecticut," is **not void for uncertainty** in the class designated.
2. When a will devises all the testator's estate to one for life, and a codicil provides legacies to others in absolute and unequivocal terms, the **codicil changes the will** to that extent, and the legacies are payable in the usual time and are not subject to the life interest previously created.

(Filed February 13, 1886.)

CASE reserved. From the Superior Court of Fairfax County.

Complaint for the construction of a will.

The facts are stated in the opinion.

Mr. Richard C. Ambler, for executor:

"It is no valid objection to carrying out the obvious intention of the testator, if it be not illegal or against good morals, that it be strange or unnatural or absurd." 1 Redf. Wills, 434.

The testator has created a trust estate, if not by direct words expressed in the will, yet by words showing such an intent. *Bull v. Bull*, 8 Conn. 49; *Donalds v. Plumb*, 8 Conn. 452.

"The fact that no trustee has been expressly appointed by the testator, will not render the trust void, for a trust never fails for the want of a trustee. If needs be, equity will provide one; and beyond that the Legislature will grant its aid. This is especially so in the case of public charities." *Treat's App.* 30 Conn. 117.

Rather than a trust shall fail, the court will appoint a trustee. 1 Jarm. Wills, 207; *Donalds v. Plumb*, *supra*.

The testator may have intended after the executor had realized the fund and deposited it in "some safe banking institution" that then the acting Selectmen should be the trustees, for they are the ones to whom he gives the discretionary use; or he may have intended that the bank should be the trustee; or that the executor should hold the trust, subject to the orders of the acting Selectmen. The Selectmen by statute are the established fathers of the poor. Act, as to Soldiers' Orphans, Gen. Stat. 95, § 2; Act, as to Adoption of Foundling Children, Gen. Stat. 189, § 1; Overseers of the Work House, Gen. Stat. 106, § 2.

The Constitution of the State requires that there shall always be selectmen. Art. 10, § 2.

The testator created a public charity. The words of the testator in the will are sufficient in themselves to indicate such an intent. "Whenever it is once ascertained that the intent of the testator is to found a public charity, courts of equity will exhaust all the powers at their command to give effect to that intention and prevent the charity from failing." *Coit v. Comstock*, 51 Conn. 376. And see, Jarm. Wills, 207.

Charitable trusts include all gifts in trust for

religious and educational purposes in their ever varying diversity; all gifts for the relief of the poor, the sick and afflicted. Perry, Trusts, 629; and see, *Hamden v. Rice*, 24 Conn. 355.

"If it is once determined that the donor intended to create a public charity, very different rules from those that are applied in administering private trusts will be applied in order to give effect to the intention of the donor and establish the charity. Thus, if, in a gift for private benefit, the *cestuis que trust* are so uncertain that they cannot be identified or cannot come into court and claim the benefit conferred upon them, the gift will fail and result to the donor, his heirs and legal representatives. But if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain, or incapable of taking, or that the objects of the charity are uncertain, or indefinite. *Coit v. Comstock*, 51 Conn. 376. And see, *Am. Bible Soc. v. Wetmore*, 17 Conn. 188; *White v. Howard*, 88 Conn. 366.

"Trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. The instrument creating them should be so construed as to give them effect if possible and to carry out the general intention of the testator when clearly manifested, even if the particular form or manner pointed out by him cannot be followed." *Russell v. Allen*, 107 U. S. 167 (bk. 27, L. ed. 890).

It is a doctrine universally admitted by the equity courts of this country, that a devise for a public charity shall not fail for want of a devisee capable of taking the legal estate, to protect and perpetuate such charity. The legal estate will be considered, either as remaining in abeyance or as vesting in the heir as trustee for the persons beneficially interested. *Am. Bible Soc. v. Wetmore*, *supra*.

"Uncertainty in the object is one of the characteristics of a true technical charitable use, because, if the beneficiaries are described with precision, the ordinary doctrines of equity would be sufficient to support it." Perry, Trusts, 630. And see, Bisp. Eq. 164; *Fountain v. Rarenel*, 17 How. 384 (58 U. S. bk. 15, L. ed. 330); *Saltonstall v. Sanders*, 11 Allen, 455; *Coit v. Comstock*, 51 Conn. 376.

The expression "for the special benefit of the worthy deserving poor" is fairly within even the words of our statute of uses, "for the relief of the poor." Gen. Stat. title 18, ch. 6, § 2.

There is no uncertainty in the word "protestant" nor "residing in." *Tappan's App.* 52 Conn. 412.

In the use of the word "democratic" the testator intends to designate those belonging to one of the two great political parties of today. Political parties are recognized in the law. The charter of the City of Hartford provides that the appointment of the members of the several boards of commissioners, viz.: Water, Street, Fire, Police and Park, "shall be made in such manner as to divide the membership of each of said boards as nearly as may be between the two leading political parties." Priv. Acts, Conn. 1872, 225, § 2.

The charter of the City of Bridgeport provides that the registrars shall be elected by the common council, "dividing the same between the two leading political parties." *Id.* 832, 1874, § 13.

And see, an Act to prevent fraud at elections. Pub. Acts, Conn. 1875, 457.

A gift to the poor generally or to the poor of a particular town, parish, age, sex or condition is a good charitable gift. *Saltonstall v. Sanders*, 11 Allen 455.

"If a devise can by possibility be upheld, then it can never be pronounced void for uncertainty." *White v. Howard*, 88 Conn. 366. And see, *Bull v. Bull*, 8 Conn. 51.

If a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking or that the objects of the charity are uncertain and indefinite. *Perry*, Tr. 630.

A devise is never to be construed as absolutely void for uncertainty, but from necessity; if it be possible to reduce it to a certainty, the devise is to be sustained, *Ut res magis valeat quam pereat*. *Powell*, Dev. 421. And see, *Brewster v. McCall's Dev.*, 15 Conn. 292; *Coit v. Comstock*, 51 Conn. 376.

It is an undoubted principle that the intention of the testator shall be effectuated if it can be done consistently with the rules of law. *Bull v. Bull*, 8 Conn. 50.

Our courts have recognized the validity of charitable bequests to individuals or classes of individuals, in nature of charities where the testator has clearly given a power to some person or persons to exercise a discretionary authority in their management, so that uncertainty may be made certain. *White v. Fisk*, 22 Conn. 53. And see, *Bull v. Bull*, 8 Conn. 48.

The uncertainty that must exist is reduced to a certainty if a definite class of beneficiaries is described and a mode is provided for the selection of the particular objects of the bounty. *Id certum est quod certum reddi potest*. *Coit v. Comstock*, 51 Conn. 376.

In the case at bar the beneficiaries of the testator's bounty are described as definitely as could be expected, in a bequest to benefit the class of poor people designated. *Coit v. Comstock* 51 Conn. 376. This is equally true of the present case.

In the following cases are examples of what our own court has considered a sufficient description of the class of beneficiaries: *Bull v. Bull*, *supra*; *Treat's App.* 30 Conn. 113, 116; *Coit v. Comstock*, 51 Conn. 376; *Tappan's App.* 52 Conn. 412; *Hughes v. Daly*, 49 Conn. 34.

The executor further asks this court to advise him whether the legacies in the codicil are to be paid at once or whether they are subject to the life use of the widow of the testator. Are the legacies inconsistent with the clause in the will giving the widow the life use of the whole estate? The general rule seems to be that the latter of the two conflicting clauses in a will must prevail, unless a different intent is apparent from other parts of the will, *Minor v. Ferris*, 22 Conn. 378. And see, *Chappel v. Avery*, 6 Conn. 34.

As to interpretation of wills and codicils, see, further, Redfield on Wills, 201, note and *Birks v. Birks*, 13 L. T., (N. S.) 193.

J. A. Joyce, for Selectmen.

J. S. Rose, for Bridgeport Hospital.

H. S. Sanford, for Orphans Asylum.

J. C. Chamberlin, for widow.

L. Warner, for heirs at law.

Pardee, J., delivered the opinion of the court: Complaint asking for advice as to the construction of a will. Reserved.

By his will as originally made Aaron Summers gave to his wife the use of his entire estate during life or widowhood; by the codicil he gave \$1,000 to the Bridgeport Protestant Orphan Asylum and \$1,000 to the Bridgeport Hospital. The claim of the widow is that she is to have the use for life of the entire estate and that neither of these legacies is payable until after her death. But the office of this codicil is to change what had been written before; it is the latest and controlling expression of the testator's wish. The bequests thereby made are absolute in terms; as perfectly so as is the devise of the life use to the wife in the will. The expressions are all free from ambiguity; all express a legal interest in legal language, and in them the rules of law require us to find the precise extent of the change intended by the testator. These legacies are therefore payable at the usual time.

Subject to the use for life by his wife and to diminution by certain legacies, the testator disposes of his estate as follows, viz.: "To be used discretionary by the acting Selectmen of said Bridgeport for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, Connecticut, until all is expended." It is the claim of the heirs at law that this bequest is void for uncertainty as to the persons composing the class to be benefited, and they have pressed upon our attention the doubts and difficulties which will beset the trustees whenever they shall attempt to select the beneficiaries. But, notwithstanding the accumulation of adjectives, the bequest is within our Statute of Charitable Uses, as interpreted by this court; for it is to be borne in mind that the question before us is not: are there not many persons concerning whom there must be doubts whether they can meet some of the requirements of the testator? But it is, are there not many concerning whom no doubt can exist that they are able to meet them all?

Each one of the adjectives is of common use and has as definite and precise a meaning as have most words in the language. Of course there are all grades of character and of pecuniary condition; all shades of color; of course men may profess the protestant faith and worship after its forms; many advocate the principles of the democratic party and vote for its candidates, and yet at heart accept neither. But, notwithstanding all this, men are constantly deciding and acting in matters which concern both property and person, upon the belief that they will not be misunderstood when they use adjectives like these under consideration. The business of the world will not, cannot wait until every word shall become mathematically precise.

The office of selectmen is continuous by law. The persons from time to time constituting the board of Selectmen of the Town of Bridgeport are joint trustees in perpetual succession, clothed with power and placed under obligation to select beneficiaries from the classes specified by the testator, and apply either the interest or the principal of the fund to the relief of their ne-

cessities at discretion. The beneficiaries must be "poor." This word as used by the testator includes those who have exhausted all means of support and are in a condition to require public aid for the supply of their necessities; certainly it includes those who as paupers are receiving such aid, and therefore, beyond all question within the statute. They must be "worthy and deserving."

In *White v. Fisk*, 22 Conn. 81, the descriptive adjective was "pious."

In *Treat's Appeal*, 80 Conn. 118, this court said of the will under consideration in *White v. Fisk*, that the testator "Had provided in his will no way of selecting the beneficiaries from a class, and the court held that they could not, even as a court of equity, do it for him. Had that power been given to his executors or trustees the clause in the will would have been sustained * * * To determine that one is 'worthy and deserving' is no more difficult than to determine that he is 'pious.'"

They must be "white." In *Treat's Appeal*, *supra*, they were Indians and Africans, and the bequest was sustained. It is as difficult to declare of a person that he has color as that he has none. For many years, by the Constitution of this State only white men were permitted to vote; if the word has in the general mind a meaning so sharply defined that it can be put to a use so practical and so important, we think it may well support a charitable bequest.

They must be "American." In the general mind this adjective now describes the descendants of Europeans born in America, especially to the inhabitants of the United States; persons quite as easily distinguished as Indians and Africans.

They must be "protestants." This adjective was defined and declared capable of sustaining a charitable bequest by this court in *Tappon's Appeal*, 53 Conn. 412.

They must be "democratic." It is a matter of common knowledge that there is a political party known as the democratic party to which a large portion of the voters in every one of the United States adhere; which they support by speech and act, by advocating its principles and voting for its candidates for office; and that the determination of the question as to what persons and principles shall be in the ascendant in government for the time being, depends upon the belief of the voter that the speech and the act of the candidate are true indexes of his opinion. The trustees are to inquire and decide concerning a given man whether they believe that he adhered to and supported the principles of the Democratic party; and they may well rest upon reasons which are sufficient to control the general mind of voters in a matter of the highest importance.

They may be "orphans." This word describes a child who has lost one or both of its parents. He may be extremely young and so of course without character, religious belief or political principles, and as by law neither women nor children vote, so in the common speech neither are said to have Democratic or other political principles. Therefore, it must be determined to have been the intent of the testator, as to an orphan not of sufficient age to have acquired a character, that he should have been born of white, American and Protestant par-

ents, of a Democratic father, and be destitute; and, as to a widow, that she should be worthy, deserving, poor, white, American, Protestant, and have had a Democratic husband.

The Superior Court is advised that the bequest for "the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the Town of Bridgeport, Connecticut," is valid; and that the legacies by the codicil to the Bridgeport Protestant Orphan Asylum of Bridgeport, Conn., and to the Bridgeport Hospital, are payable at the expiration of one year from the death of the testator.

In this opinion the other Judges concurred.

Town of NAUGATUCK

Arthur W. SMITH, *Appt.*

1. Where in **bastardy proceedings** a plea in abatement is interposed, the **justice has power** incidentally to dispose of it; and if overruled, the **statutory issue remains** to be tried, and it is his duty to try it. The **district court** can take **jurisdiction** only as handed to it in the statutory manner which is by **binding over** to a higher tribunal, as **no appeal** lies from a judgment on the plea in abatement.
2. The **requirement** of the statute, that the **justice** commit defendant on default of his producing bond, is **for the plaintiff's security** and not for the purpose of retaining jurisdiction and **may be waived** by plaintiff.
3. The **presence** of defendant in the **district court** is **not essential** to its jurisdiction; he may if he chooses absent himself and trial proceed without him. **The right to be present** in court is a privilege which **defendant may waive**.

(New Haven—Filed February 22, 1886.)

A PPEAL by defendant in bastardy proceedings. *Affirmed.*

Arthur W. Smith was charged with bastardy, and brought before a justice of the peace at Naugatuck. He pleaded in abatement. This plea was overruled by the justice, and from this judgment the defendant moved to be allowed to appeal. The justice declined to allow any appeal; found probable cause for supporting the complaint and bound Smith over to the District Court of Waterbury. Smith declined to enter into this latter bond. The justice did not commit Smith to jail. The cause was entered in the docket of the upper court. Smith did not appear. The bastard child was born, and a supplemental complaint stating this fact was filed in the upper court. Smith was defaulted. Maintenance was ordered, and now Smith appeals on questions of law.

The first error assigned by the appellant is, that the district court erred in deciding that the binding over was lawful.

The second error assigned is, that the justice had no jurisdiction to proceed after the defendant had moved to be allowed to appeal.

And the third error assigned is, that the defendant was not legally before said district court.

Messrs. Baldwin & Sweeny, for defendant :

The proceedings before the justice were such as to vitiate the whole subsequent proceedings, so that the District Court could not acquire jurisdiction, because the defendant pleaded in abatement, and the plaintiff Town took issue upon that plea; and whether it was or was not sufficient, were questions which he had the legal right by appeal to have reviewed by a higher court. *Vide*, G. S. 415; *Prosser v. Chapman*, *supra*.

The only method to follow in such proceedings was that pointed out by statute; but this was studiously avoided both by the justice and the plaintiff. R. S. 469.

The plaintiff Town voluntarily abandoned all claim to the defendant, or to jurisdiction over him when it did not sue out a *mittimus*, which was its plain duty to do if it intended to have him for trial in the higher court. *Vide*, *Navigatuck v. Bennett*, 51 Conn. 500.

Since 1821 the statute has plainly pointed out the method of procedure for a justice in such cases, and the correct conclusion can only be reached by following it. The revision of 1808 made the justice acting in such matters a ministerial officer, and he was not directed or empowered to commit as under our present statute. *Vide*, Stat. 1808, 99, 100.

The plaintiff relies, it seems, entirely on the case reported in Swift's Evidence, 90. That case was under the Statute of 1808, which did not point out the *modus operandi*, and it was not until 1821 that the power to commit was given justices in bastardy proceedings.

The question as to the validity of the action on the part of the justice has never been decided, and is still an open one. *Vide*, 51 Conn. 500.

Messrs. Kennedy, Webster & O'Neil, for plaintiff:

A prosecution for bastardy is not a "civil action," within the meaning of this statute. *Robinson v. Dana*, 16 Vt. 474; *Sweet v. Sherman*, 21 Vt. 28.

The practice on a complaint for bastardy in Connecticut is *sui generis*. *Hinman v. Taylor*, 2 Conn. 364; *New Haven v. Rogers*, 32 Conn. 222.

In each of the following named cases there was a complaint for bastardy; a plea in abatement was filed by the defendant before the magistrate; the plea in abatement was overruled; a hearing was then had on the merits; defendant was bound over too; and in the upper court the same matter in abatement was again interposed as a defense: *Davis v. Salisbury*, 1 Day, 278; *Hinman v. Taylor*, *supra*; *Chaplin v. Hartshorne*, 6 Conn. 44; *Hopkins v. Plainfield*, 7 Conn. 290.

The action, although of a civil nature, is criminal in form; that is, though money or security only is to be obtained, yet the forms, the processes, the practice made use of to accomplish these results, are all of them criminal. And no appeal lies from a judgment on a plea in abatement in criminal practice. *State v. Beecher*, 25 Conn. 541.

The justice acts ministerially and not judicially. Swift, Ev. 89.

It is not necessary for the defendant to plead all before the justice. *Hopkins v. Plainfield*, *supra*.

Pleas in abatement may be entered in the court above. Swift, Ev. 88.

No appeal was actually taken. The motion to be allowed an appeal was denied by the justice. If the justice was wrong in this, *mandamus* would lie to compel him to do right. *Prosser v. Chapman*, 29 Conn. 515.

The defendant has had, since November, 1882, to procure a *mandamus*. Smith's saying he would take an appeal and offering a bond did not perfect the appeal. An approved bond was necessary. *Curtiss v. Beardsley*, 15 Conn. 524.

The omission to commit Smith to prison did not oust the magistrate nor the upper court of jurisdiction. *Gray v. Davis*, 27 Conn. 455.

The power to commit is not a statutory prerequisite to the jurisdiction. This provision of the statute is wholly for the benefit of the plaintiff. A plaintiff may waive even a statutory benefit. *Nichols v. Standish*, 48 Conn. 321; *Hopkins v. Plainfield*, 7 Conn. 286, 290.

Carpenter, J., delivered the opinion of the court :

Complaint under the statute relating to bastardy. The defendant was brought before a justice of the peace; upon an adjournment he gave bonds for his appearance; he appeared and filed a plea in abatement. The issue on that plea was decided against him. He then moved for an appeal to the District Court of Waterbury and offered sufficient bonds; but the justice decided that unless he would enter into a bond with sufficient surety in the sum of \$1,000, conditioned to prosecute his said appeal to effect, and also conditioned to appear personally before said District Court and abide the order of said court in said cause, said appeal would not be allowed. The defendant refused to enter into such bond. Thereupon the court decided that probable grounds existed for the support of said complaint, and ordered the defendant to become bound with surety in the sum of \$1,000, conditioned that he appear before said District Court, etc. The defendant refused to give such a bond.

Without committing the defendant for want of bonds the justice transmitted copies to the District Court, which were duly entered in the docket thereof; and at the next term, the defendant not appearing he was defaulted and, upon hearing had, judgment was rendered for the plaintiff. At the same term and after judgment the defendant appeared in court and appealed to the Superior Court, alleging errors.

A party in default is not ordinarily supposed to be in court for the purpose of appealing from the judgment against him. But the irregularity seems to have been waived; and the Superior Court found no error and rendered judgment for the appellee.

Two reasons of appeal are alleged, both of which, in effect, deny the jurisdiction of the District Court: 1, that the justice had no power to find probable cause after the defendant had moved for an appeal from the judgment on the plea in abatement and offered sufficient bond; and 2, that the district court erred in proceeding to and rendering judgment

as upon a default when the defendant was not before the court.

First. As to the power and duty of the justice. The proceeding is purely statutory. In form it possesses many of the features of a criminal prosecution; in substance it is a proceeding to enforce a civil remedy. It is a special proceeding provided by statute and is peculiar to this class of cases. The justice has not final jurisdiction; consequently, he can render no final judgment. The sole issue, so far as the merits of the case are concerned, is prescribed by statute: the finding of probable cause. R. S. 469, § 1.

If a dilatory plea is interposed, as it was in this case, the justice has power incidentally to dispose of it. If the plea is overruled, the statutory issue remains to be tried, and it is the duty of the justice to try it. That seems to be essential in order to give the higher court jurisdiction. Although final jurisdiction was exclusively in the District Court, yet that jurisdiction was not strictly original. It could take it only as handed to it by a justice of the peace in the statutory manner. The statute does not provide for an appeal from an adverse decision on a plea in abatement.

Such a provision would be inconsistent with the general scope and intent of the statute. The general statute relating to appeals, p. 415, § 15, has reference to causes within the jurisdiction of justice of the peace and has no application to a case like this, where the justice can only bind over to a higher tribunal. The analogy between this case and criminal cases in which the justice can only bind over is striking. In such cases an appeal from a judgment on a plea in abatement is unknown to our practice.

It does not follow however that the defendant may not have the judgment on such a plea reviewed in the higher court. We believe the practice to have been to allow him to renew the objections there. *Davis v. Salisbury*, 1 Day, 278; *Chaplin v. Hartshorne*, 6 Conn. 41.

In *Hinman v. Taylor*, 2 Conn. 357, and in *Hopkins v. Plainfield*, 7 Conn. 286, the defendant pleaded in abatement in the county court. Thus far therefore the proceeding before the justice was regular and proper.

We come now to the second objection, which is that the District Court had no jurisdiction. This objection rests upon the fact that the justice did not commit the defendant for want of bonds. We agree that that is the regular mode pointed out by statute in which the body of the defendant is detained; but his detention is for the plaintiff's security and not for the purpose of retaining jurisdiction. If that is not resorted to, the defendant may abscond, and the plaintiff may lose all means of enforcing the judgment. The plaintiff, however, runs all the risk; the defendant may gain, but he risks nothing by not being committed. He therefore is not in a condition to complain. The provision is for the benefit of the plaintiff and he may waive it.

In the District Court the presence of the defendant in court is not essential to its jurisdiction. In that respect it is unlike a criminal prosecution. It closely resembles a civil suit in actions for tort, in which the body may be arrested and held to respond to the judgment.

CONN.

The arrest and detention of the body are for security and not to give jurisdiction. If he is not arrested, or, if arrested and special bail is given, he may, if he chooses, absent himself, and the trial may well proceed without him. He has a right to be there, but it is a privilege which he may waive. By waiving it he in no manner impairs or affects injuriously the plaintiff's rights.

Moreover, it is apparent that he was not altogether absent. At each time when an order for his arrest was asked for, counsel interceded in his behalf. A motion was made in his interest to erase the case from the docket for want of jurisdiction; and when judgment was rendered against him he was promptly present for the purpose of appealing. With these facts before us perhaps he might properly be regarded as present, if necessary, for all purposes. But it is not necessary, for jurisdiction did not depend upon his presence.

There is no error.

In this opinion the other Judges concurred.

Henry SEYMOUR, *Appt.*,

Over River SCHOOL DISTRICT.

1. An order on the treasurer of the school district drawn by the district school committee and delivered to the teacher is a cash payment of the teacher's salary for the month for which it was drawn.
2. A public school teacher is not a public officer within the meaning of the law exempting the salaries of public officers from attachment and garnishee process in this State.
3. Where a teacher's salary had been earned and the debt therefor existed whether payable then or afterwards is immaterial, the existing debt is liable to attachment.
4. A finding of fact by the court, which is responsive to the issue on a controverted question, will not be disturbed on appeal.

(Fairfield—Filed February 23, 1886.)

APPEAL from Fairfield County. *Affirmed.*
Seire facias.

Process of foreign attachments against a teacher, and garnishee proceedings against the school district factorizing his salary, brought before the Court of Common Pleas.

Messrs. John H. Perry and Winthrop H. Perry, for plaintiff:

The order of November 8, 1883, although negotiable in form was not negotiable in law. 1 Dan. Neg. Inst. § 427; 1 Dill. Mun. Corp. 3d ed. §§ 487, 406; *Smith v. Cheahire*, 13 Gray, 318; *Allison v. Juniata Co.* 50 Pa. St. 353.

His claim either before or after the order given being non-negotiable, and no notice of its assignment having been given to the District before the attachment, or even within a reasonable time after it was made, November 5, sequestrated it. *Bishop v. Holcomb*, 10 Conn. 444; *Fanton v. Fairfield Co. Bank*, 23 Conn. 485.

A series of decisions exempt public officers

from liability to answer, in such suits, for money in their hands due to the judgment debtor. The principle is well recognized, but its application varies in the different States.

The case of *Stillman v. Isham*, 11 Conn. 124, affords an instance of the early application of the rule in this State. But this is now doubted. *New Haven Saw Mill Co. v. Fowler*, 28 Conn. 110.

The basis for the claim and assignment of error in this case can only be surmised from the authorities cited by the defendant in its support in the court below. The leading authority was the case of *Bliss v. Lawrence*, 58 N. Y. 442.

In this case the court decides that an assignment by a clerk in the United States Treasury Department of a month's salary in advance was contrary to public policy and void.

The proposition established by the English cases is thus stated, p. 446: "Salary for continuing services could not be assigned; while a pension or compensation for past services might be assigned."

The other principal authority relied upon by the defendant was the case of *Hightower v. Slaton*, 54 Ga. 108; 21 Am. Rep. 274. In this case the salary of a teacher in a public school had been factorized in the hands of the treasurer of the board of education. The court held that the attempted attachment was illegal.

Three reasons are given for the judgment of the court, one of which is that "Children of the State cannot be educated without competent teachers; and competent teachers cannot be obtained if they are to be deprived of their wages for the support of themselves and families by process of garnishment." See, *McLellan v. Young*, 54 Ga. 899; 21 Am. Rep. 276. *Rodman v. Musselman*, 12 Bush, 354; 28 Am. Rep. 724.

The case of *Bray v. Wallingford*, 20 Conn. 418, states the policy of our law to be to subject all the property of debtors to the payment of their debts; and contains much that is pertinent to the question under discussion. See also, *New Haven Saw Mill Co. v. Fowler*, 28 Conn. 108; *Flagg v. Platt*, 32 Conn. 216.

So much of this assignment as relates to the certificate of the board of school visitors is not based upon any claim made in the court below and cannot be considered. This claim has reference to the statute, R. S. 148, as amended in 1875, chap. 59.

The general rule is that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has duly performed it unless the contrary be shown. *Hartwell v. Root*, 19 Johns. 345.

The presumption that every man has conformed to the law shall stand, until something shall appear to shake that presumption. *King v. Hawkins*, 10 East, 211.

The presumption is against the breach of a positive law. 2 Phil. Ev. pt. 1, 298, q. v.

The legal maxim is: *Omnia presumuntur rite fuisse acta donec probetur in contrarium*. *Bank of U. S. v. Dandridge*, 12 Wheat. 64 (25 U. S. bk. 6, L. ed. 552); *Booth v. Booth*, 7 Conn. 350; 2 Stark. Ev. pt. 2, p. 936.

It is within "The common and ordinary experience of mankind, that a man will not pay a debt which is not due," and the remark of

this court in *Goodman v. Meriden Britannia Co.* 50 Conn. 150, that "There can be no more convincing evidence that a man believes that he owes a debt than his voluntary payment." 2 Stark. Ev. pt. 2, p. 937.

The sixth assignment of error relates to a question which the record does not show to have been "distinctly raised at the trial and decided by the court adversely." Acts of 1882, ch. 50, § 8.

By admitting to make the claim insisted on, the defendant waived the claim.

Mr. John S. Seymour, for defendant:

The salaries of public officers and all such profits as a man receives in respect to the performance of a public duty are, from their very nature, exempt from attachment and incapable of assignment. The following cases sustain and illustrate the principle: the half pay of a lieutenant is not assignable. *Flarty v. Odium*, 8 Term R. 681; *Lidderdale v. Montrose*, 4 Id. 248, 250.

The vicar's tithes, etc., the profits of a living, are not assignable. *Arbuckle v. Cowtan*, 3 Bos. & P. 321. See also, *Barwick v. Reade*, 1 H. Bl. 627; *Wells v. Foster*, 8 Mees. & W. 149; *Collyer v. Fallon*, 1 Turn. & R. 459.

The fees of the office of clerk of the peace are inalienable. *Liverpool v. Wright*, 28 L. J. N. S. ch. 871.

The salary of a city marshal cannot be attached on grounds of public policy. *McLellan v. Young*, 54 Ga. 399; 21 Am. Rep. 273. Nor the salary of an officer or servant of a county. *Wallace v. Lavyer*, 54 Ind. 501. Nor the salaries of officers in general. *Hawthorn v. St. Louis*, 11 Mo. 59. Fees due from a county to a juror not attachable. *Williams v. Boardman*, 9 Allen, 570. Seaman's wages are exempt, when employed on government vessels. *Buchanan v. Alexander*, 4 How. 20 (45 U. S. bk. 11, L. ed. 857).

The salary of an auditor of a county cannot be attached. *Wallace v. Lavyer*, *supra*.

The assignment of the salary of a clerk in the United States Subtreasury in New York is contrary to public policy and void. *Bliss v. Lawrence*, 58 N. Y. 442.

The court cites with approbation the cases of *Flarty v. Odium*, *Lidderdale v. Montrose*, *Barwick v. Reade*, *Arbuckle v. Cowtan*, and *Wells v. Foster*, above, and refers to other cases respecting persons not strictly public officers, as to which the court remarks, "But the principle before stated has, in the courts of England, been adhered to firmly."

To the same effect are the text writers. 2 Story, Eq. § 1040, 12th ed.; 1 Pars. Cont. 194; 1 Wait, Act. & Def. 361.

A teacher in a public school of this State is a public servant, within the meaning of the law exempting from attachment the emoluments of those who perform public services. For these reasons the public school system is a state establishment, grounded in the fundamental law. Const. of Conn. art. 8, § 2.

Attendance at the public schools is made compulsory by law on children between the ages of eight and fourteen years, and it is a misdemeanor not to enforce such attendance. G. S. 126, 127; Acts, 1882, ch. 80, p. 162.

The teacher may be chosen by a popular vote of the district, by ballot and check list. G. S. 184, § 2; Pub. Acts, 1880, ch. 96, § 3.

His duties and the qualification she must possess are defined by statute and ascertained by a public board. G. S. 182, § 1; p. 142, §§ 1, 2; Pub. Acts, 1875, ch. 59, p. 82.

The fund from which he is paid, or the character of the trust committed to him show that he ought to be regarded as a public functionary, in the limited sense claimed by the defendant. The decided cases sustain this proposition. *School Dist. v. Gage*, 39 Mich. 484.

The court of last resort in Georgia holds that teachers' wages are exempt from the garnishee process of attachment. *Hightower v. Staton*, 54 Ga. 108.

The quasi judicial character of school teachers is discussed in *State v. Miener*, 50 Iowa, 145; *Lander v. Seaver*, 32 Vt. 114.

His duties are so far public that a parent cannot maintain an action against him for refusing to teach his son. *Spear v. Cummings*, 23 Pick. 224.

It is contended that neither the district nor the town, nor any party whatever, could bring an action against him, for non-performance, or negligent performance of his duty. And but one reason can be given for this, that he is a public officer. Accordingly, it is provided that the board of school visitors may remove him. G. S. 182, § 1.

No teacher shall be entitled to receive any pay unless a school register shall have been kept and filled out during the time for which any payment may be made. G. S. 143, § 2, as amended by Pub. Acts, 1875, chap. 59, p. 82.

The engagement of said Wigham with said district was an entire contract for one year, at a salary of \$1,200, and was incapable of apportionment. *McMillan v. Vanderlip*, 12 Johns. 165; *Reab v. Moor*, 19 Johns. 387; *Daily v. Jordan*, 2 Cush. 390.

The sufficiency of the defense that the salary was exempt could only be raised by demurrer; tendering an issue of fact waived its sufficiency in the law. *Powers v. Mulvey*, 51 Conn. 432.

Carpenter, J., delivered the opinion of the court:

Scire facias. A process of foreign attachment was served on the defendant, November 5, 1883, as the trustee, etc., of one Wigham, a teacher in the defendant District, factorizing the salary of said Wigham for the month of October preceding; afterwards his salary for December and February was factorized by service of two orders for further attachment, one served December 21, 1883, the other February 29, 1884. The Court of Common Pleas held the defendant liable as to the second and third attachments, and not liable as to the first or original attachment. Both parties appealed.

Plaintiff's appeal. On the 3d of November, 1883, the committee of said District drew an order on the treasurer thereof, payable to the order of said Wigham for his salary for the month of October and delivered the same to him. The salary of said Wigham was usually paid to him by such orders. On the same day Wigham indorsed the order in blank, and delivered it to S. E. Olmstead, who, in good faith, paid him the money thereon. None of the officers of the District were notified of the transfer to Olmstead, until the treasurer paid the order to Olmstead on the 14th of December, when

the factorizing process was served. November 5, the treasurer disclosed to the officer an indebtedness of the District to Wigham of the sum of \$120.

The court overruled the claim of the plaintiff, that the defendant was liable for the salary for October, and held that the delivery to said Wigham of said order, transferred and paid as aforesaid, was in law a payment of the salary for said month of October, before the first attachment by the plaintiff.

We think the facts stated are equivalent to an express finding that the order was given by the District and received by Wigham in payment. His salary was "usually paid to him by such orders." He had been in the employ of the District for more than two years and was accustomed to receive his pay in orders on the treasurer. The District had adopted that mode of payment, in which Wigham acquiesced and which was continued after the suits were brought. The salary for November was paid by a similar order; and so was the salary for each of the months of December, January and February following. That the parties intended by giving and receiving the order to give and receive a chose in action, evidence of an indebtedness, simply to change the form of the obligation, will not be presumed. It was a reasonable and convenient method of paying their bills. When an order was received, the claim was liquidated, adjusted; and nothing remained to be done but to call upon the treasurer and receive the money. It was intended and understood by the parties as payment; as much so as receiving a town order or bank check. The order was regarded and treated as cash, not only by the parties but by Olmstead, who received several of them. To regard it otherwise, to treat the indebtedness as still subsisting, would mislead and operate as a snare. When, therefore, the Judge says that he overruled the claim of the plaintiff, and held that the order so given and paid was in law a payment, his language imports, not merely a legal conclusion but, taken in connection with the facts, an actual payment; especially as he made such payment the foundation of his judgment.

The supposed error is not manifest and the judgment on the plaintiff's appeal is not reversed.

Defendant's appeal. 1. It is claimed that the court erred in holding that the teacher was not a public officer within the meaning of the law exempting the salaries of such officers from attachment. We think the court did not err in this respect. It will be noticed that the claim is not that the defendant is not liable as garnishee. That it may be so liable is practically conceded; and well it may be. In *Bray v. Wallingford*, 20 Conn. 416, it was expressly held that a town is so liable; and doubtless for the same reasons other territorial corporations would be liable.

We think school districts, in respect to all matters within the scope of their powers, must stand upon the same footing.

But the claim is, that Wigham's salary is exempt for his sake, or on his account. It is true he was serving the public in a matter of great public importance. But not everyone serving the public can claim that his compensation therefor is exempt from attachment. *Me-*

chanics and laborers employed in erecting school buildings are serving the public, but their wages are not on that account exempt from attachment.

A teacher is not an officer in the ordinary sense of the word. He is not usually elected or appointed, but is employed; contracted with. He has duties to perform incident to his employment; but they are not official duties and he is not under oath. We see no good reasons why his salary should not be liable for his debts, the same as the compensation of others employed by the District.

The argument drawn from the general nature of our school system; the divisions of the territory of the State into school districts; the pains taken to secure suitable persons to perform the duties of teachers; the supervision provided for through the local and state boards of education; the large amount of taxes raised for the support of schools, etc., etc., fails to convince us, in the absence of any statute to that effect, that the Legislature intended that a teacher's salary should be exempt from attachment. The statute authorizing debts to be attached is broad and comprehensive. The statute makes no exceptions, and none exist unless found in cogent reasons of public policy. While it may be the policy in some States to exempt teachers from the operations of similar statutes, yet in this State the policy of the law has ever been to compel every man to pay his debts, and to that end to subject substantially all his property to attachment. That policy has its foundation in principles of justice; and before any class of persons can be declared exempt from its operation, reasons therefor of greater weight than those which support the policy must be shown. They have not been shown in this case.

2. It appears that Wigham assigned his salary for the months of December and February, by separate assignments, to Olmstead. Said assignments in form complied with the requirements of the statute. Session Laws 1878, p. 268. The second reason of appeal is that the court erred "In holding that said assignments were fraudulent or invalid on account of any fraudulent intent of the parties to them, in that no such issue was raised by the pleadings."

The defendant's third defense alleges that said assignments were made to secure *bona fide* debts, as the statute requires, due from Wigham to Olmstead. That allegation is denied. On that issue the court found: "Said assignments were neither given by said Wigham, nor received by said Olmstead to secure a *bona fide* debt. Said assignments were given by said Wigham and taken by said Olmstead for the purpose of defeating the plaintiff's said attachments, and for the purpose of securing to said Wigham his said salary." We think that finding is responsive to the issue.

3. The defendant says that the court erred "In overruling the defendant's claim that the plaintiff took nothing by his attempted attachments, because it did not appear that said Wigham ever kept or filled out any school register, as required by law, or any register, or that he ever held a certificate from the school visitors of the Town of Norwalk." The finding of the court is substantially as this reason assumes. Obviously there was no evidence on the subject either way.

This matter is in the pleadings only as it is involved in the question whether the defendant was indebted to Wigham. Upon the trial of that issue, with no evidence from either party as to the register and certificate, the court might well find an indebtedness, upon the principle that it will be presumed that the law was complied with until the contrary appears.

4. The fourth reason is that the court erred "In holding that the salary of said Wigham was apportionable or divisible, on the compulsion of said Wigham or of any attaching creditor."

The vote of the District was, "That the District employ Mr. H. B. Wigham as principal, at the same salary as last year."

"Said Wigham accepted the office of employment made under said resolution. No express contract of employment other than that above stated was proved."

But the court found as follows: "From said resolution, and from the knowledge of the parties of the manner of the payment of the salary during the previous year, and from the manner of the payment to said Wigham during said school year of 1883, I find that it was the intention and understanding of said contracting parties that said Wigham should be paid \$120 a month for the ten months of said school year of 1883, and that the same should be paid at the end of each of said months."

This finding does not seem to be inconsistent with the vote of the District, and it effectually disposes of the question of apportionment.

5. The next reason is that the court erred "In holding that if apportionable at all, it could be apportioned so that at the time of the attempted attachments, any sum was due or subject to attachment beyond the amounts theretofore paid said Wigham."

Under this reason it is claimed that the salary for December was not due on the 21st day of the month, when the second attachment was served, and that the salary for February was not due on the 29th of that month, when the third attachment was served; and therefore, that the plaintiff took nothing by those attachments.

We think this claim is untenable. All the service that Wigham was required to render during those months had been rendered. His salary had been earned, and the debt existed. Whether payable then or afterwards was immaterial. An existing debt is liable to attachment although it may not be presently payable.

6. The last error assigned is that the court erred "In finding the material facts of the defendant's second defense true, and yet rendering judgment for the plaintiff, in that no issue of law on that defense was raised by the pleading."

The vital point in this defense is that Wigham was a "public officer." It is not claimed that the other facts therein stated, without this, constituted any defense. The court found in effect that the allegation was not true in law or in fact. That negatives the defense and the court committed no error in so deciding.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

George H. PERRY

v.

James REYNOLDS *et al.*

The board of registration of a town, in deciding upon the qualifications of an elector acts in a quasi judicial character, and public policy demands that the rule which exempts judicial officers from personal liability for mistakes or errors of judgment, in the exercise of their judicial functions, applies as well to boards of registration.

(New Haven—Filed February 6, 1886.)

ACTION against the members of the board for the admission of electors, consisting of the town clerk, and the selectmen of the Town of New Haven, as joint *tort feorsors* for their illegal refusal to admit the plaintiff as a voter. *Complaint insufficient.*

The facts are stated in the opinion.

Mr. Lynde Harrison, for plaintiff:

It is a fundamental principle that an elector shall not be deprived of his vote. *Cooley*, Const. Lim. 616.

An elector is entitled to a civil remedy whenever through ignorance, incapacity, prejudice, negligence or willfulness he is subjected to the loss of his vote. *Freeman v. Selectmen*, 34 Conn. 415; *Sanders v. Getchell*, 76 Me. 158; *Kitham v. Ward*, 2 Mass. 286; *Gardner v. Ward*, 2 Mass. 244, *note*; *Lincoln v. Hapgood*, 11 Mass. 350; *Capen v. Foster*, 12 Pick. 485; *Gates v. Neal*, 23 Pick. 308; *Blanchard v. Stearns*, 5 Met. 296; *Jeffries v. Ankeny*, 11 Ohio, 372; *Monroe v. Collins*, 17 Ohio St. 665; *Gillespie v. Palmer*, 20 Wis. 544; *Vanderpool v. O'Hanlon*, 53 Iowa, 246.

While this court has held in *Freeman v. Selectmen*, *supra*, that there is no remedy by *mandamus* to compel the board to admit an elector, it suggested that the duties of the board may not be judicial in the strict sense of the word; and while they ought not to be interfered with "so long as they act fairly," the court added: "If they act wantonly or maliciously, they may be liable to the party injured, but not in this form of proceeding. Should a case arise in which we are called upon to decide any or all of these questions, we should not hesitate, if necessary, to differ from the opinion of the board of registration, review their proceedings, or direct them how to decide in any given case."

The power to "decide on the qualifications of electors", conferred by § 5, art. 6, of the Constitution, is only a power to decide subject to the rule of the Constitution.

There can be no iron clad rule laid down, that the intention and the residence can only be shown by particular acts of the party claiming a residence. No particular acts of a party can be said to contradict conclusively the alleged intention of the party, unless such acts clearly show that the alleged intention is false. The declared intention should always prevail, unless the acts of the party or the facts in the case clearly show that the declared intention cannot be true. *McCrary*, Elect. §§ 38-41, 71; *Chase v. Miller*, 41 Pa. St. 404; *Miller v. Thompson*, 1 Bart. El. Cas. 118; *People v. Holden*, 28 Conn.

Cal. 124; *State v. Judge*, 13 Ala. 806; *Lincoln v. Hapgood*, 11 Mass. 350.

Whenever a question is raised concerning the legal residence of the party, the intention of that party must have great weight in determining where the residence is. *Clinton v. Westbrook*, 88 Conn. 12; *Grant v. Dalliber*, 11 Conn. 288; *Salem v. Lyme*, 29 Conn. 80; *Culver's App.* 48 Conn. 171; *State v. Frest*, 4 Har. (Del.) 558; *McDaniel's Case*, 8 Pa. L. J. 310. *The Venus*, 8 Cranch, 278 (12 U. S. bk., 3 L. ed. 561).

Every person must have a domicile somewhere. *First Nat. Bank v. Balcom*, 35 Conn. 358; *Abington v. N. Bridgewater*, 23 Pick. 170.

And this rule applies to a single as well as to a married man. *French v. Lighty*, 9 Ind. 478.

There have been several cases raising the special question of the right of students in colleges to vote. In all of these cases the most important question considered by the courts seems to have been that of the intention of the applicant, and subsidiary to this question have been those of age, support, emancipation from parents' control, and intention after graduation. In this particular case the evidence sustaining the plaintiff's intention is clear. *Putnam v. Johnson*, 10 Mass. 488; *Farlee v. Runk*, 1 Bart. El. Cas. 87; *Op. of Judges*, 5 Met. 587; *Cush. Elect. Cas.* 436; *Sanders v. Getchell*, 76 Me. 158; *Vanderpool v. O'Hanlon*, 53 Iowa, 246; *Cesena v. Myers*, Elect. Com. 47th Congress.

Messrs. Townsend and Watrous, for defendants, Treat, Feldman and Beecher:

The defendants, Treat, Feldman and Beecher, answer that they voted in favor of his admission. To this answer the plaintiff demurs. The question is whether they can be held.

They are not so liable individually, at common law, unless it appears that they acted in concert, or contributed to the wrong by advising or procuring it to be done, or by ratifying it when done. 2 *Hilliard*, Torts, 446; *Burd v. John*, 26 Pa. St. 489; *Berry v. Fletcher*, 1 Dil. 70.

There is no relation of principal and agent between the members of the board. The individual liability of each depends upon his individual act. If one votes in favor of an illegal measure which is carried out, he may be liable in damages therefor. Unless he assents to such vote, and *a fortiori*, if he expressly dissents therefrom he cannot be so held.

The defendants are not liable for the acts of the board as a whole. *Devoss v. Gray*, 22 Ohio St. 159; *Talmadge v. Fishkill I. Co.* 4 Barb. 389.

In conformity with the rules of the common law on this subject, our statute holds only the assenting directors liable for the impairment of the capital stock. Pub. Acts, 1880, 564.

By statute the town clerk and selectmen are, *ex officio* constituted a board for the admission of electors. Certain additional responsibilities are imposed upon them as members of said board. The statute provides for the individual liability of such officers for neglecting the performance of their duties. R. S. 1875, 519.

And this court has declared the same principle, in a case where part of the selectmen of a town wrongfully imposed the burden of the support of a pauper upon the plaintiff town. *Stratford v. Sanford*, 9 Conn. 275, 285.

If the principle contended for by the plaintiff were to prevail as to these defendants, a public officer, while liable to be fined for a refusal to act, would be personally liable for his proportionate share of all damages resulting from the wrongful acts of his associates, in which he did not participate, to which he did not contribute and which he expressly refused to ratify.

Carpenter, J., delivered the opinion of the court:

The plaintiff applied to the board of registration to be admitted an elector. The board heard the evidence as to his qualifications, and refused to admit him; and that is the wrong complained of, for which this suit is brought against the members of the board. A majority of the defendants demurred to the complaint, and on that issue the case was reserved for our advice. The question relates to the residence of the plaintiff.

Upon the evidence it seems clear that his only domicile was in New Haven, and that he should have been admitted. If that was the only question involved in the case the demurrer should be overruled; but the question is whether the defendants, acting strictly within their jurisdiction, and without malice or willful disregard of their duty can be held liable.

The Constitution prescribes the qualifications of electors, and constitutes the selectmen and town clerk of each town the tribunal to decide on those qualifications. In doing so they bear testimony, weigh it and decide. Thus they act judicially. They are *quasi* judicial officers. *Freeman v. Selectmen of New Haven*, 84 Conn. 415.

The general rule is that such officers are not liable for errors or mistakes; but there are exceptions. In Massachusetts it is held that selectmen, etc., are liable in such cases without averring or proving malice. In *Lincoln v. Hapgood*, 11 Mass. 350, Chief Justice Parker, after stating that he had for some time entertained a different opinion, says that "However hard such an action may be against selectmen, it is essential to the rights of the citizen that it should be sustained."

The argument is: first, that the citizen has no other remedy; second, that the good of society, and security against a repetition of the wrong, require that the suffering party should be permitted to resort to this mode of relief; third, that a man may be otherwise prevented, for his life, from exercising a constitutional privilege. In *Capeen v. Foster*, 12 Pick. 485, Shaw, C. J., says: "It has been decided upon great considerations of public policy that such an action may be sustained."

The same rule prevails in Wisconsin and Ohio. *Gillespie v. Palmer*, 20 Wis. 544; *Jeffries v. Ankeny*, 11 Ohio, 372; *Monroe v. Collins*, 17 Ohio St. 665.

In the Wisconsin case, however, the defendant was merely a ministerial officer.

We have no disposition to question the validity or strength of the reasoning in those cases, theoretically considered. It is sufficient to say that with nearly seventy years experience under our Constitution, it is believed that the evils apprehended have not existed to any considerable extent. Indeed, it is believed that if

the Massachusetts rule prevailed here, the evils that would arise from increased litigation, subjecting men, who, it must be presumed, endeavor honestly and fairly to discharge their official duties, to annoyance and expense, would be greater than any we have hitherto experienced. Viewed in the light of experience we cannot regard those reasons as sufficient to induce us to depart from the general rule.

For two thirds of a century our system has been in operation, and we are not aware that the records of our courts show any cases of this description. This circumstance, though not in itself a decisive argument, tends strongly to show the almost universal sense of the profession during that time, that such an action cannot be maintained.

As a rule, we think, the duties devolving upon boards of registration are fairly and honestly discharged. Doubtless it occasionally happens that a man entitled to vote is excluded, or one not entitled to vote is admitted; but so far as such cases result from mistakes it is hard to subject the members of the board to an action.

We think it not politic or wise to expose those upon whom the law casts the burden of ascertaining the qualifications of electors to the annoyance of private suits for errors in judgment. If they act wantonly or maliciously, there may be a private remedy; but that is not this case, as there is no allegation of wanton or malicious conduct.

We think that the general rule which exempts judicial officers from liability should continue to apply to boards of registration, so long as they act in good faith and within their jurisdiction.

The Superior Court is advised that the complaint is insufficient.

In this opinion the other Judges concurred.

Samuel D. NEWELL, *Appt.*,
v.

Newton SMITH.

A **settlement**, even intended to cover the whole subject matter, can be **corrected** when shown to have been made under a **mistake** of both parties as to an important fact.

(Filed December 8, 1885.)

A PPEAL from a judgment of the Court of A Common Pleas for Hartford County in favor of defendant, in an action to recover the price of a cow sold by plaintiff to defendant. *New trial ordered.*

The facts are stated in the opinion.

Messrs. Newell & Jennings, for appellant: Among the essentials of a contract are: a good and sufficient consideration; clear and explicit words to express the contract; the assent of both contracting parties. 1 Pars. Cont. 6; Metc. Cont. 14, 30.

None of these essentials are fulfilled in this case. There was no consideration. The transaction included no benefit to the plaintiff, no

trouble, inconvenience, prejudice or loss to the defendant. Com. Dig. *Assumpsit*, B. 1; Smith, Cont. 4th Am. ed. 166; *Homer v. Ashford*, 8 Bing. 327.

There was no mutual assent. There are three requisites to assent: 1. It should be mutual. 2. It should be without restraint. 3. It should be understandingly made, without error or mistake. Metc. Cont. 80; 1 Pars. Cont. 399; *H. & N. H. R. R. Co. v. Jackson*, 24 Conn. 517.

It was not the duty of the plaintiff to make any reservation at this time as to anything concerning his claims covering the contingency of the cow "Kittina" being with calf, the reason being that he did not regard it a final settlement. If the defendant ever expected to claim the transaction a settlement, it was his duty to make it perfectly clear to the plaintiff. The idea of its being a settlement entered the minds of neither. Under these circumstances how could there have been that mutual assent which is necessary in order to make a contract? *Jenness v. Mt. Hope Iron Co.* 53 Me. 23.

They were resting under a mutual mistake of fact. "The cases founded on mistake seem to rest on this principle: that if parties, believing that a certain state of things exists, come to an agreement with such belief for its basis, on discovering their mutual error, they are remitted to their original rights," *Mowatt v. Wright*, 1 Wend. 362, citing *Cox v. Prentice*, 3 Maule & Sel. 844. And see, *Hammond v. Allen*, 2 Sumner, U. S. C. C. 388, 394; *S. C.* 11 Pet. 63 (36 U. S. bk. 9, L. ed. 633); *Daniel v. Mitchell*, 1 Story, U. S. C. C. 173; *Wheaton v. Olds*, 20 Wend. 176; *Baldwin v. Van Deusen*, 37 N. Y. 489; *Calkins v. Griswold*, 11 Hun, 213; *Roberts v. Fisher*, 43 N. Y. 159, 163; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Kingsdon Bank v. Ellings*, 40 N. Y. 395; *Duncan v. Berlin*, 11 Abb. Pr. N. S. 116; *Union Nat. Bank v. Sixth Nat. Bank of N. Y.*, 43 N. Y. 452; *Westerlo v. De Witt*, 36 N. Y. 840; *Martin v. McCormick*, 8 N. Y. 331; *Hadlock v. Williams*, 10 Vt. 570.

Mr. F. L. Hungerford, for appellee:

Granger, J., delivered the opinion of the court:

The plaintiff sold the defendant a Jersey cow called "Kittina" and a Jersey heifer called "Colt's heifer", on the 18th of October, 1883. For the cow the defendant agreed to pay \$100, if she should prove to be with calf; but if she was not he was to pay but \$40. The heifer was honestly represented by the plaintiff to be of a certain pedigree, but proved to be of less pure blood, and the defendant claimed \$50 damages, which the plaintiff admitted that he was entitled to; and on the 16th of April, 1884, the parties met and agreed that the \$50 should be paid by turning in the cow Kittina at \$40 and paying \$10 in cash, which sum the plaintiff then paid to the defendant.

At this time both parties were satisfied that the cow was not with calf, and that, therefore, under the original contract the plaintiff was entitled to only \$40 for her, and in making the settlement both parties acted on that belief. It proved, however, that she was with calf, and had been at the time she was sold, as she had a calf on the 18th of the following June.

CONN.

The defendant claims that the settlement was a full and final one of the whole matter of the purchase, and that the plaintiff is not entitled to the \$60 additional which he was to have had by the original contract if the cow was then with calf. The plaintiff claims that the settlement was made under a mutual mistake as to the condition of the cow, and that he may now fall back on the original contract and recover the \$60.

It is clear that the settlement was merely of the \$50 damages claimed by the defendant, and assented to by the plaintiff, for the failure in pedigree of the heifer. In paying that \$50 the cow Kittina was turned in at the price which by the original contract the plaintiff supposed he was bound to accept, and which the defendant supposed was all that by the contract he was bound to pay. The case does not stand differently from what it would if the defendant had paid the plaintiff the \$40 in cash, under the mistake of both parties as to the cow's condition. As soon as the mistake was discovered the defendant would be bound to correct it, by paying the remaining \$60. If the settlement had been in writing and made in terms to cover the whole matter, yet, being made under a mistake of both parties as to an important fact, it could have been corrected.

The plaintiff is clearly entitled to recover the \$60 remaining unpaid for the cow.

There is error in the judgment, and a new trial is ordered.

In this opinion the other Judges concurred.

Frank G. FOWLER

William H. MALLORY *et al.*

1. A contract assigning, for one year, certain letters patent owned by the assignor, for the purpose of being sold by assignee together with other letters patent owned by the assignee, all the patents relating to the same subject matter and each adding to the value of the others, construed as pooling the properties and as meaning that one or more of the patents might be disposed of, after reasonable exertions to dispose of them together and that each party had a right to share in the proceeds of all the sales that might be made of any or all the patents.
2. Hence, the assignee having succeeded in disposing only of the patents originally owned by him, but not of assignor's patent, the assignor is entitled to his proportionate share of the money received therefor, on the terms prescribed by the contract.
3. The fact that the contract provided for the return to the assignor of his letters patent, in case the assignee failed to dispose thereof, does not render the transaction one of bailment only.
4. The assignor not having warranted the validity of his patent while negotiating the contract, the fact that it subsequently proved to have been anticipated by a

prior patent did not work a failure of consideration on the part of the assignor, the defect being in the assignor's letters patent only and not inherent in his device.

(Filed March, 1886.)

RESERVED by the Superior Court for Fairfield County. *Judgment for plaintiff.*

Action of covenant, to recover the amount due for alleged breaches of the conditions of a bond given by defendants to secure the performance on their part of the provisions of an agreement by which the plaintiff assigned certain letters patent to the defendants, to enable the latter to dispose of the same for their mutual benefit.

The terms of the agreement and the facts of the case are stated in the opinion.

Messrs. S. Fessenden and F. L. Holt, for plaintiff:

Where a vendee has the power by examination to ascertain as fully as the vendor himself can, the full knowledge of the quality and merchantable value of a chattel, there being no fraud or misrepresentation on the part of the vendor, and the purchase results in a total loss, that loss must fall upon the vendee. This is especially so in regard to patents, provided there is no written guarantee in the assignment set forth or unless the assignor knows at the time of making the assignment that the patent is invalid. This is the settled law of England, the authorities and decisions being uniform, clear and decisive. 1 Chit. Cont. last ed. § 626, and cases cited; 2 Add. Cont. §§ 316, 653, and cases cited; *Taylor v. Hare*, Bos. & Pul., N. R. 280; *Cutler v. Bower*, 11 Q. B. 978; *Cherry v. Hemming*, 2 Exch. 557, W. H. & G. vol. 2; *Laves v. Purser*, 6 El. & B. 931, 88 Eng. C. L. 931; *Smith v. Neale*, 2 C. B. N. S. 67-89, Eng. C. L. 67; *Hall v. Conder*, 2 G. R. N. S. 22, 89 Eng. Com. 22; *affd. on app. Id.* 53; *Smith v. Scott*, 95 Eng. C. L. R. 6 C. B. N. S. 771.

Curtis on Patents, ed. 1867, §§ 188, 184, thus refers to the rule in England: "As against the assignor himself an assignment vests a good title of a patent in the assignee, from the time of its execution. * * * We may now pass to the consideration of the relations which an assignment of a patent establishes between the assignor and the assignee, assuming it to have all the requisites of an assignment, as well as the nature and extent of the interest which it possesses. And in the first place, it has been held in England, that a mere naked assignment of an interest in a patent does not import a warranty by the assignor of the validity of the patent. A mere assignment without words which imply an undertaking that the patent is valid, is to be regarded as a sale of an ascertained chattel, viz.: patent issued in respect to the validity of which the parties have an equal opportunity to inform themselves; and, therefore, in an action for a breach of such contract, brought by the assignor against the assignee, the pleading *non concessit* puts in issue the granting of the patent, and not its novelty or utility."

The American authorities and decisions fully sustain this position: "It is a perfectly well

settled rule that if a benefit accrues to him who makes the promise, or if any loss or disadvantage accrues to him to whom it is made and accrues at the request or on the motion of the promisor, although without benefit to the promisor, in either case the consideration is sufficient to sustain *assumpsit*. 1 Pars. Cont. 5th ed. 431, 445, and cases cited; Curt. Pat. § 184, and cases cited; Simonds, Pat. L. 91; Walker, Pat. § 288; *Hiatt v. Twomey*, 1 Dev. & B. Eq. Cas. (N. C.) 315; *Cansler v. Eaton*, 2 Jones, Eq. Cas. M. 490; *Thomas v. Quintard*, 5 Duer, 80; *Jones v. Willimantic Co.* 33 Conn. 436.

Letters patent are *prima facie* evidence of their own entire validity. The burden of proof that the Clark patent was invalid rests upon the defendants in this case. *Minter v. Wells*, Web. Pat. 129; Curt. Pat. § 471, ed. 1867; Walker, Pat.'s §§ 76, 85, 491; *Pitts v. Hall*, 2 Blatchf. 229.

The finding of the committee shows that the difference in the results accomplished by the Clark and the Moodie patents are not differences in degree, but that the Clark device enables that to be done which with the Moodie device cannot be done at all, and that the result so accomplished is a result of great practical utility.

This new and additional result is effected by a new and additional device, to wit: the "graduation and numbering" of the Clark device; which graduation and numbering are not found in the Moodie device.

Hence, then, we have a new device, and a new and valuable result from it. These two features can not occur together except as the product of invention.

Whenever a change of device is new and accomplishes beneficial results, courts look with favor upon it. The law in such cases has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new device. *Middleton Tool Co. v. Judd*, 3 Fish. 141, cited in Merwin on Patentability of Inventions, 473; Curt. Pat. §§ 34, 36, 39; *Clark, Pat. Steam & Fire Reg. Co. v. Copeland*, 2 Fish. 221; also, *Magic Ruffle Co. v. Douglas*, 2 Fish. 330; Law, Am. Dig. (d. 1868, § 423, § 87; p. 181, §§ 8, 4; p. 182, §§ 9, 14, 15; p. 188, §§ 22, 24, 25, 28, 29; p. 184, § 42; p. 185, § 51; p. 309, §§ 20, 21, p. 311, § 40; *Consol. Safety Valve Co. v. Crosby Steam Gauge & V. Co.* (113 U. S. 157, bk. 28, L. ed. 939); 80 Pat. Off. Gaz. 991; *Boulton v. Bull*, 2 H. Bl. 487; *Huddart v. Grimshaw*, Dav. Pat. Cas. 267, *Hill v. Thompson*, 1 Web. Pat. Cas. 237; *Brunton v. Hawkes*, 4 Barn. & Ald. 550; *Carpenter v. Smith*, 1 Web. Pat. Cas. 588; *Lister v. Leather*, 8 El. & B. 1004; affirmed in Exchequer Chamber, *Id.* 1081; *Farnwell v. Bostock*, 12 Weekly Rep. 725.

Superior utility is an evidence that some new principle or mechanical power or new mode of operation producing a new kind of result has been introduced, but this utility must be derived from the changes introduced, not from the use of better material or skill or care in the manufacture. *Many v. Sizer*, 1 Fish. Pat. Cas. 17; *Dangerfield v. Jones*, 18 L. T. Rep. N. S. 142.

Invention, in the sense of the patent law, is the finding out, contriving, devising or creating by an operation of the intellect something

new and useful which did not exist before. *Ransom v. Mayor of N. Y.* 1 Fish. 252.

An idea of itself is not patentable, but a new device by which it may be made practically useful is. The idea of this patentee was a good one, but his device to give it effect, although useful was not new; consequently he took nothing by his patent. 20 Wall. 498 (87 U. S. bk. 22, L. ed. 410). And see, *Nat. Feather Duster Co. v. Dearborn Duster Co.*, 24 Pat. Off. Gaz. 497; *Gottfried v. Crescent Brewing Co.* 22 Pat. Off. Gaz. 497.

Messrs. Edward W. Seymour and John S. Beach, for defendants:

The law applicable to contracts of this general character is settled beyond dispute. It may be thus condensed:

If a person promises absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and the thing to be done or event is neither impossible nor unlawful at the time of the promise, he is bound by his promise and must perform it or pay damages for not doing so. See, *School Dist. v. Dauchy*, 25 Conn. 530; *Wells v. Calnan*, 107 Mass. 514; *Dexter v. Norton*, 47 N. Y. 62; *Maine v. Butler*, 130 Mass. 196; *Walker v. Tucker*, 70 Ill. 527; *Stephens v. Webb*, 7 Car. & P. 60; 2 Pars. Cont. 357; Benj. Sales, § 424.

The defendants would not be liable, even if the contract purported to impose an absolute obligation on Mallory to sell the Clark patent and to pay the plaintiff on such sale \$8,000.

First. The parties to the contract contemplated the existence of the thing about which they were contracting, and if it did not exist the contract had no validity.

The existence of the thing to be sold, or the subject matter of the contract, is essential to the validity of the contract. *Terry v. Bissell*, 26 Conn. 81.

If there had been an absolute sale of this patent by Fowler to Mallory, and Mallory had given his promissory note therefor, for the sum of \$8,000, payable in one year after the date of sale, and it should turn out that the thing sold was at the date of sale a void patent, there could be no recovery on the note. See, *Cross v. Huntly*, 13 Wend. 387; *Head v. Stevens*, 19 Wend. 413; *Nash v. Lull*, 102 Mass. 62; *Harlow v. Putnam*, 124 Mass. 558; *Wood v. Sheldon*, 13 Groom, 421; 36 Am. Rep. 526; *Johnson v. Willimantic Co.* 38 Conn. 442.

The English courts in some of the cases cited by the plaintiff, and notably in *Hall v. Conder*, C. B. N. S., 22, look at the patent itself as the thing sold, and apply the well established rule of law that on the sale of a known ascertained article there is no implied warranty of quality.

Upon the conceded facts, the Clark patent is void under the patent law of Great Britain, as uniformly construed by its highest courts. That part of the alleged invention which relates to the dial plate being confessedly old, the entire patent is void, even although the figures upon it constituted a patentable novelty. "If it appears that any part of the invention which is claimed as an improvement is not so, the patent will be void, as the Crown is deceived in the grant." Agnew, Law and Practice of Patents and Inventions, 51, and cases cited; Ter-

rell, Patents (1884) p. 47 and cases cited; 6. E. C. L. 513; *Brunton v. Hawkes*, 4 Barn. & Ald. 541.

It is the accepted law of bailment that where one delivers to another any specific thing under an agreement, absolute or conditional, that the identical thing shall or may be restored, then it is a bailment and the risk of the property is exclusively with the bailor, unless the bailee is guilty of some wrong or has assumed the obligation of an insurer. Edw. Bail. 167; Story, Bail. §§ 86, 87; *Bulkeley v. Andrews*, 39 Conn. 70; *Conwell v. Smith*, 8 Ind. 530; *Millon v. Salisbury*, 13 Johns. 211; *Norton v. Woodruff*, 2 N. Y. 153; *Barker v. Roberts*, 8 Greenl. 101.

Plaintiff's brief in reply.

This was not a bailment, nor do any of the decisions cited by the defendants sustain their claim that it is. This case differs from all the authorities cited by the defendants, in that, in every one of those cases, the title to the chattels in question did not pass out of the owner, and the parties thus were found, upon the agreements entered into between them, to have had in contemplation a bailment, and not a sale. *Schoul. Bailm.* 56; Story, *Bailm.* §§ 871, 415; Edw. *Bailm.* § 415; *Chuse v. Washburn*, 1 Ohio St. 244; *Hurd v. West*, 7 Cow. 752; *Crocker v. Gullifer*, 44 Me. 491; *Marsh v. Wickham*, 14 Johns. 167.

Our statute, Gen. Stat. 444, § 1, providing that in actions on penal bonds containing conditions which have been broken, such damages only shall be awarded as are equitably due, and judgment shall not be rendered for the whole penalty, unless it appears to be due, etc., which the defendants invoke, cannot aid them upon the ground claimed in their supplemental brief, for the reason that, if the defendants failed to carry out their contract, and sold the Hughes and Newton patents for the amount stated in the record, the sum due us by the terms of the contract is equitably due, and the damages, to which we are in equity entitled, for the breaches of the bond, are fixed and ascertained by the contract made and entered into between the parties at the time said contract was made. *Egges. Dam.* § 642; 1 *Suth. Dam.* 475, § 6; pp. 479, 481, 491; *Wood's Mayne, Dam.* §§ 158, 159, 162, 164, 170; *Grasselli v. London*, 11 Ohio St. 349; *Bagley v. Peddie*, 16 N. Y. 469; *Springdale Cem. Asso. v. Smith*, 24 Ill. 480; *Pierre v. Fuller*, 8 Mass. 223; *Holmes v. Holmes*, 12 Barb. 137; *Astley v. Weldon*, 2 Bos. & P. 346; *Dakin v. Williams*, 17 Wend. 447.

Additional brief for defendants.

The claim of the plaintiff to recover in this action an amount less than \$15,000, such amount being based upon what he claims he would be entitled to recover of Wm. H. Mallory in a suit upon the original contract, is entirely inconsistent with any claim of liquidated damages as affecting the penal character of the bond. It is a well recognized rule of law that where a smaller amount is secured by an undertaking to pay a larger, in case of nonfulfillment of conditions, the sum so agreed to be paid must always be considered as a penalty and not as liquidated damages. *Astley v. Weldon*, 2 Bos. & P. 354; *Reynolds v. Bridge*, 6 El. & B. 528; *Thoroughgood v. Walker*, 2 Jones (N. C.) L. 15; *Moore v. Platte Co.* 8 Mo. 467; *Lord v. Gaddis*, 9 Iowa, 265; 1 *Swift, Dig.* 697;

Park, Ch. J., delivered the opinion of the court:

This case depends upon the construction that should be given to the following contract, entered into between the plaintiff and the defendant Mallory.

"This agreement made and entered into this 22d day of April, 1878, by and between Frank G. Fowler, of Bridgeport, Fairfield County, Connecticut, of the first part, and William H. Mallory of said town, county and State, of the second part, witnesseth: the said Frank G. Fowler for and on account of considerations hereinafter mentioned, and at the special request of said William H. Mallory, agrees to assign, transfer and deliver to the American Propeller Co., a certain letters patent for an improvement in steering propellers, numbered 1989, and granted by authority of the Kingdom of Great Britain and Ireland, to William Clark in said letters patent mentioned, and dated May 11, 1876, as will appear, and duly assigned to said Frank G. Fowler by said Wm. Clark, on the 4th day of October, 1876, as will appear by said assignment duly executed and delivered. The said Frank G. Fowler is to assign and deliver said letters patent to the said American Propeller Co. at the request of said William H. Mallory, upon the following terms, and for the purposes hereinafter mentioned, to wit: to be sold, assigned and transferred to any parties in Great Britain or elsewhere, together with all the rights, privileges, grants and conditions therein contained, for such a sum of money as the said American Propeller Co. shall deem advisable. Such sale, leasing or grant is to be made by the American Propeller Co. and completed on or before the 23d of April, 1879, and not thereafter. The said letters patent are to be sold or leased with and in connection with certain other letters patent, to wit: a letters patent granted to Alfred Vincent Newton, of 66 Chancery Lane, dated July 4, 1867, and numbered 1968; a letters patent granted to Edward Thomas Hughes, of 23 Chancery Lane, dated July 1, 1874, and numbered 2277, and now owned by said American Propeller Co., and the said letters patent so owned by the said American Propeller Co., and dated and numbered as aforesaid, are to be sold with the above patent numbered 1989 and dated as aforesaid and all sold together. And in case said letters patent are so sold, leased or disposed of at any price within the time aforesaid, then the said Mallory, his heirs, executors, administrators or assigns, are to pay to the said Fowler, his executors, administrators, heirs or assigns, the sum of \$8,000, within six months after the date of such disposal or sale. And in case the aforesaid letters patent, meaning either or all the said patents, shall be disposed of for a greater sum than \$80,000, then the said Mallory, his heirs, executors, administrators or assigns, are to pay to the said Fowler, his heirs, executors, administrators or assigns, at the rate of 10 per cent, or \$10 for every \$100 over and above the said \$80,000, till the amount of such sales reaches the sum of \$150,000, beyond which sum of \$150,000 sales, the said F. G. Fowler is to receive nothing, or no further percentage. In case no disposition of said letters patent hereinbefore mentioned and referred to shall be made within the time aforesaid, then the said

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Wm. H. Mallory, his heirs, executors, administrators or assigns, shall reassign or cause to be reassigned the said letters patent numbered 1989, to the said Fowler, his heirs, executors, administrators or assigns, and restore the same fully and without loss or reservation within three days from the expiration of this contract.

The said F. G. Fowler is not to be made any loss, cost or damage for or on account of this agreement; and the aforesaid 10 per cent, or \$100 for each \$1,000 of sales as aforesaid, are to be rated upon gross sales, and the said Wm. H. Mallory is to cause to be rendered to the said Fowler a correct statement from said American Propeller Co., and sworn to by the president thereof before proper authority, of all sales wherein the above per cent is to be computed, when the same shall be required by the said Fowler."

The plaintiff performed his part of the contract, and the defendant Mallory went to England, taking with him the two letters patent belonging to the American Propeller Co., described in the contract, and the letters patent belonging to the plaintiff, to perform his part of the contract.

He was duly authorized by the American Propeller Co. to do all that he had undertaken to do in the contract; and no complaint is made regarding his efforts to sell all three of the letters patent together, as the contract required, if it could reasonably be done.

But the case finds that it was impossible for the defendant Mallory to sell the letters patent belonging to the plaintiff, owing to the fact, that in the year 1868 letters patent had been granted to one Moodie, under the authority of the Kingdom of Great Britain and Ireland, which anticipated the plaintiff's letters patent to a great extent; still, the case finds that the results produced by the two letters patent were so far in favor of the plaintiffs, that the excess rendered his letters patent "of great practical utility."

The defendant Mallory sold the two letters patent, belonging to the American Propeller Co., together with a steam launch, belonging to the same company, for the sum of £22,000 sterling; of which amount £10,000 was to be paid in cash, and the remainder in the paid up stock of the Mallory Propeller Co. limited. The case finds, that only \$3,625 25, were received in cash, on account of the two letters patent, and the stock of the company, although paid and received, resulted in being of no intrinsic value.

The defendant Mallory tendered to the plaintiff a retransfer of his letters patent within the time specified in the contract, but the plaintiff refused to accept the same. The case further finds that neither the plaintiff nor the defendants had any knowledge of the Moodie letters patent at the time of the execution of the contract, or at any time before the defendant Mallory was told of its existence, while endeavoring to sell the letters patent as already stated.

The plaintiff made no fraudulent representations to either of the defendants, concerning the value, utility, novelty or validity of his letters patent at any time; and, during the negotiations which ended in the contract, the defendant Mallory gave the plaintiff to under-

stand that he did not ask him to warrant or guaranty the validity of his letters patent, and did not expect him to do it, but desired the plaintiff to obtain the opinion of a certain patent lawyer of New York, regarding its utility and validity; which opinion was obtained by the plaintiff and given to the defendant shortly before the execution of the contract.

The case further finds that the plaintiff made no express warranty of the value, utility, novelty or validity of his letters patent, to either of the defendants, at any time, unless such warranty can be inferred from the facts stated.

These are the principal facts of the case, and the question is: do they constitute a cause of action against the defendants?

In giving a construction to the contract, which is the basis of this suit, we are to look at it as it appeared to the parties when they executed the same.

Here were three letters patent, two of them owned by the American Propeller Co., and one by the plaintiff, all relating to the same subject matter, the steering of steam propellers.

The company's letters patent contained descriptions and plans of all the necessary machinery and appliances for the purpose, and the plaintiff's contained the mode for setting the machinery instantly and properly in motion as the exigencies of the case in steering such vessels, from time to time require. Oftentimes a moment's delay in giving the proper direction to the vessel jeopardizes its safety if it does not occasion its destruction.

These three devices seem peculiarly adapted to each other and necessary to make up one perfect system of steering propellers. A vessel that had the company's devices would be in great need of the plaintiff's, or a similar device; and the plaintiff's without the company's or similar devices, would be useless, and consequently valueless. Hence, it must have appeared to the parties to the contract, that it would be greatly to the advantage of all concerned to sell the three letters patent together; for, apparently, by so doing each would enhance the value of the others, and be itself enhanced at the same time. It would largely increase the value of the combination beyond its separate intrinsic value. They had heard of no device like the plaintiff's; and as this mode of steering propellers was comparatively new, they must have thought that there was but little or no danger that either of the patents had been anticipated by others.

We may safely conclude, therefore, that the parties to the contract were anxious to pool their patents; anxious to make common property of the proceeds of their sales in a speculative adventure. They had large sums of money in anticipation. They talked of sales amounting to \$150,000 and more; and their only trouble seems to have been how they should divide the proceeds of the speculation.

Neither party asked the other to warrant or guaranty the validity, utility, novelty or value of his respective patent or patents. There is no pretense that the plaintiff requested it of the defendant Mallory; and the case finds that the plaintiff made none regarding his patent, unless the facts narrated show it by implication. But none can arise by implication, for

during the negotiations for the contract, the defendant Mallory gave the plaintiff to understand, that he, the said Mallory, did not ask the plaintiff to warrant or guaranty the validity of his patent, and did not expect him to do it, but desired the plaintiff to obtain the opinion of a certain patent lawyer of New York. That opinion was obtained by the plaintiff, and delivered to the defendant Mallory shortly before the execution of the contract.

How, then, is it possible that there could have been any warranty or guaranty by the plaintiff, express or implied, regarding the validity of his patent?

If nothing had been said on the subject, there might have been an implied warranty that his patent was valid, and therefore salable; but here the matter was talked over by the parties, and the defendant told the plaintiff that he did not ask and did not expect him to warrant or guaranty the validity of his patent. He wanted the opinion of a certain lawyer, and when that was obtained and presented to him, he was fully satisfied on the subject. There is no room to claim a warranty, either express or by implication; yea, more: what passed between the parties amounted to an agreement that the plaintiff need not warrant the validity or salability of his patent, and that the defendant Mallory would take it as it was, and run his own risk regarding its validity and salability.

He was expecting the plaintiff's patent would largely increase the value of his own, besides furnishing great pecuniary profit in its sale. He was willing, therefore, to forego all security of its salability in order to make the contract.

We come now to a consideration of the contract, and an ascertainment of what it means.

The contention regarding its construction is confined to three important clauses. Two of them relate wholly to the plaintiff's share of the proceeds of the adventure, and the other pools the three patents, and makes common property of them effectively, in the speculation.

It was impossible to forecast what would be the result.

The plaintiff's patent might sell the other two; and the other two might sell the plaintiff's; and the combination might sell all and add largely to the value of all. So in the first clause it was agreed that the three patents should be sold, leased or disposed of, together.

But does this clause mean that, under no circumstances that might be found to exist, neither of them could be disposed of, otherwise than together?

If we compare this clause with the one which states, "And in case the aforesaid letters patent, meaning either or all the said patents, shall be disposed of for a greater sum," etc., we learn that such was not the meaning which the parties gave to this clause.

They intended by the language to mean, and the clause should be so construed, that one or more of the patents might be sold or disposed of, after all reasonable exertions had been made, during a reasonable length of time under all the circumstances that might be found to exist, to sell or dispose of them, together.

And further; this must be the meaning of the

first clause, or else the defendant Mallory violated the contract by selling the company's patents without selling the plaintiff's in the same sale; and well might it be contended that if the plaintiff would have an equitable right to share in the proceeds of the sale, to the same extent as he would have, if his own had been included in the sale, Mallory would be estopped to say that the plaintiff's patent was not included, if he had absolutely bound himself to sell all three of the patents together, or sell none of them.

If we have given the correct construction to the first clause, then the contract must be construed in the same way as it would be if the first clause had contained the construction we have given it, written out in full.

The second clause in controversy immediately follows the first clause, and is as follows: "And in case said letters patent are so sold, leased or disposed of, at any price, within the time aforesaid, then the said Mallory, his heirs, executors, administrators or assigns are to pay to the said Fowler, his executors, administrators, heirs or assigns the sum of \$8,000, within six months after the date of such disposal, or sale."

The words, "so sold, leased or disposed of," refer to the first clause, and mean, sold, leased or disposed of as therein described. This reference to the first clause makes it, with the construction that should be given to it, a part of this clause as much as it would be if it was written out in full in this clause.

We have seen that the first clause does not mean that the three patents must absolutely be sold together, but that one or more might be sold, after reasonable efforts for a reasonable time had been made to sell or dispose of them together.

So this clause means, by the words "so sold, leased or disposed of."

This construction is in full accord with the meaning, which is closely expressed in the third clause, and with which this clause must be construed.

The third clause immediately follows the second clause, and is as follows: "And in case the aforesaid letters patent, meaning either or all the said patents, shall be disposed of for a greater sum than \$80,000, then the said Mallory, his heirs, executors, administrators or assigns, are to pay to the said Fowler, his heirs, executors, administrators or assigns, at the rate of 10 per cent, or \$10 for every \$100 over and above the said \$80,000 till the amount of such sales reaches the sum of \$150,000, beyond which sum of \$150,000 sales, the said F. G. Fowler is to receive nothing, or no further percentage."

The language of this clause is clear, and admits of but one construction. The clause, after saying "the aforesaid letters patent," stops before going further, and defines the meaning of those words; which was not done in either of the other clauses, though a similar expression was used. "Meaning either or all the said patents," in its language.

The definition makes the clause read as follows: "And in case either or all the aforesaid letters patent shall be disposed of" etc.

What room is there for more than one construction of this clause? What foundation is

there for the claim, which one of the counsel for the defendants has urged with great persistency and pertinacity, that the words, "meaning either or all the said patents," are equivocal, that we are left to conjecture their meaning?

The words render the clause simple and easy to be understood and to all appearance free from all ambiguity. There is unmistakable evidence that they were written with mature deliberation and with full apprehension of their import to prevent the claim being made, that has been made, that all the patents must absolutely be sold together. It would seem, if language is capable of preventing such construction, it has been done.

Again; it will be observed in relation to the third clause that no sale of one or more of the patents can come within its limits, unless the amount of the sale shall exceed the sum of \$80,000, in which case all that the plaintiff could be entitled to recover by the clause, would be 10 per cent of the amount exceeding \$80,000, and not exceeding \$150,000; so that if a sale should be made of the plaintiff's patent alone, for the sum of \$150,000, all that he could be entitled to recover by this clause, would be 10 per cent on \$70,000.

And such would be the case if the Mallory patents alone should be sold for the same amount.

But it is said that what the plaintiff would be entitled to receive under the third clause is in addition to the \$8,000 that he would be entitled to under the second clause. The third clause does not so state, but doubtless it should have that construction, for any other would be absurd. Now if it be true, as seems to be conceded by the brief of the senior counsel for the defendants, that if the plaintiff's patent had been sold without the Mallory patents, or the Mallory patents had been sold without the plaintiff's for the sum supposed, the plaintiff would be entitled to \$8,000 under the second clause, and \$7,000 under the third clause; would he not be entitled to \$8,000 under the second clause, if the amount of the sale, in the case supposed, should not exceed \$80,000? Clearly he would be so entitled. How could it be otherwise? A sale of one or more patents exceeding \$80,000, it is conceded, comes within the second clause, as well as the third. How can it come within the second clause unless a sale of one or more patents may be made directly under that clause? It follows, therefore, that the sum of \$80,000 was not intended as a limitation below which no sales of patents less than the whole number could be made, but as a limitation up to which, the plaintiff could not receive more than \$8,000, as the \$150,000 is a limitation above which no percentage could be recovered. The plaintiff surrendered all claim to the surplus over \$150,000 in consideration of his receiving \$8,000 under the second clause if sales should be made at any price; thus he gave up a possible advantage in one case, to counterbalance a possible loss to the defendant Mallory in the other. In order to show this clearly, the two clauses were inserted with the plaintiff's compensation in each clause separate and distinct. If a sale is large enough to come within both clauses, the compensations in both are to be added together. If it comes within the second

clause only, then no addition to the compensation of that clause is to be made. Hence, it is clear that the phrase "meaning either or all the said patents", forms a part of the construction that should be given to the second clause.

The defendant's construction of the second clause is, that all three of the patents must be sold to entitle the plaintiff to anything; so that if the plaintiff's patent alone had been sold for a large amount, or if it had been found that one of the Mallory patents had been anticipated by some English patent and thereby was rendered wholly unsalable, but the other two patents had been sold together for a large amount, the plaintiff, in either case, could recover nothing under the contract; for strange, indeed, would it be that he could recover the percentage compensation of the third clause, when it is conceded by the defendants that the percentage is in addition to the compensation provided in the second clause. Manifestly such construction of the second clause never entered the mind of either party to the contract; and there should be clear and unmistakable language used in the clause to that effect, before it should have such construction. Such construction would make the plaintiff, not only an insurer of the salability of his own patent, but an insurer of the salability of both the Mallory patents as well; when at the same time the defendant Mallory would run no risk in regard to the salability of either of the patents, but would or might be a great gainer by such a defect in some one of them; for then he could pocket the entire proceeds of the sale, even if the defect was found to be in one of his own patents. There would be no mutuality in such construction, and the claim is clearly untenable.

Another claim is, that the plaintiff's patent must be sold, at all events, in order to entitle him to anything.

This claim likewise makes the contract a one sided affair and deprives it of all mutuality between the parties.

According to this claim, if the plaintiff's patent had been sold alone for \$150,000, the defendant Mallory would have nine times as much of the proceeds of the sale as the plaintiff; whereas, if the Mallory patents had been sold alone for the same amount, the plaintiff would not be entitled to anything. This construction is untenable, like the one we have considered, and both tend strongly to show that the construction we have given the second clause is correct.

The case finds that the defendant Mallory sold his patents for more than \$100,000.

How then can the defendants escape paying the amount of compensation provided in the second clause of the contract? For we have seen that whatever sales come within the third clause come likewise within the second clause; and this the senior counsel for the defense virtually admits when he concedes, that one or more patents may be sold under the third clause, in which case, he further concedes that the compensation provided in that clause is to be added to the compensation provided in the second clause, which could not be done unless the sale comes within both clauses.

In this part of the case, the defendants contend that by the terms of the contract, the defendant Mallory was merely a bailee of the

plaintiff's patent; that he took the same to sell with his own, at the greatest price obtainable by the exercise of due diligence and reasonable effort, for the plaintiff's benefit; all which, it is said, the case finds that he did, and made due return of the property to the plaintiff after all reasonable efforts had failed to accomplish the object.

But in what sense can the contract be called a bailment? Mallory took the plaintiff's property to sell with his own, and was bound to return it if no sales should be made of any of the properties, it is true. But each party had an interest and a right to share in the proceeds of all the sales that might be made in any or all the properties, as we have seen. There was a pooling of the properties for all purposes of the speculative adventure; and the proceeds of all sales were made common property, differing only in the shares which each party would be entitled to receive. If the plaintiff's property only should be sold, Mallory would share in the proceeds to the same extent that he would in a sale of one of his own properties for the same amount; and the share of the plaintiff would be the same in both. There would be no difference, in this regard, whichever property was sold.

How then can it be said that Mallory, or the Propeller Company (which in this case we call Mallory) was simply a bailee of the plaintiff's patent, to sell the same for his benefit, and return the same if no sale should be made?

Again; it is claimed that there is a failure of the consideration for the promise in the contract to pay the plaintiff the sum of \$8,000, should one or more of the properties be sold, and 10 per cent additional of the excess in the amount of such sales over \$8,000, and up to \$150,000, owing to the fact, as is claimed, that the Moodie patent rendered the plaintiff's patent unsalable, by anticipating and superseding his device.

We have already considered the answer to this claim, while considering whether there was any warranty of the validity, salability, utility or value by the plaintiff of his device, while negotiating the contract. We there showed that what passed between the parties, during the negotiations of the contract, amounted to an agreement that the plaintiff not only need not warrant the validity or salability of his patent, but that the defendant Mallory would take the same running his own risk of its validity and salability. Surely he could do this and deprive himself of the right to claim there was no consideration for his promise, on the ground that the patent was invalid when he accepted the same. And further; it will be noticed that the defect claimed is not in the device itself. There is no pretense that it would not accomplish all that it professed to perform.

The defect was in the letters patent only. Had it been inherent in the device and the device worthless in consequence, then the claim of the defendants might be sound.

The defendants' counsel illustrate their claim by supposing that Mallory was the owner of a valuable horse, and that Fowler was the owner of its perfect match. The owner supposed their horses would sell together for a much larger sum than could be realized by their separate sales, and could be sold to greater advan-

tage in England than in this country. So they made a similar contract to the one in question, regarding the sale of the horses. They agreed that Mallory should take them to England and sell them together as a pair. If the horses should be so sold at any price, Fowler shall receive \$500. If either or both should be sold for a greater sum than \$1,000, Fowler shall receive 10 per cent on the excess over \$1,000.

Mallory went to England to perform the contract, and while engaged in efforts to sell the horses together as a pair, Fowler's horse met with an accident that destroyed its value, and rendered it impossible to sell the same. Mallory afterwards sold his horse for the sum of \$1,500.

The counsel asks: has Fowler any redress?

We answer and say we think he would have if the facts attending the making of the contract were similar in all respects to what they are here.

If the owners of the horses, in order to obtain the much larger sum that they expected to receive by the sale of the horses together as a pair than could be realized by their sale in any other way, pooled their horses for the speculation and made the proceeds of all sales of them or either of them common property, to be shared by the parties in certain proportions; and it was further agreed, after a discussion of the subject had been had, that neither party need insure his horse from accidents of any kind, and if injury should befall either of them in this regard, it should be borne by both.

The supposition would be more analogous to the case in hand if we could suppose that Mallory, on his arrival in England, found so many horses like Fowler's in every respect, with which the Mallory horse could be matched, that the number destroyed the value of the Fowler's horse as a match with Mallory's, and ruined the expectations of the parties in regard to the Fowler horse.

It is further said that if Mallory, after becoming satisfied that the Fowler patent could not be sold, had returned home and tendered a retransfer of the patent to Fowler, he would have performed his full duty under the contract; and could then have returned immediately to England and sold his own patents.

This could not have been done if our construction of the contract is correct. We have seen that the contract made common property of the proceeds of all sales of the patents, whether one or more should be sold.

Fowler had an interest to the extent of his compensation in whatever sale might be made of the Mallory patents, and Mallory had an interest in whatever sale might be made of the Fowler patent.

If Mallory had found it impossible to sell his own patents, but had sold Fowler's for \$150,000, he would have had \$185,000 of the amount, and Fowler only \$15,000.

Is it so, that when he became satisfied that the Fowler patent could not be sold, but he could sell his own for a large amount, he could deprive Fowler of all right to share in the proceeds by postponing the sale till he could return home and tender a retransfer of the Fowler patent, and then return and make his sale?

We think not. We think Mallory was bound to conduct the transaction fairly, and treat Fowler as he would treat himself. He was bound to

sell either or all the patents, as the case might be, without discrimination, for whatever price was satisfactory to him under all the circumstances of the case.

We fully agree with the defendants that in actions upon bonds which are given to secure and be answerable for the faithful performance of contracts, the plaintiff can recover no more than is equitably due.

But here the breach of the bond consists in a refusal by the defendants to pay the plaintiff a sum of money due him on the contract for which the bond, among other things, was given to secure the payment. The amount is equitably due, not as unliquidated damages but as a sum of money promised to be paid, in the state of things that existed.

In conclusion we say that although hardships exist in the case, it results mainly, if not wholly, from the inability of the defendants to realize hitherto the full benefit of their sale. Had Mallory received in cash the £22,000 sterling, for which the sale was made, or had the stock of the "Mallory Propeller Company, Limited" been equal in value to what it was received for and supposed to be worth at the time, and the remaining £10,000 been paid in cash, we doubtless should not have heard of any hardships existing in the case.

When the contract was executed, so far as any forecast of future events could be made, it would be supposed that the plaintiff would run twice the risk, at least, that some other patent or patents had anticipated, superseded and rendered unsalable one or the other of the Mallory patents, than there was that such would be found to be the case in regard to the plaintiff's. Mallory had, not only double the number, but it was known at the time that there were other devices intended to produce similar results to his; but nothing of the kind was known in regard to the plaintiff's.

Surely, the contract imposed no hardship upon the defendant Mallory.

It is true, Mallory agreed to pay the plaintiff the sum of \$8,000 if either or all the patents should be sold at any price; still he was not bound to sell at any losing amount. The contract left it wholly with him to say what should be the consideration of all sales he might make.

"To be sold for such a sum of money as the American Propeller Company shall deem advisable," is its language. Mallory was not only secure from all loss in this regard, but he was entitled to the surplus of all sales over the sum of \$150,000. Whatever might be the amount the plaintiff could have no more than \$15,000, nor less than \$8,000.

It is found in the case that the stock, which the defendant Mallory received in part payment for the sale of his patents, never had any intrinsic value.

We therefore advise the Superior Court to render judgment in favor of the plaintiff for the sum of \$8,000, and the interest thereon from the time the amount became due.

Carpenter, J., dissenting:

The law favors sureties. All contracts sought to be enforced against them are to be construed with reasonable strictness in their favor. This proposition will not be denied. That it applies to this case cannot be doubted. William H.

Mallory, one of the parties to the contract, contracted in fact as surety for the American Propeller Co. He and two others who were his sureties signed the bond given to secure the performance of the contract. William H. Mallory being dead the suit is prosecuted against his sureties as well as against his estate. The case turns mainly on the construction of the contract.

The plaintiff was the owner of a patent, and the American Propeller Co. was the owner of two other patents; all of which were issued by the Government of Great Britain, and all related to the matter of steering propellers. The parties supposed that they could be sold together more advantageously than separately. Hence it was agreed that the plaintiff should assign his patent to the Propeller Co. in order that the three patents might be sold to parties in Great Britain.

William H. Mallory entered into a personal contract with the plaintiff in which he undertook that said patents should be sold in one year if practicable; if not, that Fowler's patent should be reassigned to him.

By the terms of the agreement they were all to be sold together. If so sold, no matter for what sum, Fowler was to receive, as his portion of the proceeds, the sum of \$8,000. If all or either of them were sold for more than \$80,000 Fowler was to have 10 per cent of the excess up to \$150,000. Fowler's patent, without the knowledge of the parties, had been anticipated in Great Britain, by the Moodie patent, for which reason it was found impossible to sell it. The other two patents, together with a steam launch, were sold for the nominal price of £22,000, to a corporation organized in England. Of this sum there was received in cash on account of the patents the sum of \$3,625.20. The balance was paid in stock of the English corporation, which the committee finds is worthless. At the expiration of the year the plaintiff's patent was reassigned to him.

Neither the Propeller Co. nor Mallory ever received any benefit whatever from the Fowler patent; and the transaction occasioned no loss or damage to Fowler. Upon these facts the question is, whether the plaintiff is entitled to recover.

The plaintiff claims that he is entitled to recover \$8,000 and interest, and that claim is sustained by a majority of the court. The claim appears to me so palpably inequitable and unjust that I cannot assent to it. My views are strengthened and confirmed by a careful re-examination and reconsideration of the question involved, after the decision was made. The contract, after describing the parties and the patents and providing that the patents shall be sold together, is as follows: "And in case said letters patent are so sold, leased or disposed of at any price within the time aforesaid, then the said Mallory, his heirs, executors, administrators or assigns are to pay to the said Fowler, his executors, administrators, heirs or assigns, the sum of \$8,000 within six months after the date of such disposal or sale.

And in case the aforesaid letters patent, meaning either or all the said patents, shall be disposed of for a greater sum than \$80,000, then the said Mallory, his heirs, executors, administrators or assigns are to pay to the said Fowler, his heirs, executors, administrators or as-

signs at the rate of 10 per cent, or \$10 for every \$100, over and above the said \$80,000, until the amount of such sales reaches the sum of \$150,000; beyond which sum of \$150,000 sales the said F. G. Fowler is to receive nothing, or no further percentage."

The contract then provides that in case the patents are not disposed of, Fowler's patent shall be returned to him, and that he shall suffer no loss or damage on account of said agreement.

Under this contract one of three results was possible: 1, a sale of all the patents; 2, a sale of none of them; 3, a sale of one or two of them without the other or others. The first contingency is provided for: a sale of all for any price entitles the plaintiff to \$8,000. The second: a sale of none of them, entitles the plaintiff only to a reassignment of his patent; the third: a sale of two of them, not including the plaintiff's, has actually happened. Now what is the provision of the contract in that contingency? Simply that the plaintiff shall receive 10 per cent on the amount received in excess of \$80,000. But the plaintiff recovers nothing under that clause in the contract, because the amount actually received for the patents sold is but a little more than \$8,000.

Will this contract bear such a construction as to give the plaintiff the sum of \$8,000, provided for in the first clause? I think not. This was not a "pooling" of the patents as I understand the meaning of that term. Neither party became indebted as owner in the patent or patents of the other. The proceeds were not to be divided *pro rata*. The plaintiff was first to be paid \$8,000, provided all the patents were sold. There was a possibility that all would not bring more than that sum. No matter, the plaintiff takes the whole. Again; it was possible that all might sell for \$150,000 or more. In that event the plaintiff was to receive \$15,000; and that was to be the maximum of his compensation. All over that sum, or all over \$8,000 as the case might be, belonging to the American Propeller Co. That company received the plaintiff's patent simply as bailee; and it is from that point of view that this contract is to be considered. Now these defendants have a right to insist that this contract shall be literally and strictly construed. Construing it according to its plain, unambiguous terms, \$8,000 is payable only in case all the patents are sold. That being so, the plaintiff is necessarily precluded from receiving that sum if all are not sold.

Moreover, a sale of any, less than all, is a contingency expressly provided for in the second clause; and as the sum of \$8,000 is not therein named, it is excluded by implication. The plain, obvious meaning is, that if all the patents are sold, or, possibly, if a part only, including the plaintiff's, are sold, the plaintiff is to receive \$8,000. If all or any of them are sold for more than \$80,000, he is to receive 10 per cent on the excess. There is no excess and his patent has not been sold. Before he can receive \$8,000 it is indispensable that his patent should be sold. The consideration for the promise to pay him that sum is, not the right or the power to sell, nor both combined; but a sale and the receipt of the price. The promise is necessarily contingent, until there is a sale with a right at

least to receive the price, the promise does not take effect. As that has never happened and cannot happen, the promise is inoperative. There is a total failure of the anticipated consideration.

Take another view: when this contract was entered into, both parties assumed and believed that Fowler's patent was not only valid, but that it had a clear field unobstructed by any conflicting patent. The existence of the Moodie patent was then unknown. It turns out that the existence of that patent renders the plaintiff's worthless. It is very clear that the parties were mutually mistaken. They contracted with reference to something which they supposed existed but which practically did not exist. It is very much like a contract for the sale of a horse which they supposed to be alive, but which in fact was dead; or a ship at sea, which the parties supposed to be safe, but which in fact was lost. In such cases the contract is inoperative because the parties were mutually mistaken as to the existence of a material fact. In that view of the case the plaintiff ought not to recover.

Upon what theory then are the defendants held liable? Solely on the ground that Mallory, after he had discovered that it was impossible to sell the plaintiff's patent at any price, sold his own on the best terms he could. And that ground is only rendered tenable by injecting into the second clause of the contract the provision for the payment of \$8,000, when the parties had not only failed to put it there, but had carefully excluded it. I submit that such a construction falls but little, if any, short of making a contract for the parties.

We judge of principles and policies by practical results. Let us apply that test to the two constructions of this contract. Construed as I construe it, no injustice is done to either party. The plaintiff has had the benefit of an honest and intelligent effort to sell his patent in a foreign country without trouble or expense to him.

The effort failing, his patent has been restored to him in as good condition as it was when he parted with it; while the Propeller Company has only had, as was its right, the avails of its own patents. Both parties doubtless suffered by the existence of the Moodie patent, but neither is held responsible to the other therefor. A contingency arose which the parties had not contemplated and for which they had made no provision. My construction leaves them where they left themselves and where the law leaves them, with no contract governing the case. The construction which prevails, by a forced and unnatural interpretation, applies the contract to that contingency. It in effect interprets the contract as if it contained a clause in substance like this: "If it shall so happen that Fowler's patent is worthless by reason of the existence of another patent, so that it is impossible to sell it, nevertheless if the Propeller Co. shall sell its own patents, it shall pay to Fowler the sum of \$8,000. It makes the whole loss resulting from the unexpected contingency fall upon the Propeller Co., while the plaintiff bears no part of it. He is in fact in as good a condition apparently as he would have been in if the Moodie patent had not existed. It, in effect, prohibits the company from selling its own patents except upon a forfeiture of \$8,000 to Fowler. It makes Mallory to that extent guaranty that Fowler's patent shall be salable and valuable. By some mysterious, I may say miraculous, legal transformation, Fowler's patent, the worthless one, is worth more than the three patents combined; for Mallory is compelled to pay more than double the sum he was able to obtain for all of them. Surely, a construction which can work out such results must be radically wrong.

In this dissenting opinion **Loomis, J.**, concurred.

NOTE.—Where plaintiff and defendant entered into an agreement whereby a certain invention of defendant and all letters patent granted therefor should be their joint property, held, a partnership agreement and not void because made orally and not to be performed within a year; that equity had jurisdiction to enforce it; that, although made before the issue of the patent, it was valid and enforceable by assignment, accounting and other relief. *Somerby v. Buntin*, 118 Mass. 270.

One of several tenants in common may use and manufacture the patented device; *Marston v. Swett*, 82 N. Y. 526; and is not liable to account to the other for the use. *DeWitt v. Elmira Nobles Mfg. Co.* 68 N. Y. 469.

A license to one or more of several owners confers a right as against all, and the remedy of the other tenants in common is by action for an account for whatever may have been received by them. *Id.*

An agreement which operates as the transfer of a patent-right must be in writing. *Baldwin v. Sibley*, 1 Cliff. 160.

Assignees of a patented invention are not concluded or estopped by the statement made by their assignor in his application for the patent, of the date of his invention, from proving that the true date was earlier. *Union Paper Bag Mach. Co. v. Crane*, 1 Holmes, 429.

An assignment may be made as well before the issuing of the patent as after. *Gayler v. Wilder*, 10 How. 478 (51 U. S. bk. 13, L. ed. 504); *Herbert v. Adams*, 4 Mason, 15; *Rathbone v. Orr*, 5 McLean, 131; *Rich v. Lippincott*, 26 Jour. Fr. Inst. 34 S. 13.

And after the patent is issued no new assignment is necessary. *Gayler v. Wilder*, *supra*.

An inventor may sell future improvements as well as those already made. *Nesmith v. Calvert*, 1 Woodb. & M. 34.

By an agreement otherwise valid, made prior to an application for renewal, one may acquire the right to the renewal when obtained, and such agreement is not in fraud of law. *Consol Fruit Jar Co. v. Mason*, 7 Daly, 64.

The invalidity of a patent is a defense to an action for the purchase price of the same, on the ground of failure of consideration. *Marston v. Swett*, 66 N. Y. 206.

A state court may decide as to the validity of a patent when the question arises collaterally, as on an action on a promissory note given for a patent-right. *Nash v. Lull*, 102 Mass. 60.

So in an action brought for the purchase price agreed to be paid. *Rice v. Garnhart*, 34 Wis. 453.

And it has jurisdiction of an equitable action on a bond conditioned on the validity of a patent. *Middlebrook v. Broadbent*, 47 N. Y. 443.

And it has jurisdiction to rescind a contract for the sale of a patent right, on the ground of false representations. *Page v. Dickerson*, 28 Wis. 604.

Or to compel performance of an agreement to assign. *Binney v. Annan*, 107 Mass. 94.

If the vendor of a machine be an assignee of the patent for a specified territory, the machines sold by him pass out of the monopoly, and the property sold is subject only to the operation of the state laws. *Hawley v. Mitchell*, 4 Fish. Pat. Cas. 368.

While courts will not enjoin the specific performance of a contract, where they can exercise no supervision over it, they will, nevertheless, restrain the parties from infringing the contract. *Singer Mfg. Co. v. Union Buttonhole Co.* 4 Off. Gas. 553.

SUPREME COURT OF MAINE.

John A. WATERMAN, Judge of Probate,
v.Kate H. DOCKRAY *et al.*

1. In Maine, the administrator *de bonis non* is officially interested in the executor's bond, to the amount of the unadministered estate; and may maintain an action on such bond without applying to the judge of probate, provided his interest has been specifically ascertained. Otherwise he must have the authority of the judge of probate to bring the action, and he cannot rely therefor upon an authorization granted to another person to bring such an action.
2. The writ, in an action by the administrator *de bonis non* against the executor, will be adjudged bad on demurrer if it fails to allege some fact which will authorize the maintenance of such suit.

(Cumberland—Decided February 6, 1886.)

DEBT on administrator's bonds. Demurrer sustained.

The case is sufficiently stated in the opinion.

Mr. C. W. Goddard, for plaintiff:

Cited Oliver's Precedents, last edition.

Mr. Harvey D. Hadlock, for defendant, Dockray:

The authority given to Mitchell could only be transferred to the representative of Mitchell, and as appears by this writ Pierce is not such representative. *Lee v. Chase*, 58 Me. 432.

The leave of the judge of probate to bring an action on the bond of an executor or administrator can be granted only by decree in writing. *Fay v. Rogers*, 2 Gray, 175.

The judge of probate cannot of his own motion maintain an action on the bond; he can only authorize it when his consent is necessary. *Groton v. Tallman*, 27 Me. 68.

It is a general rule that suits upon probate bonds are not maintainable unless authorized by the judge of probate. *Williams v. Cushing*, 34 Me. 370.

The condition of the bond should appear in the plaintiff's writ. *Waterman v. Dockray*, 56 Me. 56; *Rand v. Rand*, 4 N. H. 267.

And there should be a specific assignment of a breach. *Am. Bank v. Adams*, 12 Pick. 303; *Bennett v. Russell*, 3 Allen, 537.

It must be assumed that the condition of the bond is such as provided in § 19, chap. 64, p. 540, R. S. of Maine.

An administrator *de bonis non* shall administer on the estate not administered on. R. S. of Me. §§ 20-24.

He derives his title from the deceased, and not from the former executor. He is entitled to all the goods and personal estate which remain *in specie*, as money received by the former executor or administrator and kept by itself; but if mixed with the administrator's own money, it is considered as connected, or as technically speaking "administered." *Bac. Abr. B. 2, 2; Packman's Case*, 6 Coke, 293; *U. S. v. Walker*, 109 U. S. 261 (bk. 27, L. ed. 928); *Beall v. New Mexico*, 16 Wall. 535, (88 U. S. bk. 21, L. ed.

292); *Coleman v. McMurdo*, 5 Rand. 51; *Bank of Pa. v. Haldeman*, 1 Pen. & W. 161; *Potts v. Smith*, 3 Rawle, 361; *Bell v. Speight*, 11 Humph. 451; *Swink v. Snodgrass*, 17 Ala. 653; *Slaughter v. Fronan*, 5 T. B. Mon. (Ky.) 19; *Gamble v. Hamilton*, 7 Mo. 469.

To the administrator *de bonis non* is committed only the administration of the goods, chattels and credits of the deceased which have not been administered. *Beall v. New Mexico*, *supra*; *U. S. v. Walker*, *supra*.

The defendants are liable only at the suit of creditors, distributees and legatees entitled to the funds. *Id.*

The executor or administrator is only liable to account at the suit of creditors, distributees and legatees entitled to the funds. *Id.*

Virgin, J., delivered the opinion of the court:

Debt on what purports to be the penal part of a probate bond, executed, with sureties, by the executrix of the last will and testament of James R. Dockray, to this plaintiff described as "Judge of Probate of Wills," and payable to him or his successor. Instead of craving *oyer* of the conditions of the bond and pleading thereto, the defendants have demurred to the writ and declaration.

The action is in the name of the obligee, the writ alleging, however, that the "suit is prosecuted by Lewis Pierce, administrator *de bonis non* with the will annexed of the estate of James R. Dockray."

While an administrator *de bonis non administratis* is understood in general terms to be the successor of the executor, still he derives his title directly from the testator and not from the executor. *Am. Board of Comrs. Appeal*, 27 Conn. 344.

On his appointment there rests in him, as is indicated by his commission and official designation, title only to the unadministered property of the testator, in trust for those to whom it belongs. Therefore, in the absence of any statutory provision to the contrary, he has no recourse against his official predecessor for *deceit* or maladministration, the remedy therefor being reserved to the creditors, legatees and distributees directly; the executor being responsible, in general terms, to his successor only for the goods, effects and credits which were of the testator at the time of his decease, and remain unadministered; that is *in specie* unaltered or unconverted by any act of the executor or the proceeds thereof not mixed with the latter's own money. *Potts v. Smith*, 3 Rawle, 361; *S. C.* 24 Am. Dec. 359; *Sch. Exrs. & Admrs. § 408 et seq.*; *Wms. Exrs. § 915 et seq.*; *Beall v. New Mexico*, 16 Wall. 535, 540 [88 U. S. bk. 62, L. ed. 292, 294]; *U. S. v. Walker*, 109 U. S. 265 [bk. 28, L. ed. 929].

In several of the States statutory provisions allow an administrator *de bonis non* to call for a full accounting by his predecessor and resort to an action on his bond. *Cases supra* and *notes*, and an elaborate note in 24 Am. Dec. 379-390.

There are no such liberal statutory provisions in this State. R. S. chap. 64, §§ 20-24; chap. 87, §§ 4, 5, 6.

Being confined to the record, we have no means of knowing for what purpose the administrator *de bonis non* is seeking to maintain

this action. He is officially interested in the defendant's bond, to the amount of the unadministered estate which she holds if any; for such property vested in him in trust for those to whom it belongs, legatees or creditors.

Being "interested in his official capacity" he had a right to originate a suit on such bond without applying to the Judge of probate; provided "his interest has been specifically ascertained" as provided in R. S. chap. 72, § 10, and this should be alleged if such preliminary action has been taken; and if not, the action cannot be maintained under that section. Nor could he maintain the action under R. S. chap. 72, § 15, for no authority by the Judge of probate is alleged, which that section makes essential. Nor can the administrator *de bonis non* prosecute the action for Ammi Mitchell, although the latter might. Assuming, therefore, that the defendant's bond is a statutory probate bond, the demurrer must be sustained, and the plaintiff may amend his writ and declaration upon payment of costs from the time when the demurrer was filed.

Demurrer sustained.

Peters, Ch. J., Walton, Libbey, Foster and Haskell, JJ., concurred.

STATE of Maine, *ex rel.* Inhabitants of
HARPSWELL,
v.

COUNTY COMRS. of Cumberland Co.

Rev. Stats. of Maine, chap. 18, § 5, provide that county commissioners shall make **return of the laying out of a highway** "at their next regular session after the hearing;" and chap. 74, § 6, provides for the sessions of the Cumberland County Commissioners as follows: "Cumberland, terms of record on the first Tuesdays of January and June, and regular sessions on the first Tuesday of each month." The Commissioners made their return on the first Tuesday of January, 1884, of laying out of a way in Harpswell, in which proceeding the hearing was had on the first day of August, 1883. **Held, that the proceedings of the Commissioners were regular and in accordance with law.**

(Cumberland—Decided January 19, 1886.)

CERTIORARI. *Record Affirmed.*

The case is stated in the opinion.

Messrs. Strout & Holmes, for Inhabitants of Harpswell:

The report of the County Commissioners locating a highway which ought to be made at any particular regular session, cannot be carried over and returned, either to an adjournment of that regular session or to any subsequent regular session. *Parsonsfeld v. Lord*, 23 Me. 511.

Nor can it be made returnable before the next session. *Monticello v. Co. Comrs.*, 59 Me. 391.

The same principle is applied to reports of committees appointed on appeal from decision of commissioners under a similar provision. *Re Windham*, 32 Me. 452; *Re City of Belfast*, 53 Me. 431.

The time for the report to be made is fixed by statute, chapter 18, § 5, as the next regular session.

If the County Commissioners originally had jurisdiction of the matter, any subsequent irregularities do not vacate their proceedings except upon proper process therefor. *Woodman v. Somersett Co.* 25 Me. 300.

Certiorari equally lies where they had no jurisdiction. *State v. Pownal*, 10 Me. 24; *Bangor v. Co. Comrs.* 30 Me. 270; *White v. Co. Comrs.* 70 Me. 317-325.

But even if the error was one of form only, the matter not having been examined by the petition for *certiorari* but a writ having issued and the whole record being before the court, unless it is perfect in form as well as in substance, it should be quashed and the whole proceedings before the County Commissioners set aside. *Gleason v. Sloper*, 24 Pick. 181-184.

And only the record can be examined. *White v. Co. Comrs.* 70 Me. 317-326; *Dresden v. Co. Comrs.* 62 Me. 363-368.

It appears that the proceedings have not been extended upon the record of the court below, by reason of an appeal, in the matter of damage taken by one of the parties over whose land the road was attempted to be laid out. It is this precise case of unfinished proceedings to which *certiorari* properly applies, error being a proceeding which lies only when the case has gone to final judgment. *Drowne v. Stimpson*, 2 Mass. 441-445.

Mr. C. W. Larrabee, for defendants:

Inspection of the record and petition answers the first error assigned, in petition. The *terms* are the same in the petition and the record of the laying out by the commissioner varies between these points. It was within their legal discretion so to do. *Goodwin v. Inhab. of Harpswell*, 12 Me. 275.

The 2d and 3d errors assigned, substantially raise the same points, *i. e.*, that the report of the Commissioners was not made to the term of the court required by the statute. As the law stood before the last revision of the statutes, R. S. 1871, chap. 78, § 6, they, the County Commissioners, shall hold annual sessions in the shire towns of each county at the times following: * * * in the County of Cumberland on the first Tuesdays of January and June.

In 1883 an Act of the Legislature which is incorporated in the present R. S. § 6, referring specially to the County Commissioners of Cumberland County, thus: "The term of the record on the first Tuesdays of January and June, and the regular session on the first Tuesday of each month."

The Act of 1883 was confined to Cumberland and changes the names of the January and June terms to "Terms of Record" and all the other sessions are to be called "regular sessions."

The annual session of the Commissioners of Cumberland County had always been their Terms of Record, had always been their "regular term," and the language of the Act indicates an intention that they should continue such.

If the letter of the law controls, then these monthly meetings called regular sessions are the only regular sessions and to them alone could returns be made as provided in the statutes for the laying out of roads, &c. The

"terms of record" would not be regular sessions, because they are called by a different name. Such a construction seems to us to be in conflict with the true meaning of the Act of 1883.

When laws and statutes seem contrary to one another, if by interpretation they may stand together they shall so stand; and if the laws only so far disagree or differ as that they may by any other construction both stand they will both be upheld; for, whenever this can be done, the rule that subsequent laws abrogate prior ones does not apply, and the last law will not repeal the former. *Smith, Com. on Const. & Stat. Const. chap. 19, § 757.*

Haskell, J., delivered the opinion of the court:

Certiorari, to quash the record of the County Commissioners for the County of Cumberland, because they did not make and file their report for the location of a way at their next regular session after the hearing.

By the Act of 1862, chap. 65, § 2, incorporated into the revision of 1871, chap. 78, § 6, the County Commissioners of Cumberland were required to hold "annual sessions" on the first Tuesdays of January and June.

By the Act of 1883, R. S. chap. 78, § 6, they are required to hold annual sessions, viz.: Terms of Record on the first Tuesdays of January and June, and regular sessions on the first Tuesday of each month. That is, Terms of Record twice yearly, with sessions thereof monthly, to be held regularly, on the first Tuesday of each month. Prior to this Act, the Commissioners might adjourn their half yearly terms from time to time at their pleasure, but the Legislature have enacted that these terms shall be held on stated days throughout the year, that persons having business touching county affairs may know when its Commissioners can be found in session. The monthly meetings are but sessions of the term on which they fall, and the business transacted at any session is at and during the Term of Record within which it is held, precisely, in legal effect, as though it had been done at an adjourned session of the half yearly term under the prior statute. The monthly sessions, after the beginning of a term of record, are, in effect, statute adjournments of that term. The duties of the commissioners and the methods of their procedure have not been changed by the Act of 1883.

All reports, that they are required by law to make at a "regular session," are to be made at a Term of Record, and all continuances required by law are to be to the next Term of Record. It is clear, from a careful consideration of all the statutes touching the court of County Commissioners and its duties, that the words "Terms of Record," in the Act of 1883, have the same significance, and are synonymous with the words, "regular session" in chapter 18, § 6, of the revision of 1871 and 1883, and that these latter words in ch. 78, § 6, of the revision of 1883, were inaptly used in contrast with the former.

In this view, the record sent up shows that the Commissioners have proceeded regularly, and in accordance with law; and therefore the order is:

Record affirmed with costs.

Peters, Ch. J., Walton, Virgin, Libbey and Foster, JJ., concurred.

City of BIDDEFORD

COUNTY COMRS. of York County.

No appeal lies from the action of a city council in refusing to lay out a way, where the charter gives the city council exclusive authority to lay out new streets and ways, and the general statutes provide only for an appeal in such matters from the action of municipal officers; the 'municipal officers' of a city being defined by statute to mean the "mayor and aldermen."

(York—Decided January 19, 1886.)

PROCEEDINGS to locate a highway. *Sustained.*

Mr. N. B. Walker, City Solicitor, for petitioner:

That the Commissioners undertook to locate a city street rather than a highway or county road, the record, as well as the particular award that the land damages should be paid out of the city treasury, affords conclusive evidence, for—

On location of highway, county pays land damage. R. S. chap. 18, § 5.

On location of town way, town pays land damage. R. S. chap. 18, § 18.

County commissioners have original jurisdiction over the location of highways only. R. S. chap. 18, § 1.

Over town ways their jurisdiction is appellate, under chap. 18, § 19, or § 21.

It is very clear that § 21 applies to a town only, and cannot include the City of Biddeford.

Section 19 gives an appeal "when the municipal officers unreasonably neglect or refuse to lay out or alter a town way."

But by reference to the charter of the City of Biddeford, it will be seen that the Legislature intended to do just what it did: confer exclusive power over the location of streets in Biddeford to the city council. Laws of 1855 amended by Laws of 1860, chap. 333.

Similar provisions in the charters of other cities have by this court been adjudged to grant an exclusive right. *Baldwin v. Bangor*, 36 Me., 522-3. *Preble v. Portland*, 45 Me. 245.

It does not appear that the municipal officers unreasonably neglected or refused to lay out the way, and there is no such claim in the petition, nor do the Commissioners make such an adjudication. The error is fatal. *Inhab. of Pownal v. County Commissioners*, 63 Me. 102, and cases there cited.

"The unreasonableness of their refusal should be adjudged by the Commissioners and entered of record by the Commissioners, as the foundation of their jurisdiction, or it would be error." *Goodwin v. County Comrs. of Sagadahoc Co.* 60 Me. 330.

The annual sessions of the County Commissioners of York County are held on the second Tuesdays of April and October. R. S. chap. 78, § 6.

By making their return to the October session, 1883, instead of the April session, A. D. 1884, the Commissioners committed an error in substance, for which *certiorari* will lie. *Parsonsfield v. Lord*, 23 Me. 515; *Inhabitants of Windham, Petitioners for certiorari*, 32 Me. 454.

The court has a judicial discretion in these matters to be exercised in accordance with established rules of law. 66 Me. 48.

Haskell, J., delivered the opinion of the court:

Petition for *certiorari*, to quash the record of the County Commissioners for the County of York, for want of jurisdiction.

The city council of Biddeford refused to locate and lay out a street in the City of Biddeford, and the Commissioners, on application, proceeded to locate and lay out the same. R. S. chap. 18, § 19, provides, that, "when the municipal officers unreasonably neglect or refuse to lay out, or alter, a town way," the commissioners, upon proper application, may determine the matter. They have jurisdiction only when given by statute. *Belfast v. Co. Com. of Waldo County*, 52 Me. 529.

The city charter of Biddeford, Special Laws of 1855, amended by special Act of 1860, chap. 383, § 2, provides that the city council "Shall have exclusive power to lay out any new street or public way, in said city, * * * and shall be governed by the same rules and regulations, as are by law provided in the case of the location or discontinuance of town ways by the selectmen of towns." An appeal from its award of damages is provided for by the charter, and the commissioners are authorized to lay out county roads that shall pass into or through the city. The charter confers upon the city council the same powers that the inhabitants and municipal officers of towns enjoy. *Preble v. Portland*, 45 Me. 241.

The municipal officers of a city are the mayor and aldermen. R. S. chap. 1, § 6, rule 23.

The charter of Biddeford confers the power of laying out streets, upon the city council, not upon its municipal officers; and in this behalf the authority is exclusive save in the case of county roads passing through or into the City; they may be laid by the Commissioners. *Hanson et al.*, appellants, 51 Me. 193.

The true construction of the law is that the city council shall have exclusive and final authority over the laying out and altering of city streets. Its determination and action in such matters cannot be reviewed or revised by the County Commissioners. This seems to have been conceded in *Baldwin v. Bangor*, 36 Me. 518; *King v. Lewiston*, 70 Me. 406.

The general statutes do not in terms give an appeal to the commissioners of the county from the action of the city council, and the charter of Biddeford expressly rests exclusive authority in such matters with its council. From its action an appeal lies only to the ballot.

Writ to issue.

Peters, Ch. J. Walton, Virgin, Libbey and Foster, JJ., concurred.

Abiel TRASK

v.

William TRASK, Admr.

1. **Upon the death of the defendant in a real action to recover land, a citation to all persons interested in the estate of the deceased defendant, without naming anyone, to appear and defend, is not sufficient to authorize the court to enter judgment for the land.**
2. **A judgment for costs, in such action, against the estate in the hands of the administrator, can only be entered when the demandant has judgment for the land.**

(Lincoln—Decided January 19, 1886.)

WRIT of entry. The action was referred by a rule of court, October Term, 1864.

In the lifetime of the original parties the referee met them upon the premises, went over the line with the parties, witnesses and surveyor. But before the final hearing, Enoch Trask, the original defendant, died, May 18, 1876.

The action was brought, not only to recover the premises described in the writ, but to recover damages for the rents and profits of the premises, and for "the destruction and waste of the property," by tearing down and carrying away fence and fencing stuff thereon belonging to the plaintiff, and cutting and carrying away the grass; as was authorized by the statute at the time the action was brought. R. S. 1857, chap. 104, § 11.

The statutes in force at the time of the death of Enoch Trask were R. S. of 1871, chap. 104, as amended by Laws of 1875, chap. 32.

Messrs. Hilton & Huston, for defendant
By R. S. chap. 104, § 16, it is provided that no real action shall be abated by the death of either party, after its entry in court; but the court shall proceed to try and determine such action after such notice as the court orders has been served upon "all interested in his estate, personally or by publication in some newspaper."

Section 17 of same chapter provides that if any heir is a minor, the court shall order notice to the guardian and may appoint a guardian *ad litem*, if necessary.

Section 18 authorizes judgment against only "such as have been notified."

In *Bridgham v. Prince*, 33 Me. 175, the court says: "Upon the death of the defendant, the court had no authority to proceed any further in relation to the writ of entry * * * without notice to his legal representatives and all others interested in his estate as heirs."

Mr. A. P. Gould, for plaintiff:

The demandant was entitled to recover judgment against the heirs upon such notice, whether they appeared and defended or not; and such judgment is conclusive on them. R. S. chap. 104, § 18.

And such is still the law. R. S. 1883, chap. 104, § 18; *Bridgham v. Prince*, 33 Me. 174.

In *Haskell v. Whitney*, 12 Mass. 47, the action was referred by a rule of court, for the court says that the court is of opinion "That neither party had a right, without the consent of the other, to rescind or discharge the rule;" and that after the entry upon the docket, "nothing more was necessary to enable the clerk to make

out the rule according to the true intent and meaning of the parties," and that it will be issued as of course.

The reference with the consent of the parties, was a substitute for a trial by jury, and it became the act of the court; and the authority of the referee was not, therefore, revoked by the death of the original defendant. *Bacon v. Crandon*, 15 Pick. 79, 80.*

It is held that "A submission once made a rule of court is no longer countermandable by either party." *Cumberland v. North Yarmouth*, 4 Me. 459.

After the submission is made a rule of court, the party cannot rescind it without incurring a breach of that rule. *Milne v. Gratriz*, 7 East, 608.

And in *Haskell v. Whitney*, 12 Mass. 47, it was decided that where an action has been referred by a rule of court, neither party has a right, without the consent of the other, to rescind or discharge it.

Before the Statute of William, "the statute authorizing arbitrations out of court" a submission to arbitration might be revoked before it was executed. The statute says that it shall be lawful for the parties to agree that their submission should be made a rule of court; which agreement; that is, so long as it subsists as an agreement merely, may be entered of record. After it is made a rule of court the party cannot rescind it. *Milne v. Gratriz*, 7 East, 608.

In *Ruston v. Dunwoody*, 1 Binn. 42, the court refused to strike off a rule of reference, on motion of the administrator, upon the ground that the reference was entered before the decease of the original defendant.

In *Dexter v. Young*, 40 N. H. 180, it is held that "Where parties to an action pending in court enter into an agreement to submit the action to one or more referees, and a rule of reference is entered by the court, neither party has the right to revoke such submission, or to rescind such rule of reference."

In North Carolina it has been held that "Where a cause has been referred to arbitrators by a rule of court, a party cannot revoke the arbitration, without the permission of the court which made the order." *Tyson v. Robinson*, 3 Ired. 833.

In New Jersey it was early held that "Where parties had agreed to refer a pending suit, and a rule of reference had been entered by the court, although one of them filed his revocation on the next day, the reference was not revocable, as the submission had become a rule of court." *Ferris v. Mun*, 2 Zab. 161.

The same doctrine was early held in Connecticut. *Bray v. English*, 1 Conn. 498.

Before the agreement actually becomes a rule of court, it may be revoked; but not afterwards. *Morse, Arb. & Award*, 232.

As a general rule, death is a revocation of the authority of an arbitrator who has been made such by an agreement of the parties; but "if the submission be by rule of court in a *lis pendens*, the result will be otherwise." *Id.* citing *Freeborn v. Denman*, 3 Halst. 116.

The true ground is suggested by the Massachusetts Court in *Bacon v. Crandon*, *supra*: that an agreement to refer, consummated by an entry upon the docket in a case pending, has become the act of the court.

The general rule is that where a contract with the decedent is of such a nature that his personal representative can execute it, he is bound to perform it. 1 Pars. Cont. 111.

That the death did not discharge the reference, but also that the court would not strike a reference off on motion, as they say, "after a party has felt the pulse of the referee at a meeting," see *Ruston v. Dunwoody*, *supra*.

Haskell, J., delivered the opinion of the court:

Writ of entry to recover land and damages for waste. The action was referred, and thereafter the tenant died. His administrator was cited to defend, and he appeared. All persons interested in the estate of the tenant were also, by public notice agreeable to an order entered in vacation, cited to appear and defend, but none appeared. The referee heard the parties and reported that the demandant should have judgment for the land and damages and costs. The court accepted the report, and the defendant has excepted.

No person beside the administrator has appeared to defend the suit, and he is not charged with being a disseisor, nor does he pretend to be tenant of the freehold. Judgment against him could not affect the heirs. *Bridgham v. Prince*, 33 Me. 174.

There are no defendants in court against whom judgment can be given for the land. Had the demandant cited by name such persons as he conceived to be heirs of the deceased tenant, they would be concluded by default, if they did not choose to appear and defend, and judgment might be given against them for the land; but this has not been done. At common law, an action of this sort would abate upon the death of the tenant, but by R. S. chap. 104, § 16, it may be further prosecuted upon notice to "all interested in the estate," that is, notice to the individuals interested, served as the court may order. Upon their appearance, they may set up title in themselves, acquired either from the deceased tenant or from any other source. *Brunswick Savings Inst. v. Crossman*, 76 Me. 577.

How then can judgment be awarded upon the report of the referee? The judgment must follow the terms of the report, and that awards the land as well as damages; and damages are only recoverable against the estate in the hands of the administrator, and then as incident to judgment for the land; for if the demandant had no title, he could neither recover the land nor damages. The demandant must cite the heirs before he can further prosecute the suit.

Exceptions sustained. Report rejected.

Peters, Ch. J., Walton, Virgin, Libbey and Foster, JJ., concurred.

STATE of Maine,
v.

C. WILLIS, Jr.

1. An indictment for **maintaining a lottery** is good, although it does not disclose the name of the prosecutor to whom the law gives a portion of the penalty.

2. A lottery is a scheme and device of chance; and a scheme is none the less a lottery because it promises a prize to each ticket holder, the prizes being of different values; nor because the prizes are called presents in the prospectus; nor because the tickets consist of receipts for subscriptions to a newspaper, but numbered to compare with numbers upon the articles to be distributed.
3. An indictment is not bad for duplicity which charges that the defendant was engaged in "a lottery, scheme or device of chance;" nor one that avers that the defendant printed, published and circulated an advertisement of a lottery.
4. An indictment which charges defendant with inserting an advertisement of a lottery in a newspaper, published in New York but circulated in this State, is bad on demurrer if it contains no averment that the defendant was concerned in some way with the circulation of such newspaper in this State.
5. An indictment which charged that at a place and on a day named the defendant was concerned in a lottery by selling a ticket to a person named, is not bad on demurrer because it omitted the words "then and there" in connection with the averment of selling the ticket.
6. Where a lottery ticket is set out in an indictment by copy and it does not appear upon its face to be a ticket, it may be averred and proved to be such.

(Kennebec—Decided December 30, 1885.)

INDICTMENT under R. S. chap. 128, § 18, and is before the court upon questions raised as to its sufficiency. Defendant was charged with being concerned in a lottery, by printing, publishing and circulating advertisements of said lottery, and with being concerned in the sale of lottery tickets and by advertising such tickets for sale.

To which defendant demurred.

Mr. H. M. Heath, for defendant:

The indictment contains no allegation of the name of any prosecutor. By R. S. chap. 128, § 18, the penalty recoverable is to go "half to the prosecutor, half to the town where the offense was committed." *State v. Smith*, 64 Me. 425; *Commonwealth v. Howard*, 18 Mass. 221; *King v. Hymen* 7 Durn. & E. 546; *State v. Cottle*, 15 Me. 475;

Commonwealth v. Howard, 18 Mass. 221, holds that where a statute inflicts a penalty partly to the use of the State and partly to that of an informer, the government may sue for the whole.

In *King v. Hymen*, *supra*, no part of the penalty goes to King, State or county.

Facts to be proved should be averred. *Commonwealth v. Messenger*, 4 Mass. 462; *State v. Grand T. R. Co.*, 60 Me. 145.

The informer must show the forfeiture and its appropriation, or at least the proportion given him by statute. *Same*, 60 Me. 152.

Circulating the notice is an act that does not include the printing of the same notice. *Commonwealth v. Clapp*, 15 Pick. 41.

A lottery is a scheme for the distribution of

prizes by chance. The element of chance is essential. *People v. Noelke*, 94 N. Y. 137; *U. S. v. Olney*, 1 Abb. (U. S.), 275; *Kohn v. Koehler*, 96 N. Y. 367; *Dunn v. People*, 40 Ill. 465.

Mr. W. T. Haines, County Atty., for the State:

This indictment is founded upon § 18, chap. 128.

Being concerned in a lottery seems to be the gist of the offense.

In the third count the defendant is charged with being concerned in a lottery, by advertising and offering for sale certain tickets in said lottery.

But one offense is set forth in the 1st and 2d counts thereof and also, although perhaps not so clearly, in the 3d count. To couple in one count the allegation of offering for sale, and to sell, is not duplicity. *Commonwealth v. Eaton*, 15 Pick. 278; *Commonwealth v. Harris*, 13 Allen, 594; *Barnes v. State*, 20 Conn. 232.

In an information on Statute 1825, chap. 184, of Mass. for advertising lottery tickets the court says it is not necessary to allege by name, nor, on the trial, to prove by name, what kind of lottery tickets the defendant advertised, nor that they were advertised as being for sale within the county in which the information is filed. *Commonwealth v. Hooper*, 5 Pick. 42.

Also, under R. S. chap. 132, Mass. 1841, an indictment for having in possession lottery tickets, with intent to sell or offer them for sale, it was held not necessary to aver the intent of the defendant to offer them for sale within the Commonwealth. *Commonwealth v. Dana*, 2 Met. 329.

The question of how the forfeiture is to be appropriated is none of the defendant's business. 64 Me. 423.

The indictment has followed the language of the statute in the words "lottery, scheme or device of chance"; also in the words "tickets, shares or interest."

See, also, the discussion of this subject in Whart. Cr. L. § 2423-2432, and cases there cited; also, 2 Bish. Cr. L. § 945.

Peters, Ch. J., delivered the opinion of the court:

The defendant demurs to an indictment which alleges against him participation in a lottery nuisance.

It is objected that it is not stated either in or upon the indictment who the prosecutor is. The law apportions the penalty between the prosecutor and the town where the offense is committed. If the law was ever critical enough to destroy an indictment because it did not disclose the name of the prosecutor or informer, when such an averment requires no proof and has nothing to do with the guilt or innocence of the person prosecuted, it was intended, by the decision in *State v. Smith*, 64 Me. 423, to dispense with such useless technicality.

It is contended that each count is ill for duplicity, because the allegation is that the defendant was engaged in "a lottery, scheme or device of chance." There is no contradiction in the terms. They are descriptive of only one thing, the pleader trying to describe the offense by as apt a word as possible. The word lottery has no technical meaning. A lottery is nothing more nor less than a scheme or device of chance. *People v. Noelke*, 94 N. Y. 137.

The indictment avers that the defendant was concerned in a lottery, by printing, publishing and circulating an advertisement of it, and also in other ways. It is argued that this is ill for duplicity. The argument is based upon a misconception of the design and scope of the law against lotteries. The statute, R. S. chap. 128, § 18, does not establish numerous independent offenses; it establishes but one offense. It declares "every lottery, scheme or device of chance," to be a nuisance. The offense to be alleged and proved is nuisance. The statute particularizes some of the modes in which the offense may be committed, and also declares generally that whoever aids in a lottery or is connected therewith shall be punished. It is but one offense and the same punishment, no matter in what form the guilty participation consists. There are not as many distinct offenses as there may be forms of the offense. The indictment describes the means by which the defendant's guilt may be proved. The same rule applies as in indictments for liquor nuisances. *State v. Laing*, 63 Me. 215; *Commonwealth v. Harris*, 13 Allen, 539.

The indictment gives the nature of the scheme by setting out the advertisement by copy; by allowing it to speak for itself. This mode of pleading is not unusual. But it is denied by counsel that the paper indicates a game of chance. It is contended that the word chance in the paper means opportunity. We do not concur in this interpretation. It is conceded that the careless reader might see in the advertisement a game of chance. But that would be so, only because the meaning is there, to be seen. In such case the reader gets the author's real meaning, which must be the same for all persons. However disguised by indirect or deceptive expression, the paper, as a whole, discloses a lottery. If it were not so, readers would not become buyers. It informs its patrons that every subscriber is sure to get a present, and the presents are of various values. Assurance is given that the presents will be "awarded fairly." How can presents of unequal value be fairly awarded unless by some lot or chance? A purchaser or subscriber receives for his money "a numbered receipt." What can be the purpose of numbers if all numbers are favored alike? Each number will take "a prize," and has "a chance to win" a very valuable one. Of course all cannot win the highest prize or present. It is not an opportunity to win, so much as it is an opportunity for a chance to win. It is not an easy thing for a notice to have the effect of advertising vice to one and virtue to another.

The first count in the indictment may not be good. It alleges the defendant's complicity in the nuisance to consist of a notice inserted in a newspaper published in New York. It charges that the newspaper was circulated in Augusta, but it is not said when or by whom, or whether the defendant had any knowledge of that fact or not. See, *State v. Paul*, 69 Me. 215.

The remaining counts are sufficient. The most of an objection is, that the words "then and there" are not employed in them. The use of the phrase would have made the declaration more finished. The second count charges that the defendant at Augusta, on a day named, was unlawfully concerned in a lottery described "by selling to one Harry May one ticket," and so

on. It is contended that, to be correct, it would read: "by then and there selling" the ticket described. In a capital case the omission would probably be considered fatal. But the rule requiring time and place to be repeated to the traversable averments is not so much regarded in indictments for inferior offenses, as in cases where the life of the prisoner is in danger. 1 Bish. Stat. Pro. § 413, and cases cited.

The sense here is by no means uncertain. There would be more ground for the objection if a series of distinct overt acts were alleged, all essential to the commission of the offense. *Commonwealth v. Doherty*, 10 Cush. 52.

The words then and there need not be repeated to an averment which merely declares a legal conclusion. The averment of being concerned in a lottery was of that nature, although preceding other allegations, the potent fact being the sale of a ticket. *Commonwealth v. Sullivan*, 6 Gray, 477; *Commonwealth v. Langley*, 14 Gray, 21.

In the last counts the the ticket is set out in its own words. It may not on its face appear to be a ticket. Still, it may be proved to be such. It is averred that it is a ticket. The advertisement proves it. *State v. Ochsner*, 9 Mo. App. 216.

Demurrer sustained, as to first count only.

Walton, Danforth, Libbey, Emery, and Foster, JJ., concurred.

George W. WING

v.

Thomas J. NEAL.

The owner of a horse placed him in the hands of a commission merchant for sale. The commission merchant exchanged him for another horse and \$25 in money. Held, that his authority as commission merchant ceased and his liability to account to the owner accrued when that exchange was made; that the owner was not liable for losses arising from subsequent exchanges nor for the board of horses after the first exchange.

(Kennebec—Decided January 20, 1886.)

ASSUMPSIT on an account annexed for a horse sold and delivered in December, 1880, \$80, and interest on that sum. *Motion overruled.*

The plaintiff testified to the sale of the horse at the price charged in the account annexed. The defendant testified that he did not buy the horse, but that the plaintiff placed the horse in his hands for sale; that after two months he swapped the horse for another, receiving \$25 boot; that he afterwards made several exchanges and finally a sale; that he received in all the exchanges and sale the sum of \$95; that the expenses for board of all the horses amounted to the sum of \$173; that the value of the horse the plaintiff left in his hands for sale was at that time about \$40. The defendant introduced other evidence tending to confirm his testimony. The verdict was for plaintiff, for \$40, and the defendant moved to set that verdict aside and for new trial.

Messrs. Beane & Beane, for plaintiff.
Messrs. Potter & Lancaster, for defendant.

Per Curiam:

The letters put up in evidence in this case do not appear to have been copied. So far as we have the testimony the parties are in conflict with some preponderance from the corroborating testimony in favor of the defendant. The verdict shows that the jury must have come to that conclusion and believed that the defendant took the colt upon commission and not by purchase. They must also have come to the conclusion that, when he disposed of the horse by the first exchange, in which he received another horse and \$25 in money, his authority as commission merchant ceased and his liability to account had accrued; that the plaintiff was not liable for losses arising from subsequent exchanges, nor for the board of horses afterward obtained. The court is of the opinion that this view is in accordance with the law as well as the defendant's own statement, and that another jury could not be expected to do any better justice between the parties than is done by the verdict now in question.

Motion overruled.

Daniel TYLER, *Plff. in Err.*

v.

Abiel W. ERSKINE.

1. Writs of error lie to such defects as are apparent from inspection of the record, a certified transcript of which should be exhibited at the trial.
2. A party desiring to reverse a judgment for error, should require the clerk to complete and attest his record, and until this is done such party is not entitled to relief by writ of error.

(Waldo—Decided January 8, 1886.)

ON EXCEPTIONS. *Overruled.*

The case is stated in the opinion.

Mr. Hiram Bliss, Jr., for plaintiff.

Mr. George E. Wallace, for defendant.

Haskell, J., delivered the opinion of the court:

Writ of error to reverse a judgment of this court for error in law. Plea, *nullo est erratum*. The presiding Justice found no error, and the case is here on exceptions.

This writ lies to such defects as are apparent from inspection of the record, a certified transcript of which should be exhibited at the trial. No such transcript is here produced. The plaintiff shows only copies of original papers and docket memoranda, from which a record is to be made. Until that is done, it cannot be known whether any error exists. *Wood v. Leach*, 89 Me. 555.

A party, desiring to reverse a judgment for error, should require the clerk to complete and attest his record; and until this is done the plaintiff is not entitled to relief in an action of this kind. *Rockland Water Co. v. Pillsbury*, 60 Me. 425; *McArthur v. Starrett*, 48 Id. 845;

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Denison v. Portland Co. 60 Id. 519; *Valentine v. Norton*, 80 Id. 194; *Starbird v. Eaton*, 42 Id. 569; *Paul v. Hussey*, 35 Id. 97; *Kirby v. Wood*, 16 Id. 81; *Jewett v. Hodgdon*, 2 Id. 335.

It would seem that if the plaintiff had exhibited a transcript of a record of a judgment against him, or the writ of review, for the same amount of the original judgment, with costs of review, that the same would be erroneous. The judgment in review did not vacate the original judgment, but that judgment should be affirmed, and execution should issue for costs of review only. R. S. chap. 89; *Dyer v. Wilbur*, 48 Me. 287; *Crechore v. Pike*, 47 Id. 435. *Exceptions overruled.*

Peters, Ch. J., Danforth, Virgin, Emery and Foster, JJ., concurred.

LEWISTON STEAM MILL CO., *Plff. in Err.*

v.

A. R. MERRILL.

Same *v.* George R. Easter.

Same *v.* Christopher S. Reed.

Same *v.* Lewis Tucker.

1. An abbreviated record of a judgment in default which complies with the provisions of R. S., ch. 79, § 11, is valid.
2. Writs of error, for errors in law, lie only for defects apparent upon the face of the record.
3. If there be an error in law which would appear upon an extended record that either party desires to avail himself of, upon a writ of error, he should, before trial, require the clerk to make such a record of such judgment, procuring an order from the court for that purpose if the clerk refuses, and then present a transcript of such extended record that the court may know from inspection of it whether an error exists.
4. Defects in a declaration, which are amendable, are cured by a default.
5. A record which recites a command in a writ for the officer to attach certain logs upon which a lien is claimed, and the return of the officer that he did attach the same and put his mark upon them, and that within five days thereafter he filed in the clerk's office of the town where the logs lay the usual copy of his attachments, is sufficient to sustain a judgment *in rem* against the logs.

(Oxford—Decided January 19, 1886.)

ON error from the County of Oxford. *Plaintiff nonsuit.*

The cases are stated in the opinion.

Messrs. Savage & Oakes, for plaintiff in error:

The plaintiff in error seeks to reverse certain judgments rendered by the Supreme Judicial Court in Oxford County in favor of the defendants in error, and against its logs on alleged lien claims.

The substantial errors complained of are two in number:

1. That the accounts annexed to the declaration are insufficient.

2. That the officer's return on the original writ does not show an attachment so as to justify a judgment against the logs.

The plaintiff is entitled to this remedy. It was made a party to the original suit. *Spaulding*, Pr. 441; *Porter v. Rummary*, 10 Mass. 64; *Shirley v. Lunenburgh*, 11 Mass. 379.

The declaration was demurrable; it was likewise amendable. *Bennett v. Davis*, 62 Me. 544.

The account annexed "being a part of the declaration is a part of the record and should be fully recorded." *Baker v. Moor*, 63 Me. 446.

In the case of *Bean v. Ayers*, 70 Me. 421, cited by defendants on this point, the omission of the account annexed from the record was not considered.

There are cases in which the errors were amendable, where the courts have refused to set aside the judgment, but these were cases where the errors alleged were want of form only or "circumstantial errors or mistakes which by law are amendable" and "when the person and case can be rightly understood."

Such is the statute, chap. 82, § 10. We do not understand that it reaches such a defect as this.

Generally, to constitute a valid attachment, the officer must take and return the possession of personal property attached. Unless the case is brought within the special provision of the statute, the attachment must be made in this way.

In this case the court must assume from the officer's return as found in the record that he did not retain possession of the property attached, because within five days he filed in the clerk's office of the town in which the attachment was made an attested copy of his return, etc.

All those substantive facts which alone could authorize such an attachment must appear affirmatively in the return and be a part of the record. *Haynes v. Small*, 22 Me. 14.

The return should state specifically what the officer has done, and when the manner of doing it is important it should be set forth, that the court may judge whether the requirements of the law have been complied with. *Drake*, Attach. § 205.

Messrs. H. A. Randall and James S. Wright, for defendants:

The plaintiff in error was the owner of certain logs attached on the original writs, wherein these defendants were plaintiffs, and Gilbert T. Hodsdon and certain logs defendants; and judgment having been rendered after due proceedings had, this plaintiff seeks to reverse the same for the reasons assigned.

The declaration must show that the suit is brought to enforce the lien; but all the other forms and proceedings therein shall be the same as in ordinary actions of *assumpsit*. R. S. chap. 91, § 42; Laws 1862, chap. 131; *Parks v. Crockett*, 61 Me. 494.

The writ and declaration in these cases are in the appropriate form as required by the laws of 1862, and by the present Revised Statutes, the language of which is substantially the same, only consolidated and abbreviated.

If the declaration be sufficient in substance, a mere informality in the writ will not be ground for error, if the judgment be formal. Defects in the form of a writ and declaration are cured by a verdict or judgment by default. *Piper v. Goodwin*, 23 Me. 251.

No process or proceeding in courts of justice shall be abated, arrested or reversed, for want of form only, or for circumstantial errors or mistakes which by law are amendable, when the person and case can be rightly understood. R. S. § 10.

A declaration, defective in not alleging a promise to the assignee by the debtor, is amendable. A judgment rendered on such a defective declaration cannot be reversed on error. *Page v. Danforth*, 53 Me. 174.

The record shows a valid judgment. Nothing which contradicts the record can be alleged as error. *King v. Robinson*, 33 Me. 114; *Paul v. Hussey*, 35 Me. 97.

When error in law is alleged, a writ of error lies only to correct such errors as are apparent upon the record. Papers presented to a common-law court and acted upon only as matter of evidence are no part of the record. *Kirby v. Wood*, 16 Me. 81; *Valentine v. Norton*, 30 Me. 199; *Lovell v. Kelley*, 48 Me. 265; *Starbird v. Eaton*, 42 Me. 571; *Storer v. White*, 7 Mass. 448, and other cases cited in above reports.

The record shows that the judgment was against the logs on which the labor had been performed. *Thompson v. Gilmore*, 50 Me. 430.

Writs of error have never been sustained where judgments have been rendered on default, by consent, or where the parties voluntarily suffered the default to be entered. *Lord v. Pierce*, 33 Me. 350; *Weston v. Palmer*, 51 Me. 73, 76.

The errors assigned go to the record. The record is before the court. It shows a valid judgment duly and legally rendered. *Bean v. Ayers*, 70 Me. 421-483.

Haskell, J., delivered the opinion of the court:

Writs of error to reverse, for errors in law, four several judgments of this court, rendered in the County of Oxford.

The transcripts presented at the trial prove records that comply with the requirements of the statute, R. S. ch. 79, § 11, and show the nature of the judgments rendered. The records of the judgments sought to be reversed are sufficient in form for abbreviated records under the statute, however defective they may be without its aid. Writs of error, for errors in law, lie only for defects apparent upon the face of the record. *Valentine v. Norton*, 30 Me. 194; *Paul v. Hussey*, 35 Me. 97; *Starbird v. Eaton*, 42 Me. 569; *McArthur v. Starrett*, 43 Me. 345; *Wood v. Leach*, 69 Me. 555.

If there be error in law, that would appear from an extended full record, which either party desires to avail himself of upon a writ of error, he should, before trial, require the clerk to make a full extended record of the judgment sought to be reversed; and if he refuses so to do, procure an order from the court directing such record to be made, and then present a transcript of such extended full record, that the court may know from inspection of it whether an error exists.

In the case at bar, the parties have agreed that the pleadings omitted from the records may be treated as properly included in them, and under the peculiar circumstances, that agreement will be regarded by the court.

Two errors in law are assigned:

1. That the accounts annexed to the writs are insufficient. The actions were *assumpsit*, according to the accounts annexed. The accounts set out claims for labor performed and the price demanded. The plaintiff in error was duly cited to become party defendant in those actions, but interposed no defense. The insufficiency of the declarations, it might have availed itself of. It did not do it. The objections presented come too late. They are not available in this action. They were proper subjects of amendment, and are cured by default. Enough is shown by the declarations to sustain the judgments rendered. Full and complete averments show that the services sued for were rendered upon the logs attached, and that the suits were seasonably brought. The statute provides that no proceeding shall be reversed for error that by law is amendable. R. S. chap. 82, § 10.

2. That there was no sufficient attachment of the logs. The record recites a command in the words, for the officer to attach certain specified logs, upon which a lien is claimed; and a return of the officer, that he did attach the same and put his mark upon them; and that, within five days thereafter, he filed in the clerk's office of the town where the logs lay the usual copy of his attachment. Attachments of chattels are made by gaining possession of the property attached; and in certain cases may be preserved by recording the attachments and abandoning the actual possession or control.

In these cases the property attached was logs on the bank of a river; clearly, property that could not have been immediately removed to a place of keeping within the absolute control of the officer, by reason of its bulk; and actual possession of it, he could only retain by his presence or the presence of his servant, at unnecessary cost. The record discloses an attachment, within the express terms of the statute, followed by a judgment *in rem*, without error or fault. The defendants have interposed no plea, and the order is:

Plaintiff nonsuit.

Peters, Ch. J., Walton, Virgin, Libbey and Foster, JJ., concurred.

INHABITANTS of KITTERY

v.

PROPRIETORS of PORTSMOUTH BRIDGE.

The owners of the Portsmouth toll bridge, extending from Kittery, Maine, to Portsmouth, N. H., are **taxable** in the Town of Kittery for so much of that bridge as is situated within that Town.

(York—Decided January 11, 1886.)

A PPEAL from Western District. *Defendant defaulted.*

Suit for taxes assessed on the real estate of a

Corporation for 1880, by plaintiff's town officers on bridge property of defendant situated within the town. Defendant Corporation claims that it is a foreign corporation created by and domiciled in New Hampshire where its only stock was issued, records kept, meetings held for more than sixty years; that it is not taxable in Maine nor has it any taxable property in Maine although by special Act of the Maine Legislature of June 23, 1821, it was authorized to exercise its franchise in Maine.

Mr. John M. Goodwin, for plaintiffs:

The defendant is a domestic corporation. It is not necessary nor important for any legal purpose that the administration of its affairs be conducted in this State. Green, Brice, Ultra Vires, appendix IV, p. 276; *Galveston R. R. Co. v. Coudrey*, 11 Wall. 476, 477 (78 U. S. bk. 20, L. ed. 205); *Arms v. Conant*, 36 Vt. 745.

By the laws of Maine, taxation of all property is the rule; exemption the exception. R. S. chap. 6, § 2.

The words "land or real estate" include all lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein. R. S. chap. 6, § 6, art. 10.

Under the R. S. 1871, in force in 1880, real estate for purposes of taxation includes all lands and all buildings and other things erected on or affixed to the same. R. S. chap. 6, § 3.

It is not even necessary that the Corporation have any title to the land the bridge is upon. *People v. Cassidy*, 46 N. Y. 46; *New Haven v. Fair Haven & W. R. R. Co.* 38 Conn. 422, cited in *Cooley*, Taxn. 274.

The real estate of the defendant Corporation was properly assessed in Kittery. R. S. 1871, chap. 6, § 14, art. 2; *Portland S. & P. R. R. Co. v. Saco*, 60 Me. 196; *Cumberland & Marine R. Co. v. Portland*, 37 Me. 444. See also, *Hall v. Benton*, 69 Me. 346.

Mr. George C. Yeaton, for defendant:

Every corporation has its domicile in the State of its origin, beyond which it has no legal existence. "It must dwell in the place of its creation." *Bank v. Earle*, 13 Pet. 579 (38 U. S. bk. 10, L. ed. 303); *Marshall v. B. & O. R. R. Co.* 16 How. 314 (57 U. S. bk. 14, L. ed. 953); *Day v. Newark Rubber Mfg. Co.* 1 Blatch. 628; *Müller v. Ewer*, 27 Me. 509.

The Act in Maine intended to grant such powers as were needed to authorize the convenient and facile management of the business, by obviating the dilemma of two corporations, and leaving but one in existence. This the Act undertook to accomplish. The presumption is that the Act did accomplish the purpose intended. This purpose could only be accomplished, regarding the limitation of interstate jurisdiction and functions, by operating as an enabling Act, conferring power on the New Hampshire Corporation to exercise its franchise in Maine also; for there cannot be one corporation from the joint paternity of two different State Legislatures. *Furnum v. Black Canal Corp.* 1 Sum. 47; *Quincy R. R. Bridge Co. v. Adams Co.* 88 Ill. 615; *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 286, 297 (66 U. S. bk. 17, L. ed. 470); *R. R. Co. v. Harris*, 12 Wall. 65-82 (79 U. S. bk. 20, L. ed. 854); *Blackstone Mfg. Co. v. Inhab. of Blackstone*, 13 Gray, 488; *Müller v. Ewer*, *supra*; *Freeman v. Machias Water Power & M. Co.* 88 Me. 343; *Ang. & A. Corp.* 164:

Morawetz, Priv. Corp. 527, *et seq.*; *Walah v. N. Y. & Brooklyn B.* 96 N. Y. 427, 435.

In *Granger's L. & H. Ins. Co. v. Kamper*, 78 Ala. 325, 345, the court declares the domestic character of the plaintiff corporation to be shown by its having "its own capital, its own members, its own domicile, its own governing body," within the jurisdiction, and by its powers not having been derived "from a foreign power, or by reference to the powers a foreign power may have conferred on a corporation of its creation, etc." Conversely, *Phil. Wil. & Balt. R. R. Co. v. Kent Co. R. R. Co.* 5 Del. 127, 138, emphasizes the facts that the "president and other officers" were nonresidents, and that its principal office and place of business was also located in another State, as determining the foreign character of defendant corporation.

Two provisions in the Act of the Maine Legislature are noteworthy, and specially significant of its intention. The first meeting was to be held in New Hampshire. This the Maine Legislature had no power to provide for, except in subordination to existing provisions of New Hampshire law.

Thompson v. Waters, 25 Mich. 214, 221, declares that no State has the power to create corporations, or to regulate their powers, or to authorize the exercise of corporate franchises in other States. *Freeman v. Machias Water Power & M. Co. supra*; 2 Field's Lawyers' Briefs, 164; Green, Brice, *Ultra Vires*, 2d ed. 442, note a.

If it were doubtful under its organic Acts where its domicile is, it would be held to be in New Hampshire, by virtue of these facts. *Orange & Alex. R. R. Co. v. Alexandria*, 17 Grat. 176; *Quincy R. R. Bridge Co. v. Adams Co.* 88 Ill. 615, 621; *Thorn v. Cent. R. R. Co.* 2, 26, N. J. L. 121; *Culbertson v. Wabash Nav. Co.* 4 McLean, 544; Rap. & L. Law Dic. title, *Domicil*.

The following recent cases are not directly in point, but all discuss analogous principles and impliedly recognize the principles above set forth. *Easton Del. Bridge Co. v. Metz*, 82 N. J. L. 199; *Goshorn v. Supers. Ohio Co.* 1 W. Va. 308; *St. Louis v. Wiggins Ferry Co.* 40 Mo. 580; *R. R. Co. v. Vance*, 96 N. C. 450.

R. S. 1871, chap. 6, § 16, provides that the stock of all toll bridges shall be taxed as personal property to the owners thereof, in the towns where they reside. Section 19 provides for assessing the property in event of a failure to make returns required by § 21, chap. 46. The two sections, construed together, plainly negative the legislative intent to tax both stock and property in any case, except those specifically mentioned.

But again; if the phraseology were not so pointed, the double taxation which ensues, if in all cases the property may be taxed, as well as the stock, is never presumed to be intended by the Legislature. Here is not merely an entire absence of any words evincing such intent, but the words actually used in both §§ 16 and 19 cannot be given full effect consistently with the theory of any such legislative intent. *Augusta Bank v. Augusta*, 86 Me. 259; *Cooley*, Taxn. 164, 165; *San Francisco v. Spring Val. Wat. Works*, 63 Cal. 524.

The State of Maine owned the land, unless a portion of it were flats, to the middle of the river, *State v. Wagner*, 61 Me. 178-190; and granted the privilege of erecting this bridge, by ME.

means of which defendant Corporation could enjoy the franchise it had. The bridge stood upon no land owned by the Corporation. It could not be separately sold, apart from the franchise itself, and hence, as such in itself it was valueless. *Cent. Bridge Corp. v. Lowell*, 15 Gray, 106, 110, 111.

Haskell, J., delivered the opinion of the court:

Debt for a tax assessed by the Town of Kittery upon that part of Portsmouth Toll Bridge situated within that town. The defendant is a Corporation and the owner of the bridge. No question is made as to the regularity of the tax, nor as to the sufficiency of the demand before suit.

R. S. 1871, chap. 6, § 8, in force when this was laid, provides that "Real estate for the purposes of taxation * * * shall include all lands in this State and all buildings and other things erected on, or affixed to the same." Chapter 1, § 4, rule 10, provides that "the word 'land or lands,' and the words 'real estate,' include lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein."

By these rules, that part of the bridge within the Town of Kittery is there taxable as real estate. *Hall v. Benton*, 69 Me. 346.

Defendant defaulted.

Peters, Ch. J., Walton, Virgin, Libbey and Foster, JJ., concurred.

Benjamin B. CLAY, Assignee in Insolvency,
v.

Elisha TOWLE.

1. Making oath to an answer to a bill in equity, which did not require an answer under oath, will not make the answer evidence of the facts stated.
2. An unsecured creditor may join in a creditors' petition in insolvency at any time while the same is pending.
3. An adjudication of insolvency takes effect as of the date of filing the petition even though the petition had not, at the time of filing, the requisite number of creditors upon it.
4. The validity of the transfer of property by the insolvent debtor is determined with reference to the date of filing the petition in insolvency.
5. It is the duty of a director to know the financial standing of his corporation, and he cannot avail himself of any dereliction of duty in this respect to secure a personal advantage over other creditors of the corporation.
6. A mortgage given by an insolvent corporation to secure a preexisting debt to a creditor, with intent to give him a preference, made within four months of the time of filing the petition in insolvency, is void, when the creditor had reason to believe such corporation insolvent and that a preference was intended in fraud of the insolvent law. (A

court of equity in such a case will declare the mortgage void.

7. A mortgage given by an insolvent debtor, to secure a loan made at the time, is valid, in the absence of fraud.

(Kennebec—Decided January 8, 1886).

BILL in equity. *Sustained.*

This bill was brought by complainant, as assignee in insolvency of the Kennebec Wire Works, praying a decree that respondent shall cancel and discharge upon the record two mortgages given by it to respondent, one dated January 28, 1884, for \$4,000, the other dated January 24, 1884, for \$3,000, both mortgages being given within four months prior to the commencement of proceedings in insolvency, upon the ground that said mortgages were given in preference and in fraud of the Insolvent Law. § 52, chap. 70, R. 8.

The petition in insolvency was filed May 21, 1884, and was made and signed by two creditors only, who represent less than one fourth of the probable debt of the company, and no other creditors became parties to the petition until June 28, 1884, long after the four months had passed.

Messrs. Clay & Clay, for plaintiff :

Complainant takes the ground that said mortgages were given as preferences and in fraud of the Insolvent Law, and relies on § 52, chap. 70, R. 8. of Maine.

The word "conveyance" includes mortgages. *Bingham v. Frost*, 6 Bank. Reg. 180.

If the allegations are in the bill and are proved, then the mortgages must be set aside. *Merrill v. McLaughlin*, 75 Me. 64.

The court had a right to permit other creditors to join if they wish, it having appeared that the allegations as to insolvency were proved, and an adjournment for two weeks (the next court day) for that purpose was not unreasonable or illegal. *Re Hawkes*, 70 Me. 218; *Re Roberts*, 71 Me. 390.

And when the court has adjudged that the requisite proportion of creditors have joined in an involuntary petition the judgment is final and will not be re-examined by this court except upon an allegation of fraud or bad faith. *Bump, Bankr.* 454; *Re Duncan*, 14 Bank. Reg. 18.

A court of equity will not set aside proceedings under the Insolvency Act, when the sole object is to give effect to fraudulent preferences. 71 Me. 390, before cited.

The term insolvency means present inability to pay. The probable or improbable future condition of the party in this respect does not affect the question. *Re Wells*, 3 Bank. Reg. 371.

By giving these mortgages, they put it out of the power of creditors to secure a dollar by attachment and execution, and the moment the mortgages were recorded their credit was gone. As a matter of law and common sense, the officers of the company must have "contemplated insolvency." *Re Craft*, 1 Bank. Reg. 378; *Re Waite*, 1 Lowell, 207.

Testimony of the parties as to their intention is weak and can rarely avail against the stronger proof which the transaction itself affords. *Oxford Iron Co. v. Slafter*, 14 Bank. Reg. 380.

The burden of proof is upon the debtor in

such case, and not upon the assignee. *Toof v. Martin*, 6 Id. 49; *Bump, Bankr.* 817, and cases there cited.

Whether a debtor knows he is insolvent, or purposely and willfully refuses to know by shutting his eyes to the facts before him, the result is the same. *Farrin v. Crauford*, 2 Bank. Reg. 602.

The intent need only exist on the part of the person making the transfer. *Re Drummond*, 1 Id. 231.

The question whether these mortgages were given in fraud of the Insolvent Law, is dependent upon what the parties do and say, and the effect thereof. *Esfort v. Greely*, 6 Id. 438.

A corporation may, in judgment of law, intend to defraud creditors. *Curtis v. Leavitt*, 15 N. Y. 9; 17 Barb. 309; *Smith v. Morse*, 2 Cal. 524.

The notice of the fraud need only be sufficient to put a man of ordinary prudence on his guard. *Bump, Fraud. Con v.* 278, 483, 563.

Messrs. Baker & Cornish and A. M. Spear, for defendant :

The court may undoubtedly allow amendment and permit new creditors to sign. *Re Hawkes*, 70 Me. 215; *Re Roberts*, 71 Me. 393; *Foster v. Goulding*, 9 Gray, 50.

And such amendment of course ordinarily relates back by fiction of law to the date of the original petition. *Re Roberts*.

Thus an amendment of an officer's return ordinarily relates back to the original return and dates from it. *Malone v. Samuel*, 13 Am. Dec. 180, note, and cases cited.

But it will not relate back to affect an intervening right. *Note to Malone v. Samuel, supra*, where many cases are cited.

And this when the amendment has already been allowed by the inferior court. *Emerson v. Upton*, 9 Pick. 167.

But as to such third parties any amendment will take effect only from the time when made. *Ohio L. Ins. & T. Co. v. Urbana Ins. Co.* 13 Ohio, 220.

So an amendment of the date of attachment in an officer's return, after it has been allowed by the court, will not affect the rights of third parties. *Emerson v. Upton, supra*.

This case is cited and approved in *Banister v. Higginson*, 15 Me. 77.

So the amendment of a levy to show the fact that the appraisers were sworn, such being the truth, was refused as against an intervening right. *Id.*

Against such intervening right the doctrine of relation will not apply. *Means v. Osgood*, 7 Me. 149.

So an amendment in an officer's return on a levy, stating notice in accordance with the fact, will not affect a third party, even although he had purchased *pendente lite*. *Id.*

So it seems that a return of an attachment cannot be amended as against an intervening right. *Williams v. Brackett*, 8 Mass. 240; *Whittier v. Vaughan*, 27 Me. 301.

So an officer, having taken acknowledgment of a married woman, cannot amend by afterwards signing the unsigned certificate thereof, to affect an intervening right. *Harmon v. Magee*, 57 Miss. 410; cited and approved in *Jordan v. Corey*, 52 Am. Dec. 520, note.

So an amendment of the writ of execution will not be suffered to affect third persons or

intervening rights. *Purcell v. McFarland*, 1 Ired. 34; 8 C. 35 Am. Dec. 784, and note; *Tidd*, § 986, 1027; *Seawell v. Bank*, 8 Dev. 284; *Williams v. Sharpe*, 70 N. Car. 584.

Although the officer might amend his return according to the fact, this could not so affect the title of one taking a mortgage of the land, Oct. 13, 1864, but that the sale and return would convey the equity of redemption of a mortgage made prior to the attachment. *Milliken v. Bailey*, 61 Me. 816.

Amendment of writs will affect third persons, as subsequent attaching creditor or bail, only when the amendment is of form alone. *Haven v. Snow*, 14 Pick. 33; *Dennis v. Clark*, 2 Cush. 347.

But not where an additional demand or a new cause of action is introduced. *Haven v. Snow*; *Wood v. Denny*, 7 Gray, 542.

Nor when a new party, plaintiff or defendant is added by the amendment. *Denny v. Ward*, 3 Pick. 199; *Moulton v. Chapin*, 28 Me. 505.

Even a purchaser *pendente lite* in the most lax rule is only held constructively chargeable with those facts, the existence of which is in the first place indicated by the record, and in the second place provable in fact. *Whittier v. Varney*, 10 N. H. 291; quoted in *Fairfield v. Paine*, 28 Me. 498; and in *Knights v. Taylor*, 67 Me. 594.

There can be no constructive notice of a fact which does not exist. *Drew v. Bank*, 55 Me. 452, foot p.

If a person has acquired a right in property prior to suit, he may even take active steps after suit to perfect his right and will not be affected by notice of the *lis pendens*. 2 Pom. Eq. § 637, and cases. See also *Chase v. Denny*, 130 Mass. 568.

A creditor cannot be permitted to withdraw his proof of debt, to affect an intervening right. *Re Hubbard*, 1 Law Mag. 190; cited in *Re Hawkes*, 70 Me. 215. This is the exact converse of our claim.

Haskell, J., delivered the opinion of the court:

Bill in equity, by assignee of an insolvent debtor, seeking to annul mortgages given to a creditor, as a preference in fraud of the insolvent law. The cause is reported, to be heard on bill, answer and proofs. The bill does not call for answer upon oath, and the answer, although verified by oath, does not operate as evidence, even as to the facts stated in it, responsive to the bill; but like ordinary pleadings, points out the issues to be determined by evidence. R. S. chap. 77, § 15.

The bill avers the proper adjudication and the regular appointment of the assignee by the insolvent court. The answer denies both. The burden is upon the orator to prove the allegations of the bill. To do this, he produces the records of the insolvent court and the original papers on file in the case. These show an involuntary petition, not supported by the requisite number of creditors, in which other creditors, sufficient to complete the necessary quorum, were allowed to join, against the objection of the debtor, upon which the adjudication of insolvency was entered, and a regular choice and appointment of the orator assignee had.

A creditor's petition against an insolvent

debtor is in the nature of a bill in equity, brought for the benefit of all in like interest. At any time, while pending, an unsecured creditor may join in it, and aid its prosecution. *Re Hawkes*, 70 Me. 218.

The adjudication takes effect from the date when the petition was filed, and the validity of all transfers of property, by the debtor, is to be determined with reference to that date. *Re Roberts*, 71 Me. 390.

The insolvency proceedings are valid, and take effect from the time the original petition was filed.

The debtor gave two mortgages of its real estate, alleged to be a preference to the respondent, in fraud of the insolvent law; one bears date January 23, 1884, and is conditioned to secure the payment of \$4,000; the other is dated the next day and is conditioned to secure the payment of \$3,000. The respondent was a director of the corporation at the time when he received these mortgages from it. The evidence clearly proves the insolvency of the corporation at the time these mortgages were given. It was unable to meet its maturing demands in the ordinary course of business. *Lee v. Kilburn*, 3 Gray, 594; *Toof v. Martin*, 13 Wall. 40 [80 U. S. bk. 20, L. ed. 481].

The respondent was a director. His duty required that he should know the financial standing of the corporation, and he is presumed to have performed it. If he has been recreant in guarding the interests intrusted to his care, he cannot be allowed to set up such dereliction of duty, to his own profit and advantage, over other creditors who had a right to rely upon his judicious action and discreet management, for the equal benefit of all interested in the affairs of the corporation. *European & N. A. R. Co. v. Poor*, 59 Me. 277; *Bradley v. Farwell*, 1 Holmes, 438; *Coons v. Tome*, 9 Fed. Rep. 533; *Koehler v. B. R. F. Iron Co.* 2 Black. 715; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587 [bk. 23, L. ed. 328]; *Imperial Merch. Credit Assn. v. Coleman*, L. R. 6 Ch. App. Cas. 558.

This branch of the case might well rest upon these wholesome rules of law, but the artful method, contrived to blind the eyes of justice, in making these mortgages appear *bona fide*, and to have been given for a present consideration, demonstrates the fact that a preference was intended by both parties, in fraud of the insolvent law.

The respondent held demand notes of the corporation, more than six months old, amounting to about \$4,000. On the 22d of January, 1884, he called upon the president of the corporation to pay them; the president, thereupon, not having sufficient funds of the corporation at his command, gave the respondent his personal note, for the amount of the demand notes of the corporation that the respondent held, payable in thirty-seven days to the respondent's order, and received in exchange the demand notes held by the respondent. The next day, January 23, the respondent surrendered to the president of the corporation the time note he had given the day before to the respondent and received in exchange for it corporation notes, on time, aggregating \$4,000, and a mortgage of the real estate of the corporation, to secure their payment. The president then destroyed his personal note given

to the respondent the preceding day, and surrendered to the corporation its original demand notes, that the respondent had transferred to him. The effect of this round-about contrivance was to give the respondent a mortgage, to secure his debt against the corporation. No money was passed between the parties, save a few dollars to make an even \$4,000. If the purpose had not been fraudulent, but only an intention by a solvent debtor to secure a creditor, and thereby change a "floating debt" into a permanent loan for a specific time, that might have been a prudent operation, why this strange transaction? Why was a plain, straightforward method avoided? If no fraud had been intended, and the corporation was solvent, it would not have violated the insolvent law in securing its debtor by the usual methods of business.

It is quite plain that the \$4,000 mortgage was given and received, to secure a pre-existing debt, in fraud of the insolvent law, and should be adjudged invalid and decreed to be canceled and surrendered to the orator; but the notes, as evidence of his debt, the respondent may retain.

The next day, January 24, the respondent loaned the corporation \$3,000, and took a second mortgage to secure the payment of it. This loan was used to meet the pay roll and other current bills due from the corporation. Its manifest purpose was to put the corporation in funds to meet pressing liabilities and thereby enable it to survive its insolvency, possibly, until the respondent's first mortgage should become old enough to withstand the insolvent law.

The bill seeks the cancellation of this mortgage, because it is a preference; but the proofs show the reverse; and because it was given to hinder and delay creditors; but the averments in the bill are too meager and vague to warrant relief for such reason. Touching this mortgage the orator is entitled to no relief.

Bill sustained with costs. Decree according to this opinion.

Peters, Ch. J., Danforth, Virgin, Emery and Foster, JJ., concurred.

William H. HULL

v.

Artell A. HALL et al.

Where a servant is injured while using defective machinery provided by the master, the latter is liable for the damages occasioned thereby, if he knew or by proper diligence ought to have known of the defect, and the servant did not know and could not reasonably be held to have known of it.

(Waldo—Decided January 28, 1886.)

ON defendants' exceptions. *Sustained.*

Action to recover damages for personal injuries received by the plaintiff April 29, 1881, in the defendants' saw mill in Damariscotta, where he was employed by the defendants in sawing pickets, by reason of alleged defective,

unsuitable and unsafe machinery furnished by the defendants. The plaintiff lost all the fingers of one hand by the injury.

At the trial the presiding judge instructed the jury as follows at the request of the plaintiff's counsel: "When defendants set plaintiff at work sawing pickets upon their circular saw, they were in duty bound to provide good and sufficient machinery for that purpose, with such safeguards against injury to him in running the saw, as common experience in that business had shown to be necessary, whether the defendants personally knew that such safeguards were necessary or not."

The verdict was for the plaintiff in the sum of \$985, and the defendants alleged exceptions.

Mr. William H. Fogler, for defendants:

By the instructions the defendants were bound "at their peril" to furnish machinery and appliances of a certain character, and in default of this their liability to the plaintiff was absolute. "Absolute" means "independent of anything else," "without condition, limitation, relation or dependence." Worcester, Dic.

As this court has said in *Shanny v. Androscoggin Mills*, 66 Me. 427: "The employer may, undoubtedly, exercise his own judgment as to the kind of machinery he will use * * * having due regard to the rights of others."

The master has failed to furnish proper apparatus, but he is in no peril on that account. His liability to his servant for injury received on that account is not "absolute," but on the contrary he is absolutely without liability.

This limitation of the master's liability is fully stated in *Coombs v. New Bedford Cord Co.*, 102 Mass. 586, as follows: "The implied contract to have the machinery in such a safe and proper condition as not to expose the servant to unnecessary risks in the foundation of the master's liability."

Although it is a part of the implied contract between master and servant that the master shall provide suitable instruments for the servant with which to do his work yet it is in the power of the servant to dispense with this obligation. *Sullivan v. India Mfg. Co.* 118 Mass. 896.

Again; in *Wheeler v. Wason Mfg. Co.* 185 Mass. 294 (a case relied upon by plaintiff), the court said (p. 298): "When the servant is as well acquainted as the master with the dangerous nature of the machinery or instrument, or of the service in which he is engaged, he cannot recover."

In *Buzzell v. Laconia Mfg. Co.* 48 Me. 113, the declaration was adjudged bad because it did not aver that the defect was unknown to the plaintiff. The court says, p. 121: "If the danger is known and the servant chooses to remain, he assumes, it would seem, the risk, and cannot recover."

The courts have repeatedly declared that the master is liable to the servant for such defects when the danger is known to him and unknown to the servant. *Buzzell v. Laconia Mfg. Co. supra*; *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; *Wheeler v. Wason Mfg. Co. supra*.

In the case last cited it is said, p. 29: "But when the master employs a servant in the use of machinery which he knows but the servant does not know to be attended with peculiar danger * * * he must be held responsible

for any injury which occurs in consequence of his failure to see to it that a proper notice is given."

The only ground upon which they could be held responsible was because they had been guilty of some negligence. *Sullivan v. India Mfg. Co.* 113 Mass. 399. See also, the language of the court in *O'Connor v. Adams*, 120 Mass. 431; *Walsh v. Peet Val. Co.* 110 Mass. 25; *Ryan v. Tarbox*, 135 Mass. 208; *Loonam v. Brockway*, 3 Robt. 74.

The second requested instruction to which exceptions are taken is objectionable and should not have been given, because it assumes that there was evidence in the case tending to prove that the plaintiff was impelled by a power which he could not resist, to undertake the work in which he was employed at the time he received his injury; it should have been refused. *Copeland v. Copeland*, 28 Me. 525; *Lord v. Kennebunkport*, 61 Me. 462; *Brackett v. Brewer*, 71 Me. 484; *Duley v. Kelley*, 74 Me. 556.

Mr. A. P. Gould, for plaintiff:

The first instruction given to the jury by request of plaintiff's counsel was correct; especially as explained by the presiding Judge. *Buzzell v. Laconia M. Co.* 48 Me. 113, 116, 117; *Laubler v. Androscoggin R. Co.* 62 Me. 463, 466, 467; *Shear. & Redf. Neg.* §§ 92, 93, and notes; *Coombs v. New Bedford Cord. Co.* 103 Mass. 572, 583, 584.

In *Noyes v. Smith*, 28 Vt. 59, the plaintiff was in the employ of the defendants as engineer, with a defective fire box, of which neither plaintiff nor defendant was aware. An explosion occurred. Defendants were held liable, because they might have discovered the defect by the exercise of proper care and vigilance.

In *McGarrick v. Wason*, 4 Ohio St. 566, Thurman, C. J., said: "The general rule is, that an employer, who provides the machinery and controls its operation, must see that it is suitable; and if an injury to the workman happens, by reason of a defect unknown to the latter and which the employer, by the use of ordinary care, could have cured, he is liable for the injury."

In *Ford v. Fitchburg R. R. Co.* 110 Mass. 240, it was held, that "One employed by a railroad corporation to drive a locomotive engine over its road may recover damages against the corporation, for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents."

The negligence of the defendants might have consisted in not discovering the defects. *Fifield v. Northern R. B.*, 42 N. H. 225, 225.

Every person who admits another into his employment, whereby he constitutes him a servant, is bound to furnish and maintain such instruments as are suitable to his work, and as may be used with safety to the person employed. The law, by implication, makes such a stipulation a part of every contract for service; and in proportion as the employment is hazardous, so is the rigid enforcement of the master's duty. *Crookes v. Richmond & D. R. R. Co.* 84 N. C. 309. See also, *Hough v. R. Co.* 100 (U. S. bk. 25, L. ed. 612); *Holden v. Fitchburg R. R. Co.* 120 Mass. 263, 276, 277.

For a case in many respects similar to this, although not so strong for plaintiff, see *Wheeler v. Wason Mfg. Co.* 135 Mass. 294. In that case, p. 296, the court says: "This case is not like one where a practiced and skillful workman is set to work upon machinery which, although dangerous in itself and requiring the use of great care, he nevertheless thoroughly understands, and is willing to take the risk of using, in the condition in which he finds it."

If knowledge by the managing defendant of the defects in the equipment of his machinery which caused the accident was necessary, proof is abundant that he had that knowledge. But such knowledge is immaterial, as the duty of an employer is absolute, to furnish suitable machinery to his workmen, or to give them notice of its defects. *Wheeler v. Wason Mfg. Co. supra*.

As Byles, J., said, in *Clarke v. Holmes*, 7 Hurl. & N. 937: "A servant may know the facts, but may be utterly ignorant of the risks."

It may frequently happen that the dangers of a particular position for or mode of doing work are great, and apparent to persons of capacity and knowledge of the subject; and yet, a party, from youth, inexperience, ignorance, or general want of capacity, may fail to appreciate them. *Sullivan v. India Mfg. Co.* 113 Mass. 399. See, *Shear. & Redf. Neg.* § 28.

Virgin, J., delivered the opinion of the court:

The verdict having been for the plaintiff, the question presented by the bill of exceptions is whether the instructions given at the request of the plaintiff are sufficiently favorable to the defendants.

Without elaborating the variously expressed but universally acknowledged rule of law involved, it is sufficient to say when the relation of master and servant is created between two persons by a simple mutual agreement, that one of them, at an agreed compensation, shall work for the other in the latter's saw mill, all the terms of the contract are not expressed, and those not expressed are left to implication. In such case it is implied among other things, on the part of the master, that he shall use ordinary care and diligence in supplying and maintaining, for the servant's use in that more or less hazardous business, such saws and appliances as are reasonably safe. And the correlative implication on the part of the servant is, among other things, that he shall take upon himself the risks which ordinarily attend or are incident to the business in which he thus voluntarily engages.

The implied duty of the master being measured by the legal standard of ordinary care, his knowledge or want of knowledge of the actual condition of the machinery when it falls below the legal standard of being reasonably safe and causes the injury, becomes a material element. *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113, 122.

Hence, although not a complete defense, necessarily, it is admissible for the defendant to testify that he had no knowledge or information of its defective condition. *Boyle v. Mowry*, 122 Mass. 251.

When the master, therefore, does not know of the dangerous condition of the machinery and has exercised that standard of care in relation thereto, he has discharged his duty

and there is nothing of which negligence can be predicated. And such is the result of all the cases. Hence, writers upon this topic have said: "If the master knew or ought to have known, and the servant did not know and was not bound to know of its existence, the liability of the master, the servant having been otherwise in the exercise of due care, is fixed. And it is equally true, in every case, that unless the master knew of the defect which subsequently produced the injury, or was under a duty of knowing it, he cannot be held liable." 2 Thomp. Neg. 992-3.

Or, as the same view is expressed by another: "To render the master liable, it must appear that he knew or from the nature of the case ought to have known of the unfitness of the means of labor furnished to the servant, and that the servant did not know or could not reasonably be held to have known of the defect." Beach, Con. Neg. § 123.

We are of opinion, therefore, that since knowledge on the part of the master, or its equivalent: negligent ignorance is essential to hold the master, the first instruction making the master's liability absolute was not sufficiently favorable to the defendants and may have misled the jury. Having no occasion to pass upon the other exception, therefore, the entry must be:

Exceptions sustained.

Peters, Ch. J., Walton, Libbey, Foster and Haskell, JJ., concurred.

Daniel MARTIN

v.

William H. DARLING *et al.*

1. No judgment *in rem* can be rendered against the property attached in an action brought to enforce a lien upon granite, where the defendant is the general owner of the property attached, and made the contract upon which the alleged lien is based, and no general notice of the action has been given.
2. The same is true where the defendant is not the general owner, and such owner has not become a party to the action, nor had any notice to do so.

(Knox—Decided January 1, 1886.)

CASE submitted upon agreed statement, sufficiently recited in the opinion. *Judgment for plaintiff.*

Mr. J. E. Haully, for plaintiff.
Mr. H. A. Tripp, for defendant.

Danforth, J., delivered the opinion of the court:

This case is submitted upon an agreed statement, by which the court is authorized "to render such judgment as the legal rights of the parties require." The amount due from the defendants is agreed upon. The plaintiff is therefore entitled to judgment for that amount. The legal rights of the parties neither require nor authorize any further judgment.

The counsel have argued the question as to whether the plaintiff had acquired a lien upon

the property attached, and if so, whether it has been lost by taking the note in suit. Any judgment which the court can render under this statement as to the lien will not be binding, and therefore would be useless. If the defendants alone are interested, as the contract for labor was made with them and the property is attachable, a judgment for a lien would add nothing to the security which the plaintiff now has by virtue of his attachment. In such cases and in the absence of general notice given, the law does not authorize a judgment *in rem* to be given, *Byard v. Parker*, 65 Me. 576, but leaves the question to be settled by subsequent proceedings if necessary. But this necessity can arise only when persons not parties to the case claim an interest in the property, either as owners or prior attaching creditors. No judgment could be rendered which would be valid against the rights of such persons until they were notified and had an opportunity to become parties to the action, and be heard. *Parks v. Crockett*, 61 Me. 489, and cases cited.

It is true that, since these decisions there has been a change in the statute, so that now in all lien actions when the contract for labor or materials is made with a person not the owner of the property affected, such person may voluntarily appear and become a party to the suit. If he does not, such notice as the court orders may be given him, and he shall become a party. R. S. chap. 91, § 44.

But this provision in no respect changes the law as laid down in the cases above cited. The statute does not, nor does it purport to bind anyone except such as have become parties to the suit or had notice to do so, nor would the judgment be valid as against any others. Now as when the decisions were made, a judgment *in rem*, valid as such against the world, can be rendered only when the world has such notice as the court shall order.

In this case no notice except to the defendant has been given; neither has any person appeared; for that reason no judgment as to the validity of the lien can be given.

Judgment for the plaintiff for \$221.86 and interest from date of writ.

Peters, Ch. J., Virgin, Emery, Foster and Haskell, JJ., concurred.

John H. POTTER

v.

J. McKENNEY.

1. When mortgaged personal property is attached as the property of the mortgagor and placed in the hands of a keeper by the attaching officer, the mortgagee cannot maintain replevin therefor against the keeper until he has given forty-eight hours notice of his claim under the mortgage and the amount thereof, as provided by the Statute of Maine.
2. The keeper may make the same defense as the attaching officer, whose servant he is, could make if the action was against him.

(Androscoggin—Decided January 4, 1886.)

REPLEVIN for the recovery of personal property. Case presented on an agreed statement of facts. *Nonsuit*.

The facts sufficiently appear in the opinion.

Mr. John H. Potter, for plaintiff:

The real question to be determined in this case is this: was it necessary for the plaintiff, in order to maintain this action, to first give the written notice provided for in § 44, chap. 81, R. S.?

Our statute makes it imperative that an action of replevin shall be brought in the county where the property is detained. § 9, chap. 96, R. S.

The doctrine that it can be maintained against the original taker who has parted with the possession thereof, as laid down in *Sayward v. Warren*, 27 Me. 453, has long since been exploded. *Ramsdell v. Bursell*, 54 Me. 546.

Nor does it make any difference that the defendant is merely the agent of the original taker or detainer, so long as he is in possession and refuses to deliver up to the true owner on demand. *Eveleth v. Blossom*, 54 Me. 447; *Douglass v. Gardner*, 63 Me. 462.

The officer should have given plaintiff notice as is required in § 45, chap. 81.

The object of the written notice, provided in said § 44, is that the creditor may redeem.

Mr. John P. Swasey, for defendant:

The only question submitted is whether a mortgagee of personal property can maintain an action against the keeper or servant of an officer who has properly attached the same on a writ against the mortgagor or, in other words, is the written notice required in § 44, chap. 81, R. S. 1883, also required in case the property thus attached has been placed by the officer making the attachment in the hands of a keeper?

When goods are attached by an officer and delivered to a third person, the latter is but a servant of the officer and cannot maintain replevin against one who shall take them from him. *Eastman v. Avery*, 23 Me. 248.

The officer's special property is not lost by the bailment, and the bailee stands in the position of his servant. *Drake, Attach.* § 353.

While said property is in possession of the bailee, a second attachment may be made by the same officer without an actual seizure. *Id.* § 356.

In view of such a special property, legal seisin and possession in the officer simply because the property is in the keeping of a servant, shall such a plain provision of the statute be avoided? We think such a conclusion as the plaintiff claims is a plain absurdity. In case of *Nichols v. Perry*, 58 Me. 32, Barrows, *J.* says, the statute is to be fairly and liberally construed.

Libbey, J., delivered the opinion of the court:

This is replevin of a sleigh and wagon. Plaintiff claims title under a mortgage from one Davis. The property was attached by a deputy sheriff on a writ against said Davis, as his property. At the time of the attachment it was in the possession of Davis. The officer who attached it put it into the possession of the

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defendant to hold as his keeper or servant. Before bringing his action the plaintiff did not give to the officer or the defendant, the notice in writing required by R. S. chap. 81, § 44.

The plaintiff does not claim that he could maintain the action against the officer without first giving such notice, but claims that he was not required under the facts in this case to give the notice, because the action is not against the officer. The question raised is whether the defendant can make the same defense that the officer could make if the action was against him. We think he can. The defendant is the servant of the officer, holding the property for him. He has all the rights that his master has. His possession is the possession of the attaching officer, and the attachment remains in full force. No other officer could attach the property on a writ against Davis and take it out of the possession of the defendant. The officer who made the attachment might make other attachments against Davis without a new seizure of the property. These principles are too well settled to require citation of authorities. The policy of the statute applies in all its force. It frequently occurs that an officer who attaches personal property cannot keep it in his actual possession all the time, but must employ a servant for such purpose. Can it be that the statute should be so construed that while the officer is present, having the actual possession of the property, a mortgagee cannot bring an action of replevin and take it from him without first giving notice, but the moment he is obliged to leave it in the care of his servant, the action may be brought and maintained against the servant without the notice? If so it is quite easy to evade the statute. The statute should be liberally construed to effectuate its object. *Nichols v. Perry*, 58 Me. 29.

The action is virtually against the officer. It takes the property out of his possession, and cannot be maintained without the notice required by the statute.

Plaintiff nonsuit.

Peters, Ch. J., Walton, Danforth, Foster and Haskell, JJ., concurred.

Benjamin F. OTIS

v.

Stephen ELLIS and Trustees.

1. A matter in abatement must be pleaded in a justice court, before a continuance of the action.
2. Taking an appeal in a justice court, without making any general defense, is a waiver of all questions except the one the decision of which is appealed from.

(Kennebec—Decided December 30, 1885.)

APPPEAL from the Superior Court. *Exceptions overruled.*

This was an action of *assumpsit* brought by Benjamin F. Otis against Stephen Ellis, principal defendant, and Edwin A. Nash, of Brewer, in the County of Penobscot, and J. Wesley Gilman, of Oakland, in the County of Kennebec, as trustees.

The writ was dated October 3, 1884, and was returnable October 11, before George W. Ayer, Esq., a trial justice within and for the County of Kennebec, at the office of Geo. W. Field, in said Oakland, in Kennebec County.

On October 11, 1884, G. T. Stevens, counsel for the principal defendant, and E. A. Nash, one of the alleged trustees, appeared generally and asked for a continuance, for two weeks, to October 25, 1884, at which time defendant's counsel appeared, filed his pleading, the general issue and a brief statement; also, a motion to dismiss, on the ground of want of jurisdiction.

Mr. G. T. Stevens, for E. A. Nash, Trustee:

All trustee actions returnable before a trial justice should be commenced within the county where some one of the trustees resides; and if not so brought the action should be dismissed. R. S. chap. 86, § 5; *Mansur v. Coffin*, 54 Me. 314.

In *Bigelow v. Stearns*, 19 Johns. 39, Spencer, C. J., declared that if a court, whether of limited or superior jurisdiction, undertake to hold cognizance of a cause of action without having gained jurisdiction of the persons of the parties, by having them before the court in the manner required by law, the proceedings would be void.

No legal service was made upon J. Wesley Gilman. The court below had no jurisdiction over him, on this account, and was incompetent to render a valid judgment against him. *Penobscot R. R. Co. v. Weeks*, 52 Me. 456.

The judgment, if void in part is void in all; if reversed as to one of the parties, it must be reversed as to all. 2 Saund. 101; 2 Bac. Abr. 227, 228; *Benner v. Welt*, 45 Me. 483; *Richards v. Walton*, 12 Johns. 434; *Arnold v. Sanford*, 14 Johns. 417.

Any party may avail himself of this objection. *Scudder v. Davis*, 33 Me. 576.

There is no law establishing terms of court for a trial justice. He can hold his court at his dwelling house or other suitable place, and adjourn it from time to time, as justice requires. R. S. chap. 83, § 15. There are no terms about it.

In the supreme judicial court, pleas or motions in abatement or to the jurisdiction must be filed within the first two days after entry. Rule 6. This rule controls the practice in the supreme judicial court. It does not affect or control the practice in any other court.

In *Elder v. Dwight Mfg. Co.* 4 Gray, 201, it was held that a motion to dismiss a case, for want of jurisdiction in the magistrate before whom it was tried, might be first made in the court of common pleas to which the case had been appealed.

Mr. George W. Field, for plaintiff:

A general appearance and a continuance of the action is a waiver of all defects of service. *Shaw v. Usher*, 41 Me. 102.

The defendants' motion to dismiss was unseasonably filed. The motion should have been filed on the 11th day of October, 1884, which was the return term or return day in the case at bar.

Motions or pleas in abatement should be filed within the first two days of the term to which the suit or process is returnable. *Fogg v. Fogg*, 31 Me. 302; *Snell v. Snell*, 40 Me. 307; *Shorey v. Hussey*, 32 Me. 579; *Puttee v. Low*, 35 Me. 124.

In all actions returnable before a trial justice all motions should be filed on the return day of the writ.

Peters, Ch. J., delivered the opinion of the court:

An action was commenced before a magistrate, in Kennebec County, in which the names of two persons were inserted as Trustees, one residing in Penobscot and the other in Kennebec County. No service was made on the Trustee residing in Kennebec County. Upon the face of the papers, the process was abatable. *Mansur v. Coffin*, 54 Me. 314.

An appearance was entered for the defense on the return day and the action continued a week. Upon the adjourned day a motion was made to dismiss the action for want of jurisdiction, upon the ground that a trustee action before a trial justice must be brought in a county in which some one of the trustees resides. The question is whether the motion came too late. We think it would be the better doctrine to declare that it did.

The general rule is that nothing more than the general issue need be pleaded before justices' courts, title to land and matter in abatement excepted. *Williams v. Root*, 14 Mass. 273; *Vickery v. Sherburne*, 20 Me. 34; R. S. chap. 83, §§ 15, 20. See, Laws 1885, chap. 255.

Pleas and motions in abatement should be filed before a general imparlance, which is nothing else than a continuance of the cause till a further day. Bac. Abr. Pleas, C.

This is not a rule of court, but a rule of law, acted on generally by courts of common-law jurisdiction, where there is no rule of court to the contrary. In most courts the time for such pleading is shortened. *Martin v. Commonwealth*, 1 Mass. 347; *Wyman v. Dorr*, 3 Me. 183, 186.

We do not perceive any objection in applying the rule to justices' courts, and to holding that after a general continuance (a special imparlance could be granted), it is too late to interpose the plea. The plea is not a favored one. Neither trial justices nor those who practice before them are, in all instances, legal experts, and it is for the advantage of the court and its suitors that technical questions in abatement should be at the earliest moment made and disposed of. The object of the plea is to avoid further costs if the plea is good. If this rule is not applied, it will be difficult to find a better. The only other definite rule would be to allow a plea in abatement to be filed at any time before the general issue is pleaded. But that would cause unfairness often. A plaintiff should know what plea he is to meet before summoning his witnesses. It is to be admitted that the rule would work somewhat harshly in the present instance, but its effect in cases generally will be beneficial.

What light there is upon the question, afforded by the authorities, seems to favor this view.

In *Stiles v. Homer*, 21 Conn. 510, it is said: "Although no time has been limited, either by statute or by any rule of court, in which such pleas shall be presented, in cases before justices of the peace and other inferior tribunals, yet it is obvious that they ought not to be received in any stage of the trial. The same reason there exists for requiring pleas to be presented at an early period as exists in the higher courts." In that case, a motion in abatement was rejected as coming too late, although the general issue had not been pleaded.

The Vermont court approves and practices upon the rule. *Montpelier v. Andrews*, 16 Vt. 604.

note; Wheelock v. Sears, 19 Vt. 559. And New Hampshire seems to approve it. *Bedford v. Rice*, 58 N. H. 227.

The appellant contends that if this motion is overruled he should be allowed to put in a general defense for himself and the Trustee. It is too late. The general issue should have been pleaded before the case came up. Taking an appeal, without making any general defense, is a waiver of all questions, except the one the decision of which is appealed from. *Water-ville v. Howard*, 80 Me. 103. *Elder v. Dwight Mfg. Co.* 4 Gray, 201, relied on by counsel as an authority the other way, is not applicable. There the jurisdiction belonged, not in another county, as here, but to another court.

Exceptions overruled.

Walton, Danforth, Libbey, Emery and Haskell, JJ., concurred.

Fred S. MERRILL

v.

WESTERN UNION TELEGRAPH CO.

1. A verbal contract to labor at a fixed price per day, to commence on a day certain but for no stipulated or fixed period, is defeasible at the will of either party.
2. A telegraph company is liable for nominal damages only, for its failure to deliver a telegram, whereby a party loses the benefit of a contract for labor, which is defeasible at the will of either party.

(Androscoggin—Decided January 19, 1886.)

THIS action was brought to recover compensation for damages sustained by plaintiff, by defendants' failure to deliver a telegraphic message; and under the agreed statement of facts the only question for the court to consider on appeal is that of damages.

The plaintiff's brother, C. W. Merrill, in Brockton, Mass., had made in behalf of the plaintiff who resides in Lewiston, a verbal contract for the employment of the latter in a shoe shop in Brockton, the price agreed upon being \$2.25 per day. No definite time was specified for the continuance of the engagement, either party being at liberty to terminate it at any moment, and neither being bound to continue it longer than he desired.

On August 30, 1884, C. W. Merrill telegraphed the plaintiff at Lewiston, in care of B. F. Bradford & Co., in these words: "Come at once to commence Monday; answer." This telegram was delivered at the office of Bradford, Conant & Co., instead of B. F. Bradford & Co., and never reached the plaintiff. The plaintiff was not aware of this telegram or of the contract until September 3, when he received a letter from his brother informing him of the fact and that the engagement had then been canceled.

Messrs. Savage & Oakes, for plaintiff:

The contract for future employment for an indefinite time is recognized as a legal contract in various cases. It has a value, and is assignable. 7 Met. 335; 5 Gray, 49, 50.

The plaintiff having lost a contract of value to himself, the damage was the direct consequence of the defendant's negligence, as directly the consequence as was the damage in the cases: *True v. Int. Tel. Co.* 60 Me. 9, and *Bartlett v. West. Un. Tel. Co.*, 62 Me. 209.

One of the leading cases on the question of damages for loss by reason of breach of contract is *Masterton v. Mayor*, 7 Hill, 61.

In this case it is held that a right to damages equivalent to the profits to be earned by the faithful execution of a fair contract, results directly and immediately from the act of the party who prevents the contract from being performed. 42 Am. Dec. 38; 7 Cush. 523; 115 Mass. 298.

In case of wrongful attachment of property whereby the business of a firm was injured, damages for loss of probable profits were allowed. 18 Ala. 160; 48 Am. Dec. 59.

There is a clearly marked distinction between the right of plaintiff to damages in case of action for breach of contract and in case of tort. 1 Sedg. Dam. 7th ed. 129, and *note b*.

Messrs. Baker and Cornish, for defendant:

In general, the delinquent party is holden to make good the loss occasioned by its delinquency. Remote or speculative damages, although susceptible of proof and deducible from the non performance, are not allowed. *Miller v. Mariner's Ch.* 7 Me. 51; *True v. Int. Tel. Co.* 60 Me. 24.

If any principle in the law of damages is well settled, it is that possible gains and contingent profits are not allowed. *Hadley v. Baxendale*, 9 Exch. 341; *Squire v. West. U. Tel. Co.* 98 Mass. 282; *West. U. Tel. Co. v. Graham*, 1 Col. 230; *Leonard v. N. Y. A. & B. E. M. Tel. Co.* 41 N. Y. 544; *Hamlin v. G. N. R. Co.* 1 Hurl. & N. 408; *Lane v. Montreal Tel. Co.* 7 U. C. C. P. 23; *Reliance Lumber Co. v. W. U. Tel. Co.* 58 Tex. 394; *First Nat. Bank v. W. U. Tel. Co.* 30 Ohio St. 553; *Berry v. Duclinel*, 44 Me. 255; *Ripley v. Mosely*, 57 Me. 76; *True v. Int. Tel. Co.* 60 Me. 9.

The law is stated thus: "The actual injury which the employer of a telegraph company sustains through a breach of the contract to communicate his message is the failure to obtain the benefit that he would have obtained; or in other words, the failure to occupy the position that he would have occupied, through the due communication of his message." Gray, Com. by Tel. § 82.

Assuming that such a contract is void, its worthlessness follows, and no damages can in such a case be recovered of the company. *Melchert v. Am. U. Tel. Co.*, 11 Fed. Rep. 193.

In order that a contract be of value, it must be certain in all its essential elements, and enforceable. A nonenforceable contract has no value. *Kinghorne v. Montreal Tel. Co.* 18 U. C. Q. B. 60.

The plaintiff might be entitled to nominal damages, if his action was merely for not delivering the message; but he is not entitled to damages in the present form of action, for loss on a contemplated contract, unsettled and undefined in its terms, and which might never have been carried out to the extent claimed by the plaintiff. See also, *Beaupre v. Pac. & A. Tel. Co.* 21 Minn. 155; 2 Thomp. Neg. 863; *West. U. T. Co. v. Connelly*, Tex. Ct. App. Chicago Leg. News, Mar. 29, 1884.

It is very evident that plaintiff could recover nothing, for no agreement had been broken under the terms of this contract. Continuance in service was to be entirely voluntary on the part of either. *Blaisdell v. Lewis*, 32 Me. 515.

There must be some definite and clearly defined basis, upon which damages may be reckoned. They must be certain, both in their nature and in respect to the cause from which they proceed. *Griffin v. Colver*, 16 N. Y., 489.

Haskell, J., delivered the opinion of the court:

Damages are sought for the inexcusable non-delivery of a telegram, whereby the plaintiff was prevented from performing his contract to labor.

The plaintiff's agent completed a verbal contract that the plaintiff should labor for a manufacturer at \$2.25 per day, commencing Monday, September 1, and seasonably required the defendant to transmit a message to the plaintiff, notifying him of its terms. The message was not delivered in season for the plaintiff to begin his work as stipulated, and thereby he lost his employment. The defendant denies liability beyond nominal damages. The contract was defeasible at the will of either party. How then can any substantial damage be measured? Had the engagement to employ the plaintiff been for a stipulated and definite period, not over one year, the plaintiff would have a right to demand damages that could be definitely measured and assessed. He would then have been entitled to enjoy the fruit of his labor during the time of his engagement; but under the terms of the contract in proof, he was liable to be dismissed from his employment as soon as he had entered upon it, and it cannot be known what damages he has suffered in the premises. The plaintiff must prove his damages before they can be assessed. The case fails to show facts that warrant greater than nominal damages. *Miller v. Mariner's Ch.* 7 Me. 51; *Braisdell v. Lewis*, 32 Me. 515; *True v. Int. Tel. Co.* 60 Me. 9; *Griffin v. Colver*, 16 N. Y. 489.

Defendant defaulted for \$1.

Peters, Ch. J., Walton, Virgin, Libbey and Foster, JJ., concurred.

Arthur S. COLE

v.

John C. BABCOCK.

In an action for slander, the declaration should definitely set out the time when the alleged slanderous words were uttered.

(Kennebec—Decided December 22, 1885.)

ON defendant's exceptions. *Sustained.*

The case is stated in the opinion.

Mr. A. M. Spear, for plaintiff.

Messrs. Clay & Clay, for defendant.

Foster, J., delivered the opinion of the court:

Action on the case to recover damages for alleged slanderous words which the plaintiff

claims were spoken of and concerning himself. The case comes before the court on demurrer to the declaration, which contains three counts, in each of which the words are alleged to have been uttered "about the first of April 1884."

In neither count has the plaintiff definitely set out the time when the alleged words were uttered. There is not that certainty as to time which the fundamental rules of pleading require to be alleged in reference to traversable facts. "In personal actions, the pleadings must allege the time; that is, the day, month and year when each traversable fact occurred." Steph. Pl. chap. 2, § 4, Rule 2; 1 Chit. Pl. 257.

"It is a general rule of pleading in personal actions, that the time of every traversable fact must be stated; that is, that every such fact must be alleged to have taken place on some particular day"; Gould, Pl. chap. 8, § 63; and it is held that this rule applies where it is not material to prove the time as laid. *Platt v. Jones*, 59 Me. 241. The word "about" renders the allegation of time indefinite and uncertain. *Platt v. Jones*, *supra*; *State v. Baker*, 34 Me. 52. A reference to the decisions where this question has been adjudicated is all that is necessary. *Gilmore v. Mathews*, 67 Me. 520; *Gray v. Sidelinger*, 72 Me. 114; *Moore v. Lothrop*, 75 Me. 302; *Ring v. Rozbrough*, 2 Crompt. & Jervis, 418.

Whether an amendment may not be allowed can be settled by the court below.

Exceptions sustained.

Peters, Ch. J., Walton, Danforth, Libbey and Emery, JJ., concurred.

STATE of Maine

v.

KNOX & LINCOLN R. R. CO.

A railroad company is not liable to taxation, under a general law for the taxation of railroads, where its charter provides that a portion of its net income shall be paid to the State as a tax and that "No other tax than herein is provided shall be levied or assessed on said corporation or any of its privileges, property or franchises."

(Knox—Decided January 11, 1886.)

ACTION brought by the State to collect a tax levied against the property and franchises of a Railroad Company.

Mr. Orville D. Baker, Atty-Gen., for the State.

Mr. Henry Ingalls, for defendant.

Haskell, J., delivered the opinion of the court:

Debt for a tax laid under chapter 91 of the Laws of 1881. The original charter, under which the defendant exists, was granted August 13, 1849, and after providing that a portion of its net income shall be paid to the State as a tax, further provides that "No other tax than herein is provided shall be levied or assessed on said Corporation, or any of their privileges,

property or franchises," and that the Legislature shall have power to impose fines and penalties necessary more effectually to compel compliance with its charter, "but not to impose any other or further duties, liabilities or obligations." §§ 15, 17.

It was held in *State v. Dexter & Newport R. R. Co.* 69 Me. 44, that the defendant, holding a charter in terms almost identical with the charter of defendant, was not amenable to a tax laid upon it, other than specified in its charter. That case must be held to be decisive of the case at bar.

Judgment for defendant.

Peters, Ch. J., Walton, Virgin, Libbey and Foster, JJ., concurred.

Louise R. WILLIAMS

v.

Thomas WILLIAMS.

1. A demand for dower in an undivided portion of real estate, by a divorced wife upon her former husband, **need not be made** upon the cotenants of the husband, in order to entitle her to maintain her action of dower.
2. The demand for dower is good, although it covers more land than is described in the demandant's writ, in her action of dower.
3. The demandant's husband held lands by descent from his father, whose widow was entitled to dower therein. After the demandant's action of dower, as a divorced wife, was brought, the widow applied to the probate court to have her dower assigned. In proceedings duly had, her dower in all the lands was set out and assigned to her in one of the parcels, without objection by her or by the heirs, and the assignment was accepted by the Judge of probate. Held, that the assignment was valid and binding on the parties and that it defeated the demandant's right to dower in that parcel.

(Franklin—Decided January 4, 1886.)

ACTION for dower, by a divorced wife.

Judgment for demandant.

The claim of dower was made on thirteen parcels of land, in only one of which defendant held the entire interest. The other parcels were owned by him as tenant in common with other parties. No question was raised as to her right to dower in the parcel in which he held the entire interest, the controversy being as to the remaining lots.

Messrs. Walton & Walton, for plaintiff:

Plaintiff is entitled to a third part of the share of defendant, formerly her husband, to hold in common with him and the other tenants. 1 Scrib. Dow. 327; 2 *Id.* 74; 1 Washb. Real Prop. 269, 270; 1 Greenl. Cruise, Real Prop. 170; 1 Hilliard, Real Prop. 581; *Blossom v. Blossom*, 9 Allen, 254.

Bringing her action against defendant who holds, in common with others, the whole portion in which she has dower, she is to have judgment

against him for one third of the number of his parts in the whole number to be divided. 1 Co. Litt. 82 b.

Can any good reason be given why demand should be made upon the other cotenants? How could it help matters to demand dower of them and bring them in as defendants in this suit? It is not a matter which concerns them. They cannot control defendant, either in his sale of any portion of his interest or in the setting of it out or any portion of it, as dower; nor in his alienating it in any way.

She did not ask them to do anything, as she did not understand that she had any claim upon them or anything to do with them, in regard to her assignment, any more than if she had been a purchaser of one third of defendant's interest.

In many of our States, the wife's release must not only be witnessed but acknowledged, and that, too, in the presence of a magistrate, separate and apart from her husband. 2 Scrib. Dow. 2d ed. 321-335.

Why has this, the release of dower, not been acknowledged and recorded, even since the divorce?

But how could this release to defendant's mother, if established, avail defendant in this action? He does not claim under his mother. He does not plead it in abatement. *Pixley v. Bennett*, 11 Mass. 298.

It cannot avail, pleaded in bar or otherwise. *Manning v. Laborce*, 33 Me. 846; *Young v. Tarbell*, 37 Me. 514; *Robinson v. Bates*, 3 Met. 40.

Does the assignment of dower to defendant's mother affect the rights of plaintiff in this action? Her dower in several different parcels was set off to her by her being given the whole of one parcel as her full dower in all the parcels, when it should have been assigned as to each lot, separately; one third of each tract being assigned to her. *French v. Pratt*, 27 Me. 381; *Jones v. Brewer*, 1 Pick. 817.

This would, perhaps, operate to bind all those who were parties thereto, as an assignment by consent against common right. *French v. Pratt*, *supra*.

Such an assignment by consent, however, is only binding upon those who do consent. 2 Scrib. Dow. 1st ed. 71-82; *Barton v. Hinds*, 46 Me. 124.

Plaintiff was not a party. She gave no consent to this assignment. As to her, the dower of the elder lady has no effect and is not to be considered until lawfully set out. 1 Bright, Husband & W. 352, 353; 2 Scrib. Dow. 2d ed. 89.

Her divorced husband, after the divorce, cannot, with the other heirs, consent to an assignment of dower which will bind her. 1 Bright, Husband & W. 366.

Plaintiff does not take her dower as the representative of her husband nor by descent from him. Her title cannot be affected by any act of the husband nor by any proceeding to which she is not a party. 2 Scrib. Dow. 1st ed. 334, 335.

The elder Mrs. Williams accepting an assignment, contrary to common right, claims it in the nature of purchaser, so her title is subject to plaintiff's. 1 Bright, Husband & W. 388; 1 Co. Litt. 32 b, *note*; and her assignment of dower cannot affect the plaintiff's rights.

Moreover, if it had been assigned according to common right, how could this claim of dower,

not made by the elder lady until after the return term of this action, and so, of course, not pleaded in abatement, affect this action. *Manning v. Laboree, supra.*

Mr. H. L. Whitcomb, for defendant :

The demand should contain such a description of the estate as will give notice of what land dower is demanded in. A demand of all the lands of which her husband was seised during the coverture is too vague and indefinite. *Ford v. Erskine*, 45 Me. 484.

Demand should have been made on the tenant or tenants of the freehold and the action should have been brought against the same. R. S. chap. 103, §§ 16, 20.

"Tenant of the freehold" means all the tenants. The estate of a tenant in common is subject to dower as if held in severalty, but it will be set off in common, unless partition be made during the life of the husband, between the tenants. 1 Washb. Real Prop. 158, 4th ed. 199.

But such is not the case with joint tenants. "From the nature of the estate of joint tenants, no right of dower attaches in favor of either of the tenants which his wife can enforce, unless her husband survives the others." 1 Washb. Real Prop. 157, 4th ed. 198 and cases there cited in note.

A joint tenancy is created in lands when two or more persons obtain their title jointly, at the same time, by one and the same deed, or will, or death of an ancestor, when the estate is of the same nature and quality of interest. 4 Kent, Com. 357; 2 Bl. Com. 180.

The dower of the senior widow should be deducted from all the real estate in which she was dowable; and then, in any event, the junior widow would be dowable in only the remaining two thirds, provided her husband was sole owner of the premises. And there is no distinction, whether the senior widow has caused her dower to be set out or not, provided she was dowable. *McLeery v. McLeery*, 65 Me. 172.

According to this decision, it matters not whether the senior widow's dower had been legally assigned or set out to her or she had suffered it to remain as an inchoate or incipient right. The opinion of Peters, *Ch. J.*, in that case and the authorities there referred to, are conclusive upon this point. See: *Matter of Cregier*, 1 Barb. Ch. 598; 45 Am. Dec. 416; *Safford v. Safford*, 7 Paige, 259; 8 C. 32 Am. Dec. 633; *Eldredge v. Forrestal*, 7 Mass. 253; *Brooks v. Everett*, 13 Allen, 457; *Geer v. Hamblin*, 1 Me. 54.

If the husband have only a reversion or remainder after a freehold estate in another, although it be in fee, it will not give his wife a right of dower therein. 1 Washb. Real Prop. 154.

But the dower of the senior widow was legally set out and assigned to her. *French v. Pratt*, 27 Me. 381; *French v. Peters*, 33 Me. 396. She accepted it as her dower, and no appeal was taken, and the proceedings were affirmed.

Demandant is entitled to no damages for detention after demand; she has made no claim for any damages in her declaration. *Larrabee v. Lumbert*, 36 Me. 440.

The demandant signed away her dower in one undivided half of the saw mill lot, by her deed, dated August 8, 1873.

Our statute does not require a deed to be wit-

nessed and the law is well settled that, as between the parties, a deed is just as binding without being acknowledged as if acknowledged and recorded.

Libbey, J., delivered the opinion of the court :

The demandant brings this action, as the divorced wife of the tenant, to recover her dower in thirteen parcels of land of which she alleges he was seised during coverture.

The tenant objects to the maintenance of the action for want of a sufficient demand. It is claimed that the demand is insufficient, because it is a demand of dower in an undivided share of the lands owned by the tenant, in common with others, and no demand was made on his cotenants. The statute does not require it. The demand must be made upon the person who is seised of the freehold. The demandant does not seek to recover her dower in the whole of the land, but in the undivided share of the tenant. He is tenant of the freehold of such share. His cotenants are not seised of his share as tenants of the freehold. They have no interest in the demandant's claim and no demand on them is required. It is further claimed that the demand was of her dower in the whole of the lands described, while in her writ she claims dower in an undivided share only. This objection is not tenable. *Hamblin v. Bank of Cumberland*, 19 Me. 66.

The contention between the parties relates to the demandant's right to dower in the first and ninth parcels described in her writ. There appears to be no controversy in regard to her right to dower in the other parcels. As to the ninth parcel, the homestead of Thomas Williams, deceased, father of the tenant, we do not think the demandant dowable. The tenant inherited one fourth of this and most of the other parcels described, as one of the heirs of his father, who died leaving a widow, Sally G. Williams, and four children. Sally G. Williams had a right to dower in the lands of her deceased husband. The estate taken by the children was subject to that right and hence the demandant's right to dower was subject to the right to dower of the senior widow. After the action was commenced, Sally G. Williams presented her petition to the probate court to have her dower in the lands of which her husband died seised, set out and assigned to her; and upon proceedings duly had therefor, the homestead was set out to her by the commissioners, as her dower in all of said lands. The report of the commissioners was accepted and her dower was assigned by the court accordingly. This assignment was in conformity with one of the modes of assigning dower, as between the widow and heirs, recognized by the law of this State and is conclusive upon the parties. *French v. Pratt*, 27 Me. 381; *French v. Peters*, 33 Me. 396.

The land set out to her was land of which she was dowable, and by the assignment, her seisin, by relation, extends back to the death of her husband and is a continuation of his seisin. The tenant, then, was never seised of one fourth of this land during coverture, so as to give the demandant right to dower in it. *McLeery v. McLeery*, 65 Me. 172.

The evidence of the assignment of dower to the senior widow is admissible to disprove the alle-

gation of the seisin of the tenant. As to the first parcel, the saw mill, the tenant claims that the demandant is dowerable of 5-16ths only, on the ground that she joined with him in a deed of one undivided half thereof to Sally G. Williams, August 8, 1873, releasing her right to dower. The demandant denies the execution of that deed by her, and this issue was tried to the jury, who found for the demandant. The tenant claims that the verdict should be set aside as against the evidence. The evidence was conflicting and not very satisfactory, but the credibility of the witnesses and the weight that should be given to their testimony were for the jury to determine. Upon a careful examination of the evidence, we do not think it preponderates so strongly in favor of the tenant as to justify the court in setting the verdict aside.

Judgment for the demandant for her dower in all the land described in her writ, except the ninth parcel.

Peters, Ch. J., Walton, Danforth, Foster and Haskell, JJ., concurred.

Susan H. SHANNON

v.

BOSTON & ALBANY R. R. CO.

1. A person waiting at a railroad station for passage upon a train soon to depart, who is invited by the ticket agent to sit in an empty car standing on the side track while the station room is being cleaned, is entitled to the same protection from the company while in the car as if in the regular waiting room; in either place, the person is a passenger in the care of the company.
2. It is *prima facie* negligence for a passenger to jump upon or off a moving train.
3. In an action against a railroad company for an injury received in jumping from a moving train it is incumbent on the plaintiff to prove a reasonable excuse for the act, and except in extreme cases that is a question of fact for the jury. Fear of personal danger is not the only excuse that will justify one in jumping from a moving train.
4. In some cases and under certain circumstances, a passenger may be justified in alighting from a moving train, to save himself serious inconveniences.

(York—Decided December 22, 1885.)

ON defendant's exceptions. *Overruled.*

Case, to recover damages for a personal injury alleged to have been sustained through the negligence of defendant.

There was a jury trial, resulting in a verdict for \$3,091.66 in favor of plaintiff. The case is now presented to the full bench, on exceptions and on a motion for a new trial on the ground of excessive damages.

The facts are stated in the opinion.

Mr. W. F. Lunt (Portland), for defendant: In entering the car from which she afterwards jumped, the plaintiff voluntarily took a
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position exposed to just the movement she encountered.

In *Sweeney v. Old Colony & Newport R. R. Co.*, 10 Allen, 363, the court say of passengers: "If they voluntarily take exposed positions with no occasion therefor nor inducement thereto, caused by the managers of the road, except a bare license by noninterference, or express permission of the conductor, they take the special risk of that position upon themselves." See also, *Hickey v. B. & L. R. R. Co.* 14 Allen, 433; *Abend v. Terre Haute R. Co.* 19 Cent. L. J. 850.

The Judge should have instructed the jury as requested, that if the plaintiff would have been safe if she had not jumped from the car, her act of jumping, by which she received injury, is evidence that she acted rashly. *Wilson v. North. Pac. R. R. Co.*, 26 Minn. 278.

But even when in peril of injury a passenger is only justified in jumping if an ordinarily prudent person would have done so. *Card v. Ellsworth*, 65 Me. 547; *G. & Ch. U. R. R. Co. v. Fay*, 16 Ill. 558; *Stokes v. Saltonstall*, 13 Pet. 181 (38 U. S. bk. 10, L. ed. 116); *Ingalls v. Bills*, 9 Met. 1; 24 Ga. 356; *Jones v. Boyce*, 1 Stark. 498; 86 Ohio St. 418.

Where there is a prospect of collision, a passenger jumping from train may be in the exercise of due care. *Buel v. N. Y. C. R. R. Co.*, 31 N. Y. 314.

The plaintiff was not put to an election in choosing a course to avoid personal hurt. If she had remained quietly in the car she would have received no injury; she was there safe. This fact is in evidence that she acted rashly. *Wilson v. North. Pac. R. R. Co. supra*; and when an injury is so caused by the plaintiff's own carelessness or rashness, an action for damages therefor is not maintainable. *Whart. Neg.* § 427 and note 1; *Brown v. E. & N. A. R. Co.*, 58 Me. 384.

The ground of the plaintiff's fear, as shown by the evidence, was not based upon any apprehension of personal hurt. In her mind it was simply the anticipation of delay and inconvenience. It may be said that such action on her part was perfectly natural, but the reply is that there are many things natural for man to do which he is not authorized or justified by law in doing.

"Where a passenger voluntarily leaves a train of cars while in motion, simply to avoid being carried beyond the station where he desires to stop, and in doing so receives an injury, his own negligence is the proximate cause of the injury, and he cannot recover of the company though the conductor was in fault in not stopping the train." *Jeff. R. R. Co. v. Hendricks*, 26 Ind. 228; *Same v. Swift*, Id. 459. And see, *Evanville & C. R. R. Co. v. Duncan*, 28 Id. 441; *Damont v. N. O. & C. R. R. Co.* 9 La. Ann. 441; *R. R. Co. v. Apell*, 23 Pa. St. 147; *Morrison v. Erie R. Co.* 56 N. Y. 302; *Ill. Cent. R. R. Co. v. Slaton*, 54 Ill. 189; *Garrett v. M. & L. R. R. Co.* 16 Gray, 501; *Lucas v. New Bedford & T. R. R. Co.* 6 Gray, 64.

In *Burrows v. Erie R. Co.* 63 N. Y. 556, plaintiff attempted to get off after the train had started; held, he could not recover even if defendant did not stop long enough at station. See also, 57 Tex. 88; *Harvey v. Eastern R. R. Co.* 116 Mass. 269; *Brooks v. B. & M. R. R.*

185 Mass. 21, and in *Commonwealth v. B. & M. R. R.* 129 Mass. 500, the court specifies clearly the duties of the carrier and holds that when the passenger jumps from a moving train, he forfeits his rights as a passenger.

When the plaintiff offers no evidence that he was in the exercise of due care, but on the contrary the whole evidence on which his case rests shows that he was wanting in due prudence, the court, it is held, may rightfully instruct the jury as matter of law that the action cannot be maintained. *Detroit & M. R. R. Co. v. Van Steinburg*, 17 Mich. 99, 120, citing *Cotton v. Wood*, 8 C. B. N. S. 568; *Gahagan v. Boston & L. R. R. Co.* 1 Allen, 190; *Todd v. Old Colony & F. R. R. Co.* 3 Id. 21; *Wright v. Malden & M. R. R. Co.* 4 Id. 288; *Wilson v. Charlestown*, 8 Id. 137; *Callahan v. Bean*, 9 Id. 401; *Trow v. Vt. Cent. R. R. Co.* 24 Vt. 497; *Briggs v. Taylor*, 28 Id. 180; *North. Pa. R. R. Co. v. Heileman*, 49 Pa. St. 63; *Ginnon v. N. Y. & H. R. R. Co.* 3 Rob. 25.

Crossing a railroad track without looking and listening for an approaching train is, *prima facie*, negligence; so this court recently held in *State v. Me. Cent. R. R. Co.* 76 Me. 365.

In *Wright v. Malden & M. R. R. Co.* 4 Allen, 289, the court says distinctly: "We think the fact that a child of two years old is passing unattended across a public street in a city, traversed by a horse railroad, is in and of itself necessarily *prima facie* evidence of neglect in those who have it in charge." It is a fact open to explanation and not conclusive. But in and of itself standing alone, unexplained and unaccounted for, it is sufficient to authorize a jury to find that the child was not properly taken care of and to entitle the defendant to a verdict.

Where a person walks upon a railroad track without precaution against the approach of trains it is, *per se*, negligence. *Herring v. Wilmington & R. R. Co.* 10 Ired. L. 402. And see, *Hartry v. C. R. R. Co.* 42 N. Y. 468; *Terre Haute & I. R. R. Co. v. Graham*, 46 Ind. 239; *Holmes v. Cent. R. & B. Co.* 37 Ga. 593; *Maher v. Atlantic & Pac. R. R. Co.* 64 Mo. 267; *Coywell v. Oregon & C. R. R. Co.* 6 Or. 417; *Illinois Cent. R. R. Co. v. Modglin*, 85 Ill. 481.

So, crawling under a car stopped temporarily upon the track. *Ostertag v. Pacific R. R. Co.* 64 Mo. 421; *Cent. R. & B. Co. v. Dixon*, 42 Ga. 327; *Chicago, B. & Q. R. R. Co. v. Dewey*, 26 Ill. 255; *McMahon v. Northern Cent. R. Co.* 39 Md. 438.

Riding with a portion of the body protruding from the car windows is, *per se*, negligence enough to justify a nonsuit. *Todd v. Old Colony & F. R. R. Co.* *supra*; *Pittsburg & C. R. R. Co. v. Andrews*, 39 Md. 829; *Indianapolis & C. R. R. Co. v. Rutherford*, 29 Ind. 82; *Morel v. Mississippi Valley L. Ins. Co.* 4 Bush, 535; *Pittsburg & C. R. R. Co. v. McClurg*, 56 Pa. St. 294; *Louisville & N. R. R. Co. v. Sickings*, 5 Bush, 1; *Holbrook v. Utica & S. R. R. Co.* 12 N. Y. 236.

If the court can see that if a verdict for the plaintiff should be rendered, it ought to be set aside as being unwarranted by the testimony, an instruction to find for defendant should be given in advance of the verdict. *Pleuants v. Fant*, 22 Wall. 116 (89 U. S. bk. 22, L. ed. 780); *Grand T. R. Co. v. Nichol*, 18 Mich. 170; *Garrett v. Manchester & L. R. R. Co.* 16 Gray, 501.

The facts being undisputed, the question of contributory negligence is one of law. *Morrison v. Erie R. Co.* 56 N. Y. 302; *Nicholls v. G. W. R. Co.* 27 Can. Q. B. 382; *Groves v. Me. Cent. R. Co.* 67 Me. 105.

And where there are no disputed facts in the case, the court may properly tell the jury in an absolute form how they should find. *Bevans v. U. S.* 13 Wall. 57 (80 U. S. bk. 20, L. ed. 531).

Messrs. Addison E. Haley and Edwin B. Smith, for plaintiff:

Mrs. Shannon was a "passenger." *Warren v. Fitchb. R. R. Co.* 8 Allen, 232; *Snow v. Same*, 136 Mass. 552; *Gordon v. G. S. & N. R. R. Co.* 40 Barb. 546; *Cent. R. R. & B. Co. v. Perry*, 58 Ga. 467; *Allender v. C. R. I. & P. R. R. Co.* 87 Iowa, 264, and, same case, on final trial, 43 Id. 277; *Bath & O. R. R. Co. v. Mahone*, 19 Rep. 757.

When a person has purchased his ticket and arrived at the point of departure, although he has not entered the cars, he is a passenger; and while waiting for the train to set out he is, as to all duties of the company toward him directly involving his safety, entitled to extraordinary diligence; and as to all duties involving merely his convenience or accommodation, to ordinary diligence. *Cent. R. R. & B. Co. v. Perry*, 58 Ga. 467; *Allender v. C. R. I. & P. R. R. Co.*, 87 Iowa, 264, and 43 Id. 280; *Cleveland v. N. J. Steamboat Co.* 68 N. Y. 306.

The request of the defense "that the plaintiff at the time she jumped from the car was not a passenger," was probably based upon a misapplication of the language employed in *Commonwealth v. B. & M. R. R.* 129 Mass. 501. That case was of one who designedly left the moving train which had brought him to his proposed destination; and which, a few seconds later, would have given him suitable opportunity to alight. Therefore, "a majority of the court" thought he had ceased to be a passenger by thus alighting.

Upon similar facts other tribunals have deemed the rule of law to be different from that held by the majority of the Massachusetts court. *Klein v. Jerrett*, 26 N. J. Eq. 474; *Pineo v. N. Y. Cent. & H. R. R. Co.* 84 Hun. 80, 83; *Bridges v. No. Lond. R. Co.* L. R. 7 H. L. 213; *Armstrong v. N. Y. C. & H. R. R. R. Co.* 66 Barb. 437; *Van Ostrand v. Same*, 42 Hun. 592.

In *Watkins v. G. W. R. Co.* 37 L. T. N. S. 193, 195, Denman, J., said the company's liability for due care was precisely the same toward a lady who was crossing the track to accompany an intending passenger to a car, in accordance with common and recognized usage, as toward the latter; quoting *Indermaur v. Dames*, 16 L. T. N. S. 293. And, see, *Doe v. M. K. & T. R. R. Co.* 59 Mo. 27; *Barrett v. Black*, 56 Me. 505; *Carleton v. Fran. I. & S. Co.* 99 Mass. 216; *Hoffman v. N. Y. C. & H. R. R. Co.* 13 Hun. 589; *Poucher v. N. Y. C. & H. R. R. Co.* 49 N. Y. 263; 59 Me. 183, to be found with notes in 8 Am. Rep. 415-417; *D. W. & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *S. C.* 24 Moak's Eng. Rep. 718.

Held, in *Bridges v. No. Lond. R. Co.* L. R. 7 H. L. 213, that the case should have gone to the jury upon the question of invitation to alight, being facts as in 129 Mass. 501.

The Judge *ad nisi prius* directed a nonsuit; and only consented to take the jury's finding

as to damages, \$6,000, upon "strong expression of opinion" on their part against the nonsuit; *N. E. R. Co. v. Wanless*, L. R. 7 H. L. 12.

Nothing, except the pertinacity with which the far fetched theory of a suspension of Mrs. Shannon's relation of passenger was pressed, would lead us to suppose that it would be denied that she was one to whom the Railroad Company owed the duty of due care. See, *Tobin v. P. S. & P. R. R. Co.* 59 Me. 188; *Campbell v. Port. Sug. Co.* 62 Id. 562; *Wilton v. M. R. R. Co.* 107 Mass. 108; *Day v. Brooklyn City R. R. Co.* 12 Hun, 439.

She entered these cars by direction of the station agent. This is not denied by any evidence. The defendants do not call their station agent, nor any other witness. "In the absence of controlling evidence to the contrary an ordinary railway station agent is to be taken as having general charge of the tracks at and about his station. This is a reasonable presumption of fact, founded upon the ordinary course of business, the common understanding of the public, and the nature and the necessities of the case." *Brown v. Minn. & St. L. R. Co.* 31 Minn. 554. And see, *Day v. Brooklyn City R. R. Co.* 12 Hun, 439, 440; affirmed in 76 N. Y. 593; *P. & R. R. Co. v. Derby*, 14 How. 485 (55 U. S. bk. 14, L. ed. 502); *Bennett v. R. R. Co.* 102 U. S. 580 (bk. 26, L. ed. 236); *Carpenter v. B. & A. R. R. Co.* 97 N. Y. 498; *Wilton v. M. R. R. Co.* 107 Mass. 110; *Mulhado v. Brooklyn City R. R. Co.* 30 N. Y. 870; *Newson v. N. Y. C. R. R. Co.* 29 N. Y. 389, 390; *Allender v. C. R. I. & P. R. Co.* 43 Iowa, 280; *Pool v. C. M. & St. P. R. Co.* 56 Wis. 232.

Being rightly in that car plaintiff was entitled to the same degree of care as a passenger, even if it were possible to maintain that she was not continuously a "passenger" in law; and the Judge was correct in charging that it was immaterial that it was not the car by which she was to be transported to her destination. Whart. Neg. § 381, citing *Pa. R. R. Co. v. McCloskey*, 23 Pa. St. 526; *Carroll v. N. Y. & N. H. R. R. Co.* 1 Duer, 571; *Keith v. Pinkham*, 43 Me. 501, 504; *Jacobus v. St. P. & C. R. R. Co.* 20 Minn. 125, 133-135, which cites *Dunn v. G. T. R. Co.* 58 Me. 187; *Van Ostran v. N. Y. C. R. R. Co.* 43 Hun, 593.

The one element of liability, the existence of which we do not understand to be questioned by the defense, is its own negligence. It is incontestible that it was guilty of neglect of the duty owed to us; that duty being to use, toward everybody lawfully upon their premises, the highest care which human caution and foresight can suggest. *McElroy v. N. & L. R. R. Co.* 4 Cush. 400; *Warren v. Fitchb. R. R. Co.* 8 Allen, 227; *Eaton v. B. & L. R. R. Co.* 11 Id. 504; *White v. Fitchb. R. R. Co.* 136 Mass. 324; *Cent. R. R. & B. Co. v. Perry*, 58 Ga. 487; *Allender v. C. R. I. & P. R. R. Co.* 37 Iowa, 264, and 43 Id. 280; *Bowen v. N. Y. C. R. R. Co.* 18 N. Y. 408; *Alden v. Same*, 26 Id. 102.

It being apparent that the defendant did not use the care demanded of it but was guilty of the grossest negligence, the question arises whether the jury were authorized to find that Mrs. Shannon exercised that degree of care which the law required of her. This was very different from that required of the Railroad Company. It was "ordinary care," i. e., such

as persons of ordinary sense, prudence and capacity would take under like circumstances. *Shrewsbury v. Smith*, 12 Cush. 177; *Shaw v. B. & W. R. R. Corp.* 8 Gray, 79; *Holly v. B. Gas Light Co.* 8 Gray, 181, cited in *Fletcher v. B. & Me. R. R. Co.* 1 Allen, 15; *O'Brien v. McGlinchy*, 68 Me. 558; *McIntyre v. N. Y. C. R. R. Co.* 37 N. Y. 293; *Snore v. Housat. R. R. Co.* 8 Allen, 449; *Ernst v. H. Riv. R. R. Co.* 82 How. Pr. 78, 79; *Harris v. Un. Pac. R. Co.* 18 Fed. Rep. 592; *Patrick v. Pote*, 117 Mass. 801, 802.

The universal practice is to leave the case to the jury, if there are any peculiar circumstances to be considered as impelling or qualifying the plaintiff's act. Hence, it is only in those exceptional instances where the plaintiff's act is to every, the most casual, observer so obviously careless that there could hardly be an honest difference of opinion that the court declares it to be contributory negligence as matter of law. *Larabee v. Sewall*, 66 Me. 330; *Hobbs v. E. R. R. Co.* Id. 575; *Gaynor v. Old Col. & N. R. Co.* 100 Mass. 212, and cases, *passim*; *Larabee v. Sewall*, 66 Me. 330; *O'Brien v. McGlinchy*, 68 Me. 555; *Whitney v. Cumberland*, 64 Me. 541; *Hobbs v. E. R. R. Co.* 66 Me. 575-577; *Ross v. B. & W. R. R. Co.* 6 Allen, 92; *Lawless v. Ct. R. R. R. Co.* 136 Mass. 5; *Barton v. Springfield*, 110 Id. 182; *Clayards v. Dethick*, 12 Q. B. Ad. & El. N. S. *439.

This case being very different from one of a passenger unnecessarily alighting from a train about to stop, or boarding or leaving one which has just started, the circumstances attending the plaintiff's act and qualifying it, were such as to require this case to be submitted to the jury. Cases cited, *supra*, and *Plummer v. R. R. Co.* 73 Me. 593; *Lawless v. Conn. Riv. R. R.* 186 Mass. 6.

The jury were, to say the least, authorized to find that Mrs. Shannon exercised ordinary care under the circumstances. "Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovering for his injury if he has adopted the course which most prudent men would take under similar circumstances." Shear. & Redf. Neg. § 81.

Note 1 to this says: "This section was quoted and followed by the court in *Johnson v. Belden*, 2 Lans. 423. See, *Reeves v. Del. L. & W. R. R. Co.* 30 Pa. St. 454.

The defendant is not excused merely because the plaintiff knew that some danger existed, through the defendant's neglect, and voluntarily incurred such danger. The amount of danger and the circumstances which led the plaintiff to incur it, are for the consideration of a jury. *Clayards v. Dethick*, *supra*; *Humphreys v. Armstrong Co.* 56 Pa. St. 204; *Foy v. L. B. & S. C. R. Co.* 18 Com. B. N. S. 225; *Filer v. N. Y. C. R. R. Co.* 49 N. Y. 47; *Rauch v. Lloyd*, 31 Pa. St. 358.

A passenger ought not to be deemed guilty of contributory negligence when he takes only such risk as under the circumstances a prudent man would take. Shear. & Redf. Neg. § 282; citing 49 N. Y. 47; *Delamaty v. Milwaukee, etc., R. R. Co.* 24 Wis. 578; 66 N. C. 494; *Gee v. Metrop. R. Co. L. R. 8 Q. B.* 161; *Keating v. N. Y. C. R. R. Co.* 3 Lans. 469.

The highest court of the defendant's domicile recently noticed that "The fact that a person voluntarily takes some risk is not conclusive

evidence under all the circumstances that he is not using due care." *Lawless v. Conn. Riv. R. R.* 136 Mass. 5, citing *Thomas v. West. Un. Tel. Co.* 100 Id. 156, and *Mahoney v. Metrop. R. R. Co.* 104 Id. 73.

It is obviously much more dangerous for one to attach himself to a moving train in an attempt to get on, than it is to try to separate himself from it by a leap. As matter of fact there was apparently very little danger in jumping, as the plaintiff did, from the rear end of the last car, moving "very slowly," as all the testimony shows that it was. Practically, there was no danger to life. The only risk, and that seemed, *a priori* very small, was of being subjected to a fall. See, *Hutch. Carr.* §§ 641-644; *Pa. R. R. Co. v. Kilgore*, 32 Pa. St. 292; *Loyd v. H. & St. Jo. R. R. Co.* 53 Mo. 509; *Ill. Cent. R. R. Co. v. Able*, 59 Ill. 131; *Filer v. N. Y. C. R. R. Co.* 49 N. Y. 47; *Johnson v. W. C. & P. R. R. Co.* 70 Pa. St. 365, 366; *Delamatyr v. Milwaukee etc. R. R. Co.* 24 Wis. 586, 587.

It may be broadly stated as a general proposition, that whenever any peculiar reason or special motive is shown for the passenger to leave the train in which he was being wrongfully carried away from his destination, or for taking one where he was afforded no proper opportunity and wished to pursue his journey, the question of his contributory negligence in alighting from or boarding the moving car has invariably been left to the jury. *Hobbs v. Eastern R. R.* 66 Me. 577; *O'Brien v. McGlinchey*, 68 Id. 555, 556, and citations; *Plummer v. R. R. Co.* 73 Id. 593; *R. R. Co. v. Stout*, 17 Wall. 663 (84 U. S. bk. 21, L. ed. 749); *Filer v. N. Y. C. R. R. Co.* 49 N. Y. 47; 68 N. Y. 129; *Doss v. M. K. & T. R. R. Co.* 59 Mo. 27; *Pa. R. R. Co. v. Kilgore*, 32 Pa. St. 292; *Johnson v. Westchester & P. R. R. Co.* 70 Pa. St. 357; *Nichols v. Sixth Ave. R. R. Co.* 38 N. Y. 131; *Lambeth v. North Car. R. R. Co.* 66 N. C. 494; *Curtis v. Detroit & M. R. Co.* 27 Wis. 158; *T. W. & W. R. R. Co. v. Baddeley*, 54 Ill. 20; *Jeff. M. & I. R. R. Co. v. Hendricks*, 41 Ind. 65, 66; *Taber v. Del. Lac. & W. R. R. Co.* 71 N. Y. 489; *Brooks v. B. & Me. R. R.* 135 Mass. 21; *O'Connor v. Boston & L. R. R.* Id. 353; *Galv. etc. R. R. Co. v. Smith*, 59 Tex. 406; *Ter. Pac. R. Co. v. Garcia*, 62 Id. 285; *McDonough v. Metrop. R. R.* 137 Mass. 212.

There is no such general accord of judicial opinion and precedent in reference to attempts to leave a car while it is in motion as to justify a ruling that it is negligence, as matter of law, to do so. *Cumb. Vul. R. R. Co. v. Maugans*, 61 Md. 61; 23 Am. Law Reg. N. S., 518-524, with notes; *Abbey v. N. Y. C. & H. R. R. Co.*, 20 W. Dig. 37; *Loyd v. H. & St. Jo. R. R. Co.*, 53 Mo. 509; *Van Ostran v. N. Y. C. R. R. Co.*, 42 Hun, 590.

It is of no consequence that the plaintiff's act conduced to the injury complained of, for this is almost always the case. The question is whether that act under the circumstances which induced or accompanied its commission was of a character known to the law as contributory negligence. This being defined to the jury, they are to say whether or not the plaintiff's contributory act was contributory negligence. They are entitled to decide this question of fact, whenever any peculiar circumstances or

exigencies characterize the transaction, although that exigency may not seem to the court to involve a peril to life or limb. That it must be a peril to life which justifies the leap is palpably untenable. See, *Craker v. C. & W. R. Co.* 36 Wis. 657.

Our court refused to lay down abstract propositions as to contributory negligence, *Hobbs v. East. R. R.* 66 Me. 575-577, and said that it was only "where there are no exigencies to be weighed" that the admitted facts make the question of negligence one of law. *Kellogg v. Curtis*, 65 Me. 59.

Thus it may be so raised by demurrer. *Grous v. Me. Cent. R. R. Co.* 67 Me. 100.

But it cannot, where an inference is to be drawn from evidence. *Plummer v. R. R. Co.* 73 Me. 591-598; *Beers v. H. R. R. Co.* 19 Conn. 566.

Accidents occur, and injuries are inflicted under an almost infinite variety of circumstances, and it is quite impossible for the courts to fix the standard of duty and conduct by a general and inflexible rule applicable to all cases, so that a departure from it can be pronounced negligence in law. The rule that requires a party before he crosses a railroad track to stop, etc. (see, 73 Me. 591), "is the only one that approaches universality of application in reference to a particular class of accidents. But there is no such general accord of judicial opinion and precedent in reference to attempts to leave a car while it is in motion." *Cum. Vul. R. R. Co. v. Maugans*, 61 Md. 61; *Larrabee v. Sewall*, 66 Me. 381, and citations there found.

If the exigency is one calculated to affect the judgment of him who is to meet it, a mistake in his movements is not contributory negligence. *Stevenson v. Chicago & A. R. R. Co.* 18 Fed. Rep. 494; 5 McCrary, 634; *Collins v. Davidson*, 19 Fed. Rep. 86; *Walter v. C. D. & M. R. Co.* 39 Iowa, 83.

Care and want of care are evidentiary of mental conditions. *Wilkinson v. Drew*, 75 Me. 362.

It is for the jury to say whether the danger of pursuing and boarding a train when in motion was, under the circumstances, so apparent as to make it the duty of the passenger to desist from the attempt before he was injured. *Cent. R. R. & B. Co. v. Perry*, 58 Ga. 463, S. C. 16 Am. R. Rep. 122. And see, *Allender v. C. R. I. & P. R. R. Co.* 37 Iowa, 264, and 8 Am. R. Rep. 115; same case in 43 Iowa, 276, and 14 Am. R. Rep. 443.

In *Filer v. N. Y. Cent. R. R. Co.* 49 N. Y. 47, the alternative, or election was between being carried to next station of a regularly equipped train, or jumping.

The choice, or election, was between jumping and being carried along in a properly equipped train, in the other cited cases. And see, *Delamatyr v. Milwaukee etc. R. R. Co.* 24 Wis. 586, 587, and the authorities, *passim*.

A man is not necessarily to be regarded as having caused or contributed to his own injury by acting in a manner *prima facie* dangerous and imprudent if there is evidence of acts or omissions by which he might have been put off his guard. *Dublin W. & W. R. Co. v. Satterly*, 39 L. J. N. S. 865. And see, *N. E. R. Co. v. Waulless*, 7 H. L. 12; *Flint & P. M. R. Co. v. Stark*, 88 Mich. 714; *Price v. St. Louis K. C.*

& *N. R. Co.* 72 Mo. 414; *Tex. Pac. R. Co. v. Garcia*, 62 Tex. 285; *Straus v. K. C. St. Jo. & C. B. R. R. Co.* 75 Mo. 185; *Clotworthy v. H. & St. Jo. R. Co.* 80 Id. 223; *Ernst v. H. R. R. Co.* 35 N. Y. 28.

Nor is the law held in Massachusetts any different where there are any circumstances or exigencies to occasion or qualify the act. It is submitted to the jury in that Commonwealth; that the defendant having induced the plaintiff to go into the place of danger is mentioned as an important element in *Foreyth v. Bost. & A. R. R. Co.* 103 Mass. 514, and is especially emphasized in *Mayo v. B. & Me. R. R.* 104 Id. 141. And see *Bayley v. East. R. R.* 125 Id. 65; *Gaynor v. Old Col. & N. R. Co.* 100 Id. 212, 213.

It is where passengers "voluntarily take exposed positions, with no occasion therefor nor inducement thereto," that they take the risks of the exposure. *Hickey v. Boston & L. R. R. Co.* 14 Allen, 433; *Caswell v. Bost. & W. R. R. Corp.* 98 Mass. 204; *Harvey v. East. R. R. Co.* 116 Mass. 269, 270.

In *Brooks v. Boston & Me. R. R.* 185 Mass. 21, plaintiff recovered, although she was hurt alighting from a moving train.

So, one pushed from a platform. *Treat v. B. & L. R. R. Corp.*, 181 Mass. 372.

Ordinarily it is negligence in law not to look each way before crossing track; but in *French v. Taunton Br. R. R.* 116 Mass. 540, 541, held to have been properly left to the jury, because "the circumstances were peculiar;" agreeing with *Plummer v. East. R. R. Co.* 73 Me. 591.

"She had a right to a seat, and it was the duty of the defendant, to provide her with one. If, in discharging that duty, it required her to perform an act which was perilous in itself, and in doing which she lost her life, the negligence, if any, which that act involved should be imputed to the company alone." *McIntyre v. N. Y. C. R. R. Co.*, 37 N. Y. 294. And see, *Roll v. No. Cent. R. Co.* 15 Hun, 502; citing *Stokes v. Saltonstall*, 13 Pet. 181 (38 U. S. bk. 10, L. ed. 115), and many other cases. *Robson v. N. E. R. Co.* L. R. 10 Q. B. 271.

The fact that the Company did not call its station agent nor the engineer or fireman of the engine which drew off the side tracked cars, nor any other official, shows that the evidence adduced was as favorable to the Corporation as any that could have been presented. *Best, Pres.* § 241; *Blatch v. Archer*, Cowp. 63; *Tanner v. Hughes*, 53 Pa. St. 289; *State v. Bartlett*, 55 Me. 217, *et seq.*; *State v. Cleaves*, 59 Id., 300, 301; *Pullen v. Glidden*, 68 Id. 565, 566; *Gay's v. Gold*, 13 Wall. 361 (80 U. S. bk. 20, L. ed. 606).

Were the damages so excessive as to justify the court in overturning the conclusions of the jury? We start with the assumption that the verdict is right; that the jury have faithfully discharged their sworn obligation. "The law presumes a verdict to be correct." *Hilliard, New Trials*, 16.

There is no evidence of misconduct, mistake or prejudice on the part of the jury, except the presumption which it is claimed arises from the verdict itself. In this class of cases wide discretion is left to the jury in the assessment of damages, and it is clearly at present the intent of

the laws of this State that it should be so. *Hobbs v. E. R. R.* 66 Me. 579.

Without such "evidence of misconduct, mistake or prejudice" extrinsic, or found upon the face of the proceedings, a verdict cannot be set aside. It must be manifest that the jury acted improperly. *Tompson v. Mussey*, 8 Me. 305; *Jacobs v. Bangor*, 16 Me. 187; *Gilbert v. Woodbury*, 22 Id. 246; *Hanson v. E. & N. A. R. R. Co.* Am. 62 Me. 90; *Powers v. Cary*, 64 Id. 22; *Goddard v. Gr. Tr. R. Co.* 57 Me. 202; *Feld v. Plaisted*, 75 Id. 476; *Coleman v. Southwick*, 9 Johns. 50, 51, 52; *Coffin v. Coffin*, 4 Mass. *et seq.*

To determine whether any verdict is excessive or inadequate, we must consider separately all the elements of damage which the jury were entitled to make the basis of their verdict. *Phillips v. So. W. R. Co.* 4 Q. B. Div. 407, 408, affirmed on appeal, 5 Id. 78, *et seq.*

The law has in this class of cases committed the determination of the amount of damages to be awarded to the experience and good sense of jurors. *Walker v. E. R. Co.* 63 Barb. 266, 267, citing *Ransom v. N. Y. & Erie R. R. Co.* 15 N. Y. 415.

In addition to those items, like loss of time, labor, services, expenses of sickness, etc., which are susceptible of mathematical computation, the intangible, incomputable elements of damages are bodily pain, present, past and future; injury to health, etc. *Curtiss v. Rock. & Syr. R. R. Co.* 20 Barb. 282, 291.

For instances of large verdicts, sustained on appeal, see *Morse v. Auburn & S. R. R. Co.* 10 Barb. 621; *Secord v. St. Paul M. & M. R. Co.* 18 Fed. Rep. 21. *Pa. Co. v. Roy*, 102 U. S. 452 (bk. 26, L. ed. 142) *et seq.*; *Harris v. Un. Pac. R. Co.* 13 Fed. Rep. 594; *Quinn v. L. I. R. R. Co.* 41 Hun. 333; *Seaworth v. N. J. Steam. Co.* 46 Barb. 222; affirmed in 48 N. Y. 211; *Reed v. N. Y. Cent. R. R. Co.* 56 Barb. 494, 495; *H. & Ter. v. Boehm*, 57 Tex. 152; *Porter v. H. & St. Jo. R. R. Co.* 71 Mo. 66; *Collins v. Co. Bluffs*, 32 Iowa, 324; *Hegeman v. West. R. Corp.* 16 Barb. 353, 359, affirmed in 13 N. Y. 9; *Hume v. N. Y.* 57 How. Pr. 359; affirmed 74 N. Y. 264; *Gale v. N. Y. C. & H. R. R. Co.* 13 Hun, 1; *Funston v. C. R. I. & P. R. R. Co.* 61 Iowa, 452; *Chic. W. D. R. Co. v. Haviland*, 12 Bradw. 561; *Ernst v. H. R. R. Co.* 30 N. Y. 61.

The negligence in this case was so gross as to justify a claim to punitive damages and to lead the judge to ask if such claim was made. We would have a right to make it under our declaration, upon the facts proved. *Wilkinson v. Drew*, 75 Me. 360; *Hopkins v. At. & St. L. R. R.* 36 N. H. 9, 17; *Berg v. Chicago M. & St. P. R. R. Co.* 50 Wis. 427; *Campbell v. Port. Sug. Co.* 62 Me. 567.

In the many tortious actions where the body had suffered nothing or very little, the damages awarded are very heavy on account of mental suffering. *Canning v. Williamstown*, 1 Cush. 452; *Phillips v. Hoyle*, 4 Gray, 571; *Hastings v. Stetson*, 130 Mass. 78; *Hatch v. Fuller*, 131 Mass. 574; *Chesley v. Thompson*, 137 Id. 137. Mental suffering cannot be directly proved as a fact by anyone besides the sufferer, but is a matter of inference from causes which naturally tend to produce it. It cannot be measured aright by outward manifestations; for there may be a great show of distress where little or

none is felt, and great distress may be concealed and borne in silence with an apparently quiet mind. *Stowe v. Heywood*, 7 Allen, 124; *Hatch v. Fuller*, 131 Mass. 574.

Peters, Ch. J., delivered the opinion of the court:

The most important facts of the case are these: the plaintiff was at the defendant's station on Columbus Avenue in Boston, with a ticket which entitled her to a passage from that place to Wellsley Hills, another station on the road. She had to wait some time for an expected train. While she and two other ladies, strangers to her, were seated in the waiting room, some persons came in to clean the room.

The three ladies applied to the ticket agent for leave to sit in his office, a separate apartment, which was not granted because that room was also to be cleaned. Leave was then asked, it was in July, to take seats upon the platform, and that was denied as being against the rules of the road.

The agent said, "you can go into those empty cars"—cars standing beside the platform, adding the remark that the cars would remain there and they could wait in them. Thereupon, they seated themselves in the rear car. They had not been there long, when without any previous signal or notice the train began to be moved, by an engine, out of the station.

Startled by the sudden and unexpected movement, the occupants hurriedly passed to the rear of the car and jumped to the platform, the plaintiff receiving an injury thereby.

Upon these and other less important facts, by means of motion and exceptions, several questions are presented.

It is contended that the Judge erred in instructing the jury that the plaintiff was under the protection of the road as a passenger while she was in the car; it is admitted that she was a passenger before she entered and after she left the car. The position of the defendant is that she was in the car at her own risk; that the relation of carrier and passenger was terminated or suspended while she was in the car, just as much so as if she had gone entirely out of and away from the station for the time being. Much stress is placed upon the alleged fact that the three ladies were permitted to go into the car but were not required or directed to do so. That is not our view of the affair. Nor do we think that the authorities cited for the defendant bears out the position.

It may be that a person waiting at a station would not be in the condition of a passenger while wandering about the yard or entering cars for purposes disconnected with the act of traveling, although his conduct in that respect is not objected by the agents of the road. He is acting on his own responsibility for the time. That is not this case. Here the agent apprised the plaintiff that she could sit in the car as a substitute for a waiting room. It was more than a mere toleration of the act, a passive permission to enter the car; it was a positive invitation to do so.

It is contended in behalf of the defendants that, upon other grounds it should have been ruled as a matter of law, that the plaintiff cannot recover. First, because it is an imperative rule that a person cannot recover for an injury

caused by jumping from a moving train, unless the act be done through fear of an impending danger. Secondly, because even if the rule is more comprehensive than that, there is not in the evidence sufficient excuse for the plaintiff's act, to allow the question to be submitted to a jury.

There cannot be a doubt that, generally speaking, a passenger is not justified in getting upon or off of a moving train, unless at his own risk. If all you know of it is that a passenger jumps from a train in motion and is injured, you would charge him with carelessness for the act. The act is, *prima facie*, negligence. But the question, whether the case belongs to the court or jury for decision, arises when the excuse offered for the act is considered. And there can be no imperative rule governing that question, unless the defendant be right in the contention that fear of personal danger is the only excuse for jumping from a moving train, and in that position we do not concur with the defendant.

There is a good deal of well considered authority which exonerates a passenger from blame, who being suddenly put into a condition of nervous excitement and alarm by the fault of the railroad, under the impulse of the moment jumps from a moving train before it has attained much speed, although the passenger's motive in doing so is merely to save himself from serious inconvenience. Whether a justification exists or not must depend upon the speed of the train and other circumstances. One test, among others, would be whether the passenger did what careful and experienced persons generally would be likely to do in similar circumstances. *Whart. Neg.* § 377, and cases in *note*; *Robson v. N.E.R. Co.* L. R. 10 Q. B. 271; *Adams v. L. & F. R. Co.* L. R. 4 C. P. 744; *Filer v. N. Y. C. Railroad Co.* 49 N. Y. 47; *S. C.* 59 N. Y. 351, and 68 N. Y. 124; *Johnson v. W. C. & P. Railroad*, 70 Pa. St. 365; *Delamater v. Milwaukee Railroad Co.* 24 Wis. 586.

As already intimated, the burden is on the plaintiff to prove that she was not guilty of contributory negligence; that is, that she had good excuse for her act. The same evidence which describes the occurrence may be proof enough upon the point; but if not, other proof must be adduced. If the excuse set up be plainly insufficient, the law disposes of the case. If it be an extreme case, a clear case either way, the law determines the question, because a court and jury should decide alike in such case. But from the nature of things there can be no definite rule applicable to such a variety of facts as the cases are likely to present. Therefore the usual practice is to submit the case to a jury under the guidance and with the aid of the court.

The rule that a person shall look and listen before crossing a track, relied upon by counsel as analogous, stands upon a different reason. There can be but few exceptions or explanations under that rule. Nor does it take a case from the jury because all of the evidence comes from the plaintiff's side.

Even though the facts are undisputed, if they are of such a nature or pertain to such a matter that different minds might reasonably exercise different judgments upon them, the question to be decided belongs to the jury. *Leon v. Railroad*, 77 Me. 85, 91.

Upon the facts, we do not think the verdict is so far amiss that we should be justified in setting it aside. The case is exceptional, extraordinary. The defendant's negligence is undoubted. The plaintiff was greatly frightened in her dilemma caused by its fault. The car began to move with neither the conductor nor brakeman on the train to explain the movement. It could not be conjectured by the occupants where the train was going, and the case does not inform us where it went. The plaintiff's alarm was naturally increased by the prospect that her companions might get out and she be left. Her bundles had been thrown out. She saw the others land safely upon the platform, and it was their judgment that she could safely jump. They urged her to do so.

She could have alighted safely probably, had she observed how it should be done. The mistake was more in the manner of jumping than in the act itself. While we cannot know the exact rate of speed attained by the train, the cars were yet abreast of the platform and were apparently moving slowly.

Under all of those stimulations the attempt was made. The decision to jump or not had to be made almost in a twinkling. A person's judgment in such circumstances should not be too nicely criticised by those whose carelessness produced the predicament. We cannot measure the act wholly by its unexpected consequences.

The damages were assessed by the jury with rather a liberal hand, but not at such an extravagant amount as to justify us in granting another trial that they may be reduced.

Motion and exceptions overruled.

Walton, Virgin, Libbey, Foster and Haskell, JJ., concurred.

Inhabitants of WINTERPORT

v.

Inhabitants of NEWBURGH.

1. A person who is *non compos mentis* and not emancipated cannot acquire a pauper settlement by residence in a town for five successive years, after arriving at the age of twenty-one years, but will follow the settlement of his father.
2. The father of such person will not acquire a new settlement by five years' residence, if during that time such person receives pauper supplies or relief, with the knowledge and upon the application of the father.

(Waldo—Decided February 2, 1886.)

THIS suit is to recover of defendants the sum of one hundred and seventy-six dollars for supplies furnished for the relief of Nancy Holmes between January 1, 1882, and January 1, 1884, and comes before the court upon a report of the evidence adduced by plaintiffs.

Defendants admit plaintiffs' claim, "That Nancy Holmes, the pauper, when she became twenty-one years old, had a settlement in Newburgh derived from her father, and that being

at that time *non compos mentis*, she was not emancipated and did not gain a settlement for herself."

The plaintiffs claim that Nancy Holmes, the pauper, when she became twenty-one years of age had a settlement in Newburgh derived from her father, and that being at that time "*non compos mentis*," was not emancipated, and could not gain a settlement for herself, *Isleborough v. Lincolnville*, 76 Me. 572, but has continued to have the settlement of the father, who in consequence of the relief furnished to him by Newburgh has never acquired a settlement in Winterport.

Defendants, however, claim that Nancy's father, by his residence in plaintiff Town from 1868 to 1882, gained a settlement there, and that the supplies furnished by Newburgh while he lived in Newburgh and in Winterport were not furnished or received as pauper supplies.

Mr. N. H. Hubbard, for plaintiffs.

Messrs. Brown & Varney, for defendants:

If at the time of reception, for any cause, the overseers distinctly agree, or assent to the proposition, that the supplies are not and shall not be regarded for the relief of pauperism, but as a gift or loan to a party in need, under such distinct understanding by both parties they will not be so regarded. *Veazie v. Chester*, 53 Me. 29.

Foster, J., delivered the opinion of the court:

Assumpsit for the recovery of pauper supplies furnished by the plaintiff town to one Nancy Holmes, a *non compos* daughter of Jeremiah Holmes whose settlement is admitted to have been in the defendant Town from 1837 to 1868. From the year last named to the commencement of this suit the father resided in the plaintiff Town. The alleged pauper is *non compos mentis*, and has been so from early childhood. Having always lived in her father's family until the fall of 1881, never having before that time been emancipated or abandoned, though more than twenty-one years of age, she may be regarded, in her legal relations pertaining to pauper settlements, the same as if she were a minor. Such person, not emancipated, cannot acquire an independent settlement by a residence in a town for five successive years, but will follow the settlement of the father: *Isleborough v. Lincolnville*, 76 Maine, 575.

The case shows that ten years before the father moved from the defendant Town he made application to the overseers of the poor of that Town for aid in taking care of this daughter; that it was thereafter furnished each year and paid quarterly up to the year he moved from the defendant Town to Winterport; and, with the exception of that year, has ever since been furnished by the defendant Town up to January, 1882. His settlement therefore remained in the defendant Town.

Really, then, the only question presented for our consideration is whether the supplies afterwards furnished by the plaintiff Town, from January, 1882, to January, 1884, were necessary and proper within the meaning of the statute. Due notice and denial are admitted.

The pecuniary ability of the father appears to have been substantially the same during all the years in which he was receiving aid on ac-

count of this child, not only while living in Newburgh, but also during the twelve or thirteen years in which he was assisted by that Town after his removal to Winterport. In the fall of 1881, whatever property he then owned, consisting of a small farm, incumbered for nearly its value, besides a horse, cow and a small quantity of furniture, he conveyed, for the support of himself and wife during life, to his other daughter, Mrs. Bussey. His wife had been blind and helpless for several years. At the time of this conveyance to Mrs. Bussey, the defendant Town was furnishing assistance to the father on account of the pauper, and afterwards made the last quarterly payment for that year to the husband of Mrs. Bussey, who then appeared to be the head of the family.

It is a legal presumption that the officers of the defendant Town performed their duty in their investigations as to the necessity of that relief furnished by their Town for more than twenty years. The evidence in the case is sufficient to show that such relief was not only applied for and furnished, but was received as pauper supplies during all those years. There is no evidence to sustain the position of the defense, that such aid was furnished as a gift or loan to the parent, or that there was any understanding between the party receiving such aid and the party furnishing it, that the same should not be considered as supplies furnished under the statutes. Nor is there anything to show that any arrangement was made for the support of the pauper, at the time of the conveyance to Mrs. Bussey. Application was made to the overseers of the plaintiff Town for relief on account of the pauper, and after investigation the same relief was furnished as had been done years before by the defendant Town. The necessity was certainly as imperative, during the two years covered by this suit when the pauper was not a member of the father's family, with no legal provision for her care and support, as when the parental and filial relation subsisted and she was a member of her father's family and under his care and protection.

Judgment for plaintiff for \$183.78 and interest from date of writ.

Peters, Ch. J., Danforth, Virgin, Emery and Haskell, JJ., concurred.

William B. HAYFORD *et al.*
v.

COMMISSIONERS OF AROOSTOOK COUNTY.

A **petition**, to the county commissioners, for **laying out a highway** under the Statute of Maine **must state** with reasonable definiteness **the termini** of the proposed way. **Otherwise** the commissioners have **no jurisdiction** and their **proceedings**, in laying out a way under such a petition, will be **quashed on certiorari**.

(Aroostook—Decided February 6, 1886.)

PETITION for writ of *certiorari* to quash the proceedings of the Commissioners of

Aroostook County in laying out a highway. *Granted.*

Messrs. Wilson & Woodard, for petitioners:

The court, in its consideration and determination of the case, is not restricted to the causes of error specified, but it may consider any errors which, upon inspection of the record, it may find. *Commonwealth v. Sheldon*, 3 Mass. 188.

In *King v. Aroostook Co.* 63 Me. 567, this court said: "We think the words 'tracts of land' are used to designate islands, gores, or other fragments not included in a township, and that they were not intended to apply to any portion of the land within a regularly located township."

The original petition should state the places where the way desired is to commence and terminate, and its general course between them, that all parties may be enabled to judge how far their interests may be affected. Otherwise no legal notice is, in effect, given to those over whose lands the way is actually laid out, or to the persons and corporations whose interests are affected. *Sumner v. Oxford County Comrs.* 37 Me. 112, 119; *Howland v. Penobscot County Comrs.* 49 Me. 143, 146; *Pembroke v. Plymouth County Comrs.* 12 Cush. 351, 356.

No one owning lands in that town could know from the petition whether or not the road would cross his land; whether or not his interests might in any way be affected; or whether or not the matter was one requiring his attention. *Pembroke v. Plymouth County Comrs.* *supra*.

Responsible persons may present a petition, describing the way. The commissioners may act upon it, conforming substantially to the description without adhering strictly to its bounds. R. S. 1871, chap. 18, § 1.

No proceedings are to take place until it is proved that such notice has been given. R. S. 1871, § 83, chap. 18.

Section 2, chap. 18, provided what notice should be given and how it should be given in the incorporated towns.

Certiorari cannot be refused when the county commissioners have issued a judgment in a matter of which they had no jurisdiction, even if no injustice was done. *Bangor v. Penobscot County Comrs.* 30 Me. 270.

In the hearing on the petition, the court is not limited by the record with its infirmities of form; but will enlighten its discretion by inquiring into so much of the proceedings under revision as will enable it to deal with the substantial justice of the case. *Levant v. Penobscot County Comrs.* 67 Me. 429, 434, 435.

The description depending upon courses, the courses depending upon variation of the compass, no variation being stated, different variations being involved, with no allusion to these differences, render it impossible to ascertain the location of the road from the return, and so, vitiate the return. *Leaviston v. Lincoln County Comrs.* 30 Me. 19; *P. S. & P. R. R. Co. v. York County Comrs.* 65 Me. 292.

The return of the County Commissioners was not a correct return of their doings as required by § 4, chap. 18, R. S. 1871, but of the doings of another board performed some four or five years before.

It also appeared that the commissioners whose acts are here under consideration, did not themselves proceed to perform the duties required in accordance with the statute provision last cited, but simply copied an old report of some of their predecessors. *Monmouth v. Leeds*, 76 Me. 28, 32.

The statute provisions in force at the time of the proceedings in question expressly required that an accurate plan of the way should accompany the report of the commissioners. R. S. 1871, § 4, chap. 18.

The decisions holding that a plan was not necessary were based upon a different statute; the earlier statute having called for a plan or description, while the statute in force at the time of these proceedings and now, imperatively requires an accompanying accurate plan. The change was made in the revision of 1857. See, R. S. 1840, chap. 25, § 8; R. S. 1857, chap. 18, § 4.

Houlard v. Penobscot County Comrs. 49 Me. 143, involved legality of proceedings had in 1854.

Libson v. Merrill, 12 Me. 210, was much earlier still, involving proceedings had as soon as 1832.

No plan deserving the name accompanied the return in this case; much less an accurate plan. The so called plan is more unintelligible than the one condemned by the court in *P. S. & P. R. R. Co. v. York County Comrs.* *supra*.

By the very effect of this previous decision, Frenchville or some part of Frenchville was an intermediate fixed part which could not be altered or affected by the location. *Rutland v. Worcester County Comrs.* 20 Pick. 71, 85.

The answer states that the variation did not injure petitioners. The objection is one that goes to the jurisdiction of the commissioners and must be sustained, even if no injustice was done. *Bangor v. Penobscot County Comrs.* 30 Me. 270.

Mr. A. W. Paine, for defendants:

The R. S. of 1833, chap. 18, § 1041, have, as the same have been previously enacted, ever been recognized as sufficient to justify the commissioners and to make valid their proceedings.

The objection that the right of trial by jury is not provided for, is answered by the provisions of the statute which give the right of appeal, the trial of which may, at the election of the appellant, be before a jury. R. S. chap. 8, § 8.

This is sufficient, as our courts have often held. Indeed, it is the only way in which the constitutionality of the entire jurisdiction of all justices of the peace, trial justices, police and municipal courts and courts of county commissioners is sustainable. *Johnson's Case*, 1 Greenleaf, 230; *Kimball v. K. & P. R. R. Co.*, 35 Me. 255; *Bond v. Bond*, 2 Pick. 382-385.

The severely elaborate discussions of the whole subject by the court in *Holmes v. Hunt*, 22 Mass. 505 to 522, and the very large number of cases cited is enough, if any doubt could arise, to dispel it all.

The validity of an Act which has been in such extensive operation and universally acquiesced in for fifty years will probably not be questioned. *O'Neil v. Glover*, 5 Gray, 144 to 154.

The granting of the writ on petition for *cer-*

tiorari is a matter of discretion with the court and lies only to correct errors in law; and when the record discloses no error, the writ cannot issue. *Lapan v. Cumberland Co. Comrs.* 65 Me. 160, and cases below.

Nor will the court grant the writ; even where there is an apparent error or indeed a real one, unless injustice has been done by a refusal. *Levant v. Penobscot Co. Comrs.* 67 Me. 429.

Consequently, when substantial justice has already been done or only a trivial error is alleged, or slight injustice enacted or anticipated, the court will not interfere or do ought to disturb the judgment, even though an error may be apparent; and especially will not a mere technical objection avail, or matter of mere form, when no serious consequences are the result. Substantial justice must be shown, to demand the writ. *Fairfield v. Comrs.* 66 Me. 885; *Hopkins v. Fogler*, 60 Me. 266.

The statute provision is that the highway must "lead from town to town," and the petition must be in writing "describing a way" and "the commissioners may act upon it conforming substantially to the description." R. S. chap. 18, § 1.

The objection that the notice was defective is one that cannot be taken in the case.

It is not an error of law, which alone the court in cases of the kind will correct, but an error of fact which this court will not meddle with. The record certifies notice; and that cannot be contradicted. *Levant v. Comrs.* 67 Me. 435.

If the error is not apparent from the record, the writ of *certiorari* cannot be properly granted. But the record says "notice was given." *Nobleboro v. Comrs.* 68 Me. 543-551; *McPheters v. Morrill*, 66 Me. 123.

When the court takes jurisdiction and acts, it is to be presumed that notice was given and proved. *Farrar v. Loring*, 26 Me. 202.

That such notice was given at the beginning is proved by the record; and that this sufficed in the whole is decided in *Orono v. Comrs.* 80 Me. 302.

It is enough, however, to rely on the great principle which governs the law regulating *certiorari* practice, viz.: that the record is conclusive; and it is the record here which we rely on to prove that an actual view did take place. See, cases already cited.

If by mistake any error has crept into the description unawares, the same may be amended and thus the error of fact be corrected. Whether there be such, the case does not disclose and of course the court will not allow any such to avail to disturb the record. That the court will allow amendments has been repeatedly decided by one court. *Dresden v. Comrs.* 62 Me. 365; *Orland v. Comrs.* 76 Me. 467; *Gloucester v. Comrs.* 116 Mass. 579.

That the laying out of the road did not conform to the description of the road petitioned for is a matter of fact and not of law, which the court will not respect. For aught the court can know, the alleged difference or discrepancy may not exist. A difference in language may give the appearance only of difference in facts. *Cushing v. Gay*, 28 Me. 12.

But further; it is not necessary that the petition and the actual survey are the same. All that is required is that they are substantially the same. R. S. chap. 18, § 1.

And of this the county commissioners are to be the judges. This court will not interfere with their adjudication. *Cushing v. Gay*, 28 Me. 12; *Windham v. Comrs.* 26 Me. 406.

So far as damages were allowed the records of course show. If nothing is said the result follows that none or none other were allowed. That is sufficient. No citation in support of so plain a dictate of common sense would be necessary. But the question has been before the court and adjudicated and the cases cited. *Cushing v. Gay*, 28 Me. 10; *Hosland v. Comrs.* 49 Me. 148; *Detroit v. Comrs.* 52 Me. 210.

Although a new member of the board who had not viewed the road and heard no legal evidence, signed the assessment, yet the other two signed; and they being a majority that is enough. R. S. ch. 1, and cases cited.

In the case of *Gloucester v. Comrs.* 116 Mass. 579, the fact existed that while the proceedings were in progress one Smith retired from the board and Graves took his place and helped make up the judgment. The court of course affirmed the proceeding. The case is in point exactly.

In order to entitle the party to the writ for those causes, it must appear that an injury has been done thereby to petitioners. *Strong v. Comrs.* 81 Me. 578.

The causes assigned are all in the nature of matters of fact and as such not properly legal causes for granting of the petition for *certiorari*; for *certiorari* lies only to correct error in law. *Farmington River W. P. Co. v. Comrs.* 112 Mass. 206-212, and cases cited; *Locke v. Lexington*, 122 Mass. 290, and cases cited; *Lapan v. Comrs.* 65 Me. 180, and cases cited before.

Nothing *dehors* the record is admissible. 49 Me. 417.

In no one of the causes complained of is there any allegation of injustice or wrong suffered by the petitioners.

It is only where wrong has been done, injustice suffered, whereby a damage or injury has been or will be sustained, that the court will interfere as prayed for. 26 Me. 353; *Levant v. Comrs.* 67 Me. 429, 484; 37 Me. 112; *Stone v. Boston*, 2 Met. 228; 35 Me. 878, 879.

Reference is particularly made to it here as explanatory of the case; and more than that, as complete answer to most of the objections filed. The answer is conclusive. *Levant v. Comrs.* 67 Me. 429, 485; *Mendon v. Comrs.* 2 Allen, 468.

And the record if found incomplete may be amended to conform to the truth. The amendment asked for may thus be granted and when granted is a part of the record and consequently conclusive. *Orland v. Comrs.* 76 Me. 467; *Levant v. Comrs.* 67 Me. 485; *Dresden v. Comrs.* 62 Me. 865; *Gloucester v. Comrs.* 116 Mass. 579.

The parol testimony offered by respondents is therefore relied upon, if necessary, more fully to explain the merits of the case and the duty of the court to sustain the proceedings now sought to be disturbed or set aside. *Levant v. Comrs. supra.*

Proof *aliunde* may be offered as it is here, to show all to be right on the part of respondents; and the answer is not traversable. *Rutland v. Comrs.* 20 Pick. 71; *Smith v. Comrs.* 42 Me. 395; *White v. Comrs.* 70 Me. 817.

We receive the testimony or extrinsic evidence, not for the purpose of contradicting the

records but to supply omissions, etc. *Gleason v. Sloper*, 24 Pick. 184.

But petitioners cannot control the record by extraneous evidence. *Charlestown v. Comrs.* 109 Mass. 270.

The party is not to lie by and see great expenditures made, knowing a defect in the forms of proceedings, and subsequently be allowed to avail himself of a *certiorari*, to quash them as erroneous. *Stone v. Boston*, 2 Met. 228.

12 Cush. 851, is not like our case and is no authority; the petition in that case did not ask for any particular road to be laid out.

Virgin, J., delivered the opinion of the court:

Generally, the granting or withholding of a writ of *certiorari*, for the purpose of bringing up and quashing the irregular proceedings of county commissioners, rests wholly within the discretion of this court. But, as an exception to this general rule, when the commissioners have no jurisdiction in a given proceeding, the court has no occasion to exercise its discretion in the matter; but on due presentation of the record orders the writ at once; for in such a case, the action of the commissioners being without the authority of law, parties aggrieved thereby have the legal right to have the proceedings quashed for the asking. *Fairfield v. Comrs.* 66 Me. 885; *Levant v. Comrs.* 67 Me. 429.

Being an inferior tribunal, nothing is presumed in favor of the commissioners' jurisdiction, but it must appear by their record. *State v. Pownall*, 10 Me. 24.

A general jurisdiction merely, given by the statute over the subject matter, is not enough: they can only have it in the particular case in which they are called upon to act, by the existence of those preliminary facts which confer it. *Small v. Pennell*, 81 Me. 267, 270.

Moreover, while generally no particular form of words is required in the petition, nor is strict technical accuracy expected therein, *Windham v. Comrs.* 26 Me. 406, 409, their jurisdiction depends upon whether sufficient jurisdictional facts are set out, as they always should be, in the petition which forms the foundation of their action, *Bethel v. Comrs.* 42 Me. 478; although in some classes of cases concerning which the statute does not prescribe what facts the petition shall set out; such as those seeking an abatement of taxes, if the whole record when completed shows actual jurisdiction notwithstanding one or more of the jurisdictional facts were wanting in the petition, the court may, if substantial justice has been done by the commissioners, rightfully refuse to grant the writ. *Orland v. Comrs.* 76 Me. 462.

But in cases involving the laying out of highways by the commissioners the statute prescribes in part, at least, the character of the petition. It must be a "petition describing a way." Whatever else it may contain, if no way is therein described, it cannot authorize any action but dismissal on the part of the commissioners. When and only when a "petition describing a way" is presented to them by persons considered "responsible," the "commissioners may act upon it, conforming substantially to the description, without adhering strictly to its bounds." R. S. chap. 18, § 1. Without a "petition describing a way," the commissioners

would have no jurisdiction, for they could not "conform substantially to the description." One of the evident objects of the provision requiring a description of the proposed way, coupled with the required public notice thereon, is to afford those over whose lands it is to be laid and those whose interests may be affected thereby such information as will enable them to be heard. Hence it has been the practice in such cases to state at least the *termini* of the proposed way with reasonable and approximate definiteness.

Thus, in *Sumner v. Comrs.* 37 Me. 119, *Shepley, C. J.*, said: "The petition should state the places where the way is desired to commence and terminate, and its general course between them, that all interested in them may be enabled to judge how far such a way would be useful, and to what extent their interests might be affected." So in *Howland v. Comrs.* 49 Me. 146, *Cutting, J.*, said that the petition "must state its *termini* and route." We fail to understand how any description which does not contain these elements with substantial definiteness can be called "Describing a way" within the intention of the Legislature.

It is said that the *termini* and route are set out in the petition. The way asked for is "From New Sweden to Fort Kent by the most direct and feasible route, commencing in New Sweden, at the terminus of the county road." If there is but one county road in New Sweden and but one terminus thereof in that town, then the starting point may be sufficiently definite. But the petition then continues: "and running through" seven townships specifically named, "and passing between Cross Lake and Mud Lake." Now, assuming that the northern terminus intended was "to Fort Kent" as the petition first asserts and not "through Fort Kent" as it subsequently declares, then the terminus is at best left very indefinite. No one can tell within ten miles the place where "the most direct and feasible route to Fort Kent" would terminate, nor how long the route would be. And it seems that no direct and feasible route could be found by running between the lakes named, and through all the townships named, for the way as laid down does not touch Frenchville. It is evident that no owner of lands in any of the townships could learn from this petition whether or not his lands would be taken or his interests affected. Such a description is altogether too vague and indefinite to answer the requirement of the statute on which the proceeding is attempted to be based.

Moreover, this conclusion is sustained by *Pembroke v. Comrs.* 12 Cush. 351, wherein the court quashed the laying out of a highway on a petition which described one terminus as "to the Boston and Plymouth road in Pembroke" when the road alluded to extended a distance of four miles in Pembroke.

We do not mean to be understood as holding that the petition for every short piece of new road must necessarily contain a statement of its *termini*, in totidem verbis, for they may be so otherwise described, as by their connections with roads already made, that they cannot fail to be understood by interested persons owning land and residing along their routes. *Raymond v. Comrs.* 68 Me. 112. But in ways of this char-

acter and dimensions such vagueness as is disclosed in the petition cannot be upheld.

Writ granted.

Peters, Ch. J., Danforth, Emery, Foster and Haskell, JJ., concurred.

Richard HAMOR *et al.*

BAR HARBOR WATER CO.

1. **Interests in water as well as in land may be taken by the sovereign power of the government in the exercise of the right of eminent domain for purposes of public utility.**
2. **To constitute a legal taking of private property by the right of eminent domain it must be evidenced by some writing describing the estate so taken by definite boundaries, quantity or measure.**
3. **When private property has been legally taken by the right of eminent domain, the owner thereof can recover his damages only in the manner provided by the statute authorizing the taking. But, if there was not a legal taking, the owner may maintain an action on the case for his damages.**

(Hancock—Decided February 2, 1886.)

ON report of verdict.

The case is stated in the opinion.

Mr. Jasper Hutchings, for plaintiff:

The court in *Lancaster v. Kennebec Co.* 62 Me. 272, in speaking of the taking of land in the exercise of the right of eminent domain, said that there might be a using without a taking or a taking without a using; that a taking in exercise of this right must be evidenced by some writing describing the real estate taken by definite and specific boundaries; that a vote that the directors be authorized to build Brown's Island boom this season followed by a building of it, was no statutory taking.

The case of *Riche v. Bar Harbor Water Co.* 75 Me. 91, does not militate against our contention. There a new plan had been filed and new notice given, 1881, defining by metes and bounds the land taken.

Messrs. Wiswell & King, for defendant:

As the common-law action is founded on a wrong done by the defendant and the process itself presupposes a tort, where the Legislature has authorized the Act itself complained of, we cannot conceive that the action remains. *Stowell v. Flagg*, 11 Mass. 364.

If the common-law remedy remains, the defendant, instead of having the damage determined once for all in the method provided by statute, unless the capacity of the works were increased, would be subject to a new and separate action for every day's and hour's diversion. See also, *Stevens v. Props. Middlesex Canal*, 12 Mass. 468, where *Ch. J. Parker* says: "Where the Legislature authorized an act, the necessary and natural consequences of which is damage to the property of another he who does the act cannot be complained of as a trespasser or wrong doer." *Stowell v. Flagg*, *supra*. To the same effect, see, *Heard v. Props. Middlesex*

Canal, 5 Met. 81; *Sudbury Meadows v. Same*, 23 Pick. 86.

In *Spring v. Russell*, 7 Me. 273, which was an action for diverting the water from the Saco River by a canal company, acting under a charter which authorized a diversion and provided a remedy, the court held that all other remedies are by implication excluded.

The case of *Riley v. Lowell*, 117 Mass. 76, is very similar to the present case. In that case the Act which granted to the City of Lowell certain powers for the purpose of supplying the city with water, provided a remedy for all persons damaged in their property by any acts done in carrying out the purpose. The court in an opinion by Gray, *Ch. J.*, held that the remedy provided by statute excluded any other remedy.

In the case of *Ipswich Mills v. Co. Comrs.* 108 Mass. 363, the City of Salem was authorized by an Act of the Legislature to take the waters of a pond for the purpose of supplying that city and other places with water, and limited the time within which any person whose water rights were affected might apply to the county commissioners for an assessment of damages. The court held that the limitation applied, because when the water was first taken the city would be liable for future and prospective as well as immediate damages.

In a number of recent cases in Massachusetts, the same doctrine is upheld as applied to actions for the diversion; that is, that an action of tort cannot be maintained if the defendants have complied with the requirements of the Act of incorporation, it, of course, being otherwise where there has been no such compliance. *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Perkins v. The Lawrence*, 136 Mass. 305. See also, *Hull v. Westfield*, 133 Mass. 433.

As to the quantity to be taken, the Company had the right to take all the water that it might then or in the future need in carrying out its purposes, and the amount that might be necessary either then or thereafter was for the proper tribunal to determine upon application made. *Ipswich Mills v. Co. Comrs. supra*; *Bailey v. Woburn*, 128 Mass. 416.

According to the rule fully established by the later decisions in Massachusetts, the plaintiff would be entitled to recover compensation, both future and prospective as well as intermediate, having in view the amount of water that so far as could be judged would ever be needed. *Ipswich Mills v. Co. Comrs. supra*; *Bailey v. Woburn, supra*.

Foster, J., delivered the opinion of the court:

The defendant Corporation, by special Act of the Legislature approved February 10, 1874, chap. 449, was authorized to take, detain and use the water of Eagle Lake and Duck Brook, or either of them, for the purpose of conveying to, and supplying the Village and vicinity of Bar Harbor with pure water; and to erect and maintain dams and reservoirs, and lay and maintain pipes and aqueducts necessary for the proper accumulating, conducting, discharging, distributing and disposing of water, and forming proper reservoirs thereof. By this Act the Corporation is held liable to pa

all damages that may be sustained by any persons, by the taking of any land or other property, or by flowage, or by excavating through any land for the purpose of laying down pipes and aqueducts, building dams and reservoirs, and also damages for any other injuries resulting from said acts.

It is also provided, that in case damage is sustained and the amount to be paid cannot be mutually agreed upon, then the party suffering such damage may cause the same to be ascertained in the same manner and under the same conditions, restrictions and limitations as are provided in the case of damages by the laying out of highways.

By § 6, "Said Corporation shall cause surveys to be made for the purpose of locating their dams, reservoirs and pipes and other fixtures, and cause accurate plans of such location to be filed in the office of the town clerk of said Eden, and notice of such location shall be given to all persons affected thereby, by publication in some public newspaper in said county; and no entry shall be made upon any lands, except to make surveys, until the expiration of ten days from the said filing and publication."

The plaintiffs were the occupants of a saw-mill upon Duck Brook, and this action on the case is brought by them to recover damages for the diversion of the water from said stream from March 1, 1876, to March 1, 1882. The defendants admit that during the time named they have diverted the water by taking it above the plaintiff's mill, so that the water thus diverted has not been allowed to flow down the stream to it; but they claim that such diversion has been in accordance with the provisions of an Act of the Legislature authorizing them thus to divert the water, and that by that Act a method is provided by which all persons injured can recover damages as therein specially set forth, and that, therefore, the plaintiffs cannot maintain this action.

A special verdict of the jury has settled the amount of damages which the plaintiffs are entitled to recover, provided this action is maintainable.

There can be no question but that the Act granting the right to the defendants to take, detain and use the water from the sources and for the purposes therein specified is constitutional. The decisions are numerous that private property may be taken by the sovereign power of the government in the exercise of the right of eminent domain for purposes of public utility. That this may be done when the object is to supply a village or community with pure water, and though the agency by which it is done may be a private corporation thereby deriving profit and advantage to itself, is not denied. In such case the interests of the public from considerations affecting the health and comfort of densely populated communities, require that private property may be thus appropriated for uses which are deemed public. It is thus that the right of property of private individuals, whether it be in lands, or the usufructuary interest in flowing water, is made to subserve the public exigencies, and for which, under the Constitution, "just compensation" is guarantied and must be made. "It is true the injury in the one case is to the land, and in the other to the water; but this can make no differ-

ence in the result. Interests in water, as well as in land, may be taken under this Act; and both are equally the subjects of compensation." *Denslow v. New Haven & Northampton Co.* 16 Conn. 108; *St. Helena Water Co. v. Forbes*, 62 Cal. 182; *S. C.* 45 Am. Rep. 659.

Neither can water be diverted from a private stream under authority granted by the Legislature in the exercise of the right of eminent domain, for the purpose of supplying a town or village with pure water without making compensation to the riparian proprietors whose rights are thereby injuriously affected. *Bailey v. Woburn*, 126 Mass. 416; *Lund v. New Bedford*, 121 Mass. 286; *Wamesit Power Co. v. Allen*, 120 Mass. 854.

Nor can individual property be taken or individual rights impaired, for the benefit of the public, without such compensation. *Canal Comrs. v. People*, 5 Wend. 423, 456.

While not denying the plaintiffs' right to just compensation for any damage they may have sustained to their property, the defendants deny their right of recovery therefor in this action, claiming that their only remedy is that specified in the private statute herein before named.

Undoubtedly this would be true if the acts of the defendants constituted a legal taking of the water from Duck Brook. The case would fall within the well established rule that where damage is necessarily done to the property of an individual by being taken by the authority of the Legislature for public use, such damage can be recovered only in the manner authorized by statute. *Per-y v. Worcester*, 6 Gray, 546; *Hull v. Westfield*, 133 Mass. 434; *Spring v. Russell*, 7 Me. 273. To constitute a legal taking, however, by which the defendants can successfully justify their acts, they must show that the requirements of law have been complied with. The party whose property has been appropriated is entitled to demand a strict compliance with all the statutory provisions for his benefit. Being in derogation of the common-law right which every citizen has of possessing and enjoying his property, it is to be construed strictly. Contrary to the general rule in case of grants from one person to another, that the words are to be taken most strongly against the grantor, in grants of this nature authorized by the Legislature, the words are to be taken most strongly against the grantee. Therefore, if the defendants have failed of bringing themselves within the requirements of law, then their justification fails, and they are liable for such damage as they may have done to the plaintiffs as wrong doers, and this action may properly be sustained. *Wamesit Power Co. v. Allen*, *supra*.

The statute authorized the taking, detaining and using of water in which the plaintiffs had valuable rights. That the defendants have taken the water is admitted. Yet it nowhere appears that the taking has ever been evidenced by any writing of any kind, whereby the measure of such taking has been or can ever be made known to the plaintiffs or anyone else. There has been a taking of the plaintiffs' property, resulting in damages to them; but there has been no preliminary act evidenced by any writing specifying and defining what or how much has been taken or is to be taken,

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which is necessary for the just protection and proper security of the owner of the property taken.

In the case of *Lancaster v. Kennebec Log Drive Co.* 62 Me. 272, the statute there referred to authorized the taking and using of shores, flats, etc., but contained no express requirement that the property taken should be evidenced by any writing whatever, and the court say: "The taking of real estate is by attachment, or levy, or by virtue of some statutory proceedings. In all cases, the taking is to be evidenced by some writing describing the real estate so taken by definite and specific boundaries. * * * The statute contemplates a taking within definite bounds. The owner of the land cannot otherwise know whether the action of the defendants is within or without the land, etc., taken, if there are no ascertained or ascertainable limits. Neither can the committee proceed to assess damages upon an indefinite and undetermined tract. It is not for them to ascertain the shores, flats, etc., which are taken by resorting to the uncertainties of conflicting testimony. There must be written evidence of the territory the defendants may elect to take and use." See also, *P. S. & P. R. R. Co. v. County Comrs.* 65 Me. 293.

There is no reason why the same requirements should not apply equally to the taking of water from a stream in which the plaintiffs have valuable riparian rights, as to the taking of land. Both are equally the subjects of property and of compensation. *Ex parte Jennings*, 6 Cow. 526. By the statutes of this State the word land includes all tenements and hereditaments connected therewith, and all interests therein. The riparian proprietor may insist that his right to the use of water flowing in a natural stream shall be regarded and protected as property. *Nuttall v. Bracewell*, L. R. 2 Exch. 9.

Such right is not a mere easement or appurtenance, but is inseparably annexed to the soil itself. *Dickinson v. Grand J. Canal Co.*, 7 Exch. 299; *Cary v. Daniels*, 8 Met. 450. And the damage for the taking of such right may be greater or less according to the quantity of water diverted, as the damage may be greater or less when measured by the quantity of land taken. If it be necessary, therefore, that the taking of land thus appropriated to public use be evidenced by some writing defining it by definite and specific boundaries, for the same reason should there be like evidence of the measure or quantity of water thus taken. Without this, no proper estimate of damages could be made. Without this, no proper protection would be afforded to the parties without resorting to the "uncertainties of conflicting testimony."

The necessity as well as the propriety of this principle will be readily perceived when applied to the case at bar. Here the defendants are authorized to take only so much water as may be required for the purposes named in the Act. This includes not only what may be necessary for the present wants of the inhabitants, but for their future or prospective wants. But one compensation is contemplated by the provisions of the Act, like that afforded in the case of the laying out of the highways. Such compensation would include not only the im-

mediate damages caused by the taking, but future and prospective damages as well. *Bailey v. Woburn*, 126 Mass. 420; *Ipswich Mills v. Co. Comrs.* 108 Mass. 365.

The whole of the water in the stream has not been taken or diverted. It may well be understood that only so much has been appropriated as the present wants of the inhabitants require. Whether this quantity is to be the measure, or whether it may be doubled, or an appropriation of all the water in the stream may yet be made, there is no writing of any kind to determine. Nor does the plan or notice of April 14, 1874, in the least afford any evidence upon the question. The notice and plan in this case are entirely different from those referred to in the case of *Riche v. Bar Harbor Water Co.* 75 Maine, 94, 97. By § 6 of the Act the defendants were required to cause surveys to be made for the purpose of locating their dams, reservoirs, pipes and other fixtures, and cause accurate plans of such location to be filed in the office of the town clerk, and notice of such location to be given to all persons affected thereby. If the plaintiffs were to be considered as embraced among those affected by the location of the defendants' dams, reservoirs, pipes or other fixtures, neither the plan nor the notice, in this case, could be considered as sufficiently accurate to determine the rights of the defendants in the water of a stream wherein the plaintiffs had important and valuable interests, nor to measure the quantity of water to be taken. Furthermore, the evidence shows that in 1880, six years after the defendants began to divert the water from the stream, changes were made in the flume, the length between where the water was taken and the receiving reservoir being shortened nearly one half, and the main pipe, extending from the reservoir to the village, enlarged from four inches to one of ten inches in diameter.

Not only, therefore, is the evidence, so far as the plaintiffs' rights are concerned, too uncertain, but the use of the grant too fluctuating, to afford a legal justification to the defendants; and the conclusion of the court is that this action may be maintained.

Judgment on the verdict.

Peters, Ch. J., Danforth, Virgin and Haskell, JJ., concurred.

Ransom ABBOTT *et al.*

v.

James M. TREAT.

1. A warranty deed of a parcel of land described one boundary thus: "To a stake and stones on the shore of Penobscot Bay; thence southwesterly by said shore to the extremity of Squaw Point." A third party owned the fishing privilege, by a prior deed, on the premises conveyed, and he brought an action of trespass against the grantee and recovered judgment, but damages had not been assessed nor execution issued. The grantee represented to the grantor that he was liable upon the covenants

of his deeds to pay whatever damages and costs might be recovered in the trespass suit, and thereupon the grantor executed a bond to the grantee for the payment of the same. Held, that the representations were not such as would warrant a court of equity to cancel the bond.

2. A representation of what the law will permit or require to be done does not ordinarily amount to such a fraud as a court of equity will take cognizance of. It is regarded rather as an expression of an opinion than the assertion of a fact.

(Decided February 2, 1886.)

BILL in equity by grantor, to cancel a bond made to pay damages and costs which ought be recovered against grantee, in a suit for trespass on the land granted under a warranty deed.

The facts are sufficiently stated in the opinion.

Mr. Joseph Williamson, for plaintiff:

Whatever pretense the defendant had for claiming that Abbott was liable for the covenants of warranty contrived in his deed, arose entirely from the result of an action of trespass in which one Mathews was the plaintiff, and which had been decided against the defendant.

The opinion in that case expressly states "that from the testimony as reported, we find no ground for ordering more than nominal damages." *Mathews v. Treat*, 75 Me. 594.

On the date last named, therefore, Treat could not have maintained an action against Abbott, because, when a party is entitled to damages for breach of warranty, he cannot sue his grantor until he is first damnified. *Wheeler v. Schier*, 8 Cush. 224.

This principle recognized in numerous decisions from *Emerson v. Proprs. of land in Minot*, 1 Mass. 464, down to *Montgomery v. Reed*, 60 Me. 515, has been more particularly applied in questions of eviction, but there is no reason why it should not have an analogy where a grantee is sued in trespass.

The essence of Mathews' action against him was an invasion of the right of the former to take fish. It may be presumed that fish are never taken above high water mark. Abbott's deed bounds the land conveyed to the defendant "by the shore." That "the shore" of waters where the tide ebbs and flows, means the ground between high and low water mark, and that the word "by," when used in bounding land, is a word of exclusion, has been long settled. *Storer v. Freeman*, 6 Mass. 435; *Niles v. Patch*, 13 Gray, 254; *Nickerson v. Crawford*, 16 Me. 245; *Montgomery v. Reed*, 60 Me. 510.

His right to such an action has never been recognized without notice, until after judgment on eviction. *Ryerson v. Chapman*, 66 Me. 557.

Any act falsely intended to induce a party to believe in the existence of some other material fact, and having the effect of producing such belief in his injury, is a fraud. *Tranbly v. Ricard*, 180 Mass. 259.

Here no loss has been sustained, which must fall on one of two innocent persons, as in *Some*

v. *Brewer*, 2 Pick. 184, and as the bond has not passed into the hands of a bona fide holder, the defendants are not estopped from setting up their own want of caution, if such it may be termed, as in *Kellogg v. Curtis*, 65 Me. 59.

The weight of modern authority supports the jurisdiction in equity of suits for the cancellation of written instruments obtained by fraud. It is exercised for the purpose of affording relief against invalid executory contracts in the possession of another, where the invalidity is not apparent on the instrument itself, and where the defense may be nullified by unintentional delay to sue until the evidence in support of it is lost. *Fuller v. Percival*, 126 Mass. 381.

The case of *Com. Mut. Ins. Co. v. McLoon*, 14 Allen, 351, is in point. A bill in equity was brought by the plaintiff's praying that a policy of insurance which had been obtained from it by fraud might be delivered up to be canceled. The bill was sustained, the court saying that the authorities are abundant in its favor.

So, in *Martin v. Graves*, 5 Allen, 601, where protection from a deed, alleged to have been obtained by fraud, was sought the court says: "Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, * * * a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice and the rights of the parties may require."

The bond which the plaintiffs gave is negotiable according to the testimony of James D. Matthews; the defendant has already attempted to sell it. Against further risk of this kind the plaintiffs are entitled to be protected. *Huleman v. Whitman*, 109 Mass. 411.

Meers. Thompson & Dunton, for defendant:

The warranty deed from Ransom Abbott to James M. Treat, dated February 28, 1868, extends to low water mark on the shore of Penobscot Bay. *Pike v. Munroe*, 86 Me. 309; Colonial Ordinance of 1641, chap. 63, of Colony Laws; *Brakine v. Moulton*, 66 Me. 276.

At the time the warranty deed was given by Abbott to Treat, one James D. Matthews had a valid, subsisting title to the right of taking salmon, shad and alewives on the southwardly side of said premises, a distance of 220 rods on Penobscot Bay, as appears by Treat's answer, "together with all the privileges necessary for carrying on said fishery." *Matthews v. Treat*, 75 Me. 594.

Money paid as costs, and expenses necessarily incurred, including counsel fees, and a reasonable compensation for his trouble and interest for all sums paid out, whether in defending or prosecuting a suit for the protection of his right, may be recovered by the covenantee as part of his damages. *Haynes v. Stevens*, 11 N. H. 38; *Sumner v. Williams*, 8 Mass. 222; *Sweett v. Patrick*, 12 Me. 9; *Kingsbury v. Smith*, 13 N. H. 110; *French v. Parish*, 14 N. H. 496; *Willson v. Willson*, 25 N. H. 229; *Kennison v. Taylor*, 18 N. H. 230; *Gennings v. Norton*, 35 Me. 308; *Hardy v. Nelson*, 27 Me. 525; *Bickert v. Snyder*, 9 Wend. 423; *Rawle, Cov. 96, et seq.*; *Williamson v. Williamson*, 71

Me. 442; *Thayer v. Clemence*, 23 Pick. 490; *Sedg. Dam. 178*.

In an action for a breach of a covenant against incumbrances, the plaintiff may recover in damages the amount of money fairly and justly paid by him to remove an incumbrance, although it was not paid until after the action had been commenced. *Brooks v. Moody*, 20 Pick. 474; *Kelly v. Low*, 18 Me. 244.

Money paid under a mistake of law, with a full knowledge of the facts, cannot be recovered back. *Livermore v. Peru*, 55 Me. 469; *Norris v. Blethen*, 19 Me. 348; *Norton v. Marden*, 15 Me. 46.

A party voluntarily paying, to avoid or close a suit threatened or commenced, whatever may be his legal liability, must abide by the adjustment he has made. *Chase v. Dvinal*, 7 Me. 188.

In *Norris v. Blethen*, *supra*, the plaintiff to avoid a suit, paid his money to the attorneys of the defendant, to settle a claim for which he was not legally liable, and the court held that he could not recover it back.

Foster, J., delivered the opinion of the court:

It is unnecessary in this case to consider law, for equity extends its jurisdiction for the cancellation of written instruments obtained by fraud. From a very careful examination of the evidence we are satisfied that there was no such fraud as would justify the intervention of a court of equity, and for that reason the bill cannot be sustained. Devoided of all legal verbiage, the bill alleges that the defendant falsely and knowingly represented to the plaintiff that he, the plaintiff, was liable upon his covenants in a certain deed, given by the plaintiff to the defendant, to pay whatever judgment and costs one James D. Matthews had recovered or might recover in an action of trespass against this defendant.

The prime cause of these representations, without going into unnecessary detail, was this: the plaintiff had conveyed by warranty deed to the defendant a parcel of land bordering upon Penobscot Bay, the southerly boundary of which, as stated in the deed, was "To a stake and stones on the shore of Penobscot Bay; thence southwesterly by said shore to the extremity of Squaw Point, so called," etc. James D. Matthews, as it appears, had a right of fishery, by prior deed, in the waters on that side of the defendant's land, with all the privileges necessary for carrying on the same, and which was not mentioned in the deed from the plaintiff to the defendant.

An action of trespass had been brought by said Matthews against the defendant, and judgment recovered; but damages had not been assessed or execution issued at the time of the alleged representations. The defendant then claimed, and as appears from the answer to this bill, as well as by the evidence in this case, now claims, that his deed from the plaintiff covered the shore or flats in front of his mainland; and that at the time of the conveyance to him the premises were incumbered with the right of fishery, as before stated. The plaintiff, on the other hand, now claims that his deed only extended to the shore and did not embrace within its boundaries that portion claimed by the defendant between high and low water mark.

While it may be admitted that the question now before this court is not where, on the south or in front of this land, the true boundary line is, yet in one sense it has a legitimate as well as important bearing on the question at issue in throwing some light upon the character of the alleged representations. From the evidence it is impossible to determine correctly whether the plaintiff's deed extends below high water mark or not. The language is "to a stake and stones on the shore." "The shore is the ground between ordinary high and low water mark, the flats." *Montgomery v. Reed*, 69 Me. 514.

It may be narrow, or it may be many rods in width. Since the Colonial Ordinance of 1641, now a part of the common law of this State, the shore adjoining tide waters, not exceeding one hundred rods in width, belongs to the owner in fee of upland adjoining when bounded by such waters; but it may be severed by the owner, and he may sell either or both; or he may by definite boundaries and monuments exclude the shore or any part of it, in a conveyance of the upland. Whether the shore or flats, or any part of the same, pass by deed of the upland adjoining depends of course upon the terms of the conveyance.

In this case the boundary extends "To a stake and stones on the shore of Penobscot Bay; thence southwesterly by said shore to the extremity of Squaw Point, so called." The evidence does not show whether the stake and stones were at high or low water mark; or at what particular point on the shore they were located. It does show, however, that the "extremity of Squaw Point" was between high and low water mark. Hence, as the shore has two sides, if the stake and stones, being the particular monument named, were at low water mark, they would nevertheless be on the shore equally as if they were at high water mark. As Parsons, C. J., has said in *Storer v. Freeman*, 6 Mass. 488, a case many times cited by the courts, "A boundary line is described to run to a heap of stones by the shore at Elwell's Corner. The shore has two sides, high water mark and low water mark. Elwell's Corner is described as a known monument. If it is at low water mark, it is by the shore, as well as if it was at high water mark. Now, if it be a fact that this corner was a known monument at low water mark, the plaintiff might be admitted to prove it by oral testimony. Then the boundary line, running to Elwell's Corner, would cross the flats to low water mark; and the next boundary line running by the flats must run by the same side of the flats on which Elwell's Corner stands; and thus the flats would be included by the boundaries of the land conveyed by the second deed."

Applying these principles to this case, and from all the evidence before us, with the language of the deed to be taken most strongly against the grantor, we are not satisfied that the defendant may not be correct in his claim to the location of the line, as the plaintiff is in his position in regard to it. Whatever the location may be in fact, we need not now determine. All we need say is, that the assertion of title to the shore or flats was one not wholly without foundation on the part of the defendant. He had asserted title to them in the trespass suit, and sets it up in his answer to this bill. The whole evidence goes to show that at the several

times he saw the plaintiff before the bond was given indemnifying him against all loss, cost and expense on account of the trespass suit, as well as at the time his agent Small procured the bond, the time when the alleged false and fraudulent representations were made, he honestly believed that his deed from the plaintiff to him included the shore or flats.

What, then, in regard to the alleged false and fraudulent representations made by said Small?

It appears that the plaintiff and defendant had met in reference to this claim of the defendant at least twice before that, and after judgment had been rendered against the defendant, and talked over this matter in reference to indemnity against the trespass suit. The defendant advised him to get counsel, and at each interview notified him he should commence suit upon his covenants if indemnity was not furnished. The plaintiff, had he desired so to do, could have consulted counsel in reference to his liability after being thus notified. He had ample time and opportunity. After waiting several days, the defendant sent his agent Small to make some arrangements that day. It is alleged that the defendant, through his agent, falsely and knowingly represented to the plaintiff that he was liable upon his covenants to pay whatever judgment and costs had been or might be recovered against the defendant in the suit for trespass.

Admitting this to have been said, it was rather a representation of the law than the misrepresentation of any fact, and as laid down by the authorities would not, under the circumstances disclosed in this case, amount to fraud such as a court of equity would take cognizance of. Professor Pomeroy in his work on Equity Jurisprudence, discussing the nature of fraud and misrepresentations cognizable by a court of equity, says: "A misrepresentation of the law is not considered as amounting to fraud, because, as it is generally said, all persons are presumed to know the law; and it might perhaps be added, that such a statement would rather be the expression of an opinion than the assertion of a fact." 2 Pom. Eq. Jur. § 877.

In *Fish v. Clelland*, 33 Ill. 243, the principle is expressed in these words: "A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely; and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such." To the same effect may be cited the following authorities: *Upton v. Trillick*, 91 U. S. 50 [bk. 28, L. ed. 206]; *Starr v. Bennett*, 5 Hill, 308; *Lewis v. Jones*, 4 Barn. & C., 512; *Grant v. Grant*, 56 Me. 573.

By this it should not be understood that we mean to say that there may be no case of misrepresentation in regard to the law, where a court of equity would not intervene. It may be that if a party should intentionally deceive another by misrepresenting the law to him, or knowing him to be ignorant of it, should thereby knowingly take advantage of his ignorance for the purpose of deceiving him, a court of equity would grant relief on the ground of fraud.

But we do not feel that this case falls within that principle. An examination of the evidence leaves no doubt in the mind that the defendant believed the plaintiff liable upon his covenants for the amount of damage and cost in the Mathews suit. Judgment had been rendered against him. Costs and expenses had been incurred by him in attempting to maintain his title to what undoubtedly he believed his deed included. And if his position is correct as to the location of the line, if his deed includes the shore, then the plaintiff was liable on one or more of the covenants at the time the bond was given. *Harlow v. Thomas*, 15 Pick. 69; *Batchelder v. Sturgis*, 8 Cush. 206; *Lamb v. Danforth*, 59 Me. 824; *Scriber v. Smith*, 1 Cent. Rep. (N. Y.) 768; *Adams v. Conover*, 87 N. Y. 422.

Although it is alleged in the bill that the defendant threatened to commence suit and attach the property of the plaintiff if the bond was not executed, it is not claimed that these representations were not true, or that they were false and fraudulent. Unquestionably such was the intention of the defendant. The answer admits it; and he so testifies.

And while it is inserted in the bill in connection with the alleged fraudulent representations, it is two edged, and may be properly regarded as strongly corroborative of the fact that the defendant believed the plaintiff liable upon his covenants to indemnify him against the judgment in the trespass suit.

It is a rule applicable alike in courts of equity as well as in courts of law, that fraud is not to be presumed, but must be established by proof. 1 Story, Eq. § 190. As the charge alleged is fraud, it is incumbent on the plaintiff to satisfy the court of that fact; not merely that the representations were made, or that the defendant was imperative in pressing a claim which he believed the plaintiff liable to pay. In this case the evidence is not sufficient to support the allegation, and the entry must be:

Bill dismissed with costs.

Peters, Ch. J., Danforth, Virgin, Emery and Haskell, JJ., concurred.

Ella P. BURRILL

v.

City of AUGUSTA.

A city is not liable for the act of the officers of its fire department, unless made so by express statute, or unless the act complained of was expressly ordered by the city government.

(Kennebec—Decided January 30, 1886.)

ON plaintiff's exceptions. *Overruled.*
The case is stated in the opinion.

Mr. H. M. Heath, for plaintiff:

As tending to support the count demurred to, see, *Lee v. Sandy Hill*, 40 N. Y. 442; *Hill v. Boston*, 123 Mass. 844; *Gordon v. Taunton*, 126 Mass. 849; *Bailey v. Woburn*, 126 Mass. 416.

Mr. Winfield S. Choate, *City Solicitor*, for defendant:

A municipal corporation is not liable for the

negligent acts of members of its fire department, acting in the discharge of their duties. *Edgerly v. Concord*, 59 N. H. 78; *Welsh v. Village of Rutland*, 56 Vt. 228; *S. C.* 48 Am. Rep. 762; *Fisher v. Boston*, 104 Mass. 87; *S. C.* 6 Am. Rep. 196; *Hafford v. New Bedford*, 16 Gray, 297; *Jewett v. New Haven*, 88 Conn. 868; *S. C.* 9 Am. Rep. 862; *Wilcox v. Chicago*, 107 Ill., 834; *S. C.* 47 Am. Rep. 434; *Black v. Columbia*, 19 S. C. 412; *S. C.* 45 Am. Rep. 785; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *S. C.* 2 Am. Rep. 368; *Robinson v. Evansville*, 87 Ind. 834; *S. C.* 44 Am. Rep. 770; *Simon v. Atlanta*, 67 Ga. 618; *S. C.* 44 Am. Rep. 739; *Greenwood v. Louisville*, 18 Bush, 226; *S. C.* 26 Am. Rep. 263; *Smith v. Rochester*, 8 Rep. 178; *O'Meara v. N. Y.* 1 Daly, 425; *Van Wert v. Brooklyn*, 28 How. Pr. 451; *Shear. & Redf. Neg.* 3d ed. § 139, and cases cited in note; *Dill. Mun. Corp.* 2d ed. 887, § 774.

Danforth, J., delivered the opinion of the court:

The plaintiff in her writ substantially alleges that the officers of the fire department of the defendant City having occasion to use a steam fire engine belonging to said City for a necessary purpose, after said use carelessly and negligently allowed the engine to stand within the limits of a public street in said City, and while so standing negligently drew the fires and permitted the steam to escape therefrom with a great noise, whereby the plaintiff's horse, which she was rightfully driving upon the same street was frightened, ran away and the plaintiff, without any fault on her part, was thrown to the ground and injured.

To this declaration a demurrer was filed, which was sustained by the court. To this ruling exceptions were filed.

Thus the sole question presented is the liability of a municipal corporation for the negligent acts of the officers of its fire department while in the discharge of their official duties.

The statute provides that cities and towns may organize a fire department, provide for the election of the necessary officers and "prescribe their style, rank, powers and duties," R. S. chap. 26. The object and purpose of this organization is public and not private. It is not intended to nor does it especially advance the corporate interest, or immediate emolument of the city or town where it is established. Its advantages may indeed be great, but they are indirect and enjoyed in common with the public. The officers, though chosen directly by or under ordinances or by-laws established by cities and towns, are public officers, performing public duties, acting upon their own responsibility, controlled by fixed principles and established rules as found in the laws applicable, with no power of control over or to impose any obligation upon the corporation, except so far as such authority may be conferred by express statute or act of the corporation. They are a part of the municipal government and not servants or agents of the municipality. Hence, their relation to their respective cities and towns differs in no respect from that of municipal officers generally.

The absence of corporate liability for the acts of municipal officers, with its limitations and exceptions, has been so fully discussed, both

in our own State and others, and with such uniformity as to result that it is unnecessary to go over the ground again. *Mitchell v. Rockland*, 52 Me. 118; *Brown v. Vinahaven*, 65 Id. 402; *Woodcock v. Calais*, 66 Id. 284; *Hill v. Boston*, 122 Mass. 844; *Gordon v. Taunton*, 126 Mass. 849; *Whart. Neg.* § 191, and cases cited.

That the principles settled in these cases are equally applicable to the officers of the fire department, follows from the nature of their office as above stated, and is shown by *Fisher v. Boston*, 104 Mass. 87; *Hafford v. New Bedford*, 16 Gray 297; *Shearman & Redf. Neg.* § 189; *Dill. Mun. Corp.* 8d ed. § 976.

A careful examination of these cases will show that the municipal corporation has been held liable for the negligence of its officers only when made so by an express statute, or the act out of which the claim grew was directly and expressly ordered by the corporation. Neither of these exceptions is found in this case. No statute is relied upon; none exists imposing any responsibility, except where buildings are demolished to prevent the extension of fires, and there is no pretense that the act complained of was authorized or directed by any express order of the defendant city.

Exceptions overruled.

Peters, Ch. J., Walton, Libbey, Emery and Foster, JJ., concurred.

Charles W. TRAINER

v.

John MORISON *et al.*

1. The purchaser of merchandise from an agent is justified in paying for the same to the agent, when he has no knowledge, either from the usage of the trade or by express notice from the principal, of any limitation or prohibition of the agent's authority to collect the bill.
2. Such a notice printed in red ink with small type at the top of the bill head upon which the bill was written, which was forwarded with the merchandise, is not so prominent as to hold the purchaser at fault for not observing it.

(Penobscot—Decided February 13, 1886.)

ON report. *Nonsuit.*

The facts are stated in the opinion.

Mr. John B. B. Fiske, for plaintiff:

The contract was made in behalf of the plaintiff. As the contract of the agent is in law the contract of the principal, the latter may come forward and sue thereon, although, at the time the contract was made, the agent acted as and appeared to be the principal. 1 Chit. Cont. 11th Am. ed. 808 with notes; *Lapham v. Green*, 9 Vt. 407; *Pitts v. Mower*, 18 Me. 361; *Edmond v. Caldwell*, 15 Me. 840.

If goods are sold by an agent, the principal may maintain an action in his own name upon the contract for the price. *Story, Agen.* § 420; *Paley, Agen. by Lloyd*, §§ 323, 324; *Brewster v. Saul*, 8 La. 296.

It will make no difference in such cases, that

the principal at the time of entering into the contract, is unknown or unsuspected, nor that the third person has dealt with the agent supposing him to be the principal. *Story, Agen.* § 420, and notes.

An agent employed to make a contract is not as of course to be treated as having an incidental authority to receive payment. *Story, Agen.* § 98, and notes; *Doubleday v. Kress*, 50 N. Y. 410; *Higgins v. Moore*, 84 N. Y. 417; *Clark v. Smith*, 88 Ill. 298, 620.

An agent employed to negotiate sales by means of samples and on credit is not to be presumed as authorized to receive payment. 13 U. S. Dig. 742; *Greenhood v. Keator*, 9 Ill. App. 188; 14 U. S. Dig. *McKindly v. Dunham*, 55 Wis. 515; 42 Am. Rep. 740; 10 U. S. Dig. 619; *Butler v. Dorman*, 68 Mo. 298; Am. L. Reg. Oct. 1884; *Chambers v. Short*, 79 Mo. 204; *Seiple v. Irwin*, 80 Pa. St. 513.

Agents who are merely employed to sell and who are not entrusted with the custody of the goods have no implied authority to receive payment. Such agents are canvassers and employed to solicit orders; agents authorized to sell by sample, and brokers. *Benj. Sales*, by Corbin, § 1096, note; *Abrahams v. Weiler*, 87 Ill. 179; *Cupples v. Whelan*, 61 Mo. 588; *Lau v. Stokes*, 82 N. J. L. 249; *Harrison v. Ross*, 44 N. Y. Super. Ct. 280-286; *Boring v. Corrie*, 2 Barn. & Ald. 137; *Kornemann v. Monaghan*, 24 Mich. 86.

Payment to an agent not authorized to receive payment is not good as against the principal. *Story, Agen.* §§ 92, 247; *Seiple v. Irwin*, *supra*; *Greenhood v. Keator*, *supra*.

Third parties are bound to use reasonable care in dealing with agents; they are not allowed to presume authority; the duty of inquiring is incumbent upon them. *Benj. Sales*, Bennett, § 745; *Story, Agen.* § 188, and notes.

Sending of bill of goods by plaintiff was an interception by principal, which should have put defendants on their inquiry; and after it, payment to agent was invalid. *Pratt v. Willey*, 2 Car. & P. 350; *Pitts v. Mower*, 18 Me. 361.

Such sending of bill, with notice "All bills must be paid by check to our order, or in current funds at our office," printed in red ink upon it was notice to defendants not to pay agents, whether defendants saw that notice on the bill or not. *McKindly v. Dunham*, *supra*; 42 Am. Rep. 740; 14 U. S. Dig.

Messrs. Davis & Bailey, for defendants:

If the defendant acted in good faith, and without having observed the words in fine print at the top of the bill he was justified in paying the bill. *Kinman v. Korshaw*, 119 Mass. 140; and, see, *Putnam v. French*, 58 Vt. 402.

A principal is bound to disavow the unauthorized act of his agent the first moment the fact comes to his knowledge; otherwise in many cases he makes the act his own. 1 Chit. Agen. 284, and notes. And see, *Story, Ag.* §§ 185, 187, 189, 240-242, 443, 444.

Haskell, J., delivered the opinion of the court:

Assumpsit to recover the price for merchandise sold. Defense, payment to the plaintiff's agent.

The plaintiff employed an agent to "sell" his goods "by sample." The agent took an order from the defendants for oil, and directed the same forwarded to them, saying that it would arrive by next boat, and that "he came round once a month," when the defendants engaged to pay him. The goods were delivered as agreed, accompanied by a bill, with the words "All bills must be paid by check to our order, or in current funds at our office," printed in red at the top. In two weeks after the delivery of the oil, the agent called for and received from the defendants pay for the same, and gave to them a bill, receipted in the plaintiff's name by himself, that bore the same notice in red letters that was printed upon the bill sent with the goods. The agent embezzled the collection. The case comes up on report.

The agent contracted a sale of the goods to be delivered and be paid for to himself at his next call. The goods were delivered according to the contract, thereby giving the defendants reason to believe that the agent had authority to contract for their sale. An agent who has authority to contract for the sale of chattels has authority to collect pay for them at the time, or as a part of the same transaction in the absence of any prohibition known to the purchaser. *Capel v. Thornton*, 3 Carr. & Payne, 352; *Greely v. Bartlett*, 1 Maine, 173; *Goodenow v. Tyler*, 7 Mass. 36; *Story, Agen.* § 102.

Knowledge of this prohibition by the purchaser may be inferred from particular circumstances of the sale, or from customary usages of trade with which he is familiar, as well as by direct notice that the authority of the agent is limited in this particular. Persons dealing with an agent have a right to presume that his agency is general and not limited, and notices of the limited authority must be brought to their knowledge, before they are to regard it. *Methuen Co. v. Hayes*, 38 Me. 169.

A traveling agent, who assumes only to solicit orders for goods to be sold at the option of his principal, as in *McKindly v. Dunham*, 42 Am. Rep. 740, may well be held unauthorized to make collections. So a broker, not intrusted with an article sold, may not be authorized to receive the money. *Higgins v. Moore*, 84 N. Y. 417; *Baring v. Corrie*, 2 B. & Ald. 137. *Story, Agen.* § 109.

In this case, the agent assumed to complete a contract of sale, specific in its terms, stipulating that payment was to be made to himself. After the goods had been delivered, he presented for payment a bill, made upon a genuine bill head of his principal. He assumed general authority, and no facts are proved that curtail or limit it. The plaintiff seeks to charge the defendants with knowledge that payment was required to be made according to the terms of the notice in red letters upon the bill sent with the goods. The defendants did not see the notice, nor, taking into consideration the care ordinarily exercised by prudent men, are they at fault for not observing it. It is not so prominent upon the bill as to become a distinctive feature of it; one that would be likely to attract attention in the hurry of business and that ought to have been seen by the defendants. It would have been an easy matter for the plaintiff to inclose the bill in a

letter of advice, calling the attention of the defendants to the fact that he was unwilling to intrust collections to his agent. *Kineman v. Kershaw*, 119 Mass. 140; *Putnam v. French*, 53 Vt. 402; *Wass v. M. M. M. Ins. Co.* 61 Me. 587.

Plaintiff nonsuit.

Peters, Ch. J., Danforth, Virgin, Emery and Foster, JJ., concurred.

Samuel NASH

v.

Gertrude SIMPSON.

1. A testator devised to his wife as follows: "All my real estate, together with any and all right, title and interest which I have in and to, any and all real estate, or any and all which I may hereafter acquire, to remain herse so long as she shall remain unmarried after my decease; but if she shall marry again, then from that time she shall be entitled to, and receive only one third part of all that remains. It is my desire and will that said real estate shall remain as it is for twenty years, giving all the income thereof to my said wife, but authorizing her, in case of necessity, to sell any part thereof for her support and maintenance during her widowhood," with no devise over. The widow died without having married again: **held,**
 - I. That the widow by clear and apt words of the will, took a life estate only.
 - II. That the contingent authority to sell for her support during widowhood, did not enlarge her estate to a fee, conferring only a power and not property.
 - III. That the expressed desire of the testator that the real estate "should remain for twenty years", etc., could not affect the alienation of the life estate nor the undevise reversion.
2. Between tenants in common partition is, in equity, a matter of right and not of discretion whenever either of them will not hold or use the property in common. And courts of equity have concurrent jurisdiction with courts of law of partition of lands among tenants in common.
3. To entitle a complainant to partition he must show a clear legal title in himself, and in some cases the bill will be retained to give him time to establish it at law when it is disputed.
4. When the court in a process in equity has acquired jurisdiction for the purpose of construing a will, it may, if there is no defect in the plaintiff's title, do complete justice between the parties by compelling an account and partition when that is asked for in the bill.
5. It seems an assignee in bankruptcy is not bound to take possession of all the property of the bankrupt, and if he does not elect to take possession within a reasonable time it is deemed an election to reject it, and in that event it re-

verts to the bankrupt, or his legal representatives.

(Penobscot—Decided February 6, 1886.)

BILL for construction of a will and for partition.

The facts are stated in the head note and in the opinion.

Messrs. Davis & Bailey for plaintiff:

The language of the will, "so long as she shall be and remain unmarried after my decease," is apt and appropriate to create a life estate. It is equivalent to during widowhood. *Loring v. Loring*, 100 Mass. 340.

If a man grant an estate to a woman *dum sola fuil, or durante viduitate, or quamdiu se bene gesserit*, it is but a life estate. Co. Litt. 42; *Mansfield v. Mansfield*, 75 Me. 512.

An express bequest of an estate for life negates the intention to give the absolute property, and converts a superadded right into a mere power. *Denson v. Mitchell*, 26 Ala. 360; *Stevens v. Winship*, 1 Pick. 818; *Larned v. Bridge*, 17 Pick. 389; *Warren v. Webb*, 68 Me. 137; *Scott v. Perkins*, 28 Me. 85.

And as *Ch. J. Parker* remarks in *Eaton v. Straw*, 18 N. H. 331: "A general power of disposition existing as a power does not imply ownership. In fact the existence of such a power as a technical power excludes the idea of an absolute fee simple in the party who possesses the power." See also, *Burleigh v. Clough*, 53 N. H. 272.

"A power," says *Buller, J.*, in *Goodill v. Brigham*, 1 Bos. & P. 197; "is an authority enabling one person to dispose of the interest which is vested in another."

The devisee has no right under such a power to mortgage the estate in fee. *Hoyt v. Jaques*, 129 Mass. 286; *Paine v. Barnes*, 100 Mass. 471.

This is not a case where a life estate arises by implication only, with authority to dispose of the property without qualification, and which is held to constitute a devise in fee. *Shaw v. Hussey*, 41 Me. 495; *Hall v. Preble*, 68 Me. 101.

The case comes within the exception to that rule, stated as follows: where a life estate only is clearly given to the first taker, with an express power, on a certain event or for a certain purpose, to dispose of the property, the life estate is not by such a power enlarged to a fee or absolute right. *Ramodell v. Ramodell*, 21 Me. 288; *Stuart v. Walker*, 72 Me. 146; *Whitcomb v. Taylor*, 122 Mass. 248.

As a tenant in common defendant can make no objection to the partition prayed for, it being the absolute right of every tenant in common to enjoy his share of the estate in severalty. *Smith v. Smith*, 10 Paige, 470; *Hanson v. Willard*, 12 Me. 146.

The restriction, "it is my desire that said real estate shall remain as it is for twenty years," is void. It is a restraint upon alienation and repugnant to the estate granted whether that estate be a fee, or a life estate merely. *Turner v. Hollowell Sav. Inst.* 76 Me. 530.

While the earlier cases declared such a partial restraint valid, in contradistinction from a perpetual restriction, this distinction seems latterly to have been exploded. See, *Rosher v. Rosher*, L. R. 26 Ch. Div. 801.

It is a fundamental principle, underlying all

proceedings for partition in equity, that the court will not look beyond the legal title. If that is before it, it will proceed, unless there is some controversy between the parties in relation to it, when they will be turned over to a court of law to settle it. *Wilkin v. Wilkin*, 1 Johns. Ch. 117; *Phelps v. Green*, 3 Id. 805; *Hosford v. Merwin*, 5 Barb. 51; *Gay v. Parpart*, 106 U. S. 689 (bk. 27, L. ed. 260).

The authorities are very emphatic, that where a party presents a clear legal title not claimed by the opposing party, the court will not hesitate. The power of a court of equity to grant partition is not discretionary, but *debito iustitia* where the plaintiff has a clear legal right. *Wiseley v. Findlay*, 3 Rand. 361; *Burleson v. Burleson*, 28 Tex. 383.

To bring in the assignee in bankruptcy, to settle in this suit a controversy between himself and plaintiff, would be an offense against the rules of equity pleading prohibiting multifariousness. *Whaley v. Dawson*, 2 Schoales & L. 367; *Wiseley v. Findlay*, 3 Rand. 361.

It would seem, therefore, that the suggestion that this court may in this case properly take into consideration the equitable interest of a party not before it must have proceeded out of a too enlarged conception of its powers. There seem to be limits which even a court of equity cannot transcend. And it will be found that the utmost limit of consideration of equitable titles in proceedings for partition, is where one party of the suit claims an equity in the interest of the other. See, *German v. Mackin*, 6 Paige, 298.

Such title as will sustain an action of ejectment has always been regarded as sufficient to enable a court of equity to act. *Larika v. Mann*, 2 Paige, 28; *Wilkinson v. Pariah*, 3 Paige, 653.

Messrs. T. H. Appleton and A. L. Simpson, for defendant:

It is settled that the words "all of my real estate" are sufficient to create a fee. *Bacon v. Woodward*, 12 Gray, 379, and cases cited.

"Words of limitation," says *Chancellor Kent*, "mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation. The one specifies the utmost time of continuance, and the other marks some event, which if it takes place in the course of that time, will defeat the estate." 4 Kent, Com. 12th ed. 127.

The words, during her widowhood, not being words of limitation but words of condition, make a condition subsequent. *Durante viduitate*, these are estates says *Blackstone* upon condition that the grantees do not marry. 1 Bl. Com. ch. 9, 110.

In *Otis v. Prince*, 10 Gray, 581, the court held the words "so long as he remain unmarried" a condition subsequent.

It is unnecessary to consider whether or not, the condition being in restraint of marriage is *in terrorem* and void as declared in *Parsons v. Winslow*, 6 Mass. 169, as it is not contended that the condition has ever been broken.

We contend, therefore, that the intention of the testator was to create a condition subse-

quent and that the estate was immediately executed in his wife; the continuance of such estate in her depending on the breach or performance of her condition. 2 Bac. Abr. 291.

In view of these considerations does it appear by his will, to use the language of our statute, that the deviser intended to convey a lesser estate than a fee? No presumption of an intent to die intestate as to any part of an estate is to be presumed, if the testator's words will carry the whole. *Stehman v. Stehman*, 1 Watts (Pa.) 466; *Hunt v. Hunt*, 11 Met. 88.

The plaintiff has no standing in court. Chapter 160, U. S. Stat. 1878, repealing the Bankrupt Law, continues the assignee. The bankrupt's title to property and the interest of the plaintiff under his wife's devise passed to his assignee, by his assignment of his estate in bankruptcy.

In *Belcher v. Burnett*, 126 Mass. 280, it was held under a devise to a man and his wife for their lives and upon their death to such of their children named in the will as shall then be living, that the interest of a child will pass by an assignment of his estate in bankruptcy under the U. S. Stat. March 2, 1867, § 14, in the lifetime of the parents. See, *Nash v. Nash*, 12 Allen, 845; *Dunn v. Sargent*, 101 Mass. 886.

Virgin, J., delivered the opinion of the court:

Siméon H. Nash died testate, leaving a widow and two heirs, one a daughter and the other a daughter of a deceased daughter, the defendant.

The complainant claims that by the will of the testator, his widow took only a life estate in the real estate, and that as the reversion was not disposed of by the testator, the two heirs became tenants in common, each owning an undivided half thereof.

The defendant contends that the widow took a fee; and that as the widow died intestate, the reversion descended to herself as the only surviving heir.

The first question therefore is: what estate did the widow take under the fourth item of the will?

It is common knowledge that the language adopted by the testator, "All my real estate, together with any and all right, title and interest which I have in and to any and all real estate, or any and all which I may hereafter acquire," would be ample in a devise, without any words of inheritance or limitation, even before any statutory provision relating thereto to carry the fee. And the statute goes still further, by providing that a devise of land conveys all the estate of the deviser therein, unless it appears that he intended to convey a less estate. R. S. chap. 74, § 16. The omission from the several subsequent revisions of the word "clearly" next before "appears" in the revision of 1841, chap. 92, § 26, does not change the meaning. The inevitable conclusion must therefore be, that the widow took a fee, unless it clearly appears by the will that a less estate was intended. And we are of opinion that the words, "to remain her's so long as she shall be or remain unmarried after my decease," are words of limitation which clearly show it to have been the intention of the testator to limit the duration, at longest, to the natural life of his widow. They can mean no more than "during widowhood;" *Loring v. Loring*, 100 Mass. 841;

and the term must be considered to be measured by the life of a person *in case*. 1 Washb. R. Prop. 78.

Such and similar phrases have ever since the time of Lord Coke been so construed. *Mansfield v. Mansfield*, 75 Me. 512, and cases there cited; 1 Washb. R. Prop. 108; Bac. Abr. 454; *Dole v. Johnson*, 8 Allen, 864.

The last case cited, so far as this question is concerned, is very much like the one at bar. The language of the devise to the widow in that was: "All my real and personal estate, together with any and all estate, right or interest which I may acquire after the date of this will, as long as she shall remain unmarried and my widow." And in that case as in this, there was no devise over.

And on the question of intestacy, which consideration has been urged here, the court after remarking that the preventing of intestacy is an object generally to be sought in the construction of wills, say: "The will does not anywhere profess to dispose of the whole estate; and as to the remainder of his real estate, after the estate for life or widowhood devised to his wife, no disposition is made of it. It is certain, therefore, that to some extent, it was his intention to die intestate." We may well adopt this language, although general introductory words, such as "touching all my temporal estate" and the like, may have some effect in the construction of subsequent devises, are not of themselves sufficient to extend a devise for life to a fee. 3 Greenl. Cr. 176, and *note*.

As the widow, therefore, by force of the clear, apt and explicit words of the will and not by implication, took a life estate only, the contingent authority, "in case of necessity to sell any part of the estate for her support and maintenance during her widowhood," does not enlarge her estate to an absolute fee. *Warren v. Webb*, 68 Me. 187; *Stuart v. Walker*, 72 Me. 146.

Such authority confers only a power and not property. *Ayer v. Ayer*, 128 Mass. 575; *Burleigh v. Clough*, 52 N. H. 267; *Herring v. Barrow*, 13 Ch. D. 144; *Rhode I. H. Tr. Co. v. Com. Nat. Bank*, 1 New Eng. Rep. 20.

This construction gives full legal force to the language and intention of the testator.

It is urged that the clause "but if she shall marry again, then, from that time, she shall be entitled to receive only one third part of all that remains," gives her, in case of marriage, one third in fee, which would result in giving her a larger estate in quality if she acted against the wishes of her husband than she would receive if she acted in accordance therewith, by remaining unmarried. But we do not so understand it. This clause of itself gives her nothing. It only reduces the quantity of the property, in case the contingency happens, which was given to her by the former clause, which alone contains words of devise. In other words, if she married, she was then only to have one third of the estate devised for life, less what she might dispose of under the power, just what would be equivalent to her dower.

The widow not having married again, we have no occasion to pass upon the question of the restraint of marriage; and if we had, we think the preponderance of authority allows a husband to consider the probabilities whether or not his children would be so well cared for

if his widow formed a second alliance and became liable to be the mother of a second family, and govern the disposition of his property accordingly. 2 Jar. Wills. R. & T. ed. 564, and note 29. And it seems to be the opinion of the English chancery court that the same rule applies to widowers as to widows. *Allen v. Jackson*, L. R. 1 Ch. D. 399.

Nor can the clause, "It is my desire and will that said real estate shall remain as it is now for twenty years," etc., have any influence upon the life estate or upon the reversion, upon the life estate, for the testator could not restrain the alienation even of a life estate. *Turner v. Hollowell Savings Inst.* 76 Me. 527, 530; nor upon the reversion, for it being undivided, its control is not governed by the will. *Nickerson v. Bowly*, 8 Met. 424, 430.

Much stress has been laid upon the alleged real intention of the testator. But his intention, as deduced from the language of the will, is the criterion for its interpretation; and when thus ascertained, it is only to have effect provided it is consistent with the rules of law. *Warren v. Webb*, 68 Me. 135.

And the intention contended for, however plausible it may appear, cannot have effect because the rules of law will not permit. Moreover, we think it quite as certain that the testator really intended what the law declares he said: that his widow should not only have the personal property but a life estate in the real estate with power to sell any of it for her comfort during her widowhood; and in case she married again then what would be equivalent to dower and the balance to descend to his and her children.

The allegation in the answer, unsupported by any evidence, that the widow did exercise the power given her is not relied upon in the argument.

Our opinion, therefore, is that by the will the widow took a life estate, with a contingent power to sell any part of it during her widowhood, which power she never exercised; that the reversion, being undisposed of by the testator, rested in his two heirs, daughter and granddaughter, subject to the contingency of the exercise of that power by the widow, or of a sale by his executor for the payment of debts which he did not leave or have been paid, *Rich v. Rich*, 118 Mass. 197, 199, and that the complainant being sole devisee of the daughter, holds under the will, as tenant in common with the defendant, each share being one undivided half.

The plaintiff also seeks for partition of the premises.

Between tenants in common partition is a matter of right and not of discretion, whenever any one of them will not hold and use the property in common. *Parker v. Gerard*, Amb. 286; *Agar v. Fairfax*, 17 Ves. 533; *S. C. White & T. L. Cas.* 516; *Hanson v. Willard*, 12 Maine, 142; *Wood v. Little*, 85 Me. 107; *Allen v. Hall*, 50 Id. 253, 263.

And courts of equity, on account of their superior methods and procedure, not only long ago assumed and exercised, concurrently with courts of law, jurisdiction of partition of land thus held, 1 Story, Eq. § 643, *et seq.* but equitable, was expressly conferred nearly thirty years

ago. R. S. (1857) chap. 77, § 5, cl. 6; *Wilson v. E. & N. A. R. R. Co.* 62 Me. 112, 114.

Moreover, when one tenant has received more than his share of the rents and profits, an accounting may be directed and reimbursement decreed. R. S. chap. 77, § 5, cl. 6; *Leach v. Beattie*, 33 Vt. 196; 3 Pom. Eq. § 1389; 1 Story, Eq. § 655.

To entitle the plaintiff to a decree for partition he must show that his legal title is clear. This expression, with very little variation, runs down through all the cases and text books. *Cartwright v. Pultney*, 2 Atk. 380; *Parker v. Gerard*, Amb. 286; 1 Story, Eq. § 653; 3 Pom. Eq. § 1388.

One court says: "In a suit in equity for partition, the legal title of the parties is never meddled with by the court. The individual rights of the parties to participate in the division, or to call for it, may come up, but not the simple question of conflicting title to the land. A plaintiff who comes into equity for partition must show a clear legal title." *Stuart's Heirs v. Coalter*, 4 Rand. 74.

Some of the authorities say that where there are suspicious circumstances about the legal title, the decree will not be made. *Cartwright v. Pultney*, *supra*.

The doctrine almost universally held is that if the plaintiff's legal title is involved in doubt and is disputed and not established, as where it appears that the title depends upon forged deed, *Cartwright v. Pultney*, *supra*; or upon a settlement of a boundary, *Stuart's Heirs v. Coalter*, *supra*; or want of a sufficient delivery of a deed, *Nichols v. Nichols*, 28 Vt. 226, and for various other causes, *Freem. Part.* § 502, the court will retain the bill to give the plaintiff a reasonable opportunity to establish his title at law; and when he has done that, decree partition according to his established right. *Cartwright v. Pultney*, *supra*; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Phelps v. Green*, 8 Johns. Ch. 802; *Ramsay v. Bell*, 3 Ired. Eq. 209; *Wiseley v. Findlay*, 8 Rand. 361; *Howey v. Goings*, 13 Ill. 95; *S. C.* 54 Am. Dec. 427, and note.

So there are cases holding that when the title of the parties depends upon the construction of a will, that question must first be settled at law. *Slade v. Barlow*, L. R. 7 Eq. Cas. 296; *Manners v. Manners*, 1 Green, Ch. 884.

But where the defendant, as in this case, is in possession claiming to hold it under a will and the complainant files his bill under the statute to have the will construed, for accounting and partition, the court, in the absence of any defect in the latter's title, having acquired jurisdiction for the purpose of construing the will, has authority to do complete justice between the parties, by compelling an account and partition. *Scott v. Guernsey*, 60 Barb. 178; *Dameron v. Jameason*, 71 Mo. 100; *Howey v. Goings*, *supra*; *Freem. Part.* § 449.

But assuming the parties to have been tenants in common, with the right of possession on the decease of the widow, the defendant disputes the present title of the plaintiff, on the ground that his conveyance to Bulfinch in 1875 was in fraud of the bankrupt law and that the title by virtue of his bankrupt proceedings passed to his assignee who, if anyone, should have brought the bill.

On the other hand, the plaintiff contends that the conveyances through Bulfinch and J. H. Nash to himself, the latter more than a year prior to the filing of his bill, made his legal title clear; and that as the defendant does not claim under the assignee, she cannot protrude that title.

We do not understand the rule to be that the defendant cannot raise that question as a defense here, unless she claims under the assignee, although two cases, *Portis v. Hill*, 14 Tex. 69, and *Burleson v. Burleson*, 28 Tex. 383, 413, seem to so hold. For all the other cases which an extended search has enabled us to find, hold to the contrary, and the reason assigned in some of them would seem decisive, viz.: that while at law partition is effected by the judgment of a court of law and delivery of possession in pursuance of it, equity consummates partition by directing and compelling mutual conveyances by the parties; *Cartwright v. Putney*, *supra*; *Whaley v. Dawson*, 2 Sch. & Lef. 386; *Gay v. Parpart*, 106 U.S. 679, 690 [bk. 272, L. ed. 256, 260]; or by decreeing a pecuniary compensation to one of the parties for owelty. *Wilkin v. Wilkin*, *supra*; 1 Story, Eq. § 654; or by ordering a sale of the premises and a division of the proceeds. 3 Pom. Eq. § 1390. Therefore, to enforce a decree of partition between these parties in any of these modes, especially of the last two named, could not bind persons not parties; and if the assignee's title should subsequently prove good, the defendant would be in an undesirable plight.

Gay v. Parpart, *supra*, is in harmony with this view, and contains nothing inconsistent herewith. Moreover, the defendant's title being unquestioned, she ought not to be drawn into any litigation concerning any controversy between the plaintiff and some third person as to the plaintiff's title. *Whaley v. Dawson*, *supra*.

We are, therefore, of opinion that before partition can be decreed, the plaintiff must establish, by some independent proper suit or action, his legal title.

But since we have settled what we suppose to be the principal contention, the construction of the will, and the parties may, perhaps, feel inclined to save further expense and delay by an amicable arrangement, we add by way of suggestion:

Assuming that the conveyance to Bulfinch, though made some seven months prior to the commencement of the plaintiff's proceedings in bankruptcy, was in fraud of the bankrupt law, and that the land vested in the assignee by operation of law, how long does it remain there without being asserted by the assignee? An assignee, unlike an executor of a deceased testator, is not bound to take possession of all property that thus vests in him. It may be onerous property depending upon uncertain litigation. He may elect to take it or not to take it; and if he elects not to take it, then it survives to the bankrupt, unless he has disposed of it. Moreover, he must elect within a reasonable time; otherwise it is deemed an election to reject it. *Amory v. Lawrence*, 8 Cliff. 523, 535-6, and cases there cited.

Again, by U. S. R. S. § 5057: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching

any property or right of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.

Now the legal title passed to Bulfinch in February, 1875, and thence to J. H. Nash in July, 1875, and both deeds were duly recorded, showing the nominal consideration. Did not the failure of the assignees to move within two years make valid the title of J. H. Nash? *Meeks v. Olipherts*, 100 U. S. 564 [bk. 25, L. ed. 775]; *Trimble v. Woodhead*, 102 U. S. 647, 649 [bk. 28, L. ed. 268, 290].

If not arranged, the bill will be retained, so far as partition is concerned, to afford the plaintiff an opportunity, under R. S. chap. 104, §§ 47 and 48, or some other mode which may be proper, to establish his legal title, when further proceedings will be had according to his established rights.

Bill sustained so far as construction of the will is concerned; but bill retained to allow complainant to establish his legal title, when further proceeding will be had according to his established rights. Question of costs reserved till final decree.

Peters, Ch. J., Danforth, Emery, Foster and Haskell, JJ., concurred.

Tristram A. RICKER

William H. LEAVITT.

A bill of exceptions stated a general exception to so much of the judge's charge as was reported on five printed pages. Those pages disclosed that the judge discussed and explained different matters, made several illustrations and stated different contentions of the parties. Held, that such exceptions are not summary as required by the statute and should not be allowed.

(Kennebec—Decided February 13, 1886.)

ON exceptions by the plaintiff. *Overruled.*

The case is stated in the opinion.

Messrs. Brown & Carver, for plaintiff.

Messrs. Webb & Webb, for defendant.

Per Curiam:

The statute authorizing exceptions, requires them to be presented in writing in a summary manner. R. S. ch. 77, § 51. "Summary," is defined by Webster to mean, "short," "concise," "reduced into a narrow compass, or into a few words," etc.

The "summary manner" of course relates to the manner of writing or drafting the exceptions. The exceptions should present the various points singly, clearly and concisely.

In this bill a general exception is stated to five printed pages of the judge's charge, in gross. In those pages, the judge discussed and explained different matters, made several illustrations, and stated different contentions of the parties. From the bill of exceptions alone we cannot tell just what point is excepted to. We only learn that from the brief of counsel. Such exceptions are not summary as required by the statute, and should not be allowed. *Harriman v. Sanger*, 67 Me. 442; *Macintosh v. Bartlett*, Id. 130; *Crosby v. Me. Cent. R. R. Co.*, 69 Me. 422.

Seth PINKHAM

v.

Horace A. GRANT and Trustee.

The payment of a legacy before the probate of the will, by the person therein named as executor, is made valid by the probate of the will and the appointment and qualification of such person as executor.

(York—Decided February 23, 1886.)

ON plaintiff's exceptions. *Overruled.*
Trustee process.

The facts are stated in the opinion.

Mr. R. P. Tapley, for plaintiff:

Funds in the hands of an executor are liable to seizure under our trustee process. The trustee now seeks to avoid the plaintiff's attachment, by an act done anterior to his appointment. This we think he cannot do. R. S. chap. 86, § 36. And see also, *Cummings v. Garvin*, 65 Me. 301.

An executor has no legitimate authority to do any act before the probate of the will, except such as is strictly necessary and indispensable; such as providing for the decent burial of the deceased and such as is required to preserve the property of the estate and for the comfortable support of the family. 3 Redf. Wills, 21.

He cannot convey the personal property. He cannot sue for and collect debts. *Campbell v. Sheldon*, 13 Pick. 22-24.

The trustee as creditor has no lien upon the legacy. It is not a debt which he, as executor, can set off against the legacy. A debt due from defendant to the estate might be set off. R. S. chap. 82, § 56; 6 Met. 537.

Under the ancient English practice many acts done by the nominee before the probate of the will were valid. The executor under that practice could do acts that no other person could do, and there was a marked distinction in this respect between an administrator and a person named in the will as executor. But under our practice the law is quite different. See, R. S. chap. 64, §§ 6, 9; *McKeen v. Frost*, 46 Me. 249; *Gilman v. Gilman*, 54 Me. 456; *Pettingill v. Pettingill*, 60 Me. 411. See also, 3 Redf. Wills, 21.

Mr. H. Fairfield, for Trustee:

The appointment gives complete validity to the payment before the appointment. The payment was confirmed instantaneously, upon the appointment, and no moment intervened in which a trustee attachment could be made. *Alford v. Marsh*, 12 Allen, 604.

The executor, as such, could pay the legacy before his appointment. 2 Redf. Wills, 14-16; *Rand v. Hubbard*, 4 Met. 256, 257; *Spring v. Parkman*, 12 Me. 132.

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Whether the executor paid this money out of the funds of the estate or partly from the estate and partly from his own funds can make no difference; for if an executor pays out of his own money debts to the value of the assets, he may apply the assets to his own use towards satisfaction of the money he has expended. *Hancock v. Minot*, 8 Pick. 37.

Libbey, J., delivered the opinion of the court:

The exceptions raise the question of the liability of the trustee. The facts upon which the liability depends are in substance as follows: Ira Grant died, testate, July 27, 1882. The trustee was named as executor in the will. The testator gave to the principal defendant a legacy of \$1,000. On the 4th of September, 1882, the trustee, as executor, paid to the principal defendant \$912, in part payment of the legacy, taking his receipt therefor. The will was probated on the 5th of September, 1882, and on that day the trustee was duly appointed and qualified as executor. Afterwards, on the same day, this action was commenced and the writ served on the trustee. By the settlement of the estate in probate, it appears that it is insufficient to pay all legacies in full, and that the \$912 was all that the defendant was entitled to, under the will.

It is claimed by the learned counsel for the plaintiff that when the payment was made by the trustee, he had not been appointed executor by the probate court, and had no authority to make the payment; that he made it on his wrong, and therefore the legacy was due from the estate of the testator when the writ was served.

We think this is not the law. True, when the payment was made, the trustee had no legal right to use the funds of the estate for that purpose; but when one named as executor in a will deals with the assets of the estate before his appointment and qualification, without authority, his appointment and qualification date back, by construction, to the death of his testator, validate his acts, and he can no longer be held as executor *de son tort*. At the time of the service, there was nothing due the legatee. *Shillaber v. Wyman*, 15 Mass. 322; *Andrew v. Gallison*, 15 Mass. 325; *Rand v. Hubbard*, 4 Met. 252; *Spring v. Parkman*, 12 Me. 137; *Alford v. Marsh*, 12 Allen, 603.

It is further claimed for the plaintiff, that, as matter of fact, the payment was not made till after the service of the writ; but we think the case does not warrant such a finding.

Exceptions overruled.

Peters, Ch. J., Walton, Virgin, Fester and Haskell, JJ., concurred.

SUPREME COURT OF MASSACHUSETTS.

Benjamin F. BORDEN *et al.*

v.

Amy JENKS *et al.*

1. By the Statute of Massachusetts when a provision is made for a **widow** by the will of a deceased husband, which she accepts, she is **not entitled to dower**, unless it plainly appears thereby that such was the intention.
2. When a provision made for the **widow** by the testator is not in terms declared to be in lieu of dower, her **failure to waive the provisions of the will operates as an acceptance of them and places her in the same position as if such provision had been expressly declared to be in lieu of dower.**
3. The **widow has the right to a priority** of payment of a legacy which she takes in consideration of relinquishment of dower; but when she has no dower interest, as where she had a settlement in lieu of dower; she obtains **no precedence**, but shares equally with other legatees.
4. Where a **wife is entitled**, as she is under the laws of Massachusetts, to a **share in the personal property of the husband**, of which she cannot be deprived by will, the relinquishment of such right entitles her to receive the legacy given in consideration thereof, in preference to those who are pure beneficiaries.
5. Whether one devise or bequest is to be postponed in payment to another is a **question of intention.**
6. **Specific as well as general legacies and devises abate in favor of a provision made for a widow**, and she is entitled to priority of payment thereof.
7. The **widow takes as a purchaser** where she relinquishes her rights, and is not to be deemed merely a beneficiary in marshaling the assets.

(Bristol—Decided January 11, 1886.)

IN equity for the construction of a will.

The case is stated by the court.

Messrs. E. H. & S. C. Bennett, for Mrs. Jenks:

The widow's legacy in this case was: "my new dwelling house, and garden lot, for life; fire wood, and keeping of a cow"; also, "absolutely all my household furniture and indoor movables, and \$2,000."

To his son George: "my homestead farm, and also my new dwelling house and garden lot, after my wife's death;" also, "all my farming tools, live stock, carriages, etc., and \$8,000 in money."

There is nothing to pay the widow's \$2,000, except the real estate given to George; and the controversy, therefore, is between them only.

This will did not expressly say the widow's legacy was "in lieu of dower;" but her acceptance of it, by a non-waiver, does, by force of the statute, give her exactly the same rights as if it had been so expressed. *Toule v. Swasey*, 106 Mass. 100.

That she is entitled to priority in case the devise to the son were general, as, "all of the rest and residue of my estate," is conceded.

The contention is that the rule does not apply where the real estate is specifically devised, as by name or description.

She is a purchaser for value. The grounds of her priority are fully stated in the following cases: *Burridge v. Brady*, 1 P. Wms. 127; *Blower v. Morret*, 2 Ves. Sr. 420; *Icenhart v. Brown*, 1 Edw. Ch. 411; *Norcott v. Gordon*, 14 Sim. 258; *Stahlschmidt v. Lett*, 1 Smale & G. 421; *Gaw v. Huffman*, 12 Gratt. 628; *Durham v. Rhodes*, 23 Md. 284; *Potter v. Brown*, 11 R. I. 282; *Howard v. Francis*, 80 N. J. Eq. 444; *Steele v. Steele*, 64 Ala. 489; *Re Dolan*, 4 Redf. 511.

Having no dower interest to part with she does not obtain any precedence, but must share equally with other pecuniary legatees. *Perrine v. Perrine*, 1 Halst. 138; *Acey v. Simpson*, 5 Beav. 85; *Roper v. Roper*, L. R. 3 Ch. Div. 717.

In this respect she stands like any other creditor, a legacy to whom has priority if he has a real claim to surrender; otherwise, it shares *pro rata* with others. *Davies v. Bush*, 1 Younge, 341.

But if she has such dower, she is so far a "creditor" that if the estate is insolvent, she shares *pro rata* with other creditors; which, of course, voluntary legatees do not. *Tracy v. Murray*, 44 Mich. 109.

And some say she has even a superior right to other creditors, to the value of her dower interest. *Hall's Case*, 1 Bland, Ch. 208.

Like any other creditor, also, she is entitled to interest from the time of her husband's death, when other pecuniary and gratuitous legatees, ordinarily are not. *Williamson v. Williamson*, 6 Paige. 304; *Pollard v. Pollard*, 1 Allen, 490; *Toule v. Swasey*, 106 Mass. 106.

And whether the pecuniary legacy to her equals or exceeds the value of her dower interest surrendered is quite immaterial. The husband has the right to put his own value on her interest in his land. *Davenport v. Fletcher*, Amb. 244; *Roper v. Roper*, *supra*; *Farnum v. Bascom*, 122 Mass. 289.

And it is quite immaterial to her priority for a pecuniary legacy, that she also has other provision for her, in the will or otherwise, in lieu of dower. Her dower right buys her legacy in full. *Davenport v. Fletcher*, *supra*; *Heath v. Denny*, 1 Russ. 548.

The only discovered cases at variance with this steady flow of authority is that of *Jett v. Bernard*, 3 Call, 11, in which a three line opinion gives no reasons for its conclusion; and *Chambers v. Davis*, 15 B. Mon. 522, which was subsequently corrected by statute to conform to other States.

There is no difference where the devise to others is specific. *Reed v. Reed*, 9 Watts, 266; *Lord v. Lord*, 23 Conn. 827; *Warren v. Morris*, 4 Del. Ch. 289-302; *Loock v. Clarkson*, 1 Desaus. Eq. 471; *Stuart v. Carson*, Id. 500; 2 Redf. Wills, 452, *pl. 10*.

The general principles involved in this subject logically require that no distinction be made between general and specific legacies. *Hubbard v. Hubbard*, 6 Met. 50; *Toule v. Swasey*, *Pollard v. Pollard*, *Farnum v. Bascom*, *supra*; *Richardson v. Hall*, 124 Mass. 228.

Mr. T. M. Stetson, for George A. Jenks:

When a testator gives specific chattels or lands, and then gives mere money to more or less meritorious donees, his dominant thought and purpose is that the specific things shall go where he says.

The true meaning of the widow's gift is thus: "I give her \$2,000 out of my personal estate not specifically bequeathed." *Toule v. Swasey*, 106 Mass. 100-108; *Hubbard v. Hubbard*, 6 Met. 50; *McLean v. Robertson*, 126 Mass. 538.

In the absence of any provision in the will, a deficiency in assets is to be made up: 1, out of residuary estate; 2, out of general legacies; 3, out of legacies given for a valuable consideration, such as dower; 4, specific and demonstrative legacies. 2 Wms. Exec. 1463.

A legacy given in lieu of dower has no preference over a specific legacy. *Id.* 1469, 1473; 2 Redf. Wills, 462; *Wilcox v. Wilcox*, 13 Allen, 252.

Pollard v. Pollard, 1 Allen, 491, is no adverse authority. The legacies which had to contribute were not and could not be specific. The agreement of facts wrongly used that word. But neither the court nor the reporter make any such mistake.

Richardson v. Hall, 124 Mass. 228-235, explains the effect of a governing provision in a will relating to this subject.

Where the testator's intent is so distinctly marked by a specific desire, the courts hold that such gifts are even to be relieved from mortgages thereon.

Farnum v. Bascom, 122 Mass. 289, consists with our view. This was a case where all were specific and some more meritorious than others. P. S. chap. 127, §§ 27, 28, 29.

Devens, J., delivered the opinion of the court:

The provision made for the widow by the testator is not in terms declared to be in lieu of dower; but as by the Statute of Massachusetts when provision is made for a widow by the will of a deceased husband, she is not entitled to dower, unless it plainly appears thereby that such was the intention, under the Pub. Stats. chap. 127, §§ 18, 20, her failure to waive the provisions of the will operated as an acceptance of them, and placed her in the same position as if such provisions had been expressly declared to be in lieu of dower. *Toule v. Swasey*, 106 Mass. 100.

The widow is a purchaser for value in accepting the provisions of the will, and is not treated as a gratuitous object of the testator's bounty. By a relinquishment of her dower the estate acquires a valuable right of property. Whether the provisions be more or less, as far as the testator, the widow and all pure beneficiaries under the will are concerned, it is the right of the testator to affix what consideration he pleases for the relinquishment of dower, and for the widow to accept or reject it. Whether, as against creditors, a provision in lieu of dower far exceeding its value could be held good need not now be discussed. The right of the widow to a privity in the payment of the legacy which she takes in consideration of relinquishment of dower is so well established that it hardly requires the citation of authorities. *Burridge v. Brady*, 1 P. Wms. 127; *Blotter v. Morret*, 2 Ves. Sr. 420; *Norcott v. Gordon*, 14 Sim. 258; *Williamson v. William-*

son, 6 Paige 298-304; *Pollard v. Pollard*, 1 Allen, 490; *Toule v. Swasey*, 106 Mass. 100; *Farnum v. Bascom*, 122 Mass. 282, 289.

It seems to be equally established that where a widow has no dower interest, as where she is provided for by a jointure or other settlement in lieu thereof, she obtains no precedence, but shares equally with other pecuniary legatees. *Roper v. Roper*, L. R. 3 Ch. Div. 714; *Acey v. Simpson*, 5 Beavan, 35.

It would follow from these principles that where a wife is entitled, as she is under the laws of Massachusetts, to a share in the personal property of the husband, of which she cannot be deprived by will, the relinquishment of such right would entitle her to receive the legacy given in consideration thereof in preference to those who were pure beneficiaries. *Farnum v. Bascom*, 122 Mass. 289.

The position which she occupies in regard to such a legacy may be different so far as creditors are concerned, as her right is independent of theirs in the one case and subject thereto in the other. It is not disputed, in the case at bar, that the widow is entitled to payment of her pecuniary legacy from the personal property which has been generally bequeathed, to the exclusion of the other legatees; but it is contended that neither the personal chattels specifically bequeathed to George A. Jenks, nor the land devised to him, should such personal chattels prove insufficient, can be applied to the payment of the legacy to the widow. Whether one devise or bequest is to be postponed in payment to another is a question of intention. The provision which a testator makes for his widow may be in any form he chooses, as the wife may or may not accept, as she pleases. It may be charged solely on personal or real estate distinctly specified; it may be made subject to or preferred above other legacies; or that which is given may be charged with payments or liabilities to others. Where a specific thing is given, there is certainly a difference from a general donation, which may be satisfied from many sources. If the thing exists, the donee receives it; if not, no other portion of the testator's property is charged with the payment of its value. The contention of George A. Jenks is, therefore, that as the farm and personal property thereon were specifically devised and bequeathed to him, even if Mrs. Jenks was in a sense a purchaser for value, in this: that she relinquished her right of dower and her rights in the personal property, which could not otherwise have been taken from her in favor of any pure beneficiaries; yet that she is not entitled to look to the real and personal estate thus specifically bequeathed to others. The widow must be held to have accepted the provisions of the will according to their legal meaning; and the question therefore is, whether their true interpretation is that they were or were not subject to the other specific legacies. The principle on which it is held that provisions of a will accepted by a widow are to be carried out, if necessary, to the exclusion of all pure beneficiaries, would require that the same rule should be applied where legacies were specific, there being no general legacies from which these provisions could be satisfied. So long as there are general legacies, the specific legacies should be relieved; but as

the provision for the widow satisfies a legal demand against the estate, which could not otherwise be met, it should properly take precedence of everything which is pure bounty. *Pollard v. Pollard*, 1 Allen, 490.

That specific legacies must be held to abate as well as general, in favor of the provision made for a widow, appears to have been distinctly held in *Loockock v. Clarkson*, 1 De Saus. Eq. 471; *Stuart v. Carson*, Id. 500, and *Clayton v. Akin*, 38 Ga. 820.

In other cases where some of the legacies were specific and others general, it has been held that the provision for the widow was entitled to priority, apparently without suggestion that any difference could exist between the two classes, so far as their priority was concerned, whatever difference there might be among the legatees *inter sese*. *Reed v. Reed*, 9 Watts, 268; *Lord v. Lord*, 23 Conn. 827.

The statement of facts in *Pollard v. Pollard*, *ubi supra*, terms the other bequests "specific"; but as the first clause of the will provided that the executor should sell and convert into money all the real and personal property of the testator, it is probable that the word was wrongly used instead of "definite," or some similar term.

As the opinion does not deal distinctly with the question of priority in case the other legacies had been of articles or parcels of property specifically described, the opinion cannot be said to be decisive of the question before us, but the principle there established is of great weight in determining it. It is there decided that the widow always takes as a purchaser when she relinquishes her rights, and is not to be deemed merely a beneficiary in marshaling the assets. A similar principle has been applied where a devise has been made to the husband, by reason of his relinquishment of his legal rights in the personal property of the wife.

In *Farnum v. Bascom*, *ubi supra*, all legacies and devises were specific, including a life interest to the husband of the testatrix in her real estate, he not being a tenant by curtesy therein. He was entitled to one half of her personal property; of this he could not have been deprived by her will, except with his own assent. Gen. Stats. chap. 106, §§ 9, 10.

His assent was accompanied by a devise to him of this life estate. It was held that, until all the other specific legacies and devises were exhausted, no resort for the payment of debts could be had to the life estate devised to the husband. It was further said that it was not important whether that which the husband was to receive was or was not an exact equivalent of that which he relinquished. It was sufficient if the testatrix saw fit so to treat it. In *Farnum v. Bascom*, the devise to the husband was indeed specific, but the ground upon which it was given a priority over other specific legacies, they being required to contribute to the payment of the debts, while it was not, equally exists when the legacy is general in its terms. It is a testamentary gift founded on a valuable consideration, and is thus entitled to preference. *Richardson v. Hall*, 124 Mass. 228.

In *McLean v. Robertson*, 126 Mass. 537, a legacy of a fixed sum of money was given by a testatrix in consideration of a debt which

she deemed it her duty equitably to pay. There were also other bequests of specific sums of money to pure beneficiaries. It was held that the language of the will, by which all the specific bequests of money were to abate proportionally, in case of a deficiency of assets, was not to be applied to this legacy, in view of the intention of the testatrix to pay a debt by it which she held it incumbent on her to do.

It is contended on behalf of George A. Jenks, that the true meaning of the gift is as if it were written, "I give to my widow \$2,000, out of my personal estate not specifically bequeathed." But, in view of the valuable consideration she pays, she is to be treated as a *quasi* creditor; and as the gift relieves the estate of the testator from a proper charge thereon, the testator must be held to have intended in the absence of direction to the contrary, that it should be paid out of any property which he had to bequeath or devise, of course in the order in which that property was properly to be subjected to charge.

The legacy of personal chattels specifically bequeathed to George A. Jenks must therefore abate, and if necessary, the specific devise of the land, in order to satisfy the legacy to the widow.

Decree accordingly.

E. REMINGTON & SONS

v.

SAMANA BAY CO. *et al.*

1. A creditor's bill to reach the unpaid subscription to the capital stock of a corporation from a stockholder, to be applied in part satisfaction of a judgment against the corporation, **cannot be maintained without proof** that plaintiff recovered a **valid judgment** against the corporation and that he **cannot resort** to his original claim against the company in case that judgment appears to be void.
2. Where the corporation had been **dissolved** and ceased to exist for any purpose **before judgment** against it was rendered, such **judgment** is **void** and cannot be the foundation of a creditor's bill.
3. A court of **equity** has **no general jurisdiction** of a bill by a single creditor, not brought on behalf of such creditors as may choose to join, and **which does not make** other stockholders **parties**, but makes the corporation a **nominal party** when at the time, such corporation has **ceased to exist** for any purpose.

(Bristol—Decided January 9, 1886.)

EQUITY. On demurrer to bill. *Bill dismissed.*
Bill by a judgment creditor to subject the unpaid subscription of a stockholder to the satisfaction in part of a judgment against the Corporation.

Further statement appears in the opinion of the court.

Mr. J. H. Benton, for F. L. Ames and others, executors, demurrants:

The bill cannot stand as a creditor's bill, be-

cause the Corporation is not a party within the jurisdiction of the court. The Corporation is a necessary party to a suit to enforce the liability of subscribers to its capital stock for the benefit of creditors. *Vose v. Grant*, 15 Mass. 505; *Lyman v. Bonney*, 101 Mass. 562 (late case); *First Nat. Bank of Hingham v. Bigelow*, U. S. C. C. Dist. of Mass.; *Ogilvie v. Knoch Ins. Co.*, 22 How. 382 (63 U. S. bk. 16, L. ed. 349); *Davenport v. Dows*, 18 Wall. 626 (85 U. S. bk. 21, L. ed. 938); *Wetherbee v. Baker*, 35 N. J. Eq. 501-507.

The liability of the stockholder to the creditor is through the corporation, not direct; and when the stockholder is sued it must be in a way to put what he pays, directly or indirectly into the treasury of the corporation for a distribution according to law. *Patterson v. Lynde*, 106 U. S. 519 (bk. 27, L. ed. 265).

It is obvious that no order can be made in this suit which the Corporation or its officers are bound to perform, for the publication of the order of notice under the equity rules was only constructive notice to the Corporation that it might come in and become a party if it chose, but did not in any sense bring it within the jurisdiction and control of the court as a real party. *Spurr v. Scoville*, 3 Cush. 578, 582; *Macomber v. Jaffray*, 4 Gray, 82; *Pennoyer v. Neff*, 95 U. S. 727 (bk. 24, L. ed. 570.)

This is not a proceeding *in rem* but a proceeding *in personam* against the Corporation and its stock subscribers to compel the Corporation to collect the subscriptions and pay its debts; and if it does not, to cause it to be done by a receiver who would hold the amount collected as the Corporation would if it collected it; i. e., for the benefit of all creditors of the Corporation. *Felch v. Hooper*, 119 Mass. 52.

A foreign corporation can be sued and made a party only by an attachment of its property. Publication of notice or service on its officers, even if it have a usual place of business in the Commonwealth, is at most only notice of the suit. *Desper v. Cont. Water Meter Co.* 187 Mass. 252; *Levitt v. N. R. R. Co.* 139 Mass. 294.

In *Erickson v. Nesmith*, 4 Allen, 233-237, the court says: "This court has no jurisdiction that will reach such corporation out of this Commonwealth, having no assets here."

A bill in equity, even when an injunction is issued to restrain the disposition of the property sought to be reached by it, creates no lien upon the property. *Squire v. Lincoln*, 187 Mass. 399; *Powers v. Raymond*, 187 Mass. 483.

And besides, subscriptions to the stock of a corporation, being a trust fund belonging to it only for the benefit of all its creditors, are not attachable in a suit by one creditor. *Crease v. Babcock*, 10 Met. 525, 533; *Patterson v. Lynde*, 106 U. S. 519 (bk. 27, L. ed. 265).

After an assessment to satisfy such deficiency has been made by the order of a court, which has jurisdiction and control of the corporation and its directors, a bill in equity may be maintained, on such assessment by the receiver or assignee, against the stockholders without making the corporation a party. *Upton v. Tribilcock*, 91 U. S. 45 (bk. 23, L. ed. 208); *Adler v. Milwaukee Brick Mfg. Co.* 18 Wis. 57.

Equity does not interfere in behalf of a creditor suing for himself alone to obtain payment out of the assets of an insolvent debtor, even

when the debtor is within the jurisdiction of the court, but requires that the other creditors should be permitted to share in the relief, which must be sought by a creditor's bill. *Story*, Eq. Pl. § 92, et seq.; *Hallet v. Hallet*, 2 Paige, 19; *Egberts v. Wood*, 3 Paige, 517; *Mann v. Pentz*, 3 N. Y. 415; *Osgood v. Laytin*, 3 Abb. App. 418; *Adler v. Mil. Brick Mfg. Co.* 18 Wis. 57, 62.

Upon principle and authority a creditor's bill must be in behalf of all creditors who may join. But even when the courts held that when creditors of equal rank were entitled to a fund they must be joined in a suit to reach it. *McDermutt v. Strong*, 4 Johns. Ch. 687, 691. See *Thompson v. Brown*, 4 Johns. Ch. 619, 643, 644.

The doctrine, that an execution creditor acquires a legal preference to the assistance of the court so that he may maintain a bill in equity for himself alone, applies only when he seeks the aid of equity to reach property belonging to the debtor at law, but which cannot be reached on execution at law. It does not apply when the property is assets in a court of equity only, and then only in trust for others, as in this case. *Purdy v. Doyle*, 1 Paige, 558; *Wilson v. Fiedling*, 2 Vern. 763; *Freedmans Savings & Trust Co. v. Earle*, 110 U. S. 710 (bk. 28, L. ed. 301).

There are peculiar reasons for the enforcement of this rule in case of suits to enforce the common-law liability of stock subscribers to creditors of the corporation. This is not an absolute liability for its debts, like that which the statute law in some cases creates or provides shall arise upon certain contingencies, as in *Bond v. Appleton*, 8 Mass. 472; *Knowlton v. Ackley*, 8 Cush. 93; *Hawes v. Anglo Saxon Pat. Co.* 111 Mass. 200.

It is the same which exists when the capital or assets of the corporation have been divided among its stockholders before its debts are paid; as in *Vose v. Grant*, 15 Mass. 505, and *Spear v. Grant*, 16 Mass. 9; or where by statute the stockholders are made liable upon the debts of the corporation to the amount of their stock; as in *Harris v. Dorchester Parish*, 28 Pick. 112.

It is, as to the creditors, only an obligation to contribute ratably with all other subscribers to ratable payment of all creditors. It is a proportionate liability limited to the amount of the stock, and on which no decree can be rendered for a greater amount, nor for any purpose but to make up a deficiency of assets to pay the debts of the corporation. *Vose v. Grant*, *supra*; *Spear v. Grant*, *supra*; *Harris v. Dorchester Parish*, *supra*; *Baker v. Atlas Bank*, Met. 182, 192; *Crease v. Babcock*, *supra*; *Grew v. Breed*, 10 Met. 575; *Bell v. Spaulding*, 3 Allen, 485; *Commonwealth v. Cochituate Bank*, 3 Allen, 48; *Ward v. Griswoldville Mfg. Co.* 16 Conn. 598-601.

When, therefore, a creditor seeks to compel a subscriber to perform this obligation, he must do it in equity and in a court where the subscriber can, if he desires, have the extent of his obligation determined once for all, as well that which he is under to his associate subscribers as to creditors. Otherwise, he may be compelled to respond to creditors under one rule, and obtain his contribution from his associates under another. *Pollard v. Bailey*, 20 Wall. 520; (87 U. S. bk. 22, L. ed. 376); *New England Bank v. Stockholders*, 6 R. I. 154;

Terry v. Tubman, 92 U. S. 156-161 (bk. 23, L. ed. 587-589).

A bill cannot be maintained by a single creditor on his own behalf alone against a corporation and one of its stockholders to procure the application of the unpaid subscription of stockholders to the payment of his claim. No one creditor can assume that he alone is entitled to what any stockholder owes. *Patterson v. Lynde*, 106 U. S. 519-521 (bk. 28, L. ed. 265, 266); *Terry v. Little*, 101 U. S. 216 (bk. 25, L. ed. 864).

A creditor's bill to reach unpaid stock subscriptions must be brought on behalf of creditors, in the courts of the country or State where the corporation is established and where it can be wound up and the trust fund of the unpaid subscriptions to its capital equitably distributed among all its creditors. *Brickson v. Nesmith*, 4 Allen, 233-236.

The remedy must be: 1. In a tribunal having power to act over the whole subject, in an equitable point of view, and so to adjust the various claims and various liabilities as to produce a final and just distribution of the funds equitably found among all who can substantiate their claims. *Voss v. Grant*, *supra*; *Spear v. Grant*, *supra*; *Crease v. Babcock*, *supra*; *Grew v. Breed*, *supra*; *Carrol v. Green*, 92 U. S. 509 (bk. 23, L. ed. 788).

2. In a court which has jurisdiction of the corporation, so that its decree, when satisfied by the stockholders, will be a bar to any other proceeding against them in behalf of the corporation or a receiver or assignee. *Smith v. Huckabee*, 53 Ala. 191, 195; *Coleman v. White*, 14 Wis. 700; *Umsted v. Buskirk*, 17 Ohio St. 113-118.

A receiver of a corporation can only be appointed by a court which has control of the corporation, or in aid of such an appointment. High, Rec. § 44; *Harvey v. Varney*, 104 Mass. 436.

A plaintiff cannot acquire an exclusive right or lien, by an attachment or other proceeding, in a suit which he is not entitled to maintain for his exclusive benefit. *Crease v. Babcock*, *supra*.

The bill cannot be maintained under the special jurisdiction conferred on this court by the G. S. chap. 113, § 2:

1. Because the debtor Corporation is not within the jurisdiction of the court. The statute looks only to property or rights vested in a debtor residing in the Commonwealth who can be compelled, by suitable process, to assign them to the creditor or a receiver. *Carver v. Peck*, 181 Mass. 291.

2. Because the debt from the defendant executors is not within this State, but is in the domicile of the Corporation; which holds it in trust to be there applied by it, or by a court of equity or insolvency to the benefit of all the creditors. *Carver v. Peck*, *supra*.

In connection with this case, see, *Ager v. Murray*, 105 U. S. 126 (bk. 26, L. ed. 942); *Sanger v. Bancroft*, 12 Gray, 865; *Moody v. Gay*, 15 Gray, 457.

3. Because the liability of a subscriber to capital stock is not property of the corporation which it could assign to one creditor alone, but property which is vested in it in trust for all its creditors. *Ingalls v. Baker*, 18 Allen, 449-451.

Stock debts are trust funds in their hands for the benefit of the corporate creditors, and must in all cases be dealt with as trust funds are dealt with. *Sawyer v. Hoag*, 17 Wall. 610-621 (84 U. S. bk. 21, L. ed. 781-786); *Sanger v. Upton*, 91 U. S. 56; *Morgan Co. v. Allen*, 108 U. S. 498-508 (bk. 26, L. ed. 498-501).

It is upon this ground that the corporation cannot release the liability. *New Albany v. Burke*, 11 Wall. 96 (78 U. S. bk. 20, L. ed. 155); *Burke v. Smith*, 16 Wall. 890 (83 U. S. bk. 21, L. ed. 861); *Rider v. Morrison*, 54 Md. 429; *Wetherbee v. Baker*, 85 N. J. Eq. 501-512.

A corporation could not by voluntary assignment transfer to one of its creditors the whole or part of the trust fund of its unpaid stock subscriptions, to the exclusion of all other creditors entitled to share in the fund. *Curran v. Arkansas*, 15 How. 807 (56 U. S. bk. 14, L. ed. 707).

This statute is only an extension of the attachment or trustee process at law to cases where the property or interest of the debtor cannot, by reason of its character, be taken by such process. It does not create a liability to be taken, but only a method of taking. *Schlesinger v. Sherman*, 127 Mass. 206; *Marwell v. Cochran*, 136 Mass. 74.

The original provision of chap. 26, laws 1851, gave the court "jurisdiction in equity upon a bill by any creditor," etc. This was condensed in the General Statutes, chap. 113, § 1, cl. 11, to the provision that the court should have jurisdiction in equity of "bills by creditors," etc. Both provisions give an exclusive remedy, which not only can but must be pursued by a plaintiff for himself alone; and "other creditors will not be permitted to come in and share with the plaintiff the benefit obtained by the suit." *Phoenix Ins. Co. v. Abbott*, 127 Mass. 558-560; *Chapman v. Banker & T. Pub. Co.* 128 Mass. 478.

Upon the facts it is submitted that the bill cannot be maintained in any form.

The Corporation was dead, and although its assets were subject to be collected and administered in equity for the benefit of its creditors and stockholders, no judgment could be rendered against it any more than against a dead man. The record of it proves nothing, except that a void judgment was rendered. *Merrill v. Suffolk Bank*, 31 Me. 57; *Bonaffe v. Fowler*, 7 Paige, 576; *McCulloch v. Norwood*, 58 N. Y. 568; *Sturges v. Vanderbilt*, 73 N. Y., 384; *U. S. Bank v. McLaughlin*, 2 Cranch, C. C. 20; *Thornton v. Marginal Freight R. Co.* 123 Mass. 32; *Nat. Bank v. Colby*, 21 Wall. 615.

The existence of the Corporation having been terminated before the assumed judgment against it in favor of the plaintiff was rendered, the plaintiff has no judgment against the Corporation and cannot maintain a creditor's bill in any jurisdiction. *Wiggin v. Heywood*, 118 Mass. 514; *Carver v. Peck*, 181 Mass. 291.

The plaintiff's judgment in New York is not conclusive against the stockholders of the Corporation as to the validity of the plaintiff's debt against the Corporation. They were not parties or privy to the suit in which it was rendered, and it is, at most, only *prima facie* evidence against them. *Downs v. Fuller*, 2 Met. 135; *Inman v. Mead*, 97 Mass. 810; *Goodnow v. Smith*, 97 Mass. 69.

Mr. H. J. Fuller, for plaintiff :

The capital stock is a trust fund which can only be reached through the aid of a court of equity. 2 Story, Eq. Jur. § 1252. See also, *Vose v. Grant*, 15 Mass. 505; *Spear v. Grant*, 16 Mass. 9.

The subscriptions, especially that portion uncalled for by the Company, could not be attached by trustee process or otherwise at law. *Hatch v. Dana*, 101 U. S. 205 (bk. 25, L. ed. 885).

The plaintiff had no occasion to bring the bill in behalf of itself and other creditors. *Bartlett v. Drew*, 57 N. Y. 587.

Especially under G. S. chap. 113, § 2, cl. 11; P. S. chap. 151, § 2, cl. 11; *Sillouway v. Col. Ins. Co.*, 8 Gray, 199; *Crompton v. Anthony*, 13 Allen, 33, 37; *Barry v. Abbott*, 100 Mass. 396; *Chapman v. Banker & T. Pub. Co.*, 123 Mass. 479.

Modern equity practice does not require that a judgment creditor of a corporation suing by a creditor's bill to enforce payment of a stockholder's subscription as a means of satisfying complainant's judgment, should demand an accounting of the entire indebtedness of the Company, or that he should make all the stockholders defendants. Each subscriber to stock is a several debtor, in equity as well as at law, to the Company, and his indebtedness is applicable to the payment of corporate debts; and a creditor's bill, seeking, not to wind up the Company, but simply to reach assets and apply them to a particular demand, merely subrogates the creditor and trustees to the debt due from the subscriber to the indebted corporation. It does not change the character of the subscribed debt attached or trusted, from several to joint. *Hatch v. Dana*, *supra*; *Ogilvie v. Knox Ins. Co.*, 22 How. 830 (63 U. S. bk. 16, L. ed. 849); *Bartlett v. Drew*, 57 N. Y. 587; *Pierce v. Milwaukee Con. Co.*, 88 Wis. 253; *Marsh v. Burroughs*, 1 Woods, 468.

It is not material that no actual service was made upon the defendant Company, or that it has no place of business within this jurisdiction. The equitable trustee process, as originally established by statute, only applied to debtors not residing in the Commonwealth, until in 1858, it was made applicable to all debtors. Stat. 1851, chap. 206; Stat. 1858, chap. 84; *Davis v. Werden*, 13 Gray, 306; *Lord v. Harte*, 118 Mass. 271.

The doctrine is now well established in equity that the capital stock, including unpaid subscriptions therefor, constitutes a trust fund for the benefit of the creditors of the corporation, and the trust cannot be defeated by any device short of actual payment in good faith. *Curran v. Arkansas*, 15 How. 309 (56 U. S. bk. 14, L. ed. 708); *Sanger v. Upton*, 91 U. S. 60; *Sawyer v. Hoag*, 17 Wall. 610 (84 U. S. bk. 21, L. ed. 731); *Hatch v. Dana*, *supra*; *Morgan Co. v. Allen*, 103 U. S. 508 (bk. 26, L. ed. 502); *Salmon v. Hamborough Co.* 1 Cas. in Ch. 204; *Hightower v. Thornton*, 8 Ga. 486; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Fowler v. Robinson*, 31 Me. 189; *Briggs v. Penniman*, 8 Cow. 387; *Slee v. Bloom*, 19 Johns. 474; *Bartlett v. Drew*, 57 N. Y. 587; *Osgood v. King*, 42 Iowa, 478; 2 Story, Eq. Jur. § 1252; *Ang. Corp. § 600, et seq.*

A creditor's bill lies to compel a stockholder

of an incorporated company to pay over to a judgment creditor the amount of his subscription which had not before been paid to the company, and this right exists independent of any statutory provision. *Henry v. Vermillion & Ash. R. R. Co.* 17 Ohio, 187; *Hightower v. Thornton*, 8 Ga. 486, and cases cited, *supra*.

Even though no call has been made for the same by the corporation. *Allen v. Montgomery R. R. Co.*, 11 Ala. 437; *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313.

Equity will compel payment by subscribers to the stock of commercial corporations according to their contract. *Harmon v. Page*, 62 Cal. 448; *Crawford v. Rohrer*, 59 Md. 599.

The plaintiff's judgment is competent and conclusive evidence to prove the plaintiff to be a creditor of the Samana Bay Company, and establishes the amount of its claim against the Company, in this proceeding against a stockholder. *Freem. Judg. § 177*; *Tayl. Corp. § 787*; *Morawetz, Corp. § 619*; *Thomp. Liab. Stock. § 329*; *Ogilvie v. Knox Ins. Co.*, *supra*, 387; *Sanger v. Upton*, 91 U. S. 56 (bk. 23, L. ed. 220); *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Slee v. Bloom*, 20 Johns. 669; *Bartlett v. Drew*, 57 N. Y. 587; *Hastings v. Drew*, 76 N. Y. 9; *Stephens v. Fox*, 83 N. Y. 313; *Henry v. Vermillion & Ash. R. R. Co.* 17 Ohio, 187; *Wilson v. P. & Y. Coal Co.* 43 Pa. St. 424; *Milliken v. Whitehouse*, 49 Me. 527; *Stocum v. Prov. Steam & Gas Pipe Co.* 10 R. I. 112; *Bank of Australasia v. Nias*, 16 Ad. & Ellis, Q. B. 717; *Gaskill v. Dudley*, 6 Met. 550; *Holyoke Bank v. Goodman Paper Mfg. Co.* 9 Cush. 576; *Farnum v. Ballard Vale Mach. Shop*, 12 Cush. 507; *Lane v. School Dist.* 10 Met. 462; *Haves v. Anglo Saxon Pat. Co.* 101 Mass. 385, 397; *Norfolk v. Am. Steam Gas Co.* 106 Mass. 404.

Judgment against a corporation, as acceptor of a draft, is *prima facie* evidence that the draft was properly drawn and accepted, in a suit against a stockholder. *Hoagland v. Bell*, 86 Barb. 57.

The Samana Bay Company was not dissolved by the manifesto issued March 25, 1874, by Gonzalez, "General of the National Armies and Supreme Chief of the Republic." The only modes of dissolving a corporation, known to the common law, were: by the death of all its members; by Act of the Legislature; by a surrender of the charter, accepted by the Government; or by forfeiture of the franchise, which could only take effect upon the judgment of a competent tribunal on a proceeding in behalf of the State; and neither a court of law nor a court of equity had jurisdiction to decree a forfeiture of the charter or dissolution of the corporation at the suit of an individual. *Folger v. Col. Ins. Co.*, 99 Mass. 274. And see, *Briggs v. Cape Cod Ship Canal Co.* 137 Mass. 71; *Rice v. Nat. Bank Commonwealth*, 126 Mass. 300; *Boston Glass Mfg. Co. v. Langdon*, 24 Pick. 51; *Ang. Corp. § 777*.

The rule of the civil law is the same. *Ang. Corp. §§ 48, 49, 11th ed.*

There is no evidence as to the laws of the Dominion Republic. In the absence of all proof to the contrary, the court will presume the law is the same there as here. 1 Greenl. Ev. 12th ed. § 448; *Wood v. Corl*, 4 Met. 206; *Dubois v. Mason*, 127 Mass. 87.

The possession of property and the carrying on of business was not essential to the existence of the corporation. The omission to choose officers clearly does not show a dissolution. They were not essential to its validity. Although no directors or other officers had been chosen for several years, yet, by the by-laws of the Corporation, the directors and other officers were to continue in office until others were chosen in their stead. *Boston Glass Mfg. Co. v. Langdon, supra.*

Even if the Company was dissolved, whatever the rule at law may be, it is well settled in equity that the obligation of its contracts survives, and that the creditors may enforce their claims against any property belonging to it, which has not passed into the hands of bona fide purchasers, but which is still held in trust for the Company or for the stockholders thereof, or against any trust fund belonging in equity to the Company. *Mumma v. Potomac Co.* 8 Pet. 281 (33 U. S. bk. 8, L. ed. 945); *Bacon v. Robertson*, 18 How. 486 (59 U. S. bk. 15, L. ed. 508); *Lum v. Robertson*, 6 Wall. 277 (78 U. S. bk. 18, L. ed. 748); *Folger v. Col. Ins. Co.* 99 Mass. 276; Story, Eq. § 1252; Ang. Corp. 11th ed. § 779, a.

The provision of the charter relates to the liability of the stockholders as such, not to their contract of subscription. As to the remedy, it is local and has no extraterritorial force. *Taft v. Ward*, 106 Mass. 518; *Gott v. Dinmore*, 111 Mass. 45; *B. & A. R. R. Co. v. Pearson*, 128 Mass. 445; *Morawetz, Corp.* §§ 610, 611.

Messrs. Evarts, Southmayd & Choate, also for plaintiff:

With special reference to the Law of New York.

It is a well settled principle of public international law, that until there has been a formal and legal recognition, by the Legislative and Executive Departments of the Government, of a change in the government of any foreign State, the courts are bound to presume that the former order or condition of things still exists. Wheat. Elem. Int. L. Lawrence, 2d ed. 1863, 47; *Gelston v. Hoyt*, 3 Wheat. 325 (16 U. S. bk. 4, L. ed. 401); *S. C. 13 Johns. 155*; *Kennett v. Chambers*, 14 How. 38 (55 U. S. bk. 14, L. ed. 316).

And so, of course, of the recognition of a change in the government of a State. All of these are purely political questions, to be disposed of by the Political Department of the Government. *Luther v. Borden*, 7 How. 1 (48 U. S. bk. 12, L. ed. 581). See authorities cited in dissenting opinion, 56, 57, *Id.*

The recognition or acknowledgment is an act of the Legislative and Executive Departments of the Government of the United States. It is not the act of the Executive by private or other correspondence or instructions; nor is it the act of the state department. The government must act through the usual channels, Congress and the President, or the President and the Senate, the treaty making power. Otherwise there will and can be no such formal or legal recognition of a change in the government of a foreign State as will bind the courts of justice in this country. *U. S. v. Palmer*, 3 Wheat. 610 (16 U. S. bk. 4, L. ed. 471). See, Wheat. Elem. Int. L. Dana's ed. § 27 and notes; Wheat. Elem. Int. L. Lawrence's 2d ed. 1863, 48, note 19.

Of course, the mere appointment or reception of consuls can have no legal force or effect. 1

Halleck's Int. L. new ed. Eng. 1878, 318; 3 Phillimore, Int. L. 8d Eng. ed. 1882, 271; U. S. Consular Regulations, 1881, § 75, p. 28; U. S. R. S. § 1738.

And no action by any consul of the United States, as such, looking to the recognition of any foreign government, can bind either the government or the courts. Consuls are a "subordinate authority." *The Anne*, 3 Wheat. 485, 445, 446 (16 U. S. bk. 4, L. ed. 428-431); U. S. R. S. § 1738, *supra*.

Upon the facts, whether lying in evidence or in judicial knowledge, there never was, nor has been, as matter of law, any such recognition of the revolutionary government of Gonzalez in Santo Domingo, by the United States Government, as will or can bind the courts of justice in this country.

This is purely a question of law arising upon the master's report. The master has, however, found that the government was "officially recognized by the United States," this finding being expressly based upon all the facts in evidence on that point, all of which facts are reported by the master. This is purely an inference of law, which it was not competent for the master to make. The rule or order of reference simply required him to "report the facts, together with such evidence as either party shall request him to report." It is for the court to act upon the facts when found, not for the master. It is also clearly an error arising upon the face of the report. No exception was necessary to bring the question before this court. 2 Dan. Ch. Pr. 5th ed. *1810, *1811, *1299, *1814, notes and cases cited; *White v. Johnson*, 2 Munf. 285; *Levert v. Redwood*, 9 Port. (Ala.) 79.

The master having clearly exceeded his authority, the court may, of course, disregard the finding. 2 Dan. Ch. Pr. 5th ed. *1320.

There is no proof that the act of Gonzalez was or could be under any circumstances the act of the government, even assuming it to have been a legal and recognized government. *U. S. v. Wagner*, L. R. 2 Ch. App. Cas. 582, 594.

In the case of a Republic, the public property of the State remains in the State, and the State therefore, and not any mere officer of the State is the proper party to sue for it. *U. S. v. Wagner, supra*, 592 per Turner, L. J.

In the absence, then, of an express and unequivocal declaration that this Company is dissolved and its charter forfeited, the court, with provisions like these before it, is bound to presume and to hold that no forfeiture was intended or created. See, *Hamilton v. Accessory Transit Co.* 26 Barb. 46.

Even if the Corporation be considered as dissolved when the New York suit was brought, the creditors and this plaintiff are nevertheless entitled in equity to be paid from the assets of the Corporation, a part of which assets consists of unpaid stock subscriptions, upon proof of their original debts. *Morawetz, Corp.* §§ 662-664, 575-577.

Where it was provided, as here, that the recovery of judgment and return of execution unsatisfied against the Corporation should be a condition precedent to an action against the stockholders, it was held that admitting the dissolution of the Corporation, the condition was impossible of performance and was of no

force, and the right of the plaintiff to this action was perfect. *Kincaid v. Drinelle*, 59 N. Y. 548, 551.

The unpaid stock subscriptions are a part of the assets of the corporation, and a trust fund pledged for the payment of its debts. *Sanger v. Upton*, 91 U. S. 56, 60 (bk. 23, L. ed. 220, 221); *Morawetz, Corp. supra*.

The point which may be made with reference to the duty or obligation of this plaintiff to proceed for a recovery of its debt in proceedings which it should have instituted or which might be instituted in New York, to wind up the corporate affairs, is without any force. Creditors are not bound to wait upon a settlement of the affairs of a corporation; nor will the courts of New York interfere to wind up the affairs of a foreign corporation. *Opitzie v. Knox Ins. Co.*, 22 How. 380, 391 (63 U. S. bk. 16, L. ed. 849, 858).

Not only is the creditor absolutely independent of any such proceeding for the settlement of the affairs of the corporation; but neither he nor any other person would be able, under any circumstances, to bring about the winding up of the affairs of the corporation, and a distribution of its assets, through the New York courts. Those courts absolutely refuse to interfere, in this way, with a foreign corporation. The utmost they will do is to protect the rights of creditors by appointing a receiver of the assets of such corporation situated in that State. *Barclay v. Tulman*, 4 Edw. Ch. 128, 180; *Merrick v. Van Santvoord*, 34 N. Y. 208, 222; *Redmond v. Enfield Mfg. Co.* 13 Abb. Pr. N. S. 333.

The plaintiffs' debt is further established and proved by the judgment of the Supreme Court of the State of New York. That judgment is a valid and binding judgment, and conclusively establishes the plaintiff's status as a creditor of the defendant Company.

Sections 427, 184 and 189 of the Code of Procedure of New York, and laws of N. Y. 1849, chap. 107, in force at the time of bringing that suit, sustained it and the judgment therein, in every respect.

It requires no argument to show that the subject of that action, the orders or drafts, the promise to pay by acceptance, and the breach of contract by the failure of the Company to pay, all arose and were made in the City and State of New York.

The following cases also explain the statutes and sustain the action, if any explanation or support be necessary: *Gibbs v. Queens Ins. Co.* 63 N. Y. 114; *O. & L. C. R. R. Co. v. V. & C. R. R. Co.* 63 N. Y. 176; *Barnett v. Chicago & L. H. R. R. Co.* 4 Hun, 114; *Prouty v. Michigan S. & N. Ind. R. R. Co.* 1 Hun, 655.

The rule is well established, that by appearing generally and answering in the action, all objections to the jurisdiction and to the regularity and sufficiency of the service are waived. *McCormick v. Pa. Cent. R. R. Co.* 49 N. Y. 308; *O. & L. C. R. R. Co. v. V. & C. R. R. Co. supra*; *Dart v. Farmers Bank*, 27 Barb. 387; *Carpentier v. Minturn*, 65 Barb. 295.

As to the Company, the debtor, the plaintiff must fully prove his debt. He must establish his status as a creditor. This he does, in this case, by producing the New York judgment. *Stephens v. Fox*, 83 N. Y. 813, 816, 817.

As to the stockholder, the trustee, the debt

must be regarded as fully established, if it be proved as against the Company, the debtor, as above and the only question is, as to how much the stockholder owes the company; as to what is the amount of his debt, of the assets of the company in his hands, which can be applied in satisfaction of the plaintiff's debt, so proved. *Opitzie v. Knox Ins. Co. supra*; *Henry v. R. R. Co.* 17 Ohio, 187.

We have always understood the law in Massachusetts to be in favor of the conclusiveness of the judgment. And if the law of New York is to have any influence in the determination of the question, there is not the slightest doubt that the judgment is conclusive there also. *Slee v. Bloom*, 20 Johns. 669, 689.

The statute neither created nor enlarged the ordinary liability of the stockholder. *Mills v. Stewart*, 41 N. Y. 384, 390; *Stephens v. Fox, supra*.

In the lower courts of New York, the following cases have followed the court of last resort in *Slee v. Bloom, supra*: *Moss v. Oakley*, 2 Hill, 265; *Moss v. McCullough*, 7 Barb. 279.

That case has also been recognized and followed in *dicta* by particular judges in the Court of Appeals. *Moss v. Averell*, 10 N. Y. 452; *Belmont v. Coleman*, 21 N. Y. 96. And see, *McMahon v. Macy*, 51 N. Y. 160; *Sanger v. Upton, supra*; *Miller v. White*, 50 N. Y. 141.

The unpaid stock subscription is a part of the Company assets, as we have seen, and the stockholder is bound to that extent. See, *Henry v. R. R. Co.* 17 Ohio, 187, *supra*.

Holmes, J., delivered the opinion of the court:

This is a bill in equity alleging that the plaintiff, a Corporation established under the laws of the State of New York, has recovered a judgment against the Samana Bay Company, on which execution has issued and has been returned unsatisfied; and seeking to compel the executors of Oliver Ames, who was a stockholder in the Company, to pay over the sum of \$3,500 in partial satisfaction of that judgment, the sum mentioned being the amount remaining unpaid upon Ames' subscription for stock.

The bill alleges that the Company is insolvent, but that there are no other stockholders or creditors residing in this Commonwealth. It does not purport to be brought on behalf of such creditors as may choose to join, nor does it make other stockholders parties. The Company is made a nominal party, but there has been no service upon it and could not be, for reasons that will appear.

A demurrer by the executors was overruled by Chief Justice Gray, and the case was sent to a master. It is now before us on appeal from the decree overruling the demurrer, and on the master's report.

We are of opinion that the bill cannot be maintained without proof that the plaintiff has recovered a valid judgment against the Corporation; and that it cannot resort to its original claim against the Company in case that judgment appears to be void; and as we are of opinion upon the facts disclosed by the report that the judgment was void because the Corporation had been dissolved and had ceased to exist for any purpose before the judgment was

rendered, it will be unnecessary to discuss the questions raised by the demurrer.

We proceed, therefore, to consider the case upon the facts, and to give our reasons for the opinion to which we have come.

The liability sought to be enforced is a liability through the Corporation, not a direct liability of the stockholders to the creditor, and cannot be carried beyond the limit set by the charter. See, *Patterson v. Lynde*, 106 U. S. 519 [bk. 27, L. ed. 265].

The charter, which was granted by the Dominican Republic, provides that no subscriber to the capital shall be individually liable for any debt or liability of the Company beyond the par value of the stock subscribed by him, and that no holder of stock in the Company shall be proceeded against for the collection of any debt of the Company, until judgment thereon shall have been obtained against the Company, and an execution on such judgment shall have been returned unsatisfied.

It will be seen that a judgment against the Company is there made a condition precedent to a creditor's right to call on stockholders for payment of their unpaid subscriptions, in satisfaction of the Company's debt; and we think it very plain that this is not a mere local rule of procedure, but a limitation of the substantive rights and liabilities of creditors and stockholders of the Company respectively. It is not like the case where there is a partnership, the members of which are parties to the contract, as in *Boston & Albany Railroad v. Pearson*, 128 Mass. 445.

Of course, it may be argued that this charter is drawn with a view to American law; that the unpaid subscriptions of stockholders are a trust fund for creditors; and that there is an implied exception to the universality of the condition precedent to coming upon that fund in cases where the law makes a performance of the condition impossible; and therefore, that, if the Company was dissolved by an arbitrary act before judgment was obtained against it, the bill may be maintained upon the original claim. But, if this charter were to be read as adopting American law beyond the extent to which it does so in express words, we should have to assume that law to be as declared by the decision of this Commonwealth.

In *Thornton v. Marginal Freight Railway Co.* 128 Mass. 32, it was held on demurrer, that a bill by a creditor to reach and apply a claim of a corporation for damages could not be maintained, when it appeared on the face of the bill that the corporation had been dissolved before the judgment alleged in the bill was rendered against it. It was held that the Gen. Stats. chap. 118, § 2 (Pub. Stats. chap. 151, § 2, cl. 11), did not apply, and it was said, that "A court of equity has no general jurisdiction of a bill by a single creditor, who has not recovered a valid judgment against his debtor, and whose debtor has ceased to exist, to apply to the payment of his debt, property of the debtor in the hands of a third party." The language cited is not strictly a decision that the bill could not be maintained on the original claim, if amended so as to set it forth. But as the court not only sustained the demurrer but ordered the bill to be dismissed, it goes very far towards deciding the question for this State. Clearly the require-

ment that the creditor shall recover a judgment before assessing a stockholder, stands on at least as strong, if not on stronger ground.

But, supposing the general question to be open, we think that peculiar caution is necessary in dealing with the law of a foreign government, in whose jurisdiction our system of law does not prevail.

There is nothing in the charter which can be construed to import our law into the provision concerning the liability of stockholders.

The language under consideration limits the existence of the supposed trust funds for creditors to the extent to which it goes, just as it might have declared that there should be no such fund, and no liability of stockholders to pay up anything, had the Dominican Government seen fit. That language is universal. We do not feel at liberty to read into it an exception based on our peculiar conceptions of equity.

The bill adopts the view which we have taken, and proceeds solely on the ground that a judgment has been recovered. If this view be correct, it does not matter whether the bill is brought under the Pub. Stats. chap. 167, § 2, cl. 11, or under the general equity jurisdiction of the court, because the recovery of a judgment is essential to the plaintiff's right and to the defendant's liability, and the requirement cannot be affected by the nature of the proceedings adopted.

We may say, however, that the bill is framed under the general jurisdiction; and that in our opinion, it could not be maintained under the statute, consistently with principle or the decision. *Thornton v. Marginal Freight Railway Co. supra.*

It remains to consider whether the allegation is of a judgment is maintained. The defendants say that before the judgment relied on was rendered, and even before the suit was brought, the Company had been dissolved; and therefore that the whole proceedings were void. The plaintiff says that nothing has been done which we can recognize as an act of the Dominican Republic; and that what was done did not purport to dissolve the Corporation. The charter constituted a portion of a document styled: "Convention for the Lease of the Peninsula and Bay of Samana, and for other purposes." By article 10: "The grants, franchises, rights, privileges and immunities shall become operative on the first day of January, 1873, and shall continue to be in full force for ninety-nine years thereafter * * * upon condition that the Company, its successors or assigns shall pay or caused to be paid to the Dominican Government the sum of one hundred and fifty thousand dollars in American gold, annually, in advance," on the first day of January of each year. By article 11, "This convention * * * may be declared null, and by the government of the said republic whenever the Samana Bay Company * * * shall fail to fulfill the conditions established in article 10, except in case of war or of other controlling circumstance duly attested, when thirty days grace shall be allowed, counting from the first day of January of the year in which the payment should be made."

The Company was organized, and the rental for the first year, which was due January 1, 1873, was duly paid.

In November or December, 1873, the government which had granted the charter or convention was overthrown by a revolutionary army under General Gonzalez, and a provisional government was established. In the latter part of December, 1873, Gonzalez was elected President, and April 6, 1874, took the oath of office; but he acted as President, and was in fact the supreme executive of the republic, from the beginning of December, and was recognized as such by the citizens.

The master finds that the Gonzalez government was officially recognized by the United States on June 17, 1874. This date seems to have reference to a letter from President Grant, in reply to one of Gonzalez, announcing his election, and having taken possession of the office, in which the President tenders his congratulations and offers his good wishes.

It is unnecessary to consider the correctness of this date, which after the New York action was brought, in which judgment was recovered, as we are of the opinion that the recognition imported by a recognition of a consul in New York, appointed by the Gonzalez government which took place on July 18, 1874, coupled with the other facts to which we shall advert, is sufficient to warrant us in assuming, for the purpose of this case, that the act relied on by the defendants was an act of the Dominican Government. From December into March, the Samana Bay Company had various communications and dealings with the Gonzalez government, which it also recognized as the government of the Republic. Especially it made efforts to obtain a reduction of rent. The effort was unsuccessful.

More than the thirty days of grace allowed by the charter in case of war had elapsed, if there was any claim to them, and on March 25, 1874 (before the New York action was brought), the Gonzalez government made the decree relied on by the defendants as dissolving the Company. The decree recites the stipulation for rent of the Peninsula and Bay of Samana and its quays, the dealings between the Company and the present government, and the default on the part of the Company, and then decrees as follows:

"Article 1. The agreement entered into in this city on the date of December 28, 1871, between the Dominican Government and the Company, entitled the Samana Bay Company of Santo Domingo, for the renting of the Peninsula and Bay of Samana, and the islands and quays which are found in its waters, is, and is declared from this date to be, in virtue of that agreement itself, rescinded in all its parts, and null, and of no value or effect."

We are of opinion that the purport of the words was, not merely to terminate so much of the convention as made a lease to the Company which was called into being by another article of the same agreement, but to end each and every part of it, including that which operated as a charter to the Company. We should read the words taken by themselves, as intended to designate the whole agreement, although they select the most conspicuous feature only, the lease, as the means of identifying it. The preamble, when referring to the whole agreement, designates it in substantially the same way, as we have shown. The words, "rescinded in all its

parts," naturally convey a reference to all the parts of certain particular agreements to be picked out of a more extensive instrument by construction. The instrument referred to confirms the opinion drawn from the decree. It is called, "convention for the lease," etc., as in the decree, and the condition in articles 10 and 11, which the decree purports to enforce, goes to all the rights and franchises conferred by the convention, and to the convention itself, as has been shown earlier in our opinion.

What seems to us the meaning of the words of rescission is not cut down by the provision in article 3, that "The Company shall make good the amount for re-exchange for the drafts protested through its default, and the proportionate amount of the rent which is due from the first of January to the date of this decree." This seems to us simply intended as a declaration that the government does not mean to abandon the rights which it may have as creditor of a dissolved corporation, and to define the extent of its claim. Our construction is confirmed by a fact which seems to us of importance also on the other question, as to whether the decree can be recognized as a decree of the Dominican Government. The master finds that the Samana Bay Company was thereupon forcibly ejected from the territory which it had occupied, and has never since had any possession or control of the property which had been possessed and occupied by it before, under the grant; and that the Company has never since been reorganized by the Dominican Government as a corporation under its laws.

If the Dominican Government deals with the words of Gonzalez, upon a matter wholly within its power, as having had a certain scope and meaning, that is a strong, if not a conclusive reason for our giving them the same construction.

And, if the Dominican Government deals with the decree as effectual to accomplish all that it says the decree purported to accomplish; how can we deny it that effect, whether the government of Gonzalez was ever recognized diplomatically by the United States or not? Would it not be a most extraordinary spectacle, if, when a *de facto* government, recognized as a *de facto* government by the United States had made a decree dissolving a corporation, and its decree had been accepted as valid by all succeeding governments of the country having exclusive power and jurisdiction over the matter, the courts of another State should undertake to assert that the corporation existed under the laws of that country, in spite of their repudiation and denial? Suppose the Gonzalez government had not been recognized for any purpose by the United States, yet when acting in this purely and exclusively domestic matter is recognized by subsequent governments which are recognized by the United States, could we deny its validity or effect? It would be a false semblance of justice for courts of other jurisdictions to undertake to look behind the fictitious entity of a corporation for the purpose of affecting the liability of its members. It is true that the existence of a corporation is a fiction, but the very meaning of that fiction is that the liability of its members shall be determined as if the

fiction were the truth. That fiction or artificial creation is wholly within the power of the creator. And persons dealing with it must be taken to understand that it is so.

Under the circumstances which we have set forth, we think that, without going into nicer detail, we must now assume the Gonzalez decree to have dissolved the Samana Bay Company at the time when it purported to do so. This was on March 25, 1874. The New York action was not brought until April 8, of the same year. We may add that the judgment was not rendered until January 14, 1875, long after the recognition of the consul sent by Gonzalez. It follows that the judgment on which this suit is founded was void for want of jurisdiction. Upon our view of the facts, the case presented on the demurrer is not the actual case between the parties.

In some respects the argument for maintaining the bill is strengthened, and in some respects it is weakened by the impossibility of either obtaining a judgment or making the Corporation a party. Compare *Voss v. Grant*, 15 Mass. 505, 522, and *Terry v. Anderson*, 95 U. S. 628 [bk. 24, L. ed. 365], with *Thornton v. Marginal Freight Railway Co. ubi supra*.

But we are precluded from considering that argument if it is not answered by the last cited case, by our construction of the charter.

Bill dismissed.

Supreme Council American LEGION OF HONOR

v.
Betsey PERRY *et al.*

James P. Hicks, Exr.,

v.
Benjamin G. Perry *et al.*

1. A corporation organized for **co-operative insurance**, under Stat. 1877, chap. 204, for the purpose of assisting the widows, orphans or other dependents of deceased members, has no authority to create a fund for other persons than the class named.
2. Although by the **certificate** issued to a member of such corporation the sum therein named was payable to his wife and subject to such further disposal among his dependents as he might direct, it is not, on the death of his wife, subject to disposal by him by will to other persons than the class named.
3. A **person engaged to be married to a member** is not within the class of "dependents" upon him, so as to entitle her to be a recipient of such fund. A finding of fact by the court below that she was not dependent upon him is binding in this court.
4. Where the **by-laws** of such corporation provide that in the event of the death of all the beneficiaries selected by the member before his decease, the **benefit** shall be paid to his dependent heirs, the finding of fact by the court below

that the mother of the member was dependent upon him and was his sole heir, will be affirmed.

5. A **will of a member** purporting to bequeath such fund to one not of the class named in the statute is **void**, although the certificate issued to him provided for its payment to such person or persons as he may subsequently direct by will.
6. A **contract** entered into under the Statute of 1877 could not be **affected by statute** subsequently passed.
7. **By-laws of a corporation** in contravention of the statute under which it is organized are *ultra vires* and of no effect.
8. Whether a sister was dependent upon a brother was a **question of fact**, to be determined by the court below.
9. The superior court could not, in this action, dispose of the **real estate of decedent** by ordering its sale and the application of the proceeds; this belongs exclusively to the probate court.

(Essex—Decided January 11, 1886.)

IN EQUITY. On report. *Modified.*

The questions presented for review are stated in the opinion.

Mr. D. B. Kimball, for plaintiff.

Messrs. Brickett & Poor, for Augusta F. Wallace, defendant in the first above entitled case:

The report finds that Augusta F. Wallace was the lawfully betrothed wife of Samuel B. Perry at the time of the making of his will and at the time of his decease.

A portion of said will is as follows, to wit: "To Mrs. Augusta F. Wallace * * * all money accruing from the balance of insurance money in the American Legion of Honor, Excelsior Council No. 99.

It is the policy of the law and of the courts to carry out, if possible, the manifest intention of the testator. *Sup. Council v. Priest*, 46 Mich. 429; *Hirshls' Laws of Fraternities and Soc.* 28; 9 N. W. R. 481.

Section 8, of chap. 115 of the Pub. Stats. provides that such a corporation may, for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members, "Provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto; and such fund so held shall not be liable to attachment by trustee or other process; and associations may be formed under this chapter for the purpose of rendering assistance to such person and in the manner herein specified."

Article 2, chap. 5 of the constitution, under the head, "Objects of the Order," provides that the benefit fund shall be paid to the family, orphans, or dependents, as the member may direct.

Section 2 of law 3 under the head, "Benefit Certificates," provides that the entry of the name or names in the original application is "subject to such future disposal" of the benefit among their dependents as they thereafter direct.

Section 5 provides for "other and further disposition thereof."

It was the right of the testator, Samuel B. Perry, to bequeath by will the benefit fund or any portion thereof in the manner and form he did.

The by-laws or sections of the constitution referred to do not preclude that right. Mrs. Wallace as his betrothed wife certainly had an insurable interest in his life. *Chisholm v. Nat. Cap. Life Ins. Co.* 52 Mo. 218; *S. C.* 14 Am. R. 414; *Hirshl. Law of Fraternities and Soc.* 21, 22 and notes.

The absence of such an "interest" avoids a policy in a beneficiary association the same as in a regular insurance company. Although the mere relation of parent and child, or uncle and nephew does not constitute an "insurable interest," the wife has an insurable interest in the life of her husband. The reason is that it is not to be presumed that for the sake of money she would desire his death. 9 N. W. R. 497; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 85; *Hirshl. Law of Fraternities*, 21, 22 and notes.

The reason is quite as apparent between those betrothed in marriage that one would not for money desire the death of the other.

The defendant Mrs. Wallace was, within the meaning of the statute, and of the constitution and by-laws of the Association, a "dependent," and comes within the class of persons specified therein because of the relation she bore to the testator, viz., that of his affianced wife.

Gardner, J., delivered the opinion of the court:

The plaintiff in the first case is a Corporation organized for the purpose of co-operative insurance, belonging to that class of corporations mentioned in the Pub. Stats. chap. 115, §§ 9, 10 and Stats. 1882, chap. 195.

From the report of facts, it is evident that the plaintiff must have organized under the Stat. of 1877, chap. 204, which provides that certain associations of which the plaintiff is one, "may for the purpose of assisting the widows, orphans or other dependents of deceased members, provide in their by-laws for the payment by each member, of a fixed sum, to be held by such associations until the death of a member occurs, then to be forthwith paid to the person or persons entitled thereto." This is substantially the same as § 8 of the Pub. Stats. chap. 115.

The plaintiff made certain by-laws, after which Samuel B. Perry became a member. He named as his beneficiary in his application for membership his wife, Carrie E. Perry. By the terms of the certificate issued to him by the plaintiff, \$1,000 was made payable to his wife "subject to such further disposal among the dependents of said Samuel as he might thereafter direct in compliance with the laws of said corporation." Carrie E. Perry died before her husband. He died in September, 1882, leaving a will and codicil, and being at the time of his decease engaged to be married to the defendant, Augusta F. Wallace, to whom he bequeathed said \$1,000. 1. The first question raised is whether Samuel B. Perry could dispose of this money by will. The statute under which the plaintiff is organized gives it authority to pro-

vide for the widow, orphans or other dependents upon deceased members, and provides that such fund shall not be liable to attachment. The class of persons to be benefited is designated, and the Corporation has no authority to create a fund for other persons than the class named. The Corporation has power to raise a fund payable to one of the classes named in the statute to set it apart to await the death of the member and then to pay it over to the person or persons of the class named in the statute, selected and appointed by the member during his life, and if no one is so selected, it is still payable to one of the classes named. The claim that the fund is subject to disposition by will appears to be contrary to the scheme projected by the statute. If the fund were subject to testamentary bequest, then upon the decease of the member it might go into the hands of his executor, or the administrator of his estate, and become assets thereof, liable to be swallowed up by the creditors. *Johnson v. Ames*, 11 Pick. 178, 181; *Osgood v. Foster*, 5 Allen, 560.

If there were no creditors, the member by his will could divert it from the three classes named in the statute. In either case, this would defeat the purpose for which the fund was raised and held, and would be in direct conflict with the object of the statute for which the association was formed, and would set aside the contract entered into between the member and the Corporation. In determining this question, it is the duty of the court to construe the statute liberally and in such a manner as to carry out the benevolent purpose sought to be provided for, and in no event unless absolutely required by its language, to construe it so as to defeat such purpose. We think, therefore, that Samuel B. Perry was not empowered to bequeath the fund by his last will and testament; and that the bequest of the same to Augusta F. Wallace is void and of no effect. *Kentucky Mut. Life Ins. Co. v. Miller*, 18 Bush, 489; *McClure v. Johnson*, 56 Iowa, 620.

2. The defendant, Augusta F. Wallace, contends that if she is not entitled to this fund under the will of Samuel B. Perry, she comes within the class of persons designated as "dependents" upon said Samuel, and should, therefore, be its recipient. At the time of the decease of Samuel B. Perry, "a valid engagement of marriage subsisted between him and the defendant Augusta;" and by reason of this she claims to be dependent upon him. Until they became man and wife by marriage, there was no obligation upon Samuel to support or provide for her. She does not come within the class of persons which, if able, he was bound by law to support. Pub. Stats. chap. 84, § 6.

The mere engagement to marry imposed no obligation upon him except to carry out his contract with her. Their mutual promise to marry did not in any sense, by itself, make her dependent upon him. In *Ballan v. Gile*, 50 Wis. 614, under similar by-laws to those of the plaintiff Association, the court said: "We think the true meaning of the word 'dependent,' in this connection, means some person or persons dependent for support in some way upon the deceased. If this interpretation is correct, then it is a question of fact and not of law to determine whether Augusta was dependent upon Samuel. If it is not correct, the Superior Court

assumed the question to be one of fact, and so passed upon it. As matter of law, it is clear, upon the facts stated in the report, that Augusta was not dependent upon Samuel, as that term is used in the statute. The Superior Court having passed upon the question of fact, and found that she was not dependent upon him, we are bound by this decision and cannot review it. As the plaintiff's by-laws provide that, in the event of the death of all of the beneficiaries selected by the member before his decease, if no other or further disposition thereof be made, the benefit shall be paid to the dependent heirs of the deceased member; and as it appears by the report that the Judge found, as matter of fact, that the defendant, Betsey Perry, the mother of Samuel B. Perry, at the time of his death, was a widow, his sole heir at law and dependent upon him; and, inasmuch as the above provision in said by-law is in conformity to the statute, the decree of the Superior Court must be affirmed.

The second case, in many respects, is similar to the one we have been considering. The association known as the Knights of Pythias was organized under the statutes before September, 1879. One of the certificates of membership granted to Samuel B. Perry in September, 1879, by the Association, sets out that, "in consideration of the representations and declarations made in his application, which is made part of the contract, and the payment of the prescribed fee, and in consideration of the payment hereafter to said endowment rank of all assessments as required, and the full compliance with all the laws governing the rank now in force or that hereafter may be enacted, two thousand dollars will be paid by the 'said Association' to Carrie E. Perry as directed by said brother in his application, to such person or persons as he may subsequently direct by will or otherwise, and entered upon the records of the Supreme Master of Exchequer," upon the proof of death and the surrender of this certificate. The wife Carrie died before her husband, and he made no designation of any other beneficiary to receive the fund, except as contained in his last will. Before Perry died, but after the issuing of said certificate to him, the Corporation made certain by-laws relating to the payment of benefit funds, upon the death of a member, viz.: that the fund should be paid to the widow and children of the deceased; and if none, then to the father, mother, sisters and brothers, share and share alike; or he may name a party at the time he becomes a member to whom the money shall be paid at his death; if none of said persons are alive, then, after payment of the funeral expenses of deceased members, it shall be paid into the widows' and orphans' fund. The Statute of 1882, chap. 195, § 2, added to the classes, after the word "orphans," the following, "or other relatives of deceased members." Augusta F. Wallace, one of the defendants in the original bill, claimed these funds under the will of Samuel B. Perry. In this case the contract contemplated the making of a will by Samuel. But, independently of the contract, the member could not make a testamentary disposition of these funds, as we have shown. The will of Samuel, although it purported to bequeath these funds, did not in fact accomplish it. In this respect the will was void. The defendant

Augusta also claims that she was dependent upon Samuel. The Superior Court, as the report shows, found, as matter of fact, that she was not dependent upon him, and we have decided in the previous case that as matter of law, the facts do not warrant us in determining that she was dependent upon him.

Lydia A. Perry, one of the defendants, claims that she is entitled to part of these funds under the last will of Samuel. We have already passed upon this claim. She also asserts that she was within the class of persons designated by the Stats. 1877, chap. 204, and 1882, chap. 195, to whom such benefit funds were payable, because she was the sister of Samuel. It is clear that sisters were not within any of the classes named in the statutes prior to that of 1882, which was approved May 1, 1882. She would be included under this last statute among the "other relatives of deceased members" therein mentioned. But this statute, passed in 1882, which mentioned widows, orphans or other dependents of deceased members, as the only recipients of these funds, and could not deprive the person entitled to the funds thereby from possession of the same, could not affect the contract entered into under the Statute of 1877. Before the Statute of 1882 took effect, the Statute of 1877 was in force and the Association formed under it could create funds only for the benefit of those classes named therein; and to those belonging to those classes alone could the benefit funds be paid. If the plaintiff Corporation undertook to make by-laws in contravention of the statute, they were *ultra vires* and of no effect. *Briggs v. Earl*, 139 Mass. 473.

It was a question of fact to determine whether the by-laws of the Corporation, including sisters of the deceased members as a class to receive the funds under certain conditions, were enacted after the amendment contained in the Statute of 1882 took effect as law, and before the death of Samuel in September, 1882. The Superior Court has settled the fact in effect by the final decree passed therein, that the by-laws creating the new class of beneficiaries were not enacted after the Statute of 1882 took effect.

The facts relating to this matter are not reported. From the time of the death of Carrie E. Perry to that of Samuel, the report finds that he resided with the defendant, Emily A. Morse; and "that she depended upon him to support her, if he was able and she was in need." She had no property except real estate valued at about \$1,400, and furniture worth about \$300. We cannot determine from the report that she was dependent upon him, or that she was ever in need. This may depend upon many circumstances. By the decree of the Superior Court it must have been found by the Judge that she was not dependent upon him. This was a question of fact to be determined by the Superior Court at the trial, and it is apparent that it was there determined in the negative. This disposes of all the questions argued by the three defendants, Wallace, Lydia A. Perry and the administrator of Emily A. Morse. By the will of Samuel B. Perry, he gave various articles of personal property to several of the defendants; and at the time of his decease he left certain real estate. The Superior Court has incorporated in its decree the following: "That the real estate mentioned in the original suit should

be sold and the proceeds thereof applied to the payment of the debts, funeral expenses and charges of administration mentioned in said bill." Although all the parties to these proceedings have considered this decree as within the power and jurisdiction of the Superior Court, yet we think that this belongs exclusively to the probate court, to be there considered and passed upon. This decree is in effect an order determining what the probate court should adjudge under the facts stated. This cannot be done by the Superior Court. The cross-bill proceeds upon the ground that the executor of estate of Samuel B. Perry, received these funds, amounting to \$3,000, not as assets of the estate, but in trust, to pay the same over to the person entitled to receive them; that they were wrongfully paid to him; and that he does not hold them as the executor of Perry. So far as the decree of the Superior Court relates to this sum we think it should be affirmed.

Decree accordingly.

Jerome F. MANNING

v.

Edward B. NETTLETON.

1. A judgment for costs against the next friend and attorney of a plaintiff, cannot be reviewed upon his petition after one year, as rendered in his absence, although the petition for review is filed within one year after his actual knowledge of the judgment.
2. A stranger to a suit cannot have a review of a judgment therein.

(Worcester—Decided January 6, 1886.)

PETITION for review of judgment. *Dismissed.*

The facts are found in the opinion.

Mr. W. A. Gile, for petitioner.

Messrs. F. A. Gaskill and P. S. Maher, for respondent:

This court, in *James v. Townsend*, 104 Mass. 367; *Matthewson v. Moulton*, 135 Mass. 122, and in *Smith v. Brown*, 136 Mass. 416, has conclusively determined the question raised by this report.

Manning was a party to the record. *Blood v. Harrington*, 8 Pick. 552; *Smith v. Carney*, 127 Mass. 179.

There is no ground for a review. Any error, if any exists, is apparent in the record, and can only be availed of by writ of error. *Hart v. Huckins*, 5 Mass. 260.

W. Allen, J., delivered the opinion of the court:

This is a petition filed in 1883, for a review of a judgment rendered in 1872. The Pub. Stats., chap. 187, § 22, provide that, "If a judgment complained of was rendered in the absence of the petitioner and without his knowledge, the petition for review shall be filed within one year after the petitioner first had notice of the judgment; otherwise within one year after the judgment was rendered." The judgment complained of was for costs on a nonsuit of the plaintiff in an action in which the present re-

spondent was summoned to answer "unto Jerome F. Manning, next friend of Julius Henley, a minor." The petitioner is Jerome F. Manning, named in the writ, and he entered the action and appeared in it as the attorney for the plaintiff. The petition alleges that the judgment should have been entered against Henley, and not against the petitioner; and that the petitioner had no knowledge that the judgment was against him until within one year before filing his petition. It is very clear, upon these facts, that the judgment was not rendered in the absence of the petitioner; and that the petition is too late. *James v. Townsend*, 104 Mass. 367; *Matthewson v. Moulton*, 135 Mass. 122; *Smith v. Brown*, 136 Mass. 416.

It is argued that the petitioner was not a party to the suit, and not having been present when the entry of judgment was made by the clerk and not having actual knowledge that the judgment was against him, it must be deemed to have been rendered in his absence, as if it had been entered by the clerk against an attorney or any stranger to the suit. But a stranger to the suit could not have a review of the judgment; his remedy would be by writ of error. *Hart v. Huckins*, 5 Mass. 260; *Bowditch Ins. Co. v. Winslow*, 3 Gray, 416.

See, also, *Fullam v. McKenny*, 16 Gray, 579. *Petition dismissed.*

John HOLT et al.

v.

S. P. WELD.

1. In a suit in equity to remove a cloud from the title to land, a plaintiff is a competent witness to testify that the grantee, named in deeds under which he claimed, was his wife; that she was dead; and that the other plaintiffs were her only children.
2. It is too late, after a hearing on the merits, for defendant to object that the plaintiff had not filed a replication in writing.
3. If, after a sale of real estate for taxes, the purchaser thereof fails to pay the collector, within ten days, the sum bid by him, the collector must make a deed to the city or town, and a deed to purchaser is void.
4. A tax deed to the purchaser under such circumstances is a cloud upon title, and a suit can be maintained to remove it.

(Essex—Decided January 11, 1886.)

ON defendant's exceptions. *Overruled.* Bill in equity to remove cloud on title.

The facts are stated in the opinion.

Mr. T. F. Bartlett, for plaintiff.

Mr. B. F. Briggs, for respondent.

Morton, Ch. J., delivered the opinion of the court:

This is a suit in equity to remove a cloud from the title of the plaintiff's to a lot of land in Lynn.

1. The land was, in 1876, conveyed by two deeds to Mary Ann Holt, wife of John Holt, of

Lynn. It was clearly competent for the plaintiff John Holt to testify that the grantee named in said deeds was his wife; that she was dead; and that the other plaintiffs were her only children. This was the best evidence of those facts.

2. It was too late for the defendant, after a hearing upon the merits, to object that the plaintiff had not filed a replication in writing; and the court was not required to dismiss the bill for that cause.

3. The statute provides that "If after the sale of real estate for the payment of taxes, a purchaser thereof fails to pay the collector within ten days the sum offered by him, and to receive his deed, the sale shall be null and void, and the city or town shall be deemed to be the purchaser of the estate according to the provisions of the preceding section." Pub. Stats. chap. 112, § 44.

If a purchaser does not pay the collector within ten days, the collector must, in order to comply with the statute, make a deed to the city or town, and a deed to the purchaser is void. The statute does not give the collector any option in the matter. In case at bar, there was evidence sufficient to justify the finding that the defendant, the purchaser at the tax sale, failed to pay the collector, within ten days, the sum bid by him, and to receive his deed. We cannot revise the finding of the superior court upon this evidence. We must assume that the court so found; and that the collector's deed was, for this reason, void. The decree entered was, therefore, justified by the evidence. The court properly held that the tax deed held by the defendant was a cloud upon the plaintiff's title, and that this bill can be maintained. *Russell v. Deshon*, 124 Mass. 342.

Exceptions overruled.

MT. HOPE IRON CO.

v.

George R. DEARDEN *et al.*

1. In partition, after an interlocutory judgment, practically assented to, defendants cannot set up want of title in the petitioners as a bar to the petition.
2. The extinguishment of a way over land of a party to the partition may be awarded by the commissioners; but it must be allowed for in the partition.

(Bristol—Decided January 7, 1886.)

ON respondents' exceptions. *Overruled.*

This was a petition for partition. No answer contesting the right of the petitioner to partition was filed by the respondents.

At the hearing as to whether interlocutory judgment for partition should be awarded, the respondents contended that the premises should be sold and could not be advantageously divided; but the court decided otherwise and ordered an interlocutory judgment to be entered for partition. No exception to or appeal from that order was taken. Commissioners to make partition were duly appointed and notified and met the parties on the premises for the purpose of making partition, and duly made a report to the

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court, setting off to the petitioner by metes and bounds a certain portion of the common premises, and also a right of way over other land of the petitioner on the south side of the tract partitioned and adjoining the premises set off to it by the commissioners; said right of way was appurtenant to the whole of the common premises belonging to the petitioner and respondents which were the subject of the partition suit, and consisted of a considerable tract of land on the north side, whereon stood a dwelling house with a store in the lower story.

At the hearing, upon the motion of the petitioner that the partition should be made firm and effectual according to the report of the commissioners, the respondents objected that the right of way aforesaid could not be a subject of partition in the manner in which the commissioners dealt with the same, and also offered to show the following facts: that the premises in question formerly belonged to one Joseph Marble, who deceased intestate in 1881 possessed of this and other real estate, and leaving numerous heirs at law; that the respondents were some of the heirs at law of said Joseph Marble; that the complainant acquired from certain of the other heirs at law of said Joseph Marble 86-100 of the premises in question, which were described in the various deeds to it from such heirs by metes and bounds; that the complainant did not acquire by purchase or otherwise any interest in any of the remaining land of which Joseph Marble died seized, and which still belonged to his estate at the time of commencement of the proceedings for partition.

After the commencement of the proceedings in this case, and before the motion that the commissioners' report therein should be made firm and effectual, it appeared that upon the petition of a cotenant, who was not either of the respondents, the remaining land belonged to the estate of said Joseph Marble had been sold and the proceeds divided under partition proceedings in the Probate Court for said County of Bristol. The greater part of the title of two of the respondents to the premises in question was derived by purchase from other heirs at law. The title of the remaining respondent was acquired wholly by inheritance.

The respondents claimed upon these facts that the complainant's title was wholly void for the purposes of partition, and that the court had no jurisdiction. But the court ruled that this defense would not avail the respondents, and was not open to the respondents at this stage of the proceeding; and also ruled that the right of way could be wholly assigned to the petitioner in the division; and ordered that the report be accepted and the partition be made firm and effectual forever.

The respondents, being aggrieved by the aforesaid ruling and order, except thereto and appeal therefrom.

Messrs. Morton & Jennings, for respondents:

The title of the petitioner is derived by purchase from some of the heirs of Joseph Marble deceased, to whom the estate which is the subject of this partition belonged at his decease; the deed to the petitioner describes the estate conveyed by metes and bounds. Said Joseph Marble also owned other real estate at his de-

cease; but the petitioner acquired no title to that. The title under which the petitioner claims is, therefore, a title to a part of an estate held in common and described in its deed by metes and bounds from a part of the cotenants.

As against the other cotenants it is entirely clear that such a title is void. *Adam v. Briggs I. Co.* 7 Cush. 368; *Blossom v. Brightman*, 21 Pick. 285; *Marks v. Sewall*, 120 Mass. 174, 176.

And even when the alienation is sought to be accomplished by operation of law, the rule is the same. *Peabody v. Minot*, 24 Pick. 332, 333; *Blossom v. Brightman*, 21 Pick. 383; *Baldwin v. Whiting*, 13 Mass. 57; *Pond v. Pond*, Id. 413; *Varnum v. Abbot*, 12 Mass. 476; *Bartlett v. Harlow*, Id. 852-854.

In cases where the petitioner's title is wholly void as to the respondent, that fact may be availed of at any time before final judgment. It goes to the jurisdiction of the court.

The effect of an interlocutory decree cannot be to bar an inquiry into the title of the parties under any circumstances. Only a final judgment could do that or a trial in which the question of title is directly involved. There are several cases in which the contrary seems to be held. *Savery v. Taylor*, 102 Mass. 511; *Wenson v. Wenson*, 14 Allen, 81; *Burghardt v. Van-Deusen*, 4 Allen, 374; *Brown v. Bulkley*, 11 Cush. 168.

But in *Burghardt v. Van Deusen* it is evidently the final judgment that is referred to, and in *Brown v. Bulkley*, which is probably the strongest case, the court discusses and decides upon the petitioner's title. In the two other cases the question was not presented as in the case at bar.

And see, for cases in which parties were allowed to raise similar questions at stages in the proceedings corresponding to that at which the question as to title was raised in this: *Eaton v. Framingham*, 6 Cush. 245, 247; *Elder v. Dwight Mfg. Co.* 4 Gray, 201; *Sherman v. Fall River Iron Works Co.*, 5 Allen, 215; *Inhab. of Cheshire v. Adams & Ches. Reservoir Co.* 119 Mass. 356, 361.

The proceedings subsequent to the bringing of the petition for partition, in relation to the other estate left by Joseph Marble, have no bearing upon the case, as the rights of the petitioner and respondent depend on the state of the title at the time of the commencement of this suit. *Hooper v. Bridgewater*, 102 Mass. 512.

Section 82, chap. 167, P. S. does not apply to this case. *Chamberlain v. Hoogs*, 1 Gray, 172, 173.

The commissioners erred in assigning the right of way to the petitioners. It belonged with the whole estate and should have remained with the whole estate. *Underwood v. Carney*, 1 Cush. 285.

An easement or incorporeal hereditament is not subject to partition. *Adam v. Briggs I. Co.* 7 Cush. 868.

In Maine it has been held that a right to haul logs over a portion of the common property given to parties to whom another portion of the common property was set off was beyond the power of the commissioners. *Dyer v. Lowell*, 30 Me. 219.

Much less, it would seem, could rights over

a third person's lands belonging to the whole estate to be divided, be made a subject of division.

The petition does not set out any such right and does not even describe the tract to be divided, with its privileges and appurtenances. To take the way from one and give it to another is a destruction, not a division of property.

Mr. William E. Fuller, for petitioner:

The respondents were not entitled to show such facts as they offered relative to the petitioner's title without formally pleading them. P. S. chap. 178, § 14.

They could not amend as a matter of right. *Smith v. Whiting*, 100 Mass. 123.

Where parties waive their rights with knowledge of what those rights are, they cannot afterwards when the rights of others are affected, insist upon those rights. *White v. Clapp*, 8 Met. 369.

Upon an appeal from the judgment upon the report of commissioners, the interlocutory judgment awarding that partition be made shall not be drawn in question. *Brown v. Bulkley*, 11 Cush. 168; *Wenson v. Wenson*, 14 Allen, 81; *Savery v. Taylor*, 102 Mass. 511.

The precedent of *Dudley v. Adams*, 5 Allen, 96, is not in conflict.

The remaining land belonging to the estate of Joseph Marble had been sold and the title that was defective at the date of the petition is now valid for partition. *Bartlett v. Harlow*, 12 Mass. 352; *Varnum v. Abbot*, 12 Mass. 476; *Baldwin v. Whiting*, 13 Mass. 57; *Blossom v. Brightman*, 21 Pick. 283, 284; *Peabody v. Minot*, 24 Pick. 332; *Adam v. Briggs Iron Co.* 7 Cush. 368; *Marks v. Sewall*, 120 Mass. 174; *Miller v. Miller*, 13 Pick. 339.

The doings of the court are not void for want of jurisdiction. *Smith v. Rice*, 11 Mass. 507; *Thayer v. Thayer*, 7 Pick. 209; *Symonds v. Kimball*, 3 Mass. 299; *Munroe v. Luke*, 19 Pick. 39; *Procter v. Newhall*, 17 Mass. 81; *White v. Clapp*, 8 Met. 369; *Nichols v. Smith*, 23 Pick. 317; *Eddy's Case*, 6 Cush. 28; *Eaton v. Framingham*, 6 Cush. 245; *Elder v. Dwight Mfg. Co.* 4 Gray, 201; *Ashuelot Bank v. Pearson*, 14 Gray, 521; *McQuade v. O'Neil*, 15 Gray, 52; *Gray v. Thrasher*, 104 Mass. 373; *Inhab. Cheshire v. Adams & Ches. R. Co.* 119 Mass. 456; *Santom v. Ballard*, 133 Mass. 464; *Smith v. Brown*, 136 Mass. 416.

The case is before a court of general jurisdiction. The record shows a case where the court had jurisdiction of the subject matter, and of the parties; that all the respondents were notified and appeared and submitted themselves to the jurisdiction of the court. The court necessarily having passed upon the question of jurisdiction, in issuing the warrant, could not at a subsequent stage revise its decision. *Potter v. Hazard*, 11 Allen, 191.

Certainly, it could not hear new evidence to ascertain if there had been error of fact which went to the jurisdiction. *Brown v. Webber*, 6 Cush. 562. But the facts offered do not strike at the jurisdiction.

The respondents would have ceased to have any interest in the way after the partition, even if the commissioners had omitted any mention thereof, and such mention in their report is to be regarded as surplusage. *Underwood v. Carney*, 1 Cush. 285; *Schwöerer v. Boylston Market*

Association, 99 Mass. 288; *Whitney v. Lee*, 1 Allen, 198; *Boston Water Power Co. v. Boston*, 127 Mass. 374.

A way appurtenant to a tract of land does not become appurtenant to every parcel into which it may be divided. *Lewis v. Carstairs*, 6 Whart. 198.

Where an easement is appurtenant to the whole estate, the assignee of any part of it may claim the right, so far as it is applicable to his parcel, provided it can be enjoyed by the several estates without increasing the burden upon the servient estate. *Hills v. Miller*, 3 Paige, 254; *Rankin v. Huskisson*, 4 Sim. 13; *Grubb v. Guilford*, 4 Watts, 223; 2 Washb. Real Prop. 32; *Davenport v. Lamson*, 21 Pick. 72.

It is within the province of commissioners exercising a sound discretion, to assign a right of way exclusively to the owners of one parcel. *Hoffman v. Savage*, 15 Mass. 130; *Davenport v. Lamson*, 21 Pick. 72; *Cheswell v. Chapman*, 83 N. H. 16; *Chandler v. Goodridge*, 23 Me. 78.

The decision in *Dyer v. Lowell*, 30 Me. 217, when restricted to the exact facts of that case, is not in conflict.

Holmes, J., delivered the opinion of the court:

It was not open to the respondents after an interlocutory judgment, to which they had practically consented, to set up want of title in the petitioners as a bar to the petition. *Brown v. Bulkley*, 11 Cush. 168; *Wonsen v. Wonsen*, 14 Allen, 71, 81; *Savery v. Taylor*, 102 Mass. 509-511.

A more difficult question is raised by the attempt of the commissioners to set off to the petitioner all the rights in a passage way theretofore appurtenant to the whole estate, and to provide that the passage way should "become exclusively appurtenant to the share set off to the petitioner." If the right of way were over land of a stranger, and the parcel set off to the respondents abutted upon it, there would be more force in the argument that such a provision amounts to a destruction of property, and that the commissioners had no more right to destroy it in this way than to order trees to be cut down and burned. For of course, so much of the right as was incident to one parcel could not be transferred to the other. But in this case the passage was upon the land of the petitioner, and the parcel set off to the respondents was separated from it by that set off to the petitioner. Whether under these circumstances the respondents' rights would have been extinguished, irrespective of the provision in question, as the petitioner contends, and whether an extinguishment which follows as merely incidental to an act, otherwise within the commissioners' power, would affect the validity of that act, are questions which we need not consider, because we think a sufficient answer to the respondents' argument, if sound, is to be found in the fact that the petitioner owned the servient estate. We see no reason why the extinguishment of a way over land of a party to the partition may not be awarded by the commissioners. In such a case, what is taken from one goes to the other, and must be allowed for in the partition.

Exceptions overruled.

BOSTON & Maine R. R. CO., *Plf. in Review*,
v.

Alfred A. ORDDWAY *et al.*

More admissions of a freight agent are not competent to establish the liability of the principal for injury to goods transported, if made after their delivery and performance of his duties as agent. The same principle of law applies to admissions and declarations of a general superintendent.

(Essex—Decided January 9, 1886.)

ON defendants' exceptions. *Overruled.*

Action for damages, against a carrier for injury to merchandise transported.

Mr. Solomon Lincoln, for plaintiff, in review:

"The admission or declaration of an agent binds his principal only when it is made during the continuance of the agency in regard to a transaction then depending, *et dum ferret opus*." Greenl. Ev. 156, 157.

At the time when it is claimed that these admissions were made, the merchandise which it was claimed had been damaged had been delivered, and the duty of the freight agent had terminated. His declarations after that time became mere hearsay and were not admissible in evidence. *Robinson v. Fitchburg & W. R. R. Co.* 7 Gray, 92; *Grinnell v. W. U. Tel. Co.* 113 Mass. 299; *G. W. R. Co. v. Willis*, 18 C. B. N. S. 748; *B. & O. R. R. Co. v. Md.* 19 Am. & Eng. R. R. Cas. 83; *Pierce, R. R.* 294, and cases cited; *Stiles v. W. R. R. Corp.* 8 Met. 44; *Fogg v. Pew*, 10 Gray, 409; *Pratt v. Ogdensburg & L. C. R. R. Co.* 102 Mass. 557.

Provided the duty of the agent has been completed, it is immaterial how soon after such completion the admissions or declarations are made. Whether near or remote in time, they are equally inadmissible. *Fawcett v. Bigley*, 59 Pa. St. 411; *Luby v. H. R. R. Co.* 17 N. Y. 181; *Bigley v. Williams*, 80 Pa. St. 107; *Morse v. Conn. R. R. R. Co.* 6 Gray, 450; *Gott v. Dinsmore*, 111 Mass. 45; *Lane v. B. & A. R. R. Co.* 112 Mass. 455; *Green v. B. & L. R. R. Co.* 128 Mass. 221.

While the scope of a superintendent's authority and duty is wider than that of a local freight agent, the same principles of law apply to the admissions and declarations of both. Nothing which was excluded amounted to evidence of declarations made by General Superintendent Furber while discharging any duty. *Huntingdon R. Co. v. Decker*, 82 Pa. St. 119; *Pa. R. R. Co. v. Books*, 57 Pa. St. 389; *Robinson v. F. & W. R. R. Co. supra*.

In fact, the acts and conversations of Furber were immaterial in themselves and did not amount to declarations or admissions which, if admitted, could bind the plaintiff. So far as they were not irrelevant, they amounted to mere expressions of opinion. See, *Robinson v. F. & W. R. R. Co. supra*.

Mr. W. H. Moody, for defendants in review:

Holmes, J., delivered the opinion of the court.

1. Evidence that Flanders made certain ad-

missions tending to establish the Company's liability was not made competent by the fact that he was the Company's freight agent, without more. A freight agent cannot affect his principal by admissions, merely as such. In the cases cited for the defendants in review, the admissions were statements made when delivery of the goods was applied for; *Lane v. Boston & Alb. R. R. Co.*, 112 Mass. 455; or where information was sought from the person designated by the general representative of the principal; *Gott v. Dinsmore*, 111 Mass. 45; *Green v. Boston & L. R. R. Co.*, 128 Mass. 221-225; or in some other similar way were raised from the ranks of mere admissions to authorized acts, done on behalf of the principal, in furtherance of the principal's legal duty. The admissions, too, were not mere admissions of liability, but of specific facts which it was the agent's province to know. Here, even if one assume that the admissions were of specific facts, the goods had been delivered and opened before the conversation; and there is nothing to show that the freight agent had any further duties to perform, or if he had, that he was attempting to perform them. See, *Robinson v. Fitchburg & W. R. R. Co.* 7 Gray, 92; *Pratt v. Ogdensburg & Lake Champl. R. R. Co.* 102 Mass. 557-565, and *Grinnell v. W. U. Tel. Co.* 113 Mass. 299-307.

2. The statements offered, of Furber the general superintendent, were simply statements of conclusions that he had formed in his own mind from what he had been told, by whom does not appear.

These conclusions were that the injury was a piece of negligence which the Judge has found to be a fact; that, as near as he could ascertain, the case was in good condition when it was received by the plaintiff in review, which, of course, could refer only to the external condition of the case, and, in that sense, was not disputed, since the case was in good condition when it arrived so far as could be judged from outward inspection; and finally that it must have been injured by Cheney, a subsequent carrier. It is enough to say that the defendants in review did not suffer by the exclusion of this evidence.

Exceptions overruled.

COMMONWEALTH of Massachusetts v.

Charles S. PARKER.

Same v. Ellen McPHERSON.

Where a party has been convicted of maintaining a common nuisance in an inferior court, and appeals to the Superior Court and enters into a recognizance to appear on the first term of the Superior Court, the fact that a statute was passed after the appeal taken, changing the term of the Superior Court from the second Monday in the month to the first Monday in the month, in no way prejudices defendant, nor is it a ground for dismissing the complaints.

(Essex—Decided January 7, 1886.)

ON defendants' exceptions. *Overruled.*

Complaint for maintaining a common nuisance for the illegal sale of liquor.

Messrs. Brickett & Poor, for defendant, Parker:

This case presents the question whether under chapter 191, Acts 1885, a defendant, who before the passage of said Act had taken an appeal from the judgment of an inferior court and had recognized to the Commonwealth for his appearance at a term of the Superior Court to be held on the second Monday of May, to answer there to the case against him, can be held to appear and be put to trial at a term of said court commencing on the first Monday of May.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth:

By the passage of chapter 191, Acts of 1885, so much of the fifth clause of § 17, chapter 152, Pub. Stat. as relates to the time at which the Term of the Superior Court for criminal business shall be held at Newburyport in the County of Essex was repealed.

A later statute on a given subject, not repealing an earlier one in terms, is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter. *Goddard v. Boston*, 20 Pick. 410.

The Act of 1885 is clearly repugnant to the clause referred to and fully embraces the subject matter contained in the earlier statute. *Somerville v. Boston*, 120 Mass. 575.

Clause 2 of § 3 of chapter 3, Pub. Stat. provides that "The repeal of an Act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution, or proceedings pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred, under the Act repealed." That these rules of construction are to be deemed part of every repealing statute, see *Commonwealth v. Desmond*, 123 Mass. 407.

The objection that lies against *ex post facto* laws does not lie against statutes that merely authorize amendments or changes in the pleadings and procedure; because in these matters there are no vested rights. *Robbins v. Holman*, 11 Cush. 26; *Bickford v. Boston & L. R. R. Corp.* 21 Pick. 109; *George v. Reed*, 101 Mass. 380.

Section 2, chap. 191, Act of 1885, provides that "All writs, processes, bonds and recognizances which shall be made returnable to said court on said second Monday of May shall be returnable to, be entered at, and have day in, the term of said court to be held on the first Monday of May next."

Clause 3, § 3, chap. 3, Pub. Stat. enacts that words and phrases shall be construed according to the common and approved usage of the language. *Commonwealth v. Inhab. of Dracut*, 8 Gray, 457. See, also, *Howard v. Harris*, 8 Allen, 298.

The words "shall" and "may" are not infrequently equivalent terms. *Worcester v. Schlesinger*, 16 Gray, 166; *Phillips v. Fadlén*, 125 Mass. 201.

The crime with which the defendant was charged and convicted is not an "infamous crime" inasmuch as it is not a capital offense nor one punishable by imprisonment in the state

prison, nor one upon the conviction of which a person would formerly become incompetent to testify as a witness. *Jones v. Robbins*, 8 Gray, 349; *Lewis v. Robbins*, 13 Allen, 553; 1 Abb. L. Dic. 602, 603; 1 Bish. Cr. L. § 974; *Utley v. Merrick*, 11 Met. 302; *Ex Parte Wilson*, 114 U. S. 417 (bk. 29, L. ed.); *Commonwealth v. Dane*, 8 Cush. 384.

One who has been convicted of committing a misdemeanor is not guilty of an "infamous crime." Nothing less in degree than a felony is an "infamous crime." The crime of which the defendant was convicted is not a felony. Pub. Stat. chap. 210, § 1.

Holmes, J., delivered the opinion of the court:

The defendant was convicted of maintaining a common nuisance, namely: a tenement used for the illegal sale and illegal keeping of intoxicating liquors, and appealed. His recognizance, dated March 7, 1885, recites that "he appeals to the Superior Court, to be holden at Newburyport in the County of Essex, on the second Monday in May," and is conditioned to appear at the court appealed to. The defendant did not appear, and, after the second Monday in May, files a motion to dismiss the complaint, on the ground that the term appealed to had been abolished, since the date of his appeal and recognizance, by the Statute of 1885, chap. 191. But we think it very plain that that statute had not the effect contended for. The Legislature had no such meaning, for the language is: "The Superior Court for the County of Essex, heretofore held on the second Monday of May, shall hereafter be held on the first Monday of May in every year;" which clearly imports that the court to be held hereafter on the first Monday is the same court that has been held heretofore on the second. We cannot say that the court loses its identity, against the will of the Legislature, by being made to begin a week earlier.

It is suggested that the term might have been adjourned before the second Monday, and that the defendant's right could not depend upon an accident. We need not consider whether the Act had the effect to require the term to be continued beyond the second Monday, or, by § 2, to accelerate the day to which recognizances taken before its passage were returnable; because if it did neither, and even if the defendant is right in supposing that, if he had found the term adjourned on the second Monday, it would have been his good fortune to be discharged from further proceedings through an accident of the law and no right of his, still we do not perceive why, when the court to which he appealed was in session on the day when he had recognized to appear, his appeal and appearance should fail to have their ordinary effect. The defendant has suffered no harm. See, *Jones v. Robbins*, 8 Gray 329, 349; *Lewis v. Robbins*, 13 Allen, 552.

Exceptions overruled.

COMMONWEALTH of Massachusetts v.

Addie HOLBROOK.

Same v. William A. MURPHY.

(Essex—Decided January 7, 1886.)

ON exceptions. *Overruled.*

The first case was a complaint for keeping and maintaining a house of ill-fame. The defendant was convicted on April 10, 1885, and appealed, as in the principal case.

Subsequent to the second Monday in May, the defendant moved to dismiss the complaint. The motion was overruled; the defendant was tried and found guilty and excepted.

The second case was a complaint for unlawfully exposing and keeping for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth. The defendant was convicted on April 21, 1885. The subsequent proceedings in the case were similar to those in the first case.

Mr. Henri N. Woods, for Addie Holbrook:

All statutes are to be considered as prospective, and are not to be held to prejudice or affect the past transactions of the subject, unless such intention is clearly and unequivocally expressed. *Whitman v. Hapgood*, 10 Mass. 437, 439; *King v. Tirrell*, 2 Gray, 331; *Gerry v. Stoneham*, 1 Allen, 319, 323; *Garfield v. Bemis*, 2 Allen, 445, 446; *North Bridgewater Bank v. Copeland*, 7 Allen, 139; *Commonwealth v. Sudbury*, 106 Mass. 268; *Matthews v. Zane*, 7 Wheat. 164; *Ogden v. Blackledge*, 2 Cranch, 272 (6 U. S. bk. 2, L. ed. 269).

The statute, not being in terms retrospective, ought not to receive that effect by construction. *Danks v. Quackenbush*, 3 Den. 594; *Hooker v. Hooker*, 10 Smedes & M. 599.

Defendant's rights and obligations were fully fixed by the order of said police court and by the terms of her recognizance, because said allowance of her appeal and said recognizance were strictly in accordance with the requirements of § 58, chap. 155, P. S., and that consequently the decision of the court in *Commonwealth v. Campion*, 105 Mass. 184, has no application to the case at bar.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth.

By the Court:

These cases are governed by *Commonwealth v. Parker*, ante, 722.

Exceptions overruled.

Edwin J. HANSCOM

v.
City of BOSTON.

1. In order to recover of a town or city for personal injuries or damages to property caused by defect in a highway, under the statutes, the defect must be one which the proper officers either had knowledge of, or by the exercise of reasonable care and diligence might have had knowledge of, either in time to

have remedied it or to have prevented the injury complained of.

2. In an action for injuries received from stepping upon the cover of a coal hole, held, that if the coal hole was properly constructed, and the cover properly fitted and was not apparently insecure, and the only defect, if any, was that it was left unfastened on the inside by the occupant of the cellar, and this was not known to the officers of the city, or apparent from the street, the jury could not properly find, under existing statutes, that the city could have remedied the defect or prevented the injury by reasonable care and diligence, in the absence of testimony tending to establish those conclusions.

(Suffolk—Decided February 26, 1886.)

ON defendant's exceptions. *Sustained*.
The case appears in the opinion.

Mr. Robert W. Nason, for defendant:

There must be some evidence that can fairly be relied on that the defendant had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on its part, before in any case there can be a question for the jury. P. S. chap. 52, § 1, 347; *Harriman v. Boston*, 114 Mass. 241-246.

There is no presumption that the defective condition of the walk at the time of the injury had been in existence for any moment of time preceding the happening of the accident to the plaintiff; a presumption is not retrospective. *Brakine v. Davis*, 25 Ill. 251; *Taylor v. Cresswell*, 45 Md. 422; *Murdock v. State*, 68 Ala. 567.

Messrs. W. B. Gale and J. W. McDonald, for plaintiff:

Whether the defendant had notice of the defect, and whether it exercised proper care and diligence in discharging the duty imposed by law, in the case at bar, depended upon many circumstances in evidence and the inferences to be drawn therefrom, and were peculiarly questions of fact within the province of the jury to determine upon all the evidence. *Purple v. Greenfield*, 188 Mass. 1; *Burt v. Boston*, 122 Mass. 223; *Crosby v. Boston*, 118 Mass. 71; *Hodgkins v. Rockport*, 116 Mass. 578; *Harriman v. Boston*, 114 Mass. 241; *Loan v. Boston*, 106 Mass. 450; *Day v. Milford*, 5 Allen, 98.

In the absence of any direct affirmative evidence, showing that the cover had been ever properly fastened, the jury could well have inferred from the circumstances attending the accident, the appearance of the cover, opening and surroundings, as shown by the evidence, that not only was the sidewalk defective in the manner claimed by the plaintiff, as before stated, at the time of the accident and for some time before; but that also, the sidewalk was defective in its construction, when this cover over the opening at the time of the accident was first placed therein, without fastening, some months prior thereto; and that the sidewalk remained so defective, continuously, to the happening of the accident.

The fact that the coal hole in question was for the convenience of the owner of the fee does not relieve the City of its paramount duty to keep the sidewalk safe for travel. *Bacon v.*

Boston, 3 Cush. 179; *Purple v. Greenfield*, *supra*; *Alger v. Lowell*, 8 Allen, 405.

Field, J., delivered the opinion of the court:

Pub. Stats. chap. 52, § 18, provide that if a person receives bodily injury or damage to his property through a defect in a highway which might have been remedied or which damage or injury might have been prevented by reasonable care and diligence on the part of the county or town, he may recover damages therefor. This provision was taken from Statute 1877, chap. 234, § 2. General Statute, chap. 44, § 72, was that such a person might recover damages if the county or town "had reasonable notice of the defect," or if the same "had existed for the space of or twenty-four hours previous to the occurrence of the injury or damage." Under the Gen. Stats., upon the question of reasonable notice the rule of law was that the fact must be such as to lead to the inference that the proper officers of the town whose duty it is to attend to municipal affairs did actually know of the existence of the defect, or with proper diligence and care might have known it. *Donaldson v. Boston*, 16 Gray, 508; *Harriman v. Boston*, 114 Mass. 241; *Monica v. Lynn*, 119 Mass. 278; *S. C.* 121 Mass., 442; 124 Mass. 165; *Foster v. Boston*, 127 Mass., 290.

The decisions upon reasonable notice throw some light upon what is meant in the Statute of 1877, chap. 234, § 2, by reasonable care and diligence. See, Statute 1786, chap. 80, § 1; R. S. chap. 25, § 22; St. 1880, chap. 5; *Brody v. Lowell*, 3 Cush. 121.

We think that the defect must be one which the proper officers either had knowledge of or by the exercise of reasonable care and diligence might have had knowledge of, either in time to have remedied it or to have prevented the injury complained of. *Lyman v. Hampden*, 14 Mass. 8 [*S. C. ante*, 227]; *Rooney v. Randolph*, 128 Mass. 580; *Harriman v. Boston*, *supra*.

In the present case there is no evidence that the cover of the coal hole was out of place before the plaintiff stepped on it and was injured. There is evidence from what the jury may have found that the cover of the coal hole had not been fastened down on the inside for some time before the accident. If the defendant is liable at all, it must be on the ground that the cover when in its place, if unfastened, or on the inside, constituted a defect in the street, which the proper officers of the city ought by the exercise of reasonable care and diligence to have known and remedied. It is to be noticed that the Gen. Stats. chap. 44, § 1, required that highways be kept in repair "so that the same may be kept safe and convenient for travelers;" but the Pub. Stats. chap. 52, § 1, requires that they be kept in repair "so that the same may be reasonably safe and convenient for travelers." Under the existing statutes the questions necessarily arise: first, whether there is any evidence which tends to show that the highway was not reasonably safe and convenient for travelers; and second, if there is such evidence, whether there is any evidence that the town by reasonable care and diligence might have remedied the defect or prevented the damage or injury. The exceptions in the present case relate solely to the second

question. The testimony was in effect that there was a firm and close fitting cover to the coal hole tightly set in the sidewalk presenting no obstruction to travel, and even and regular with the surface of the walk. There was no testimony that it could be displaced by the ordinary use of the walk. It does not appear that the ordinances of the City regulating coal holes were put in evidence (see, Ordinances 1883, chap. 26, §§ 24, 25), or that the covering was not constructed in accordance with the ordinance. The cover had a ring on the under side intended to be used in fastening it down. There was no evidence that the coal hole and cover were improperly constructed, or that there was anything in the appearance of the coal hole or cover that indicated any defect, or that it had ever before been out of place; and no evidence that the officers of the City had any knowledge that the cover was not fastened down on the inside. It has never yet been held to be the duty of the officers of the City to examine from time to time covers of coal holes which are properly constructed and apparently secure, to see if the occupants of the cellars, over which the coal holes are, keep the covers fastened on the inside. In all the decided cases under former statutes, if the defect had not existed for twenty-four hours and the town officers had no actual notice or knowledge of it, or did not create it, it was left to the jury to find whether these officers by proper diligence and care might have known it only when there was evidence that the defect was open and visible, so that it might be said to be in a sense notorious. *Doherty v. Waltham*, 4 Gray, 596; *Winn v. Lovell*, 1 Allen, 177; *Burt v. Boston*, 123 Mass. 228; *Whitehead v. Lovell*, 124 Mass. 281; *Harriman v. Boston*, 114 Mass. 241; *Loddell v. New Bedford*, 1 Mass. 153; *Adams v. Ipswich*, 116 Mass. 570; *Crosby v. Boston*, 118 Mass. 71; *Reed v. Northfield*, 13 Pick. 94.

We think, if the coal hole was properly constructed and the cover properly fitted and was not apparently insecure, and the only defect, if any, was that it was left unfastened on the inside by the occupant of the cellar, and this was not known to the officers of the city or apparent from the street, that the jury could not properly find under existing statutes that the city could have remedied the defect or prevented the injury by reasonable care and diligence.

In *Burt v. Boston*, *supra*, it is said that "There is no provision of the statute which limits the liability of towns and cities to open and visible defects as contended by the defendant, but it extends to all defects." It was not decided in that case that the appearance of the flag stone was such that the jury might find that the City had reasonable notice of the defect, but only that the jury might find that the sidewalk had been in a dangerous condition for twenty-four hours previous to the accident.

We are unable to see any evidence in the case above that ought to have been submitted to the jury tending to show that the City could have remedied the defect, if any existed, or have prevented the injury by reasonable care and diligence.

Exceptions sustained.

George T. CLARK

v.

James M. WATSON *et al.*

1. **Lands held by one as trustee or mortgagee cannot be taken on execution against him** (although the deed to him purports to convey an absolute estate in fee), by one who has actual notice of the trust or mortgage.
2. The mortgagor or grantor may enjoin the sale of such lands on execution against the trustee or mortgagee.
3. The fact that the defeasance of the deed, or agreement showing the grantee's qualified interest in the lands is not on record is not a fraud and will not affect the grantor's rights, as against a creditor whom he has informed of the true nature of the transaction.
4. Lands held by one by deed absolute in form may be taken on execution against him, although he only holds as trustee, if the declaration of trust is not on record and the execution creditor has no notice of the trust.
5. The trustee, the deed to whom is absolute in form, is the only party who can make a declaration of trust, the record of which will be notice to third parties who have no actual notice of the trust.

(Suffolk—Decided February 25, 1886.)

IN EQUITY. Bill for injunction. Decreed *in part*.

This is a bill of complaint in which the complainant seeks by injunction to restrain the respondents from selling or causing to be sold, under two certain executions in favor of the said Watson and against Christopher and James Nugent, copartners as C. Nugent & Co., both of Newark, in the State of New Jersey, two certain parcels of land, one situate in Lynn in the County of Essex, and the other situate in Grantville in the Town of Needham in the County of Norfolk.

The complainant was seised in fee of both of said parcels, August 12, 1879, and on that day he conveyed the land in Lynn to said Christopher Nugent, and upon the 29th day of September, 1879, he conveyed to said Christopher the land in Grantville, both of said conveyances being by deed, with usual covenants of warranty and absolute in form.

At the time of said conveyances said complainant was indebted to said firm of C. Nugent & Co. in a sum exceeding \$26,000, and said conveyances were so made to said Nugent upon the request of said Nugent that the complainant should give him security for said indebtedness, and it was orally agreed between said Christopher and said complainant, at the time of the delivery of said deeds, that said Christopher should reconvey both of said parcels to the complainant upon the payment of said indebtedness, and that said deeds should not be recorded; the reason for which, as said Clark testified, was that he did not want his creditors to know about it. Watson was then a creditor of Clark. Subsequently, on June 26, 1880, both of said deeds were recorded without

the knowledge or consent of the complainant, who, upon being informed of such record, called upon said Christopher and received from him an agreement in writing, signed by said Christopher, to reconvey both of said parcels. A portion of said indebtedness, viz.: the first three notes referred to in said agreement, were subsequently paid by the complainant in coal, and the remaining two were surrendered to the complainant, who gave to said Nugent & Co., in consideration thereof, four promissory notes, the aggregate amount of which equaled the amount of said two notes remaining unpaid, which four promissory notes were payable to the order of said Nugent & Co., and were, at the time of filing this bill, and still are due and unpaid, and are owned and held by parties other than said Nugent & Co., to whom they were indorsed by said Nugent & Co.

Both of the actions commenced by said writs were prosecuted to final judgment, and the defendant Watson caused to be issued upon said judgments the executions hereinbefore mentioned, which executions were placed in the hands of the defendants, Potter and Paul, with instructions to levy upon and sell both of said parcels of real estate as the property of said Christopher Nugent. And the defendants, Potter and Paul, did levy upon and advertise both of said parcels to be sold under said executions, which levy is now in force, said sales being adjourned under injunction, from this court, restraining said sales.

Messrs. Charles F. Donnelly and James W. O'Brien, for complainant:

The conveyances, by the complainant to said Nugent, and the agreement by Nugent to reconvey constitute a trust and show that the real estate in question was held by Nugent, at the times when the same was attached, as trustee upon the trusts stated in said agreement. *Urann v. Coates*, 109 Mass. 581; *Faxon v. Foley*, 110 Mass. 392.

This is not property which could be taken on execution by creditors generally, but only by creditors without notice. P. S. chap. 141, § 8; *Love v. Welch*, 139 Mass. 83, 84.

It appears that the defendant's agent Kimball, who instructed his attorney to cause the attachments to be made, was informed by one Cushing, complainant's agent, that said real estate was held in trust by Nugent. This information was given to Kimball on November 4, before the making of the first attachment.

It is enough if such notice be given as to put one upon his inquiry. Information of a fact coming from a source which ought to be heeded is sufficient. *Faxon v. Foley*, *supra*.

This case differs from *Woodward v. Sartwell*, 129 Mass. 210, in this: that it there appears that the parties expressly avoided giving notice of the deed of reconveyance, and it was found as a fact that it was intended that the party holding the record title should be held out to be the owner, as the deed from him was intentionally withheld from the record.

In this case it was agreed between Nugent and Clark that the deeds to Nugent from Clark should not be recorded, but that the record title should remain in Clark. This agreement shows that there was only a conditional delivery of the deed. See, *Wall v. Hickey*, 112 Mass., 171.

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Mr. Seth J. Thomas, for defendants:

As to the Lynn estate, it is to be observed in the first place that Clark is asking this court sitting in equity, to interfere actively in his behalf to secure to him the fruits of his fraudulent device. He confesses his purpose was to deceive his creditors, and his subsequent conduct was in pursuance of that purpose. If the property was attached as Clark's, it was to be Nugent's; if as Nugent's, it was then Clark's. Watson was a creditor of both, and in either case was to be a victim. It is like the case of *Hassam v. Barrett*, 115 Mass. 258, in which the court says: "Our aid can only be invoked to relieve the party defrauded." *Hill v. Ahern*, 185 Mass. 161.

The policy of our statutes as to unrecorded deeds is not to charge third parties by other than actual knowledge thereof. P. S. chap. 120, §§ 4, 28.

Kimball was told, not by Clark or by Nugent, but by a stranger to the transaction, that the estate in Lynn was held in trust to secure the debt of Clark to Nugent. Nothing was said about the terms of the trust, nor whether the title had then become vested in Nugent.

Yet it might, according to the terms of it, operate as a mortgage, or might be a mere personal contract independent of the title to the land, for all that was said to Kimball. *Newhall v. Burt*, 7 Pick. 159.

This was clearly not the definite, actual notice to Watson contemplated by the statute. P. S. chap. 120, § 28; *Pomroy v. Stevens*, 11 Met. 247; *Coffin v. Ray*, 1 Met. 213.

Holmes, J., delivered the opinion of the court:

The defendant had notice of the plaintiff's interest in the land in Lynn before the first attachment was made upon it. *Shaw v. Spencer*, 100 Mass. 382; *Faxon v. Foley*, 110 Mass. 392, 395.

As against the defendants, therefore, the land was not subject to attachment. *Cowley v. McLaughlin* 1 New Eng. Rep. 539 [ante], to be reported in 141 Mass.; *Prout v. Root*, 116 Mass. 410, 412; *Newhall v. Burt*, 7 Pick. 157.

And there is no ground for refusing the plaintiff equitable relief. The fact that the plaintiff meant to keep his mortgage to Nugent secret, for the sake of his credit, was not a fraud; and if it had been, it would not have affected his rights as against a creditor whom he informed of the true nature of the transaction. Nugent, who held the registry title, did not dispute that the deed to him, though absolute in form, was in fact a mortgage, and signed a memorandum to that effect, so that *Hassam v. Barrett*, 115 Mass. 258, cited for the defendant, has no application. The defendant had no notice of the plaintiff's interest in the Grantville land, so that the levy of the first execution on that was valid. *McMahan v. Griffing*, 8 Pick. 149; *Pomroy v. Stevens*, 11 Met. 244, 247.

No question is raised as to the second execution, because the first will exhaust the property.

Of course, that upon the land in Lynn can stand no better than the first. On the other hand, there was no new fact to charge the defendant with notice as to the Grantville land, except that the plaintiff had recorded a deed.

ration, signed by himself, that his previously executed and recorded deed to Nugent were given for security only. He did not record Nugent's declaration to the same effect.

Nugent, the *quasi* trustee, was the only party who could make a declaration of trust which the plaintiff was entitled to record. P. S. chap. 141, §§ 1, 2; P. S. chap. 120, §§ 4-14. See, *Fazon v. Folsey*, *supra*; *Urann v. Coates*, 109 Mass. 581.

The plaintiff's declaration, although true, could not cut down the effect of his deed, and was only notice to those who actually knew of the contents. *Graves v. Graves*, 6 Gray, 391, 393; *Dole v. Thurlow*, 12 Met. 157, 163; *Pidge v. Tyler*, 4 Mass. 541; *Pitcher v. Barrows*, 17 Pick. 361-364.

It follows that the injunction must issue against selling the land in Lynn, but not against selling that in Grantville. Decree accordingly.

Alonzo E. BRAGG, *Plff.*,

v.

Gustaf DANIELSON.

1. The rule that **after breach a simple contract can only be discharged** by deed or upon sufficient consideration, applies to a promissory note, not surrendered.
2. Payment of another debt, then due and payable, cannot operate as a **satisfaction of a promissory note**, nor as a consideration for an agreement to satisfy it.
3. If a **consideration of a contract is wanting**, a party relies upon it at his peril; that he suffers substantial damage by doing so, does not render the said contract valid.

(Suffolk—Decided February 25, 1886.)

ON defendant's exceptions. *Orrruled.*

Action on promissory note made by defendant.

It was claimed on behalf of the defendant that the following facts appeared:

With knowledge that the defendant was only a surety, the plaintiff agreed for a satisfactory reason to look to Lewis, the real principal, for payment of the note in suit. Relying upon that agreement, the defendant did nothing toward securing from Lewis enough money to meet the note, as he otherwise would have done.

Lewis was sick at the time, and the defendant was on his way to visit him and have the note settled at once, which would have been done had not the defendant been diverted from his purpose by this promise of the plaintiff.

Ten days later Lewis died, but still relying upon plaintiff's promise, the defendant did not prove his claim for indemnity against the estate of Lewis. The result was that the plaintiff was enabled to present other demands of \$30,000 to \$40,000, and thereby absorb the whole estate, while the defendant remained passive, confiding in the plaintiff's release from liability.

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It was further claimed by defendant, that the ruling of the court that the agreement, if proved, would not be a valid contract, was erroneous as matter of law; it appeared from the evidence that while the \$225 note was a due and valid note, the plaintiff deemed it wise to offer an inducement to defendant to secure its prompt payment; and the defendant then no longer looked to Lewis for protection upon the note in suit, and to that extent Lewis' assets were set free to apply to demands held by the plaintiff.

The facts are further stated in the opinion.

Mr. Seth J. Thomas, for defendant:

The note was given for the accommodation of Lewis only. It was not disputed that plaintiff knew that the defendant was only a surety on the note in suit. Although the note bore the name of the defendant as promisor, it was competent to prove the real relation of the parties. *Carpenter v. King*, 9 Met. 511; *Weston v. Chamberlin*, 7 Cush. 404.

The case is similar in principle to *Harris v. Brooks*, 21 Pick. 195, where the court says: "A parol declaration of the holder to the surety that he would exonerate him and look to the principal only is a good defense, on the ground that it lulls the party into security and prevents him from obtaining his indemnity; and it would be fraud on the part of the holder afterwards, contrary to such assurance, to call upon such surety." See also, *Baker v. Briggs*, 8 Pick. 131.

There was a change of position on the part of defendant which might be of advantage to the plaintiff and of detriment to the defendant should the agreement not be kept. A legal consideration was not lacking. See, *Hastings v. Lovejoy* (1 N. Eng. Rep. 218), and cases cited in the opinion.

Mr. George A. Bruce, for plaintiff.

Holmes, J., delivered the opinion of the court:

This is an action on a promissory note and the defendant's liability is not disputed, unless the following facts disclose a defense:

The note was made for the accommodation of one Lewis, who, however was not a party to it. When it fell due, the plaintiff agreed with the defendant, that if the defendant would pay him another note for \$225, made by the defendant, held by the plaintiff and then due, the plaintiff would undertake to sue and would sue Lewis, and collect the note now sued upon from him, and release defendant from liability thereon, and deliver said note to him. The defendant paid the \$225 note and, relying upon the plaintiff's agreement, omitted to take any steps to secure payment of the note in suit by Lewis, as he would have done otherwise.

It is not clear that the plaintiff's promise meant anything more than that the plaintiff would do his best to collect from Lewis and would release the defendant and hand him the note, if successful, and Lewis was not a party to the contract, so that the plaintiff could not have done more than have possession.

There was no offer to prove that the plaintiff had not done his best during the ten days that Lewis remained alive. But if the words used imported a present discharge, they were inoperative. There was neither a release nor an accord and satisfaction. In England it has

been said that the law merchant has introduced an exception in the case of bills and notes, to the rule, that after breach, a simple contract can only be discharged by deed or upon sufficient consideration. *Foster v. Dawber*, 6 Welsb. Hurl. & G. Exch. 839-857; *Dingwall v. Dunster*, 1 Dougl. Rep. 247; *Parquhar v. Southley*, 1 Moody & Malkin, 14-16.

But no such exception is recognized in this Commonwealth when the note is not surrendered. *Smith v. Bartholomew*, 1 Metcalf, 276; *Shaw v. Pratt*, 22 Pick. 305.

There was no deed; and payment of another debt then due and payable could no more operate as a satisfaction of the debt in suit than payment of part of the later debt. *Smith v. Bartholomew*, *ubi supra*; *Dixon v. Adams*, Cro. Eliz. 538.

Then it is said that the defendant relied on the plaintiff's promise. But the very meaning of the requirements of a consideration for a promise or other agreement is that if that element is wanting the party relies on the agreement at his peril. The fact that he suffers substantial damages by doing so does not render a void contract valid. *Commonwealth v. Scituate Sav. Bank*, 187 Mass. 301, 302; *Brightman v. Hicks*, 108 Mass. 246-248; *Thorne v. Deas*, 4 Johns. 84.

As has been said, it does not appear that there was any contract between Lewis and the plaintiff; and, therefore, the cases cited as to principal and surety do not apply. The defendant was the principal and only debtor to the plaintiff.

Exceptions overruled.

Charles S. LINCOLN

v.

George E. ALDRICH.

1. In a suit in equity for the **construction of a will**, all the parties interested should have notice and an opportunity to be heard.
2. If a **will** is so **ambiguous** that the trustee is unwilling to take the responsibility of action under it, it is his duty to seek the instructions of the court by a suit in equity.
3. Where the **trustee attempts to settle** the rights of the parties **by means of a fictitious account** in the probate court, this court will not construe the will, but reverse the decree of the probate court, because the account rendered by the trustee is not just and true.

(Decided March 25, 1886.)

A PPEAL from Probate Court. *Reversed.*

The case is stated by the court.

Mr. H. G. Parker, for plaintiff.

Mr. J. B. Richardson, for defendant.

Morton, Ch. J., delivered the opinion of the court:

The plaintiff in his fourth account as trustee, under the will of George W. Perry, credits himself with the sums of \$9,375.08 and \$857.14 as money and property paid and delivered to Benj. F. Perry husband and heir at law of

Judith E. Perry. The account having been allowed in the Probate Court, the appellants, one of whom is a brother and the other a niece of Judith E. Perry, appealed to this court. The will of George W. Perry gives the bond which is in controversy to Judith E. Perry, "to have and to hold the same to her during her life and at her decease to her heirs at law."

She left no issue, but she left a husband and a brother and sister, and issue of a deceased brother and sister. They respectively claim to be the heirs at law of Judith, within the meaning of the will. This presents a proper case for a suit in equity by the trustee to obtain the instructions of the court as to the construction of the will and the duty of the trustee. In such a suit all of the parties interested would have notice and an opportunity to be heard.

Instead of bringing such a suit the trustee in this case is attempting to settle the rights of the parties by means of a fictitious account in the Probate Court. If the trustee had in good faith paid and delivered the money and property to one of the claimants, it might be the duty of the court in passing upon his account to notice all the questions involved in his first action including the questions of the true construction of the will. *Hall v. Eaton*, 139 Mass. 217.

But it is not the proper function of a probate court in passing upon an account to give instructions to a trustee as to his future duties. It appears, in this case, that the trustee has not paid over or parted with the possession of the property which he has credited himself in said fourth account as having paid to Benjamin F. Perry, but retains it in his possession and control. In other words, the account so far as these items are concerned is a fictitious one.

We do not think this is a proper course. If the will is so ambiguous that the trustee is unwilling to take the responsibility of action under it, his proper course is to seek the instructions of the court by a suit in equity. In such suit there is more certainty that all parties interested will have notice and an opportunity to be heard, than there can be in a proceeding upon the allowance of a probate account when the formal notice is by publication in a newspaper which might not give actual notice to those interested. We are of opinion that, as the case stands, the question of the construction of the will is not properly before us, and that the decree of the Probate Court should be reversed, because the account rendered by the trustee is not a true and just account.

Decree reversed.

William CLAFLIN *et al.*, *Petitioners*,

v.

Mary H. TILTON, *Appellant*.

1. A **gift in a will** "to J. B. C. and M. H. T. the additional sum of \$2,000 each" is not a gift of \$4,000 to a class which, in the case of the death of one before the testator, must go to the survivor.
2. It is a **gift of \$2,000 to each** of the legatees named **individually**; and if one dies before the testator, the legacy to him lapsed.

(Middlesex—Decided March 26, 1886.)

IN EQUITY. *Affirmed.*

The case sufficiently appears in the opinion. **Mr. E. B. Callender**, for appellant:

Mary H. Tilton's claim is under the second clause of the ninth article of the will of said John Ashton, which is as follows:

Second. "To the said John B. Callender and Mary H. Tilton the additional sum of \$2,000 each."

In the third clause of the fourth article of said will, the said John B. Callender and Mary H. Tilton are described as "children of my deceased adopted daughter Sarah." Article nine provides for a distribution among several people who belong to certain classes, namely: to the children, said John and Mary, of an adopted daughter. This legacy is to a class. *Jackson v. Roberts*, 14 Gray, 550; *Clarke v. Clemmans*, 38 L. J. N. S. Eq. 171; *Leigh v. Leigh*, 17 Beav. 605.

Nor does it make any difference that the legatees appear *nominatim*. *Schaffer v. Kettell*, 14 Allen, 528.

The construction is to be made, not solely on the bequest itself, but on the bequest taken in connection with the context. *Cummings v. Bramhall*, 120 Mass. 552; *Sohier v. Inches*, 12 Gray, 885; *Workman v. Workman*, 2 Allen, 472; *Schaffer v. Kettell*, 14 Allen, 528.

Mr. William H. Orcutt, for Sarah G. Ward and others:

When the parties to whom a legacy is given are not described as a class, but by their individual names, though they may constitute a class, the death of any one of them, before the testator, causes a lapse of the legacy intended for the legatee so dying. *Workman v. Workman*, 2 Allen, 472.

The word said has no weight in determining the question whether the devise to Callender and Tilton is a devise to a class as such. *Re Gibson's Trusts*, 2 Johns. & H. 656.

The established rule of construction is, that a gift by will to individuals described by name, though they may constitute a class, shows the testator's intention to give to them only as individuals. This is the *prima facie* and general rule of law. *Jackson v. Roberts*, 14 Gray, 550; *Barber v. Barber*, 3 Mylne & C. 697; *Workman v. Workman*, 2 Allen, 472; *Cummings v. Bramhall*, 120 Mass. 552; *Re Janet Smith's Trusts*, 38 L. T. N. S. 905; *Re Allen*, 44 L. T. N. S. 240.

This rule may be controlled by other parts of the will; but the intention of survivorship must be plainly shown by the will itself, or by the will and such evidence of extrinsic facts as is legally admissible. *Jackson v. Roberts*, 14 Gray, 550, 551; *Towne v. Weston*, 182 Mass. 516; *Hooper v. Hooper*, 9 Cush. 122; *Schaffer v. Kettell*, 14 Allen, 528.

Morton, Ch. J., delivered the opinion of the court:

The gift in the ninth clause of the will of John Ashton "to the said John B. Callender and Mary H. Tilton the additional sum of \$2,000 each," cannot be construed as a gift of \$4,000 to a class, which in the case of the death of one before the testator, would go to the survivor. It is clearly a gift of \$2,000 to each of the legatees, named individually; and as John B.

Callender died before the testator, the legacy to him lapsed. *Workman v. Workman*, 2 Allen, 472; *Jackson v. Roberts*, 14 Gray, 546. Decree affirmed.

Geo. W. W. DOVE *et al.*
v.

Mary A. JOHNSON *et al.*

1. When the **purpose of the testator** to dispose of the whole income up to the moment of distribution will be effected and a partial intestacy avoided by reading the **words of a will in their natural sense**, they will be so construed, notwithstanding the conjecture that some remote consequences were not in the testator's mind, or might not have been satisfactory to him.
2. A **direction to pay the income** of the remaining five sixths or other portion whatever, the same may be after taking out a son's share quarter-yearly or oftener "to all my daughters in equal shares," is a **gift** to the daughters as a class; and in the event of the death after the probate of the will of a daughter unmarried, the survivors take the whole income, and none of the income of such "other portion" goes to the son.
3. The **provision** that "the issue of any deceased daughter shall take the mother's share," makes a **sub-class** of such issue and puts them in place of their mother.
4. The words "**in equal shares**" simply determine the **proportion** in which the income is to be divided.
5. A slight **temporary inequality** caused by the secondary division of one share must be regarded as an accident which the testator did not provide against, perhaps because he did not consider it worth while.

(Essex—Decided March 1, 1886.)

IN EQUITY. Bill to obtain the judicial construction of a will. Heard on reservation for the consideration of the full court.

John Dove, late of Andover in the County of Essex, deceased, duly executed his last will.

The plaintiffs were duly appointed and qualified by the probate court on July 2, 1877, as trustees under the eighth clause of said will, of the property therein given in trust.

At the time of the death of said testator and of the probate of his said will, the plaintiffs George and Isabella, and defendants Mary, Laura and Clara, were, together with Helen C. Dove, singlewoman, of said Andover, all the children and the only heirs at law of said testator and the only person who would have been entitled to share in his personal estate as distributees thereof, if he had died intestate.

The said Helen C. Dove died unmarried and testate, and her last will and testament was duly proved and allowed by the probate court for said County of Essex, and the defendant, William P. Walley was appointed and qualified as executor thereof on January 12, 1885.

By said will, the said Helen C. Dove, after making sundry bequests, gave all the residue of her property to her sister, the said Isabella, one of the plaintiffs.

The questions have arisen as to the income of the trust fund whether, on the death of the said Helen C. Dove, it became the duty of the plaintiffs to pay the whole of the net income of the trust fund thereafter accruing to the four surviving daughters, or whether the share thereof, to wit: one fifth part, which until then had been paid to the said Helen, shall in future be paid either to the said William P. Walley, as executor of her will or to the said Isabella, as residuary legatee thereunder, or whether the said share of the said Helen shall be divided among the four surviving daughters and the said plaintiff George; and if so, whether it shall be divided in fifths or sixths, and whether the said Isabella is entitled to two sixths or to one fifth of said share.

The eighth clause of the will is as follows: I bequeath to my son George one sixth part of all the residue of my personal estate. But if one or more of my daughters should die before probate of this will, leaving no issue, then the share or portion hereby given to George shall be proportionally increased. The remaining five sixths (or other portion, whatever the same may be) of such residue, I bequeath to my executors and trustees, hereinafter named, and their heirs, in trust for the following purposes, to wit: to keep the same at all times safely invested and to pay the income arising therefrom quarter-yearly or oftener, at the election of said trustees, to all my daughters in equal shares, (having first deducted all expenses arising from the management of said trust), and the issue of any deceased daughter shall take the mother's share. After the decease of the survivor of my daughters the trust fund created by this item shall be distributed to those persons who may then take the same as my heirs.

Mr. L. S. Tuckerman, for William P. Walley, executor, and Isabella Dove.

The contingency which has happened, namely: the death of a daughter of the testator after him, leaving no issue surviving, does not seem to have presented itself distinctly to his mind; certainly he did not expressly provide for it, and what he did intend or would have intended had the contingency occurred to him can only be inferred from the context of the will, with the aid of such settled principles of construction as are applicable.

The daughters should be held to have taken an interest in common in the income of the trust, rather than a joint interest with right of survivorship.

Such construction as will create a tenancy in common is generally to be preferred to one which will create a joint tenancy. P. S. chap. 126, § 5; 2 Jarm. Wills, Bigelow's ed. 257, 259; *Jolliffe v. East*, 3 Brown Ch. Rep. 25; *Miller v. Miller*, 16 Mass. 59.

And so far as any inference can be drawn from the use of a particular expression, the words "equal shares" have force in this connection. See, 2 Jarm. Wills, *supra*; *Emerson v. Cutler*, 14 Pick. 114.

The case of *Loring v. Coolidge*, 99 Mass. 191, is distinguishable from the present.

If Miss Helen C. Dove's interest in the in-

come was a right in common with her sisters, and did not pass to them by right of survivorship, on her death such right went to her representatives. *Bignold v. Giles*, 4 Drewry, 343; *Eales v. Cardigan*, 9 Sim. 384; *Bryan v. Twigg*, L. R. 3 Ch. App. 183. See, *Wright v. White*, 136 Mass. 470.

It has the further advantage of carrying the income where the case of *Dove v. Torr*, 128 Mass. 38, seems eventually to carry the principal.

If, however, it is possible to hold that Miss Helen's share has thus become intestate estate of John Dove, even in that event, she as one of his next of kin, had a one sixth interest therein, to which her executor and legatee are now entitled. See, *Lett v. Randall*, 10 Sim. 112.

Where the entire ownership, or equitable fee in any part of a trust has completely vested, the court may as to such part decree termination and distribution. *Inches v. Hill*, 106 Mass. 576; *Smith v. Harrington*, 4 Allen, 566; *Bowditch v. Andrew*, 8 Allen, 339.

Even if the provision for issue be held to refer to the case of a daughter dying after the testator, it does not seem sufficient of itself to prevent the complete vesting of each daughter's share. See, *Hill v. Bacon*, 106 Mass. 578.

Messrs. Morse & Stone, for George W. W. Dove, and his children :

The intent of the testator on the whole would seem to be that the fund should be kept intact until the death of all the daughters. *Loring v. Coolidge*, 99 Mass. 191.

If division should be made the testator's son George would receive one sixth of the share so divided, assuming that the words "distributed to those persons who may then take the same as my heirs," have the meaning given to the words "descend to those persons who may then be entitled to take the same as my heirs," in the sixth clause. *Dove v. Torr*, 128 Mass. 38.

If the court should hold that there was a difference in the meaning of the two clauses, as shown in the use of the word "distribute" instead of "descend," and in other ways, and then under the 8th clause those persons would take who would have been the heirs at the time of the daughter's death; in other words, that the case fell within the class of *Long v. Blackall*, 3 Ves. 486; *Sears v. Russell*, 8 Gray, 36; and *Thomson v. Ludington*, 104 Mass. 193, then the son George would be entitled to one fifth of the share divided.

The provision that "the issue of any deceased daughter shall take the mother's share" is inconsistent with the claim that a joint tenancy was intended.

To construe the clause as is contended for by the daughters, it would be necessary to import into this clause of the will, in substance, the following provision: "And in case of the death of any daughter leaving no issue, her share of the income shall be paid in equal shares to the surviving daughters, and the issue of any deceased daughter shall take the mother's share." The court will certainly not do this unless it is necessary to carry out the intention of the committee somewhere expressly indicated. *Goddard v. Whitney*, 1 New Eng. Rep. 193 (*ante*.)

In *Dow v. Doyle*, 103 Mass. 489, there was no provision, as in the case at bar, that the issue

of either child should take the parent's share.

In the following cases it has been held that words similar to those in the eighth clause create a separate interest and not a joint tenancy in the income. "The interest to be divided amongst my cousins. This is a clear tenancy in common." *Sloan v. Holmes*, 19 Beav. 471.

The court had for many years past laid hold of words in favor of tenancy in common, and for that purpose it had laid hold of the words equally, etc. *Campbell v. Campbell*, 4 Brown, Ch. 12.

"Pay equally between" are words of severance, and indicate an intent to give separate interests. *Bootin v. Alington*, 27 L. J. Eq. N. S. 117.

"To be equally divided to and between," creates a tenancy in common. *Bryan v. Twigg*, L. R. 3 Eq. Cas. 433; *Jones v. Randall*, 1 Jacob & W. 100; *Grant v. Winbolt*, 23 L. J. N. S. Eq. 283; *Hansley v. Wills*, 14 L. T. N. S. 162; *Re Drakeley's Estate*, 19 Beav. 395; *Ashford v. Haines*, 21 L. J. N. S. Eq. 496; *S. C.* 11 Eng. L. & E. 162.

Messrs. Arthur L. Huntington and William Perry, for minor children and unborn issue of the daughters of John Dove:

As to the duration of the trust. The testator says: "After the decease of the survivor of my daughters, the trust fund created by this item shall be distributed to those persons, who may then take the same as my heirs."

A distinction is to be drawn between this expression and such expressions as "after their death," and "at their death." 2 Jarm. Wills, 263; *Armstrong v. Eldridge*, 3 Brown, Ch. 215; *Re Hodgson's Trust*, 1 K. & J. 178; *Hodgen v. Neale*, L. R. 11 Eq. Cas. 48.

There is a class of cases deciding that where the ulterior legatees are children, who are to take *per stirpes*, of the life tenant, such children take immediately on the death of their ancestor, notwithstanding expressions of the testator that his intent is to keep the trust fund intact until the decease of the surviving life tenant. No such intent, however, is to be inferred where the children are to take *per capita*, or where the ulterior legatees are a distinct class apart from the life tenants. *Pearce v. Edmeades*, 3 Younge & C. Ex. 246; *Loring v. Coolidge*, 99 Mass. 191.

The plain intent of the testator is that the trust fund shall be kept whole and intact until the death of his last surviving daughter. *Inches v. Hill*, 106 Mass. 575.

He meant that the issue of a daughter dying at any time should be treated exactly like its mother and should occupy her position as regards the other tenants until the period of distribution. *Walmsley v. Foxhall*, 1 DeGex, J. & S. 605.

A bequest to a class implies benefit of survivorship. *Barber v. Barber*, 3 Mylne & C. 697.

It may be argued that the words, in equal shares, import a tenancy in common, but such expressions are to be controlled by the context and are not to control it. Here it is submitted they refer to the amount of income each daughter is to take and not to the nature of the estate. *Armstrong v. Eldridge*, 3 Brown, Ch. 214; *Doe v. Abey*, 1 Maule & S. 428; *Pearce v. Edmeades*, 3 Younge & C. Ex. 246; *Loring*

v. Coolidge, 99 Mass. 191; *Dow v. Doyle*, 103 Mass. 489.

Mr. Solomon Lincoln, for Mrs. Johnson, Mrs. Blanchard and Mrs. Walley:

In the event that a daughter should die before the probate of the will, the share of George was to be proportionately but definitely increased. *Jackson v. Roberts*, 14 Gray, 546.

A bequest of chattels, whether real or personal, to a plurality of persons, unaccompanied by any explanatory words, confers a joint, not a several interest. 3 Jarm. Wills. Bigelow, ed. 254, and cases cited; *Loring v. Coolidge*, 99 Mass. 191; *Cook v. Smith*, 101 Mass. 341; *Shaw v. M'Mahon*, 4 Dru. & War. 481; *Crooke v. De Vandes*, 9 Ves. 204; *Tillinghast v. Cook*, 9 Met. 143-146; *Pearce v. Edmeades*, 3 Younge & C. Ex. 246; *Armstrong v. Eldridge*, 3 Bro. Ch. Rep. 215; *Alt v. Gregory*, 8 DeG. M. & G. 221.

The words "in equal shares" and the words which provide for the issue of any deceased daughter cannot be held to transform what would otherwise be a joint tenancy into a common tenancy in common. *Cook v. Smith*, 101 Mass. 341; 2 Jarm. Wills, 257, 258, and cases cited; *Emerson v. Cutler*, 14 Pick. 108-114; *Tillinghast v. Cook*, 9 Met. 143; *Loring v. Coolidge*, 99 Mass. 191; *Shaw v. M'Mahon*, 4 Dru. & War. 481.

The intent of the testator will overrule the word "equally," rather than the word "equally" shall overrule the intent of the testator. *Brewen v. Relfe*, 2 Brown, Ch. 224; *Jackson v. Roberts*, 14 Gray, 546; *Shaw v. M'Mahon*, *supra*.

If Helen C. Dove's executor takes, he takes both principal and income, and, having the whole beneficial interest, may have a conveyance of it to him, which amounts to a partial distribution at least of the principal fund. *Inches v. Hill*, 106 Mass. 575.

If it be held that the income formerly enjoyed by Miss Helen C. Dove is undisposed of, it distributes the income of her portion of the trust fund differently from her portion of the principal. This the court will not presume the testator intended. *Wright v. White*, 186 Mass. 470, 476.

Any construction of isolated or subordinate provisions which lead to results different from those intended by the testator, as exhibited by the general scope of his will, must be rejected, and subordinate provisions must be made to harmonize with the general structure. *Goddard v. Whitney*, 1 New Eng. Rep. 198 (*ante*).

Holmes, J., delivered the opinion of the court:

The last sentence of the eighth clause of the will plainly means that the whole trust fund is to be kept together and no part of the principal distributed until the death of the survivor of the testator's daughters. It is no less plainly the purpose of the 8th clause to dispose of the whole income up to the moment of distribution, and when this purpose will be effected and a partial intestacy avoided by reading the words in their natural sense, we must not be deterred by the conjecture that some remote consequences were not in the testator's mind or might not have been satisfactory to him if he had thought of them.

A majority of the court are of the opinion

that, if the words are read in their natural sense, the direction to pay the income of the remaining five sixths or other portion whatever the same may be "after taking out George's share quarterly, yearly or oftener, to all my daughters in equal shares," is a gift to the daughters as a class, and that in the event which has happened: of the death of a daughter unmarried, the survivors take the whole income. It was very plain that George was not intended to have any part of the income of the "other portion," as he would have if there were held to be an intestacy as to the deceased daughter's share.

The provision that "the issue of any deceased daughter shall take the mother's share" whatever its scope, raises no difficulty, but simply makes a sub-class of such issue and puts them in place of their mother. See, *Hall v. Hall*, 140 Mass. 267 [S. C. ante, 233]. If it has any effect it is to show that it is assumed that the share would go over, but for such provision.

The words "in equal shares," do not affect the question. They simply determine the proportion in which the income is to be divided. See, *Loring v. Coolidge*, 99 Mass. 191; *Jackson v. Roberts*, 14 Gray, 546, 551; *Dow v. Doyle*, 103 Mass. 489.

It is true that the event which has happened is not specifically provided for; but upon our interpretation it was not necessary to provide for it specifically. It is objected that if the deceased daughter's share of the income goes to the other daughters the equality which the testator seems to have desired is not preserved. Especially it is said that, so far as the testator expressed himself, he showed a disposition to give George at least as large a share as his sister; that his share of his income will be less than theirs; and that if this is not a sufficient reason for declaring a partial intestacy as to the deceased daughter's share, so as to let in George, it is one for holding her representatives entitled, and thus preserving the equality. But, as we have intimated already, we cannot carry the testator's disposition farther by conjecture than it is expressed; and then in order to satisfy the wish which we have imagined give words a different meaning from that which they would have had otherwise, a slight temporary inequality caused by the secondary division of one share must be regarded as an accident which the testator did not provide against, perhaps because he did not think it worth while. It follows, of course, from what we have said that we find no reason in the disposition made of the income for disappointing the testator's expressed wishes and ordering any part of the principal to be distributed now.

Decree accordingly.

Lucy A. WARE

v.

Daniel ALLEN.

1. A riparian proprietor upon a natural stream should use the water in such a manner that every riparian proprietor farther down the stream should have the use and enjoyment of it, substantially according to its natural flow, subject

to such interruption as is necessary and unavoidable by the reasonable and proper use of the water in the stream above.

2. The supply must not depend upon the convenience or caprice of the owner up the stream, upon accident or mere chance. The proprietor below is entitled to have the water flow to him in its accustomed channel, as it had been wont to run through his land.
3. Where an act is done which violates the rights of another and which is of such a character that if it be continued for a sufficient period of time the wrong doer may acquire a right by adverse possession, the person whose rights are violated may maintain an action therefor without proof of any other actual damage.

(Essex—Decided January 9, 1886.)

ON defendant's exceptions. *Overruled.*

The case is stated in the opinion.

Messrs. Brickett & Poor, for defendant: The ruling requested, viz.: "If, because of the defendant's opening up new sources of supply to his pond, the overflow or amount that ran down to the plaintiff's pond was equal to or larger than before, then the plaintiff cannot recover," should have been submitted to the jury.

In order to maintain an action of this nature there must be proof of actual damage. The mere diversion or detention of the water by the defendant did not entitle the plaintiff to a verdict of nominal damages without proof of actual damage. Unless the plaintiff suffered actual perceptible damage in consequence of the diversion or detention, the defendant was not liable in this action. *Elliot v. Fitchburg R. R. Co.* 10 Cush. 192, 193.

If more water ran down to the plaintiff's pond at all times after the construction of the dam, it must be evident that for the purpose for which it was used or for any other purpose it was a *damnum absque injuria*.

The declaration nowhere alleges or claims that by the uses made of the water by the defendant it ran down to the plaintiff's pond less pure or clear than before, so that the ruling prayed for only involves the doctrine of equivalents.

It was a proper question for the jury whether, by the improvements of the defendant upon his meadow taken together as a whole, including the tapping of the spring in the adjoining land and unearthing other springs, as parts of one and the same improvement, any damage was done to the plaintiff.

Nechall v. Iveson, 8th Cush. 595, is different from this case.

The maxim of the law which every riparian proprietor is bound to respect as regards his right to the water is, *Sic utere tuo ut alienum non ledas*. *Shrewsbury v. Smith*, 12 Cush. 180, 191; *Ang. Wat. 7th ed. § 97*, and note 4; *Davis v. Winslow*, 51 Me. 291; *Embrey v. Owen*, 6 Exch. 353.

Mr. H. P. Moulton, for plaintiff.

Gardner, J., delivered the opinion of the court:

The ruling requested by the defendant ex-

cluded all reference to the supply of water to the plaintiff's pond being dependent upon the raising of the defendant's drawgate.

It was limited to this: that if by the defendant's opening up new sources of supply to his pond, the overflow or amount of water that ran down to the plaintiff's pond was equal to or larger than before, the plaintiff could not recover. The Judge refused to give this instruction, but ruled that "If the defendant had wrongfully interfered to prevent the flow of a natural water course to the plaintiff's pond, the jury were not authorized to find that the defendant has furnished in the manner claimed, an equivalent supply." The manner claimed by the defendant was by "the raising of the defendant's draw bridge from time to time, the overflow of the pond and leakage." This was not in compliance with the rule of law governing the use of water by a riparian proprietor upon a natural stream, which is that he should use the water in such a manner that every riparian proprietor farther down the stream should have the use and enjoyment of it substantially according to its natural flow, subject to such interruption as is necessary and unavoidable by the reasonable and proper use of the water in the stream above. *Chandler v. Howland*, 7 Gray, 348.

The supply must not depend upon the convenience or caprice of the owner up the stream, upon accident or mere chance. The proprietor below is entitled to have the water flow to him in its accustomed channel, as it had been wont to run through his land.

Even if the plaintiff hitherto and since the acts of the defendant complained of has received all the water which ran to his pond before the erection of the defendant's pond, the instruction prayed for should not have been given upon the evidence. The law is well settled that where an act is done which violates the right of another, and which is of such a character "that if it be continued for a sufficient period of time the wrong doer may acquire a right by adverse possession, the person whose rights are violated may maintain an action therefor without proof of any other actual damage." *Lund v. New Bedford*, 121 Mass. 286, 290; *White v. Chapin*, 12 Allen, 516.

The invasion of a right, if persisted in for a sufficient length of time, may result in the extinction of such right. In the case at bar, the water to the plaintiff's pond came in addition to overflow and leakage from the raising of the drawgate at the defendant's pond. If the water overflowed the defendant's pond at all times, so that the plaintiff would always have all the water which he was accustomed to have before the acts of the defendant complained of, the instruction requested by the defendant should have been given. But the evidence shows that the plaintiff obtains his equivalent volume of water; not from the natural continued and uninterrupted flow of the water from the defendant's pond, but by the opening of the drawgate at his pleasure and whenever he thinks proper. In time, by furnishing water to the stream in such manner, the defendant may acquire an absolute right under which he may refuse to open his drawgate and thus supply water to the plaintiff's pond. The instruction given to the jury recognized this principle.

MASS.

The evidence disclosed the fact that in excavating for his pond, the defendant tapped a spring in land adjoining his own, and conducted the water flowing therefrom, to his pond, and that the water from this spring supplied his pond to a very large extent. If the spring was situated upon the adjoining land, in such way that the owner thereof could divert the water flowing therefrom to the defendant's pond, as he would have the right to do, this is an additional reason why the prayer of the defendant should have been refused, and the instruction objected to given.

The plaintiff relies upon *Elliot v. Fitchburg Railroad*, 10 Cush. 191. In that case the presiding Judge instructed the jury that, unless the plaintiff suffered actual perceptible damage in consequence of the diversion of water by the defendant, he could not recover, and that if the defendant by excavating a reservoir and spring above its dam, or by digging ditches, had increased the flow of water in the brook equal to the quantity of water it had diverted therefrom, it was not liable. The instructions given were sustained.

There was no question raised of any encroachment upon the rights of the plaintiff by which in time he might be entirely deprived of them. This marks the distinction between that case and the one at bar.

Exceptions overruled.

James W. RICKER

AMERICAN LOAN & TRUST CO.

AMERICAN LOAN & TRUST CO.

STREET COMRS. of the City of BOSTON.

1. The **New England Car Trust** is a partnership; its business is carried on in Boston. **Personal property held in trust for it by the American Loan and Trust Company**, defendant, the income of which is payable to such partnership, is, under Pub. Stats. chap. 11, § 20, cl. 5, property taxable in Boston to such trustee.
2. **Partnerships**, like corporations, may have a residence for the purpose of taxation, under the above statute. When the *cestui que trust* is a partnership, the place where the partnership resides is the place where its business is carried on.
3. The word "**person**" in a statute may extend and be applied to bodies politic and corporate.

(Middlesex and Suffolk—Decided November 30, 1886.)

CASES to test the right to tax in the City of Boston personal property held by the American Loan and Trust Company, in trust for the New England Car Trust.

The first case is an appeal from the Superior Court. The second case was reserved for the consideration of the full court. In the first case, judgment affirmed. In second case, petition for *certiorari* dismissed.

The facts fully appear in the opinion of the court.

Mr. W. C. Loring, for Am. Loan and Trust Co.

Mr. A. J. Bailey, for plaintiff Ricker and the Street Commissioners.

C. Allen, J., delivered the opinion of the court:

It is provided in the Public Statutes, chap. 11, § 24, that "Partners in mercantile and other business, whether residing in the same or in different places, may be jointly taxed under their partnership name, in the place where their business is carried on, for all the personal property employed in such business," with certain exceptions not here material. It is also provided in § 20, cl. 5 of the same chapter, that "Personal property held in trust by an executor, administrator or trustee, the income of which is payable to another person, shall be assessed to the executor, in the place where such other person resides if within the Commonwealth." By virtue of these two provisions the property in question was properly taxed to the trustee in Boston.

1. The New England Car Trust is a partnership, unless indeed, it is to be considered that there are two or more partnerships under the same name. The essential features are as follows: a number of persons formed an association, by an instrument in writing containing numerous articles, for the purpose of buying, selling and leasing railroad stock, to be sold or leased to the New York and New England Railroad Company, with provisions for admitting other persons to membership. The members of the Car Trust were to furnish money for the purchase of the rolling stock, and were to have certificates for the amounts so furnished, providing that the principal sum contributed by each member should be repaid in ten annual installments, with interest; both principal and interest being payable only out of the rentals received for the rolling stock. Instead of the lease being made to the railroad company directly by the Car Trust, a plan was adopted by which the Car Trust delivered the property to the American Loan and Trust Company as trustee, which trustee issued the certificates to the members of the Car Trust, and also executed the leases to the railroad company, with provisions for a rental sufficient to meet the above payments of principal and interest, in addition to expenses, including the taxes. In this manner the railroad company became bound by its covenants in the leases to make payments which in the course of ten years would pay in full for the rolling stock, so that the rolling stock would become the property of the railroad company at the end of that time. All contracts relating to any business of the Car Trust, involving liabilities for the payment of money, were to be in writing, and made under the direction of the board of managers. The original board of managers was named in the articles of association, but the shareholders were to have the power to remove them and elect others. At all meetings, every shareholder was to have one vote for each share of stock owned by him; and provision was made for the transfer of shares, and the association was not to be dissolved by the death of members. Every owner of one or

more shares was to be entitled to a proportionate share of the rentals received. The contemplated profits, to be sure, were limited to 6 per cent on the money advanced; the losses, if any, must be borne proportionally; this constitutes a partnership.

There were provisions looking to the purchase of rolling stock from time to time and to the issue of new certificates to those who should advance the money on the occasion of each purchase, and to the making of a new and separate lease of each lot or series of rolling stock. As such new certificates might be issued to different persons from those who contributed money for the first purchase, it would seem that the holders of each series, or separate issue of shares, would constitute a partnership by themselves under the same general provisions and management. The Car Trust Association was not a corporation. It was a mere voluntary Association. There is no intermediate form of organization between a corporation and a partnership, like the joint stock companies of England and of some of the United States, known to the laws of this Commonwealth. Since this Association is not a corporation, its members must be partners, unless, indeed, as the defendant contends, they are simply co-owners. But we cannot look upon them as simply co-owners. *Whitman v. Porter*, 107 Mass. 522; *Hoadley v. County Comrs.* 105 Mass. 519; *Gleason v. McKay*, 134 Mass. 419, 425.

2. The place where the business of the Car Trust was carried on was Boston. The meetings of the board of managers have always been held in Boston, and the Car Trust has never had any other place where its business was carried on; and the certificate holders, prior to the date of the assessment of the tax in controversy, had never held any meeting. All of the business done by the managers for the Company has been done in Boston. *Greene Foundation v. Boston*, 12 Cush. 54-60.

3. The rolling stock upon which the tax was laid was personal property employed in the business of the Car Trust. That business was the buying, selling and leasing of railroad rolling stock; and the rolling stock in question was bought in pursuance of a vote passed by the board of managers authorizing such purchase, and delivered to the defendant, as trustee for the Car Trust, and was leased by the trustee to the railroad company. All this was in precise conformity to the somewhat complicated plan by which the business of the Car Trust was to be carried on. *Singer Mfg. Co. v. County Comrs.* 139 Mass. 266.

4. It is thus apparent that, if the Car Trust had taken the title to the property in its own name, and had executed to the railroad company the instrument called a lease, which also looks to the ultimate acquisition of title by the railroad company, the assessment of taxes upon the property would properly be laid to the Car Trust, as a partnership in Boston. The circumstance that the property is held in trust for the Car Trust does not render it taxable elsewhere. It falls within the meaning of the P. S. chap. 11, § 20, cl. 5, already cited. The partnership known as the Car Trust is to be considered as a person to whom the income is payable. By express provision of statute, the word "person" may extend and be applied to bodies politic and

corporate: P. S. chap. 8, § 3, cl. 16, and numerous cases decided irrespective of statutory provisions are to the same effect. *Beaston v. Farmers Bank*, 12 Pet. 102-184 [37 U. S. bk. 9, L. ed. 1017-1029]; Bish. Wr. L. § 212, and cases cited.

Whether in any particular case this construction should be given, would depend upon a consideration of the object of the statute. *Pharmaceutical Soc. v. London & P. Supply Asso. L. R. 5 App. Cas. 857; Guardians of St. L. v. Franklin*, L. R. 8 C. P. D. 877.

It is also provided by the Public Statutes that words importing the singular number may extend to and be applied to several persons or things. There is no difficulty, therefore, in holding this to be "personal property held in trust by a trustee, the income of which is payable to another person." Such property is taxable in the place where such other person resides. In this case, such other person was a partnership. But partnerships, like corporations, may have a residence. A corporation is usually held to dwell at the place where it carries on its business. *Taylor v. Crowland Gas & C. Co.* 11 Exch. 1; *Adams v. G. W. R. Co.* 6 H. & N. 404; *Brown v. London & N. W. R. Co.* 4 Best & Sm. 326; *Calcutta Jute Mills Co. v. Nicholson*, L. R. 1 Exch. Div. 428.

Indeed, a corporation may be deemed to have two domicils, when the just construction of a statute so requires. *Atty-Gen. v. Bay State Mining Co.* 99 Mass. 148-153; *Carron Iron Co. v. McLaren*, 5 H. L. Cas. 416-449.

And in this case for the purpose of taxation under the P. S. chap. 11, § 20, cl. 5, when the *cestui que trust* is a partnership, the place where the partnership resides is the place where its business is carried on. This construction makes the system of taxation symmetrical and is in conformity with the decision: that the place of business of partners is like the domicil of an individual, in *Peabody v. County Comrs.* 10 Gray, 97, under the R. S. chap. 7, § 13, which is in the same language as the P. S. chap. 11, § 24. See also, *Lee v. Templeton*, 6 Gray, 579; *Stinson v. Boston*, 125 Mass. 348-351.

Section 47, chap. 18 of the P. S., which in terms provides another mode of taxation for companies or partnerships like that now under consideration, has been held to be unconstitutional and did not change the existing law. *Gleason v. McKay*, *ubi supra*.

The result is that the property was properly taxable to the trustee in Boston; and it may be added that this result appears to have been contemplated in framing the articles of association, which provide that the lessee shall covenant and agree to pay to the trustee a rent which shall be sufficient, among other things, to pay any and all taxes upon the income or property of the Association connected with said series or issue of certificates, or which the trustee may be required by law to pay or to retain from dividends.

Judgment in the action at law affirmed. Petition for certiorari dismissed.

COMMONWEALTH of Massachusetts v.

Maud RUISSEAU *et al.*

1. A motion for a new trial, in a criminal case, upon the grounds that the verdict was against the weight of evidence and of newly discovered evidence, is addressed to the discretion of the court below; and its action overruling the motion cannot be reviewed by this court.
2. Where the court below overruled one motion for a new trial, it is not required to hear another motion based upon the same grounds and supported by the same evidence.
8. Where an indictment contains three counts, charging three distinct offenses of adultery, there is nothing repugnant nor inconsistent in convicting on the first count and acquitting on the others.

(Suffolk—Decided January 4, 1886.)

ON defendant's exceptions. *Overruled.*
Indictment for adultery. There were three counts, charging three different acts of adultery. It appeared by the evidence that the two defendants, the woman being the wife of another man, occupied the same bed chamber during the night; and there was other evidence of intimacy and familiarity for a year prior thereto. The district attorney did not claim a verdict on all the counts. The trial court was of the opinion that the evidence was sufficient to convict on one count only, and so ruled.

Messrs. C. H. Hudson and P. J. Casey, for defendants.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth:

This was a proper case to submit to the jury. The ruling that there was not sufficient evidence to authorize a verdict except on one count was for the benefit of defendants.

The motions for a new trial were addressed to the discretion of the presiding justice. His determination upon matters of fact is not open to revision by this court. *Nichols v. Nichols*, 186 Mass. 256.

He is not obliged to set aside a verdict even when it is against the weight of the evidence. *Reece v. Dennett*, 187 Mass. 818.

The motion in arrest of judgment was properly overruled. P. S. chap. 214, § 27.

By the Court:

The defendants, having been convicted on the first count of the indictment, filed a motion for a new trial, upon the grounds that the verdict was against the weight of the evidence, and of newly discovered evidence. This motion was addressed to the discretion of the presiding justice of the superior court, and his action overruling the motion cannot be revised by this court.

Having overruled one motion for a new trial, the court was not required to hear another motion, based upon the same grounds and supported by the same evidence.

No exception lies to its order overruling the second motion.

The indictment contains three counts, charg-

ing three distinct offenses. There is nothing repugnant or inconsistent in convicting upon the first count and acquitting on the other counts.

The motion in arrest of judgment was properly overruled.

Exceptions overruled.

Josiah A. BRIGHAM

v.

John H. FAYERWEATHER et al.

1. The probate of a will is not evidence of testator's mental capacity on a collateral issue, nor should the executor be thereby stopp'd as against a stranger to the proceeding, to testify to the same; hence, a decree of a probate court is not admissible as evidence of the mental capacity of the mortgagor in a suit brought by a devisee under the will, in a court of equity to set aside a mortgage made by testator, on the ground of want of mental capacity to convey.
2. The mere fact that conversations were had with an executor about the mortgage does not show that the conversations necessarily called for a denial of mortgagor's capacity, and therefore the fact that it was not denied would not tend to contradict or impeach testimony at the trial that the mortgagor was incompetent and the evidence was properly rejected.

(Worcester—Decided January 5, 1886.)

ON defendants' exceptions. *Overruled.*

Bill in equity to have a mortgage deed executed by plaintiff's testator set aside on the ground of want of mental capacity to execute the same.

Messrs. F. G. Kent and G. T. Dewey, for defendants:

The petition of the plaintiff for the probate of the will was virtually a representation that the testatrix was of sufficient mental capacity to make the will and tended to control his evidence and the evidence produced by him to the contrary. It was an act of the plaintiff inconsistent with the theory set up by the plaintiff in his bill. *Brigham v. Clark*, 100 Mass. 430; *Clark v. Brown*, 120 Mass. 206.

"There is no difference in regard to the admissibility of this sort of evidence, between direct admissions and those which are incidental, or made in some other connection or involved in the admission of some other fact." 1 Greenl. Ev. § 194; Tayl. Ev. § 725; *Rankin v. Horner*, 16 East, 193; expounding *Maltby v. Christie*, 1 Esp. 342.

The probate of a will is a proceeding *in rem*, and the judgment is conclusive as to all the world and makes the instrument just what the judgment declares it to be. *Noell v. Wells*, 1 Lev. 235.

In *Leonard v. Leonard*, 14 Pick. 288, the court says: "In general the judgment of a court of competent jurisdiction is conclusive against the parties; and judgments *in rem* are conclusive against all the world; for instance decrees

in admiralty cases, the probate of wills," etc. See, *Woodruff v. Taylor*, 20 Vt. 65, 73.

This is one instance of a proceeding upon a written instrument to determine its state or condition, and that determination in its consequences involves and incidentally determines the right of persons to property affected by it. See also, 1 Greenl. Ev. § 550.

It is also *prima facie* evidence at least of "all facts involved in it as necessary steps or the groundwork upon which it must have been founded." *Newman v. Jenkins*, 10 Pick. 515; *White v. Palmer*, 4 Mass. 147; *Leonard v. Leonard*, *supra*; *Burten v. Shannon*, 99 Mass. 200, 203, and cases cited; *Jeffers v. Rudcliff*, 10 N. H. 242; *Reg. v. Hartington*, 4 El. & Bl. 780, 798; *French v. French*, 1 Dickens, 268; *Stone v. Damon*, 12 Mass. 488; *Breed v. Pratt*, 18 Pick. 116.

The probate of the will necessarily involved and determined that the mortgagor Azubah Brigham was of sound mind at the date of the will. It was an essential fact. Pub. Stat. 127, 1. It was competent to prove this fact by the acts and conduct of the testator and mortgagor, by the opinion of experts or by any other relevant testimony; and this judgment was competent *prima facie* evidence of the fact. *Burten v. Shannon*, 99 Mass. 203; *Hawks v. Truedell*, 99 Mass. 558; *Stockwell v. Silloway*, 113 Mass. 384; *Morse v. Elms*, 131 Mass. 151.

In *Burten v. Shannon*, the point to be established was that the status was fixed by a former decree dismissing a libel.

The case of *Barney v. Tourtellotte*, 138 Mass. 106, has very recently been decided by this court. In that case it was determined that the judgment of the probate court was not a judgment *in rem* fixing the status of the parties.

In *Stebbins v. Lathrop*, 4 Pick. 42, the court says: "Champion, upon whose application the executor was cited to produce the will, was a creditor of the deceased and also of the executor and principal legatee. He, therefore, had an interest in the will which authorized his application."

Commenting on this case and sustaining it in *Smith v. Bradstreet*, 16 Pick. 265, the court says: "The persons claiming probate of the will were creditors of the testator as well as of the devisee, and knowing that there was a will they could not have a general administration over an intestate estate; they had a direct interest therefore in the probate of the will to obtain administration and payment of these debts." Pub. Statute 129, § 8, implies that creditors of the estate are interested parties to the probate of a will and the settlement of the estate. See also, *Abercrombie v. Sheldon*, 8 Allen, 532; *Wells v. Child*, 12 Allen, 330.

Creditors are interested because in the event of the will not being probated and of no other person taking out administration, the administration may be granted to a creditor. Pub. Stat. 130, 1, cl. 3.

Any evidence that he had directly stated or admitted that she was competent would certainly have been admissible as a contradiction of his statement on the witness stand. *Hathaway v. Crocker*, 7 Met. 262; *Hubbard v. Bissell*, 2 Allen, 196; *Brigham v. Clark*, 100 Mass. 430.

The evidence of what he had indirectly admitted in a conversation about the mortgage by

his silence in reference to the mortgagor's incompetency, when it was his duty to speak, was also admissible.

The conversation should therefore have been admitted; and whether the fact that Curtis did not say at the time that the mortgagor was incompetent was entitled to any weight in considering his testimony was for the jury to determine. *Hayden v. Stone*, 112 Mass. 846; *Hook v. George*, 108 Mass. 824; *Fisher v. Plimpton*, 97 Mass. 441; *Carruth v. Bayley*, 14 Allen, 582; *Gould v. Norfolk Lead Co.* 9 Cush. 388; *Perkins v. Adams*, 5 Met. 44.

Mr. E. P. Goulding, for plaintiff.

Holmes, J., delivered the opinion of the court:

A judgment *in rem* is an act of the sovereign power; and, as such, its effects cannot be disputed, at least within the jurisdiction.

If a competent court declares a vessel forfeited, or orders it sold free from all claims, or divorces a couple, or establishes a will under statutes like our Pub. Stats. chap. 127, § 7, a paramount title is passed, the couple is divorced, the will is established, as against all the world, whether parties or not, because the sovereign has said that it shall be so. *Hughes v. Cornelius*, 2 Show. 232; *S. C. T. Raym.* 478; *Skin.* 59; *Carth.* 32; *Noell v. Wells*, 1 Lev. 285; *Scott v. Shearman*, 2 W. Bl. 977; *The Helena*, 4 Rob. 3; *Leonard v. Leonard*, 14 Pick. 280; *McClurg v. Terry*, 6 C. E. Green, 225.

But the same is true when the judgment is that A recover a debt of B. The public force is pledged to collect the debt from B, and no one within the jurisdiction can oppose it. And it does not follow, in the former case any more than in the latter, nor is it true, that the judgment, because conclusive on all the world in what we may call its legislative effect, is equally conclusive upon all as an adjudication of the facts upon which it is grounded. On the contrary, those judgments, such as sentences of prize courts, to which the greatest effect has been given in collateral proceedings, are said to be conclusive evidence of the facts upon which they proceed only against parties who were entitled to be heard before they were rendered. *The Mary*, 9 Cranch, 126, 146 [13 U. S. bk. 3, L. ed. 678, 685]; *Salem v. Eastern R. R. Co.* 98 Mass. 431, 449; *Baxter v. New Engl. Ins. Co.* 6 Mass. 277, 286; *Whitney v. Walsh*, 1 Cush. 29.

We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding *in rem*.

This does not mean that all the world are entitled to be heard; and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes.

Still, the cases last cited show that some judgments *in rem* are conclusive evidence of the facts adjudicated, in favor of a stranger as against a party. And if the analogy is to be applied to all judgments which create or change a status or a title, it would apply here. For the plaintiff was a party to the decree establishing the will, and that decree necessarily proceeded on the ground that the testator possessed sufficient capacity to make the will.

But these cases cannot be taken to lay down

a general principle. The reasons given for the decisions are not that the conclusion follows as a necessary effect of judgment *in rem*, merely as such, but are special reasons of convenience or construction. In *The Mary*, *supra*, the doctrine as to sentences of prize courts is said to rest on the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law, and the impropriety of revising the decisions of the maritime courts of other Nations, whose jurisdiction is coördinate throughout the world.

In *Baxter v. New Eng. Ins. Co.* 6 Mass. 277, 300, and *Robinson v. Jones*, 8 Mass. 586, 540, the effect of a sentence in a subsequent action on a policy of insurance is referred to the settled construction of mercantile contracts. In *Lothian v. Henderson*, 3 Bos. & P. 499, 545, the doctrine seems to be thought to stand on practice and authority, rather than on principle. See, *Castrique v. Imrie*, L. R. 4 H. L. 414, 484.

The general principle is stated with substantial correctness by Sir James F. Stephen, in his work on Evidence, art. 42: "Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between, a party or privy and a stranger, except in the case of judgments of courts of admiralty condemning a ship as prize," and some other judgments of a kindred nature. Apart from precedent, there seems to be no satisfactory ground for treating the probate of a will as evidence of the testator's mental capacity, on a collateral issue. For except in the comparatively small number of cases where the probate of the will is opposed, the investigation of the fact is necessarily only formal. Still less do we see why, if the probate is not evidence against a party who had no right to be heard, he should hold the executor bound by it when he himself is free.

Ordinarily, estoppels by judgment are mutual. The fact can be tried in the superior court as well as in the probate court and was actually tried in this very case. Thus the chief reason offered for the effect of prize sentences is removed.

One or two cases cited by the defendant may need a word of explanation. It has been held, in a suit by an administrator, that letters of administration are conclusive proof of the intestate's death, unless the defendant pleads in abatement. *Newman v. Jenkins*, 10 Pick. 518.

And elsewhere it has been decided, in a suit where the plaintiff's title was derived from an administrator's sale, that the letters are *prima facie* evidence of the death. *Jeffers v. Radcliff*, 10 N. H. 242; *Tisdale v. Conn. Ins. Co.* 26 Iowa, 170; *S. C.* 28 Iowa, 12.

But in these cases the letters are not introduced as evidence on a collateral issue. They are not put in to prove the death, but the death is denied in order to invalidate the letters. The fact of death is immaterial, except as bearing on the jurisdiction of the court to issue them. It may well be held that where the question comes up in this way, such a decree will be presumed, *prima facie*, to have been within the jurisdiction of the court that made it, so far as this fact is concerned, although it has been held

otherwise in England. *Morris v. De Bernales*, 1 Russ. 301, 307. See, *Thompson v. Donaldson*, 8 Esp. 68.

But it is entirely consistent with the New Hampshire and Iowa decisions to hold that, in collateral proceedings, the issue of letters of administration is not even *prima facie* evidence of death. *Carroll v. Carroll*, 60 N. Y. 121; *Mutual Ben. Ins. Co. v. Tisdale*, 91 U. S. 288 [bk. 23, L. ed. 814]. See, *Blackham's Case*, 1 Salk. 290; *French v. French*, 1 Dick. 268; *Spencer v. Williams*, L. R. 2 P. & D. 280.

These cases very strongly sustain the conclusion which we have reached. In the case at bar, the plaintiff's title under the will was admitted by the answer, and if it had not been, the testator's sanity or insanity did not affect it, because it did not affect the jurisdiction of the court.

If the defendant as well as the plaintiff had been a party to the probate of the will, a different question would arise. See, *Barr v. Jackson*, 1 Phila. 582; reversing *S. C. 1 Younge & Coll. Ch. 585*; *Dogliani v. Crispin*, L. R. 1 H. L. 301; 311, 314; *Burten v. Shannon*, 99 Mass. 200, 203; *Morse v. Elms*, 181 Id. 151, 152.

But the defendant was not a party in the sense that he was entitled to be heard, or to take an appeal; and unless he had that right, he was not concluded by the adjudication of facts, as has been shown. It is suggested that the plaintiff's petition presenting the will for probate was competent as an admission. But we do not think that any question except the effect of the adjudication appears by the exceptions to have been presented to the court, or to have been ruled upon by it, even if the petition would have been admissible on that ground, which we do not intimate. See, *Page v. Page*, 15 Pick. 368.

The bill of exceptions does not show that the testimony of Fayerweather was improperly rejected. The mere fact that Dr. Curtis had had a talk about the mortgage does not show that the talk was of such a nature as to call for a denial of the mortgagor's capacity; and therefore the fact that he did not deny it would not tend to contradict or impeach his testimony at the trial, that the mortgagor was incompetent.

Exceptions overruled.

James N. LARNED

v.

Albert H. WHEELER *et al.*

1. **One whose name has been wrongfully erased from the register** of voters of a town **may maintain an action** against the selectmen, **whether he appeared or not** before them within the time for registration, **to request that his name** be put upon the list or be **continued** thereon, at a meeting held for receiving evidence of the qualification of voters; and this **although** there were highly **penal provisions** in the statute in relation to such registration of voters.
2. **A declaration** which alleges that an **election was to be held** on November 6, 1888; that plaintiff's **name** had been and was on November 1, 1888, **on the register** of voters; that he had a **right to vote** at such election; that on November 8,

although the defendants had sufficient evidence furnished them of his qualifications they **wrongfully removed his name** from the list, by which he **lost the privilege** of voting, sets forth a good cause of action.

(Worcester—Filed January 5, 1886.)

ON defendants' exceptions. *Overruled.*

Action against the selectmen of a town for erasing the name of plaintiff from the registration list of voters and thereby depriving him of his right to vote.

The case is stated in the opinion.

Messrs. J. Hopkins and J. M. Cochran, for defendants.

Messrs. F. P. Goulding and A. J. Bartholomew, for plaintiff:

Under the provisions P. S. chaps. 6, 7, in force when the alleged wrongful acts were committed, all duties regarding the registration of voters in towns were imposed upon the selectmen, persons designated to discharge them, not as a board or a body, but as individuals. In actions of tort, the plaintiff may sue one or all, or any number less than all the wrong doers; and the defendants cannot be heard to object that others, guilty with them, have not been joined in the writ. 2 Hilliard, Torts, 242, § 9; Cooley, Torts, 133; *Withington v. Eccleth*, 7 Pick. 106; *Buddington v. Shearer*, 22 Pick. 429; *Milford v. Holbrook*, 9 Allen, 22.

The causes of demurrer assigned are based upon an entire misconception of the statutes.

The authority for this action is found in P. S. chap. 7, § 10, providing that "The selectmen shall not be answerable for refusing the vote of any person whose name is on the lists of voters, unless such person before the close of registration of voters furnishes them with sufficient evidence of his having the legal qualifications of a voter at such meeting and requests them to insert his name in said lists." This was the Statute of 1822, chap. 104, § 4, enacted in R. S. chap. 8, § 9, in G. S. chap. 7, § 10, and preserved in P. S. cited.

Before this statute, as this court held in *Blanchard v. Stearns*, 5 Met. 301, selectmen were liable in all cases, where the plaintiff alleged and proved in his suit that he had a legal right to vote, and requested to have his name put upon the lists, and tendered his ballot, if they declined to put his name upon such lists and refused his ballot.

The Act of 1822, modified their liability in civil actions, by requiring the voter, before he could resort to a suit, to appear and furnish the selectmen with evidence of his right to vote; but as this court held in the case cited, and in *Lombard v. Oliver*, 3 Allen, 1, reviewed in 7 Allen, 155, and in *Harris v. Whitcomb*, 4 Gray, 438, this statute established and preserved a right of action against the selectmen for any wrongful acts of theirs depriving a citizen of the privilege of voting, in all cases when the voter had appeared and furnished that evidence.

This court also held in the cases cited, that it was not necessary to allege or prove that the acts of the selectmen were willful or malicious. So that these statute provisions have been judicially interpreted, and the law well settled

as to the liability of the selectmen to civil action in proper cases.

Now as to the duties of the selectmen regarding the registration of voters: P. S. chap. 6, §§ 13-16, define them specifically, and by §§ 22-24 of that chapter, their duty to insert names of known voters, and to erase names of persons known not to be qualified is stated.

Sections 25, 27 define the limits of the time for such registration previous to an election. By P. S. chap. 7, § 9 no person could vote at an election whose name had not been previously registered. And these are all the provisions that relate to a case like this.

If he should seek redress in an action, he must show as a fact that he had, at a proper meeting of the selectmen, appeared before them; not to request his name to be put upon the lists but to furnish them with sufficient evidence of his legal qualifications, as the statute prerequisite to his suit; and if he did that, he may maintain his action against the selectmen for the wrongful erasure of his name, as expressly held in *Harris v. Whitcomb*, 4 Gray, 436, to be the simple and sole cause of action.

Devens, J., delivered the opinion of the court:

It is the contention of the defendants that no action can be maintained against them for erasing the plaintiff's name from the register of voters, he having appeared before them at a meeting held for receiving evidence of the qualifications of voters, and furnished them with satisfactory evidence of such qualifications. The law makes provision for a register of voters, and also for alphabetical lists. The latter are used at an election, and contain simply the names and residences of voters; while the former embraces a larger number of particulars. P. S. chap. 6, §§ 16, 18, 20.

The provision that "Selectmen of towns shall make and keep records of all persons entitled to vote therein at any election for town, county, state or national officers, which shall be known as a register of voters," contemplates a permanent record, to be revised from time to time, as before any annual election, or upon affidavit that persons named are illegally registered. P. S. chap. 6, §§ 13, 15, 22.

As it exists, it determines the right of persons to vote, as from it the alphabetical lists of voters are made.

While the selectmen are to meet the Saturday before the meeting for the choice of town, county or state officers, to receive evidence of the qualifications of persons claiming a right to vote, and to correct the lists of voters, the first step in the latter duty is to correct the registration, which ceases at 10 o'clock in the forenoon of that day. § 23.

As no person can be added to the lists of voters until his name has been recorded in the register, according to the express words of the statute, so it would seem clear that it cannot be hence erased until it has been struck from the register. § 27.

The argument is not sound, that there must be a new register at each election, and that, as it is so prepared for each, it cannot be said that any is erased therefrom merely because it is not there found at 10 o'clock on the Saturday forenoon previous to an election, when registra-

tion ceases, even if it had been on previous registers. While the register is subject to various modifications, such as those heretofore alluded to, it does not lose its substantial identity. The provision by which at any time, except that it must not be within seven days of an election, a legal voter may apply to the proper authorities setting forth that a person named is illegally registered, sufficiently shows that the register is treated as always existing. The rights of the voter in approaching the polls are indeed dependent upon the voting list, and the words "and no person shall vote at an election whose name has not been previously placed on such list," refer to the alphabetical list furnished to the officers conducting the election. P. S. chap. 7, § 9.

But the voting list depends on the registration which has been theretofore made. When, therefore, the defendants struck the plaintiff's name from the register, they effectually deprived him of his right to vote at any subsequent election until it was restored thereto. It was the duty of those conducting the election to refuse his vote. The erasure of his name was the injury which he sustained, and if this was wrongful, he might maintain an action therefor, if at a meeting held for the purpose of registration he had appeared before the selectmen and furnished them with proper and sufficient evidence of his qualifications. *Lombard v. Oliver*, 3 Allen, 1; *S. C.* 7 Allen, 155; *Harris v. Whitcomb*, 4 Gray, 438.

The fact that if he had formally tendered his vote, which had been refused, he might also have maintained an action for such refusal by reason of having furnished to the selectmen sufficient evidence of his qualifications as a voter before the close of registration, and requested that his name be put upon the list, should not deprive him of his remedy for the injury done him by the removal of his name from the register. P. S. chap. 7, § 10; *Blanchard v. Stearns*, 5 Met. 298, 301.

Whether he appeared before the selectmen before the close of registration for the purpose of having his name put on the register, or it being there, to prevent its being taken off, cannot be important. The removal of his name was, if wrongful, a direct injury, which deprived him of his right to vote. For this an action may be maintained, although there are also highly penal provisions in the statute, intended to provide for willful violations of the rights of a voter, under which the plaintiff does not seek to recover. It was not material whether the plaintiff actually tendered his ballot, as it could not have been received, his name not being upon the list; nor whether the tax collector had or had not returned the plaintiff's name as having paid his tax, the injury done the plaintiff not being an omission on neglect of the defendants to register his name, but an erasure by them of the name. P. S. chap. 6, § 29.

The defendants urge that the declaration does not set forth a cause of action, because it does not show that the erasure was made from the register prepared for the election of November 6, 1883. The declaration was, that an election was to be held on November 6, 1883; that the plaintiff's name had been, and was on November 1, on the register of voters; that he had

a right to vote at such election; that on November 8, although the defendants had sufficient evidence furnished them of his qualifications, they wrongfully removed his name from the list, by which he lost the privilege of voting. This sets forth a good cause of action, and although it also adds, that the defendants wrongfully refused to receive his ballot, on which part of his declaration he was not entitled to rely, as the ballot had not been properly tendered, this could not affect the other cause of action, which was well set forth.

Exceptions overruled.

Amos W. STETSON *et al.*

v.

Henry P. MOULTON, Admr., *et al.*

1. **Sureties on an administrator's bond**, who have paid to his successor on a judgment against them the amount of the property of the estate which came to their principal's hands, are entitled to be **subrogated to the rights of their principal**, who has become insolvent, and of the heirs who have been paid in full by their principal, in moneys in the hands of such successor, no decree of distribution having been made, and to receive the amount of such moneys due to their principal and such heirs. After payment of the debts of the estate, a bill in equity may be maintained for that purpose.
2. **The rights of such sureties in such moneys are paramount to the rights of principal and his assignee**, and of the heirs who received their full share of the estate; and the **subsequent administrator** holds such moneys in the nature of a trustee for them.

(Essex—Filed January 11, 1886.)

IN equity. Demurrer to bill. *Overruled.*

The substance of the bill demurred to is set out in the opinion.

Mr. C. Sewall, for defendants.

Messrs. Solomon Lincoln and Geo. B.

Ives, for complainants:

The impending injustice and need of relief are obvious, and this relief must be sought in equity. *Robinson v. Troffiter*, 109 Mass. 478; *Lord v. Harte*, 118 Mass. 271.

The case of *Kinney v. Ensign*, 18 Pick. 232, recognizes the justice of permitting such suits to be maintained as will protect sureties upon an administrator's bond from bearing burdens properly to be borne by others. Complainants may recover that portion of the intestate's estate which would fall to M. Ella Skerry or her assignee. *Commonwealth v. Gould*, 118 Mass. 307; *Glossup v. Harrison*, 3 Ves. & B. 134; *Brandon v. Brandon*, 8 DeGex & J. 524.

Gardner, J., delivered the opinion of the court:

This is a bill in equity to which a demurrer has been filed. The first cause of demurrer as-

signed to the bill is, that it does not state such a case as entitles the plaintiffs to the relief prayed for, and that it does not appear that the plaintiffs have not a remedy for the matters alleged by the usual and ordinary course of law. The substance of the bill is as follows: M. E. Skerry was appointed administratrix of the estate of Elizabeth F. Hodgdon, her mother; and while holding this trust, she distributed among the heirs, without decree of the probate court, a considerable portion of the estate, and with unimportant exceptions converted the remainder thereof to her own use.

She was removed from her office of administratrix, and the plaintiff Thorndike, who with the plaintiff Stetson was a surety on the bond given by Skerry, was appointed her successor, and gave bond with the plaintiff *et al.*, as sureties. With the exception of certain promissory notes which she delivered to her successor, no property of the intestate was delivered to him by Skerry, or was received by him.

Five days after his appointment, Skerry was adjudged insolvent, and the defendant Sewall was appointed assignee of her estate. Thorndike resigned his trust as administrator, and the defendant Moulton was appointed in his place, and brought suit in October 1882, against Thorndike and the sureties on his bond. In November 1883, final judgment was rendered against the plaintiffs for the full amount of the property of the intestate which came into the hands of Skerry, less the promissory notes by her delivered to Thorndike, and the amount of certain small accounts paid by her. *Choate v. Thorndike*, 188 Mass. 371.

No allowance was made in said judgment for the amount of property of the intestate, distributed to the heirs by Skerry as administratrix, nor for her own interest in the estate which she had converted to her own use. The present plaintiffs have paid this judgment in full to the defendant Moulton, as administrator. The estate is not fully settled, and the interests of the heirs can be accurately determined upon the settlement of accounts. The plaintiffs claim that if the estate is distributed in the probate court according to the ordinary rules of distribution, the heirs of the estate who have received advances, and Skerry or her assignee, will be twice paid to the extent of the payments already made, and the interest of Skerry retained by her.

The money which was paid over to Moulton upon said judgment he, as administrator of the estate, holds as general assets thereof, subject to the decree of distribution to be made by the probate court. It is evident that, if the plaintiffs are entitled to any relief, it is not to be sought in that court. It was conceded at the argument that it sufficiently appeared by the bill that no order of distribution nor of partial distribution had ever been made. The heirs received the property distributed to them by Skerry, have retained the same, and nothing appears in the allegations to show that the distributees interested have not acquiesced in the same and adopted such acts as advances or payments. This property is not needed for any other purpose, as the bill alleges that all the accounts against the estate as yet unpaid, payment of which can be enforced, amount to a much smaller sum than that paid in by the

plaintiffs upon the judgment of all the above named accounts. After these are paid, the plaintiffs ask to be subrogated to the rights of the distributees, to the extent that the latter have received advances and payments, claiming that this money, to the extent named, has been paid in for the benefit of the heirs, and if distributed to them they will receive double the portion which they would otherwise have received from the estate. If these plaintiffs, by a judgment recovered against them in an action at law, have been compelled, by breach thereof, to pay to the administrator of this estate an amount of money which will double its assets, and thus enable the heirs to receive twice as much as was their original share from the estate, it is needless to say that justice requires that they should find relief.

In the case of *Kinney v. Ensign*, 18 Pick. 232-236, *Chief Justice Shaw* says: "The holding the fact of a debtor taking administration upon the estate of his creditor to be a payment, may be deemed a legal fiction, adopted for purposes of justice and convenience, as well as from considerations of policy, and calculated generally to promote justice; but such a legal fiction will never be allowed to go so far as to work wrong and injustice."

It has been held by this court in an action against a surety upon the official bond of a receiver of an insolvent insurance company, that the fact that the receiver rendered as such, valuable services for which he became and was entitled to compensation, the amount of which had not been determined, is not competent evidence to reduce the amount of the surety's liability; but if anything should hereafter be ordered to be paid to the receiver by way of compensation or otherwise, his sureties could apply to the court sitting in equity to have the amount applied to their indemnity. *Commonwealth v. Gould*, 118 Mass. 800, and cases cited.

Although Thorndike as administrator of this estate during the thirty-three days in which he held the trust failed to return any inventory or render any account, and no assets came into his hands except certain promissory notes, and these he delivered to his successor, by what may be termed a legal fiction, he and his sureties became liable on their bond for all the property shown to have come into the possession of Skerry as administratrix, and disposed of by her. The money was paid upon the judgment by the plaintiff to repair the wrongs done by Skerry; and if her estate is to be benefited by the repayment to it of money which she has converted to her own use, it would seem to work wrong and injustice. We think that the bill alleges sufficient to show that the plaintiffs are entitled to the relief sought for therein. In the suit upon the bond, it is clear that the defendants therein could not file, as a set-off to said claim, the advances and payments made by Skerry to the heirs, and the amount received by her to the extent of her interest. The condition and settlement of the estate could not be investigated and determined in that suit. *Choate v. Arrington*, 116 Mass. 552, 557.

Skerry's assignee was not a party thereto, and the question of her interest could not there be settled. The same objections would exist to any suit brought at common law to recover back said sum. The defendants have suggest-

ed no adequate remedy at law, which is open to these plaintiffs. We think the allegations of the bill sufficiently show that the plaintiffs have not a complete remedy, by the usual and ordinary course of law, for the relief sought by their bill. It is alleged in the bill, that two bonds were given by Mrs. Skerry with different sureties; and the defendants demur, in that the bill does not allege any breach of the second bond signed by the plaintiffs, for which they would be finally liable, and that there is no allegation that said bond was ever put in suit. If any contribution ought to be made between the sureties upon the several bonds, and the adjustments thereof, it must be sought in a bill in equity brought for that purpose. But the bill makes no allegations in reference thereto. It is evident that the reference to these bonds was made only for the purpose of giving a history of the proceedings relating to this estate in the probate court. It was immaterial whether said bonds were put in suit and whether there was any breach of either, so as to render the plaintiffs liable therefor. The fact that Thorndike undertook to administer the estate, when he had previously been surety upon a bond, does not in any degree lessen his liability nor increase it.

The bill does not seek to avoid the rendering of any account by Thorndike or Skerry, to the probate court, nor seek to indemnify the plaintiffs for Thorndike's failure and negligence to comply with the conditions of his bond, namely: to return an inventory and render an account. This is not the object of the bill. It says in substance that the plaintiffs admit that there was a breach of their bond, that they are willing and ready that the amount recovered by judgment against them should be applied to remedy all the faults and wrongs for which they are liable; that the debts provable against the estate should be paid out of this sum, and contend that, after doing this, whatever remains should be repaid to them.

The bill does not seek to oust the probate court of its proper jurisdiction. It does seek to prevent a distribution of the entire amount paid by the plaintiffs to Moulton. The defendants demur to the allegation in the bill that the plaintiffs ought to receive back from Moulton "One fourth interest belonging to the insolvent estate of said Skerry, in that it does not allege that the complainants have any equitable claim thereon, differing from the other creditors of said Skerry's estate, and that the bill seeks to take from the estate of said Skerry, belonging to her creditors, property assigned under the insolvent laws, more than four years before the plaintiffs became creditors of said Skerry." The allegation in the bill demurred to is as follows: "And said complainants ought to receive back from said Moulton the amount of said Skerry's proportion, to wit: one fourth of the balance remaining after the payment of all claims and demands against said intestate's estate. But said Sewall claims that said Skerry's proportion of said balance should be paid to him as assignee as aforesaid." The bill does not proceed upon the ground that the plaintiffs are the creditors of Skerry. If this were the allegation or fact, they would be relegated to their place with the other creditors of Skerry's insolvent estate.

The plaintiff's claim is, as stated in their bill,

that this balance now remains in the hands of Moulton as administrator, no decree of distribution having been made. They contend that the assignee of Skerry's estate has no right to it; that in equity and good conscience, it does not belong to the intestate's estate and that it cannot be classed among its general assets; that no portion of it equitably belongs to Skerry or to her assignee in insolvency; and that, therefore, her creditors have no interest in it. This money was paid upon a judgment recovered by Moulton, in which the claim now made by the plaintiffs could not be offset. It was paid over to the administrator, and he has received the same in the nature of a trust to distribute it so that the heirs shall have their full portion of the estate to which they are entitled, and to pay back the balance over and above such requirement to the person or persons to whom it equitably belongs. If this balance does not equitably belong to the estate of Hodgdon, then the assignee of Skerry has no claim to it, and her creditors no interest in it.

We think that the plaintiffs do not stand in the relation of creditors to this balance with the other creditors of Skerry. The plaintiffs' interest is paramount to theirs; and as the money was paid over to Moulton, the plaintiffs had such an equitable interest therein that he received it subject to such interest, and holds it in the nature of a trustee for them. The accounts of the administrator of this estate cannot be settled and determined by this bill. This is within the exclusive jurisdiction of the probate court.

The bill does not ask that this power be interfered with. These considerations dispose of all the causes of demurrer which were insisted on at the argument.

Demurrer overruled.

City of FALL RIVER

John C. RILEY *et al.*

1. A **surety** on a constable's bond who is **not a party** to a suit thereon against his principal, nor a privy thereto, **cannot review or reverse the judgment** therein; he **may impeach it** in a suit against himself and, without reversing it, show that it was invalid for want of jurisdiction over the defendant.
2. Where the officer's **return does not show such service** on the defendant as would give the court jurisdiction, the **judgment is invalid**.
3. When the record fails to show an **appearance by defendant**, this cannot be controlled by any evidence from the clerk, of the docket entries.

(Bristol—Filed January 9, 1886.)

ON plaintiff's exceptions. *Overruled.*
Contract for benefit of M. B. Slocum, for breach of a constable's bond.

Mr. J. M. Wood, for plaintiff:

The clerk of the second district court was only required to keep a record of all the proceedings in the case in a book separate from the words of criminal cases and was not required by statute to extend his record. P. S. chap. 154, § 9.

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Even the court cannot direct that any part of the proceedings shall be extended, as in case of supreme and superior court. P. S. chap. 150, § 19; *McGrath v. Seagrave*, 2 Allen, 448.

Minutes of proceedings were admitted also. *Central Bridge Corp. v. Lowell*, 15 Gray, 106.

The minutes of the clerk were the full record of all facts not more fully recorded and were for that reason admissible. *Waters v. Gilbert*, 2 Cush. 31; *Park v. Darling*, 4 Cush. 197; *Knapp v. Lambert*, 3 Gray, 377.

It is a liability between plaintiff and principal that determines the liability of sureties; and a judgment good between them is all that the law requires.

This judgment became good, even if defective, after a year in which to bring a review, which was the appropriate remedy, if there was any cause for review. *Hendrick v. Whittemore*, 105 Mass. 28-30.

Mr. H. K. Braley, for defendants.

Devens, J., delivered the opinion of the court:

When this case was last before us, it was not in controversy that the judgment obtained against Riley by Slocum, for negligence in suffering an escape of one Maynard, who had been arrested at the suit of Slocum, was a valid judgment. The inquiry was whether, before bringing an action upon the bond of Riley as constable, an execution against him having been returned unsatisfied, a demand should have been made upon him; and whether, if so, there were circumstances which would excuse such a demand. *Fall River v. Riley*, 188 Mass. 386.

At the subsequent trial, the defendants, who are the sureties on the bond, having been allowed to file an additional answer, sought to impeach the judgment against Riley, by proof that by reason of a want of legal service of the writ he had no legal notice of the action, and the court rendering judgment had thus no jurisdiction of the case. How far sureties are bound by a judgment against their principal has been much discussed. In the absence of any proof of fraud or collusion in obtaining the judgment, there would be much reason in maintaining that a judgment regularly rendered against a principal would be conclusive evidence against the surety, even if their obligation would be incidentally affected thereby. *Tracy v. Goodwin*, 5 Allen, 409; *Wood v. Mann*, 125 Mass. 319; but we have no occasion now to consider this.

It is a different inquiry whether sureties may attack collaterally, a judgment rendered against their principal, by a plea and upon proof that the court rendering it had no jurisdiction of the case. The party to such a judgment certainly can avoid it only by review or by a writ of error. *Hendrick v. Whittemore*, 105 Mass. 28.

The surety on a bond, who may by his contract be responsible for the amount of such a judgment, is not a party to the original suit nor privy thereto and cannot, by the rules of law, review or reverse it. He may, therefore, impeach it in a suit against himself and, without reversing it, show that it was invalid for want of jurisdiction over the defendant. *Downs v. Fuller*, 2 Met. 135; *Lafin v. Field*, 6 Met. 287; *Vose v. Morton*, 4 Cush. 27-31; *Stimpson v. Malden*, 109 Mass. 318.

The officer's return does not, in the case at bar, show a valid service on Riley, such as would give jurisdiction to the court. It is only when the summons cannot be served personally on the defendant, and when he has no last and usual place of abode known to the officer that service may be made upon the tenant or agent or attorney of the defendant. The return not only fails to disclose that he had no such place of abode, but it is to be inferred therefrom that he had, although he was not then found therein. Pub. Stats. chap. 161, § 81.

This does not appear to be sufficient in order to authorize service on an agent or attorney. But, even if it were, and if it could be held that the return was sufficient in form, the finding of the jury, that the person upon whom the only service was made which is relied upon, was not the agent or attorney of the defendant Riley, shows that there was no legal service of the writ, and thus that the court rendering judgment had no jurisdiction of the case.

The plaintiff further seeks to show the jurisdiction of the court by proof of the appearance of Riley, according to a docket entry of the clerk; but the extended record of the district court fails to show such an appearance or that of an attorney on his behalf, and asserts that he did not appear. This could not be controlled by any evidence from the clerk of the docket entries. *Noyes v. Newmarch*, 1 Allen, 51; *McGrath v. Seagrave*, 2 Allen, 448.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

Andrew F. HANLEY.

1. A conviction or acquittal of one offense is no bar to an indictment for another and distinct offense. Rule applied to the offenses of keeping a liquor nuisance, and of doing certain acts which constitute an offense but do not necessarily involve the keeping of a liquor nuisance.
2. No inference for or against defendant should be drawn from his failure to testify in his own behalf.

(Suffolk—Filed January 7, 1886.)

ON defendant's exceptions. *Overruled.*
Complaint for violation of liquor laws.

Mr. John L. Eldridge, for defendant:

With reference to the transaction of January 18 the issue was the same in both cases and the judgment as to that evidence conclusive. *Dutton v. Woodman*, 9 Cush. 231; *Commonwealth v. Hazeltine*, 108 Mass. 479; *Commonwealth v. Doyle*, 132 Mass. 244.

Mr. Harvey N. Shepard, Asst. Atty. Gen., for Commonwealth:

The offense of keeping intoxicating liquors, with intent unlawfully to sell, is a distinct and different offense from that of keeping and maintaining a certain tenement as a nuisance. The gist of one offense is the keeping and using a tenement for an illegal purpose, which makes it a nuisance; of the other, doing certain acts which constitute an offense, but which do not

necessarily involve the keeping of any tenement or building. P. S. chap. 101, §§ 6, 7; P. S. chap. 100, §§ 1, 18; *Commonwealth v. Fontain*, 127 Mass. 452.

No inference for or against the defendant should be drawn from his failure to testify in his own behalf was in accordance with P. S. chap. 169, § 18, cl. 3, *Commonwealth v. Scott*, 128 Mass. 239.

C. Allen, J., delivered the opinion of the court:

The first point taken by the defendant is settled by the decision in *Commonwealth v. Fontain*, 127 Mass. 452, and the second by that in *Commonwealth v. Scott*, 128 Mass. 239.

Exceptions overruled.

Amariah A. TAFT

v.

Caroline M. FISKE, Exrx.

1. The fact that defendant amended his pleadings during the trial, by setting up an additional or more specific defense, is not a proper subject of comment by the plaintiff's counsel, to the jury, and should not influence their verdict.
2. Plaintiff's counsel should not be permitted, in closing, to argue to the jury that a defense, set up by defendant by an amended answer by permission of the court during the trial, was a "put up" defense because not set up in the original answer; that its filing during the trial should be taken into account; and that the fact that it was not set up until the trial was partly through, was to be considered.

(Worcester—Filed October 26, 1885.)

ON defendant's exceptions. *Sustained.*

Action of tort to recover of the estate of Eben H. Fiske, deceased, late sheriff of Middlesex, damages for neglect of his deputy William Nutt, in not making a substantial attachment upon a writ brought by the present plaintiff against one Claudius B. Travis, and returned to this court in Worcester and numbered 813, which had been placed in said Nutt's hands for service, with written instructions indorsed thereon to attach property or take a good bond.

At the close of the plaintiff's argument, the defendant asked the court to rule "That the fact that the defendant amended the pleadings during the trial and set up an additional or more specific defense, is not open to comment by counsel in addressing the jury; and the fact of such amendment should not influence or affect their judgment upon the facts in the case."

The court declined to give this instruction, or to give any instruction upon the subject, and the defendant excepted.

Messrs. E. F. Dewing and W. A. Gile, for defendant:

The creditor, to maintain an action against the sheriff, must show that the deputy was negligent; that he sustained loss by reason thereof; that he did not contribute to the miscarriage of the process himself, but did all that would be

requisite, preparatory to a levy on the property, within thirty days after judgment. *Blake v. Kimball*, 106 Mass. 118.

Plaintiff insists that he can sue the officer for not attaching in a given case under the original writ, and at the same time sue out a special precept, and under it by the same officer attach the same property, in all respects unchanged, and pursue either or both remedies at his own pleasure, punishing the officer, if need be, after he has earned his release and pardon by extraordinary tact, energy, labor and risk.

It is submitted that such a construction as this would be in violation of the policy of the law that has obtained towards officers. *Howard v. Smith*, 12 Pick. 202; *Laverence v. Rice*, 12 Met. 527.

It also appears that the plaintiff objected to the introduction of the evidence under the original answer, and thereby raised such a question as would require the defendant to take the risk of the admissibility of his evidence, even if admitted by the court, or to amend; and the defendant having chosen the latter course, his action was not open to comment as matter of fact by the plaintiff's counsel in addressing the jury. P. S. chap. 167, § 75; *Walcott v. Kimball*, 13 Allen, 480; *Phillips v. Smith*, 110 Mass. 61.

Messrs. Kent & Dewey, for plaintiff:

The defendant had no right to a ruling upon a basis of facts, unless he put in or offered evidence tending to show that those facts existed. *Drake v. Curtis*, 1 Cush. 395; *Stearns v. Jance*, 12 Allen, 582; *Coker v. Ropes*, 125 Mass. 577; *Salomon v. Hathaway*, 126 Mass. 482.

There is nothing in the exceptions to show that the introduction and use of the personal mortgage was objectionable. P. S. 169, § 22.

No attempt was made to use the answer or any branch of it as evidence. P. S. 167, § 75.

Judge Lord says in his charge in *Brooks v. Wright*, afterwards reported in 13 Allen, 75, "While you should take as true and reason from any facts stated in the answer, it is dangerous for a jury to draw inferences from legal phraseology in the formal statement of a defense."

The prayer did not correctly state the rule of law under the statute, and it was only the contents of the answer and not the fact of its filing that was not subject to comment. P. S. 167, § 75.

Devens, J., delivered the opinion of the court:

The case at bar is an action against the executrix of the late sheriff of Middlesex for the neglect and default of one of his deputies. The declaration alleges that a writ was placed in the hands of the deputy for service, which was in favor of the plaintiff and against one Travis, on which he was directed to attach property or take a sufficient bond; that Travis had in his possession enough personal property subject to attachment to have secured the claim of the plaintiff; and that, by the neglect of the officer to make a substantial attachment, the plaintiff lost his debt.

As we are of opinion that the exception which relates to the conduct of the case before the jury must be sustained, and thus there must be a new trial, we have not deemed it desirable to consider the other exceptions, as it is not probable that they will be again presented in the same form in which they are now offered.

The defendant's original answer denied the allegations of the plaintiff's declaration. Before the trial, she filed an additional answer, setting up an attachment under a special order issued while the action was pending; alleging that all the property of Travis which could have been attached on the original writ had been attached thereon, and retained until such attachment was dissolved by operation of law.

At the trial, the defendant sought to prove that the instructions given to the deputy, which were indorsed on the writ, were superseded and waived. Being met by the objection that this defense was not open under the answer as it then stood, she was permitted to file an amendment thereto, setting forth this allegation. The instructions to the jury required them to find for the defendant if this allegation was proved; and the verdict for the plaintiff necessarily disposes of this contention. The correctness of this instruction is not questioned.

The plaintiff's counsel, in closing, argued that the filing of the amendment during the trial showed that the defense so pleaded was a "put up" defense, not relied on when the original answer was filed; that its filing during the trial should "be taken into account; that not one word was said about all this in the original answer;" that the fact that this defense was not set up "until the trial was partly through was to be considered;" with other arguments of a similar nature.

While this argument was being made the defendant's counsel privately called the attention of the presiding Judge thereto, who declined to interrupt the plaintiff's counsel. At the close of the argument, the defendant formally called the attention of the Judge thereto and requested an instruction, which was refused, that the fact that the defendant amended her pleadings during the trial, setting up an additional or more specific defense, was not a subject of comment, and that "the fact of such amendment should not influence or affect their judgment upon the facts of the case." To this instruction the defendant was entitled in substance. The answer is the statement of his case by a party. It is not to be deemed evidence on the trial, but consists of "allegations only, whereby the party making them is bound." P. S. chap. 167, § 75.

The plaintiff concedes that the contents of an answer are not the subject of comment; but contends that the fact of its filing may be. This is to draw too nice a distinction. The fact of its filing was perfectly unimportant in the case at bar, except as connected with the contents of the amended answer.

In *Phillips v. Smith*, 110 Mass. 61, the original declaration was read and commented on as evidence contradictory of the plaintiff's testimony and of the additional declaration on which the plaintiff finally sought to recover; and it was held that this was irregular. The case at bar does not differ in substance. The plaintiff here, by means of the answer first filed and that subsequently relied on, endeavored to show that the amended answer was a "put up" defense. The force of his argument depended upon a comparison of the evidence afforded by the two answers.

It would be a serious embarrassment to that liberal amendment of pleadings contemplated by our statutes, if a party availing himself of

the leave in this respect granted by the court could only do so by subjecting himself to the imputation that his new form of statement, by its difference from that previously made, showed that he presented a simulated case. When the plaintiff objected to the evidence offered by the defendant, it was the right of the latter to apply to the court for leave to amend her answer, without invoking a ruling upon question thus raised, and without subjecting herself to any imputation by reason that she had not before set forth the allegations made in the amendment.

The original statement of a party's case is often hurriedly prepared, with imperfect information of the facts, and sometimes under misapprehension of the law. New facts are revealed at the trial, and new views of the law applicable to them are suggested. It would be unjust, if, in a closing argument, the counsel could be allowed to compare the answer originally made with that finally relied on, without an investigation of all the circumstances under which the original answer was made. Yet such an investigation would be obviously impossible. To permit counsel thus to comment after the evidence has been concluded and when no opportunity for explanation remains, or indeed could ever be given, would often cause an entirely different effect to be attributed to the legal statements of a defense from that which they should properly bear.

The plaintiff urges that the defendant's counsel had no right to remain silent during his address to the jury, and that it was his duty then to have interposed. To have interrupted the plaintiff's counsel while making his argument was only to provoke altercation, especially after the defendant's counsel had satisfied himself that he would not be sustained by the court. To the refusal of the court then to interrupt the counsel the defendant has alleged no exception; and, as the matter was not then brought to the attention of the opposing counsel, perhaps could not have so done. But when, at the close of the argument, the matter was brought to the attention of the court, in the presence of the counsel, the defendant was entitled, in substance, to the request made, unless at least the plaintiff's counsel then formally withdrew the comments made by comparison of the two answers, and disavowed any intention to ask a verdict by reason of them.

Exceptions sustained.

Mary E. BIGELOW *

v.

Howes NORRIS.

The words "I will send you the first spare V. or X. I have" in a letter, do not constitute a new promise to pay a debt barred by a discharge in bankruptcy.

(Suffolk—Filed January 11, 1886.)

ON plaintiff's exceptions. *Overruled.*
This was an action of contract on an account annexed, for \$78.84, rent of a room from

*See, *Bigelow v. Norris*, 189 Mass. 12.

July 2 to September 8, 1875. Answer: general denial; discharge in bankruptcy relating to July 18, 1876; Statute of Limitations. Date of writ, May 15, 1883.

Sufficient facts appear in the opinion.

Mr. L. L. Stimpson, for plaintiff:

The bankruptcy proceedings related to July 18, 1876; and the letter of July 29 is as effectual as it would have been if written after the discharge. *Cook v. Shearman*, 108 Mass. 28.

The two letters of October 7 and February 28 are sufficient to take the case out of the Statute of Limitations. This appears from the language of the former opinion in this case; by the distinction made between the statutes; from the cases cited and from the omission to mention the defense of the Statute of Limitations, except by way of contrast. *Blakeman v. Fonda*, 41 Conn. 561.

No precise form is necessary. A fair implication with no circumstances to repel it is sufficient to take the case out of Statute of Limitations. *Krebs v. Olmstead*, 187 Mass. 504.

Mr. A. M. Goodspeed, for defendant:

The letter of February 12, 1876, was written prior to the date when the proceedings in bankruptcy were commenced and is disposed of by that consideration and is incompetent for any purpose. *Reed v. Frederick*, 8 Gray, 280, as explained in *Lerow v. Wilmarth*, 7 Allen, 465, 466.

The necessary elements of certainty and definiteness are wanting, to show a new promise or waiver of the bar, if any such promise or waiver can be conceived to have been intended. *Elwell v. Cumner*, 186 Mass. 102; *Bigelow v. Norris*, 189 Mass. 12; *Kenney v. Brown*, 189 Mass.

A new promise, to avoid a discharge in bankruptcy or the Statute of Limitations, must be express, certain, unambiguous, unequivocal and, unless the condition is shown to be fulfilled, unconditional. There can be no promise by implication or inference, and the intention of making a payment, however clearly expressed, is insufficient in either. *Mumford v. Freeman*, 8 Met. 452; *Merriam v. Bayley*, 1 Cush. 78, and cases cited; *Kelley v. Pike*, 5 Cush. 486; *Cambridge Inst. for Savings v. Littlefield*, 6 Cush. 218; *Pratt v. Russell*, 7 Cush. 468, 464; *United Society in Canterbury v. Winkley*, 7 Gray, 460; *Reed v. Frederick*, 8 Gray, 280; *Randridge v. Lyman*, 124 Mass. 362; *Allen v. Ferguson*, 18 Wall. 1 (85 U. S. bk. 21, L. ed. 854); *Stewart v. Reckless*, 4 Zab. 427; *Weston v. Hodgkins*, 186 Mass. 326; *Krebs v. Olmstead*, 187 Mass. 505.

The degree of certainty in the evidence which is necessary to prove that a new or continuing contract exists is the same, whether the new or continuing contract is set up as avoiding the Statute of Limitations or the discharge in bankruptcy. Nothing short of a distinct and definite new promise will avail to waive or avoid either. *Elwell v. Cumner*, 186 Mass. 102; *Weston v. Hodgkins*, 186 Mass. 326; *Krebs v. Olmstead*, 187 Mass. 504; *Bigelow v. Norris*, 189 Mass. 12; *Kenney v. Brown*, 189 Mass.

Morton, Ch. J., delivered the opinion of the court:

It was decided in this case, at the former hearing, that the letters of October 7, 1880, and February 8, 1881, were not sufficient to take the debt of the plaintiff out of the opera-

tion of the defendant's discharge. *Bigelow v. Norris*, 189 Mass. 12.

The plaintiff now relies upon a letter, dated July 29, 1876, which was not in evidence at the first trial, and is as follows: "Yours received. I will send you the first spare 'V' or 'X' I have. I am compelled to go through bankruptcy, as a single creditor held out against signing. I am so sorry I owed you. I will not long either, for I know a lone lady has nothing to lose."

A few days before this letter was written, the defendant had applied for the benefit of the Bankrupt Act.

If this letter had been in evidence at the former hearing, we think the result would have been the same.

The expression "I will send you the first spare 'V' or 'X' I have," does not fairly import a promise to pay absolutely \$5 or \$10. It is a colloquial expression, meaning, in substance, the same that he says in his letter of October 7, 1880, that "I will also pay something on account." The whole letter shows that he meant to obtain a discharge, and it expresses a hope and intention to pay the plaintiff something in the future; but it does not contain an unequivocal promise to pay the debt, nor a distinct waiver of his legal right to rely upon his discharge when obtained. *Ellwell v. Cunner*, 186 Mass. 102.

As the discharge in bankruptcy is a bar to the plaintiff's claim, it is not necessary to consider whether, if the letter of July 29, 1876, had contained a promise, such promise would have been barred by the Statute of Limitations.

Exceptions overruled.

John A. PUTNEY

v.

Samuel A. FLETCHER.

1. No appeal lies from the appointment by the probate court of commissioners to receive and examine the claims of creditors against the estate of a deceased person, represented insolvent, by the administrator; but if the judge refuses to act upon the representation of insolvency an appeal may be taken by the administrator.
2. Where the judge refuses leave to bring an action upon a probate bond an appeal lies, but not when he grants such leave.

(Essex—Filed January 11, 1886.)

A PPEAL from Essex. *Dismissed.*
Probate Court appointment of commissioners to receive and examine claims of creditors.

The case sufficiently appears in the opinion.
Mr. S. H. Phillips, for appellant.
Mr. G. B. Ives, for appellee.

C. Allen, J., delivered the opinion of the court:

No appeal lies from the appointment, by the probate court, of commissioners to receive and examine the claims of creditors against the estate of a deceased person, which has been represented insolvent by the administrator. No person can be said to be aggrieved by such action. It is merely a mode of ascertaining the amount of

the debts due from the estate. The validity of any creditor's claim is in nowise affected. *Greenwood v. McGilveray*, 120 Mass. 519.

If, indeed, the judge refuses to act upon the representation of insolvency, an appeal may be taken by the administrator. *Bucknam v. Phelps*, 6 Mass. 448.

So, where the judge refuses leave to bring an action upon a probate bond, an appeal lies, though not where he grants such leave. *Bennett v. Woodman*, 106 Mass. 518; *Richardson v. Hazelton*, 101 Mass. 108; *Same v. Oakman*, 15 Gray, 57; *Jones' App.* 8 Pick. 121.

When an administrator represents an estate insolvent, the Pub. Stats. chap. 187, §§ 2-4, contemplate action by the judge of probate in the first instance, upon this representation alone, without notice to creditors or any other parties; and if it appears from such representation that the estate will probably be insolvent, the court is to proceed to ascertain the fact, either by the appointment of commissioners to receive and examine the claims, or by itself receiving and examining them. This is all done with a view to speed the proper settlement of the estate; and no creditor is aggrieved thereby, within the meaning of the Pub. Stats. chap. 156, § 6, giving a general right of appeal to persons aggrieved.

Appeal dismissed.

COMMONWEALTH of Massachusetts
v.

John KEENAN.

1. It seems that it is the practice to send up a copy of the complaint in addition to the substance of the charge which is contained in the copy of the judgment, in order that it may be given to the jury, that the jury may not be prejudiced by the judgment of the court below.
2. It cannot be presumed without evidence, that the jury took the law from the copy of the complaint and not from the court.
3. Where the court below in overruling the motion for a new trial was of opinion that the defendant had not been prejudiced and that the mistake of "thirtee," for "thirteen," in the copy of the complaint read by them had no tendency to mislead the jury, so that as matter of law a new trial should be granted, its ruling will not be disturbed.

(Suffolk—Filed January 8, 1886.)

ON DEFENDANT'S exceptions. *Overruled.*
Complaint for sale of adulterated milk.
Mr. C. C. Paige, for the defendant.
Mr. Harvey N. Shepard, Asst. Atty-Gen. with whom was *Mr. Edgar J. Sherman, Atty-Gen.*, for Commonwealth.

Motions for a new trial are addressed to the discretion of the presiding judge. *Commonwealth v. Parsons*, 139 Mass. —; *Nichols v. Nichols*, 186 Mass. 258; *Boston v. Robbins*, 116 Mass. 318.

The ruling of the court was correct. *Com-*

monwealth v. Nash, 185 Mass. 541; *Commonwealth v. Crawford*, 111 Mass. 423.

Field, J., delivered the opinion of the court:
The motion for a new trial was addressed to the discretion of the Superior Court, unless upon the admitted facts the defendant was entitled, as matter of law, to a new trial. *Nichols v. Nichols*, 186 Mass. 256.

By the words "a copy of the judgment," in the Public Statutes, chap. 154, § 61, is meant such a copy of the record as includes the substance of the complaint, and the judgment entered on it; a copy of the judgment without the substance of the charge, would be unintelligible. An attested copy of the complaint was properly allowed to go to the jury.

It seems that it is the practice to send up a copy of the complaint, in addition to the substance of the charge which is contained in the copy of the judgment, in order that this copy of the complaint may be given to the jury and that the jury may not be prejudiced by the judgment of the court below. *Commonwealth v. Crawford*, 111 Mass. 423. See, *Commonwealth v. Nash*, 185 Mass. 541.

The exceptions find that the "court fully instructed the jury as to what would constitute an adulteration under said statute," to which no exceptions were taken; and that the only issue on adulteration was: "Whether or not the milk contained less than 18 per cent of solids or more than 87 per cent of water." By "solids" was of course meant milk solids; and by "water," watery fluid.

It cannot be presumed, without evidence, that the jury would take the law from the copy of the complaint, and not from the court; or that, if they read the copy of the complaint, they would not detect the mistake of writing "thirteen" for "thirteen." The court below, in overruling the motion must have been of the opinion that the defendant had not been prejudiced, and the mistake has no such tendency to mislead the jury that, as matter of law, a new trial should be granted.

Exceptions overruled.

Albert GRONSBRA

v.

Lucie BOURGIES.

1. A landlord may terminate a tenancy at will by the execution of a lease to a third party, and such lessee has the legal right after due notice to eject the tenant at will in a peaceable and lawful manner.
2. An action by the ejected tenant will not lie against the landlord for advising and procuring the lessee to assert and enforce his legal rights even if actuated by malice; as the rights of the tenant at will are not involved, and he sustains no legal injury.
3. No exception lies to the exercise of discretion in the presiding judge in refusing a new trial upon the evidence alone.

(Suffolk—Filed January 11, 1886.)

MASS.

ON plaintiff's exceptions. *Overruled.*
Action for maliciously making litigation.
Mr. Geo. H. McConnell, for plaintiff.
Mr. G. W. Ruffin, for defendant.

Morton, Ch. J., delivered the opinion of the court:

The plaintiff occupied his store as the tenant at will of the defendant.

The defendant had the legal right to terminate this tenancy by giving a lease to Hallett; and after the lease was given, Hallett had the legal right, after due notice, to eject the plaintiff in a peaceable manner.

It is immaterial what his notices were. An action cannot be maintained against him or against any person acting with him or advising and procuring him to act, unless either the acts complained of or the means by which it was accomplished are shown to be unlawful. *O'Callaghan v. Cronan*, 121 Mass. 114.

The plaintiff cannot maintain this action against the defendant for advising and procuring Hallett to assert and enforce his legal rights, even if the defendant was actuated by malice, because the plaintiff's rights are not involved and he sustains no legal injury. The evidence offered by the plaintiff and excluded by the court was therefore immaterial.

The motion for a new trial was addressed to the discretion of the Superior Court. The bill of exceptions does not show that the presiding judge ruled upon any question of law, but only that upon the evidence before him, he in his discretion refused a new trial.

No exception lies to this exercise of his discretion. *Behan v. Williams*, 128 Mass. 866.

Exceptions overruled.

Josiah B. THOMAS *et al.*,
v.

Alfred WELLS *et al.*

1. Where there is evidence that a letter in reply to one received by defendant from plaintiff was written by a salesman in the employ of defendant, who had authority to make the original contract to which the letter related, but whose authority to write any letters for him is denied by defendant, the question of whether the salesman was authorized by defendant to write such letter should be submitted to the jury.
2. Where an agreement stipulates that if plaintiff is entitled to recover for a breach of contract the measure of damages shall be at a certain rate on the quantity of goods not delivered, the plaintiff, in the event of recovery, is entitled to interest from the date of his demand.

(Essex—Decided January 9, 1886.)

ON defendant's exceptions. *Overruled.*
This was an action on contract. On trial of the cause before a jury, Rufus Thomas, one of the plaintiffs, testified substantially as follows: that the plaintiffs were engaged in the manufacture of boxes, some of which were made of straw board, in Lynn; that in the latter part of August, 1879, one Charles N. Wells,

who was a traveling salesman of the defendants, and a son of one of the defendants, called upon Rufus Thomas, one of the plaintiffs, at his place of business in said Lynn, and asked him to purchase straw board, an article defendants dealt in as middlemen; that after some talk as to price and condition of the market, the plaintiff agreed to buy fifty tons of straw board with the privilege of having fifty tons more if they, the plaintiffs, elected to take it, at the price of \$50 per ton, 5 per cent off in sixty days or 3 per cent additional off if paid for on delivery, the said straw board to be delivered in Lynn, at the depot of the Eastern R. R. Co., free of expense to the plaintiffs, within six months from said time, to wit: the last week in August, 1879, in such quantities and in such sizes as the plaintiffs should require and order; that a few days after this conversation the said Charles N. Wells again called upon said Thomas at his place of business, who informed him, the said Wells, that he would take the 100 tons under the terms above set forth.

It was admitted that plaintiffs had no dealings with defendants prior to the making of the alleged contract. The defendants admitted the right and authority of the said Charles N. Wells to make such a contract, but denied that the same was made; it was admitted by the defendants that they had sold and delivered straw board after the said last part of August, 1879, but denied that it was sold under any contract for 100 tons.

The defendants introduced as evidence certain letters written by the plaintiffs to the defendants after August, 1879, and within the alleged time of six months, which the defendants claimed contained statements inconsistent with the plaintiffs' claim that such a contract was made, and also letters written by defendants to plaintiffs in answer to the letters of the plaintiffs.

Office of White and Wells.

Waterbury, Conn., Nov. 17, 1879.

Thomas Brothers. Gents. Yours of the 15th is at hand and contents noted. Your understanding about the board is correct and you shall have it at the price named by me when at your place and as fast as the mill can make it. Now in regard to the special sizes.

On Woodman order the sizes were 26x36, 26x32, 26x35, 25x38. And you will see that they will run well on our machine while the size you wanted the most of was twenty-two inches; in making that size they could only make forty-four inches of board and would lose sixteen inches on the machine, which you will readily see that they could not afford to do. I will be in Boston in about four weeks and will come out and see you.

Yours Truly,

White & Wells.

C. N. Wells.

The defendant Wells was called as a witness by the plaintiffs to prove the handwriting of the letter; and, in answer to the plaintiffs against the objections of the defendants, testified that the letter had the appearance of the handwriting of said Charles N. Wells, but that he wouldn't swear to it.

The defendants objected to the admission of this testimony; but the court admitted the same, and the defendants excepted; this letter was

then, against the objection of the defendants, read to the jury and introduced as evidence, and the defendants excepted. No direct evidence was offered tending to show that the said Charles N. Wells had any authority to answer any letters for the defendants or had anything to do with the defendants' correspondence.

The jury were instructed, among other rulings that if they found for the plaintiffs they must compute interest from the date of the demand, which was December 3, 1879, and not from the date of the writ; to this instruction as to time when interest should be computed the defendants excepted.

Messrs. H. F. Hurlburt and W. H. Lucie, for defendants:

Declarations or admissions by an agent, not made at the time of the transaction nor forming a part of the *res gesta*, but made after the contract has been consummated, are not evidence to affect the rights of the principal. *Roberts v. Burke*, Litt. Sel. Cas. 411; *State Bank v. Johnson*, 1 Mill (S. C.) 404; *Thalhimer v. Brinckerhoff*, 4 Wend. 394; *Haven v. Brown*, 7 Greenl. 421; *Hubbard v. Elmer*, 7 Wend. 446; *Davis v. Whitesides*, 1 Dana, 177.

The declarations of the agent were merely hearsay evidence, as he was not acting within the scope of his authority, and formed no part of the *res gesta*. *Corbin v. Adams*, 6 Cush. 93; *Stiles v. Western R. R. Corp.* 8 Met. 44; *U. S. v. Gooding*, 12 Wheat. 460, 468 (25 U. S. bk. 6, L. ed. 698-5); *Am. Fur Co. v. U. S.* 2 Pet. 358, 364 (27 U. S. bk. 7, L. ed. 450-2); *McGregor v. Wait*, 10 Gray, 72; *Thalhimer v. Brinckerhoff*, 4 Wend. 394; *Stewart v. Wells*, 6 Barb. 81; *Luby v. H. R. R. Co.* 17 N. Y. 183; 1 Greenl. Ev. §§ 118, 114.

Declarations by an agent, of his own authority, and not accompanying the making of the contract, or the doing of any act in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon the principal, nor being part of the *res gesta*; and are not admissible in evidence, but come within the general rule of law excluding hearsay evidence; being but an account or statement by an agent, of what has passed or been done, or omitted to be done, not a part of the transaction, but only statements or admissions respecting it. *Franklin Bank v. P. D. & M. S. N. Co.* 11 Gill & J. 28; *Langhorn v. Allnutt*, 4 Taunt. 511; *Stark*, Ev. 60, 61; *Burnham v. Ellis*, 39 Me. 319.

The agent had no authority to make admissions binding the defendants; and the evidence of his declarations was therefore incompetent to support the plaintiffs' case. *Johnson v. Trinity Ch. Soc.* 11 Allen, 123; *Wilson v. Bowden*, 118 Mass. 422; *Woods v. Clark*, 24 Pick. 35; *Cooley v. Norton*, 4 Cush. 93; *Inhab. of Dartmouth v. Inhab. of Lakeville*, 7 Allen, 284.

The sum due the plaintiffs having been unliquidated and dependent upon the market values at the time of the demand, interest should have been allowed only from the date of the writ. *Brewer v. Tyngham*, 12 Pick. 547; *Palmer v. Stockwell*, 9 Gray, 239.

Messrs. Niles & Carr, for plaintiffs:

If further proof were required, comparison of the writing in the letter offered with the letter which had already been introduced into the case, and the genuineness of which was not

disputed, standing alone might well lay the foundation for the introduction of this letter. *Homer v. Wallis*, 11 Mass. 809; *Cabot Bank v. Russell*, 4 Gray, 168; *Richardson v. Newcomb*, 21 Pick. 815; *Commonwealth v. Coe*, 115 Mass. 491; *Moody v. Russell*, 17 Pick. 490.

At the time when the letter was written only a part of the goods had been delivered. The sizes had not been agreed upon, but were to be "Such as should be required" by the plaintiffs and until the details of this contract had been arranged and settled, it cannot be said, as matter of law, that the authority of the agent, relating to the same, was exhausted, or that his work was fully done; and the declarations in this letter are sufficiently connected with the transaction to make it a part of the *res gesta*, and as part of the *res gesta* it was competent evidence against the defendants. *Woods v. Clark*, 24 Pick. 85; *Pool v. Bridges*, 4 Pick. 878; *Tozier v. Crafts*, 123 Mass. 480; 1 Greenl. Ev. 118, 114; *Story*, Agen. 184-187.

The Statutes of this Commonwealth are wholly silent as to the right of the plaintiff to recover interest in an action of this nature, and the question has never been before this court in any reported case; but interest from the time of conversion has been allowed in actions for unliquidated damages. *Angier v. Taunton Mfg. Co.* 1 Gray, 621; *Brackett v. Edgerton*, 14 Minn. 174; *Graham v. Chrystal*, 1 Abb. Pr. N. S. 121; *Sipperly v. Stewart*, 50 Barb. 62.

Morton, Ch. J., delivered the opinion of the court:

We are of opinion that the letter of November 17, 1879, was properly sent to the jury. The defendants do not now contend that there was no evidence tending to show that it was in the handwriting of C. N. Wells, but only that he was not authorized to write it. There was, however, evidence tending to show that he was authorized by the defendant to write the letter. It was admitted by the defendant that C. N. Wells was in their employ as a salesman, and had authority to make a contract with the plaintiffs, such as they contended had been made by him. The letter in question was signed "White & Wells, C. N. Wells." It was written upon the business paper of the defendants' firm, and was in answer to a letter sent two days before by the plaintiffs to the defendants, which plainly required an answer, and to which no other answer was returned. Upon this evidence, it was not a violent inference for the jury to draw, that the plaintiffs' letter had been handed for an answer to Wells, the salesman who had made the contract with the plaintiffs and knew what its terms were. The subsequent testimony of one of the defendants, denying the authority of C. N. Wells, was properly submitted to the jury, who alone were entitled to decide whether it controlled the plaintiffs' testimony.

It is not shown that there was error in the ruling of the Superior Court upon the subject of interest. Under the contract the plaintiffs were entitled to have one hundred tons of straw board delivered to them upon demand from time to time. The bill of exceptions states that "it was agreed that if the plaintiffs were entitled to recover, they were entitled to recover for the failure to deliver forty-six and 6-40 tons, and that the

measure of damages should be \$10 per ton. The fair meaning of this agreement is that, at the time the defendants refused to perform the contract, the plaintiffs were damaged to the extent of \$10 per ton; that is, that the goods were then worth \$10 per ton more than the contract price. This being so, in order to put the plaintiffs in as good a position as they would have been in if the contract had been performed, they are entitled to interest from the date of their demand. Otherwise they will not be fully indemnified.

Exceptions overruled.

Michael J. HAYES

v.

Antonia DEVITO et al.

Where defendants had a right of way over the *locus* as appurtenant to lot A; plaintiff had no right to obstruct the passage by gates and defendants lawfully broke them down in the exercise of their authority to remove obstructions. The fact that they intended to make an unjustifiable use of the way at some future time could not make them trespassers.

(Suffolk—Filed February 26, 1886.)

ON plaintiff's exceptions. *Overruled.*
Action for trespass on breaking down gate on plaintiff's property.

Mr. J. O. Teele, for plaintiff.

Messrs. C. P. Greenough and J. B. Parmenter, for defendants.

W. Allen, J., delivered the opinion of the court:

The defendants had a right of way over the *locus* as appurtenant to lot A. The plaintiff had no right to obstruct the passage way with gates, and the defendants lawfully broke down the gates in the exercise of their authority to remove the obstructions. The fact that the defendants also claimed the right in the passage way as appurtenant to lot "B" did not give the plaintiff the right to obstruct it, and did not impair the right of defendants to move the obstructions. They did only what they had a right to do, and made no wrongful use of the way, as was done in *Davenport v. Lamson*, 21 Pick. 72.

The fact that they intended to make an unjustifiable use of the way at some future time could not make them trespassers.

Exceptions overruled.

Wm. B. LIVERMORE

v.

Daniel K. BATCHELDER.

In an action under the statute for killing plaintiff's dog, justification for the act is not made out by finding that the defendant had reasonable cause to believe that the dog was proceeding to maim and kill his hens, without a

finding that defendant had reasonable cause to believe that it was necessary to kill the dog.

(Middlesex—Decided February 25, 1886.)

ON defendant's exceptions. *Overruled.*

Tort for killing dog of plaintiff.

The case is stated in the opinion.

Messrs. Swift & Sullivan, for defendant.

Mr. J. B. Richardson, for plaintiff.

Holmes, J., delivered the opinion of the court:

The ruling of the court, as we understand it, meant that the facts found, without more, did not disclose a justification for killing the plaintiff's dog. It was found that the defendant had reasonable cause to believe that the dog was proceeding to maim and kill his hens, but not that he had reasonable cause to believe that it was necessary to kill the dog in order to prevent him from killing the hens.

The justification, therefore, was not made out. *Wright v. Bancroft*, 1 Samd. 84; *Janson v. Brown*, 1 Campell 41. See, *Comrs. v. Woodward*, 102 Mass. 155-161.

It is unnecessary to consider whether the common law is taken away by Pub. Stats. chap. 102, §§ 80-110.

Exceptions overruled.

Franklin T. ROSE, *Appt.*,

v.

Alexander S. PORTER.

A provision in a will giving all testator's estate to certain sons and "assuming that they will not fail to do for another son" all that truest fraternal regard may require them to, creates no trust and is not an incumbrance upon real estate.

(Suffolk—Filed March 2, 1886.)

A PPEAL by the plaintiff from a judgment of the Superior Court. *Affirmed.*

The case was presented on the following agreed statement of facts:

This was an action of contract to recover \$500 had and received by the defendant to the plaintiff's use; the same being deposited with the defendant as part payment for the purchase of real estate. The plaintiff agreed to purchase of the defendant, who was a real estate broker, the premises No. 8 Boylston Place, for \$10,000 in cash, and the usual agreement in writing was signed by the plaintiff, in which the plaintiff agreed to take the estate and pay the cash therefor, within ten days; which agreement contained the following clause: "Conveyance to be made by a good and sufficient deed giving a clear title free of all incumbrances, on or before, etc. Title to be satisfactory or the sale void."

Upon examination of the title, it appeared that Selah B. Treat, late of Boston, deceased, held the estate in fee simple at the time of his decease in April, 1877. He left a will, which was duly probated May 21, 1877, which con-

tained the following clause: "After the payment of my just debts and funeral expenses, I give, bequeath and devise to my two younger sons, Alfred O. Treat and Charles R. Treat, all my estate, whether real or personal, to have and to hold to them and their heirs forever. In making this disposition of my property, I assume: first, that if my dear wife shall survive me (which does not seem probable) my said sons will take pleasure in providing for all her wants; second, that my eldest son, John B. Treat, will understand and appreciate my reasons for giving whatever property I may have at my decease to his younger brothers; and, third, that they, on their part, will not fail to do for him and his family all that in the circumstances the truest fraternal regard may require them to do."

Subsequent to the death of Selah B. Treat, Alfred O. Treat died, leaving by will all his property to Charles R. Treat; and at the date of the agreement between the plaintiff and defendant his estate had been duly settled under his will.

Under the agreement, the plaintiff offered the defendant a warranty deed in the usual form, signed by said Charles R. Treat with release of dower by his wife. The defendant refused to accept such deed, or any deed that could be signed by said Charles R. Treat, solely and only on the ground that the above clause of the will of said Selah B. Treat created a trust in some form sufficient to be an incumbrance upon the estate, so that by said deed the plaintiff could not receive a clear title, and that the title was not satisfactory, by reason of the clause above recited, of the will of S. B. Treat. It is agreed by the parties that if said clause creates no incumbrance on the estate, judgment is to be for the defendant with costs. If it is an incumbrance, then judgment for the plaintiff for \$500, with costs.

It was further agreed that the widow of S. B. Treat died before the date of the agreement in suit.

Mr. Leon H. Bateman, for plaintiff:

The fact that by the provisions of the will the devisees take the fund as beneficiaries and trustees will not of itself defeat precatory words. *Chase v. Chase*, 2 Allen, 101; *Irvine v. Sullivan*, L. R. 8 Eq. 678.

The words "I assume" are to be considered as words of reference to all that has gone before; and constitute a qualification to the preceding limitation. *Martelli v. Holloway*, L. R. 5 H. L. Cas. 582.

All the elements of a precatory trust are present. The words are imperative and the objects sufficiently set forth. *Warner v. Bates*, 98 Mass. 274; *Liddard v. Liddard*, 28 Beav. 266; *Barnes v. Grant*, 26 L. J. Ch. 92; *Salisbury v. Denton*, 8 Kay & J. 529; *Smith v. Smith*, 2 Jur. N. S. 967.

The beneficiaries are named. 2 Story, Eq. § 1071.

The trust fund is provided, the amount to be disbursed being left to the discretion of the trustees. *Gibbs v. Rumsey*, 2 Ves. & B. 294.

If not a trust estate it is an absolute estate subject to a charge on the real estate for the benefit of the widow. *Adams v. Brackett*, 5 Met. 280; *Lewis v. Darling*, 16 How. 1 (57 U. S. bk. 14, L. ed. 819).

If held that no trust is created, the words of the will raise such doubt as to the validity of the title that the plaintiff should not be compelled to take the estate with this shadow of an incumbrance. *Richmond v. Gray*, 3 Allen, 25; *Sturtevant v. Jaques*, 14 Allen, 528; *Butts v. Andrews*, 186 Mass. 221.

Mr. Linus M. Child, for defendant :

In order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given, absolutely and without restriction, a trust is not to be lightly imposed upon mere words of recommendation and confidence. *Hess v. Singler*, 114 Mass. 56, 59. And see, *Warner v. Bates*, 98 Mass. 274; *Spooner v. Lovejoy*, 108 Mass. 529; *Nichols v. Allen*, 180 Mass. 211.

The amount of property to which the trust should attach is not sufficiently defined. Lewin, Tr. 7th ed. 122; Godef. Trust. 55.

Field, J., delivered the opinion of the court:

We think that by the terms of the will, the son was not to take an interest in the property, and that it was left to the discretion of the two younger sons to do for him and his family, whatever in their judgment "fraternal regard" might require. The testator has not made it imperative that the two younger sons shall do anything for their older brother or his family, and has not defined what they shall do, if they choose to do anything; and there is clearly no trust for him or his family.

It is conceded that the wife of the testator deceased before the parties entered into the agreement, and it is unnecessary to determine whether by the will, a trust was created for her during her life.

Judgment affirmed.

John K. SARTWELL

v.

William H. PARKER.

1. **The plaintiff in an action for malicious prosecution must prove that defendant's action was commenced without probable cause and that it terminated in his, the present plaintiff's, favor.**
2. **A party who terminates a suit against him by paying what is demanded in it, by being charged with the amount as an item in account, cannot be permitted to say that the action was commenced without probable cause.**
3. **Question of probable cause is for the court, except as far as it depends upon disputed facts.**

(Suffolk—Filed March 31, 1886.)

ON plaintiff's exceptions. *Overruled.*

This was an action of tort, for malicious prosecution in a civil action, and for a malicious attachment made therein. There was evidence on the part of the plaintiff tending to prove the following facts: the plaintiff was a creditor of one Eustis P. Parker. The defendant also claimed to be a creditor of said Eustis P. Parker, and the latter being insolvent, the defendant, on September 6, 1881, ap-

proached the plaintiff to settle the plaintiff's claim against said Eustis, and to sign a composition paper for thirty-five cents on a dollar. The plaintiff refused to settle for less than 50 per cent of his debt. The defendant then offered to give his note to the plaintiff for the difference, if the plaintiff would sign the composition paper. The plaintiff assented to this proposition, and the defendant thereupon signed a note on four months for the amount of the difference, which was \$116, payable to his own order, and indorsed the same to the plaintiff, who negotiated and collected the same. The defendant afterwards gave similar notes to other of the creditors of said Eustis P. Parker, for an amount in excess of the 35 per cent provided in the composition paper, in order to get signatures to said paper.

The settlement by composition was not affected, and said Eustis P. Parker filed his petition in insolvency. The defendant, holding a mortgage, the validity of which was disputed by the plaintiff, then took possession of the store and stock of goods of said Eustis P. Parker, and began to purchase goods therefor in his own name. He bought goods in his, the defendant's, own name, from the plaintiff, to the amount of \$255.

There were little or no assets of said Eustis P. Parker other than the stock of goods taken possession of by the defendant. The plaintiff, became satisfied that the defendant could be held for the whole of the debt which said Eustis P. Parker had contracted with the plaintiff, and brought suit against William H. Parker to recover the amount of said debt, and the amount of \$255 contracted by the defendant in his own name.

The said suit was duly entered at the April Term, 1882, of the Superior Court, and on May 4, then next ensuing, the defendant filed an offer of judgment for the plaintiff for the sum of \$255.

On January 9, 1882, the day of the maturity of the said note given by the defendant to the plaintiff, the defendant paid the same to the party holding the same, and received the note. On May 11, 1882, he brought an action of contract for money had and received, joining a count in tort for conversion, to recover the amount of \$116, paid as aforesaid by him on said note. After paying said note, the defendant claimed that he had never signed nor indorsed it. He so instructed the attorney who brought the action in his behalf.

There was evidence at this trial that he did sign and indorse said note. In bringing the action against the plaintiff, the defendant caused the writ to be placed in the hands of the sheriff, and an attachment to be made thereon of the stock of goods in the plaintiff's place of business and caused a keeper to be put in custody.

The action was duly entered at the June Term of the superior court, 1882, in Essex and was tried at the September Term, resulting in verdict for the defendant therein, the present plaintiff. In October, 1882, negotiations for a settlement of both the said cases were begun and a settlement was finally made. By the terms of this settlement, the defendant, Parker, waived his exceptions in the case brought by him against the plaintiff, in which case the attach-

ment of the plaintiff's goods was made for which this action was brought; and consented that judgment should be entered for this plaintiff, the defendant therein; and paid the costs of said suit to this plaintiff.

The defendant in the present suit placed his attorney on the stand, and he testified that one of the terms of said settlement by the defendant was that the \$116 paid by the defendant on said note should be allowed to him as cash in making up the amount for which the suit of *Sartwell v. Parker*, entered at the April Term 1882, of the Suffolk Superior Court, was settled. This suit was settled as follows. Of the amount claimed by the plaintiff, the defendant paid \$255 and one half the balance of the plaintiff's claim, less the amount of \$116, which the plaintiff had realized on said note.

The plaintiff produced no evidence to rebut this testimony of the defendant's attorney as to the allowance of said amount of \$116 by the plaintiff in the settlement.

The defendant offered evidence to prove that the note given to the plaintiff was to be returned, if a composition was not effected; and that the notes subsequently given other creditors had this provision incorporated.

The Justice presiding at the trial ruled that the plaintiff had not shown a termination in his favor of the action brought against him by the defendant, and that the allowance by the plaintiff in the settlement of the other suit, of the amount of \$116 claimed by this defendant in the action in which the plaintiff's goods were attached, and in which the defendant consented to a judgment for this plaintiff, was conclusive against the plaintiff in the present action.

The plaintiff asked the court to rule that he had a right to go to the jury upon the question whether or not the said action brought against him by the defendant had terminated in his favor; but the court declined so to rule, and ordered the jury to return a verdict for the defendant; to which rulings and refusals to rule, the plaintiff excepted.

Mr. Phillip J. Doherty, for plaintiff:

The defendant had no cause of action in his original suit against the plaintiff. *Solinger v. Earle*, 82 N. Y. 393.

In an action for abusing the process of the court, it is not necessary to show the first case to be at an end. 2 Add. Torts, Wood's ed. 82.

The fact that the judgment was rendered in favor of the plaintiff in present action, although by consent of the defendant, is a sufficient termination of the first suit to enable the defendant to pursue this remedy if the other elements necessary for the establishment of the plaintiff's case are proven. *Craig v. Hasel*, 4 Q. B. 481, 499; *Grainger v. Hill*, 4 Bing. N. C. 212.

Mr. Chas. J. Noyes, for defendant:

The exceptions find that defendant claimed that he never signed nor indorsed the note paid, and that there was evidence that he did both. If he paid a note which he did not sign nor indorse, by mistake, it could not be malicious to try to maintain a suit for damages against a party wrongfully negotiating it. If he gave the note for \$116, to be returned under the contingencies stated by him, and it was not returned but negotiated, it would seem that he

could recover against the party negotiating it. *Partridge v. Messer*, 14 Gray, 180; *Smith v. Cuff*, 6 M. & S. 160; *Horton v. Riley*, 11 Mees. & W. 492.

The payment of the \$116 by the plaintiff in this suit is a conclusive admission of the existence of probable cause for the suit in which it was paid. *Savage v. Brewer*, 16 Pick. 453; 2 Greenl. Ev. § 453.

The question of reasonable or probable cause when the facts are not contested is a question of law. *Cloon v. Gerry*, 18 Gray, 202; *Stone v. Crocker*, 24 Pick. 85; *Kidder v. Parkhurst*, 3 Allen, 895; *Good v. French*, 115 Mass. 201.

In an action for malicious prosecution the plaintiff must show that the prosecution or suit complained of has been terminated by a judgment in his favor. *O'Brien v. Barry*, 106 Mass. 304.

Judgment for the defendant, entered by consent or by way of compromise, is not such a termination of the suit as to enable the defendant to maintain his suit for malicious prosecution. *Parker v. Parley*, 10 Cush. 281; *Grates v. Dawson*, 180 Mass. 81.

W. Allen, J., delivered the opinion of the court:

The defendant gave his note to the plaintiff, payable to his own order and indorsed by him. The plaintiff negotiated the note and received and retained the money procured upon it. When the note became due the defendant paid it, and afterwards sued the plaintiff to recover from him the money paid to take up the note, joining with a count for money had and received a count in tort, for the conversion of the note.

This action is brought for malicious prosecution in instituting that suit. The plaintiff must prove that it was commenced without probable cause and as essential to that, the prosecution was terminated in the plaintiff's favor. The evidence of the plaintiff tended to show that the note was given upon the consideration that the plaintiff would sign a certain composition paper releasing his debt against a third person. The evidence of the defendant tended to prove that the note was delivered on condition that it should not be used but should be returned, if the settlement with the debtor was not effected and that in fact the settlement was not carried out and the composition paper never became operative. After the giving of the note and after the composition deed had been abandoned and the debtor had gone into insolvency, the plaintiff became satisfied for reasons not material to the inquiry; that the defendant was liable for the debts of the insolvent debtor and brought an action against the defendant to recover the amount due from the insolvent debtor to the plaintiff as well as a sum due from the defendant to the plaintiff. The two suits were pending at the same time and were included in one settlement by the parties by which the defendant paid to the plaintiff the whole amount of the defendant's own debt and one half of the amount due from the insolvent debtor less the amount claimed by the defendant in his suit against the plaintiff and in that suit judgment was entered for the defendant against the plaintiff in this suit. These facts were not contested. It thus appears that the plaintiff settled the suit which he must prove was commenced without

probable cause by allowing all that was claimed in it.

A party who terminates a suit by paying what is demanded in it by being charged with it as an item in account cannot be admitted to say that the action was commenced without probable cause. The question whether want of probable cause appears is solely for the court except as far as it depends upon disputed facts which must be determined by the jury. In this case the facts claimed by the plaintiff, with the undisputed facts, do not show want of probable cause and will not sustain a verdict for the plaintiff and the court properly ordered a verdict for the defendant. *Stone v. Crocker*, 24 Pick. 81.

Exceptions overruled.

George A. BRUCE

v.

Pliny NICKERSON *et al.*

1. Where plaintiff offered evidence to prove that he made the contract of purchase of an interest in the mine on the oral representation of defendants, and upon the condition that certain written reports as to the condition and quality of the mine should be verified; testimony offered by defendants to show that contracts made by some of the subscribers, who were not present when contract of plaintiff was made, were not conditional, is clearly incompetent.
2. The fact that some of the subscribers to the agreement had lent money to the company is not competent to prove the value of the stock; and evidence offered to prove that fact was properly excluded.

(Middlesex—Filed March 31, 1886.)

ON defendants' exceptions. *Overruled.*
Action on subscription to the purchase of a mine.

The case is stated in the opinion.

Messrs. Solomon Lincoln and Charles E. Grinnell, for defendants:

The courts have adopted liberal rules in admitting testimony to exhibit the condition of affairs under which contracts have been claimed to be made in order to determine the probability or improbability that they were made as claimed. *Butts v. Tiffany*, 31 Pick. 95. *Connor v. Parks*, 10 Cush. 266, 267.

This evidence was, in the opinion of the court, under the circumstances of the case and the course of the plaintiff's evidence, admissible. *Dowling v. Dowling*, 10 Ir. C. L. R. 236, and cases there cited and note on 241; *Fladong v. Winter*, 19 Ves. Jr. 196.

It is to be remembered that the attempt of the defendants is not to prove or disprove the character of dealings between one set of parties by proof of other dealings between other parties, but to establish the intrinsic improbability of the condition or contract alleged. *Bradbury v. Dwight*, 8 Met. 81; *Upton v. Winchester*, 106 Mass. 380; *Lee v. Wheeler*, 11 Gray, 286; *Regan*

v. Dickinson, 105 Mass. 112; *Harris v. Holmes*, 30 Vt. 352; *Woodward v. Buchanan*, L. R. 5 Q. B. 285.

The evidence is admissible to rebut the possible inference from plaintiff's testimony, that the defendants promised to verify, because they sent out Sykes. *Boymton v. Lighton*, 1 Allen, 509; *Harris v. Holmes*, *supra*.

In such and similar actions the rules liberally admit all evidence which bears upon the charge of deceit by exhibiting the circumstances. *Salem I. R. Co. v. Adams*, 23 Pick. 256; *Matthews v. Bliss*, 23 Pick. 48; *First Nat. Bk. v. Goodsell*, 107 Mass. 149; *Haskins v. Warren*, 115 Mass. 514; *Stockwell v. Silloway*, 113 Mass. 384.

Contract B made the subscribers and those interested in it, in effect, partners in a joint enterprise. *Dougherty v. Creary*, 30 Cal. 290; 2 Coll. Part. 6th ed. chap. 85.

Market value is not the only standard, under any circumstances; and, especially when there is no market value, other evidence must be resorted to. *Murray v. Stanton*, 99 Mass. 345; *Eaton v. Mellus*, 7 Gray, 566; *Benham v. Dunbar*, 103 Mass. 365.

Evidence of an actual loan upon the property to the company was of weight to determine the value of the property. *Murray v. Stanton*, *supra*; *Whitney v. Thatcher*, 117 Mass. 523.

The question asked of the witness Stevens as to his conference with experts should have been admitted. It must be presumed to have been preliminary to an inquiry as to the value of the property. *Whitney v. Thatcher*, *supra*; *Haskins v. Hamilton Mut. Ins. Co.* 5 Gray, 432.

For that purpose it was competent to exhibit his qualifications to testify as to value. *Whitman v. Boston & Me. R. R. Co.* 7 Allen, 318.

Mr. A. E. Pillsbury, for plaintiff:

The question: "At the time or after you signed this subscription, was there any condition between you and Mr. Nickerson, one of the defendants, or any of these subscribers, as to having the report of Smith and Northup verified?" is objectionable: 1, because it limits the inquiry to one of the defendants, while the purchase might have been made of, and all conversation had with, the other defendant; and, 2, on the broader ground, that the fact that the defendants made with a third person a different contract concerning the same subject matter, if proved, has no tendency to show that they did not make with the plaintiff the contract declared on. The following cases may be referred to as in point: *Hollingham v. Head*, 4 C. B. N. S. 868; *Carter v. Fryke*, Peake, 95; *Smith v. Wilkins*, 6 C. & P. 180; *Spenceley v. De Willott*, 7 East, 108; *Holcombe v. Hewson*, 2 Camp. 391; *Jackson v. Smith*, 7 Cow. 717; *Phelps v. Conant*, 30 Vt. 277, 284.

W. Allen, J., delivered the opinion of the court:

These exceptions present but two questions, both as to the admissibility of evidence. The plaintiff having offered evidence that he made the contract for the purchase of an interest in the mine on the oral representation of the defendants, and the condition that certain written reports as to the condition and quality of the mine should be verified; the defendants called two witnesses, subscribers to the agreement for the purchase of the mine, but who

were not present when the contract testified to by the plaintiff was made, and asked them the questions whether there was any condition between them and the defendants or the other subscribers about having the reports verified, or if there was any collateral agreement to which they were parties. The evidence was clearly incompetent.

It is argued for the defendants that the representations testified to by the plaintiff were that the subscriptions were conditional, referring to all the subscriptions; and that the reports were to be verified before anybody would be called upon to pay; and that therefore it was competent to prove that some of the subscriptions were not conditional, as showing the circumstances under which the plaintiff's contract was made, and the improbability that it was conditional. But we do not see that this raises the question, or leaves it anything but an offer to prove that the representations were not made to other subscribers as evidence that they were not made to the plaintiff.

It is argued that the subscribers were partners, and that the testimony offered is that of partners as to the terms of the copartnership. But it is not competent, on the question whether one partner was induced to join the partnership by false representations as to its terms, to prove that others joined without such representations. The fact that some of the subscribers to the agreement had lent money to the company would not be competent to prove the value of the stock; and the evidence offered to prove that fact was properly excluded.

Exceptions overruled.

Henry T. WILCOX

v.

City of NEW BEDFORD.

The entry upon land, by a city, for the purpose of constructing a sewer must be after the taking of the land and not before; but if the city, in contemplation of laying out a street and while legal proceedings therefor are in progress, takes possession of the land and works thereon for the purpose of constructing the way, such acts give character and effect to the possession taken afterwards; hence, where the city afterwards and within two years did some acts in pursuance of opening up an extension of the way, it is not liable to an action of trespass, on the part of property holders, for entry upon the land after the expiration of two years, under the provisions of the statute.

(Bristol)—Filed January 18, 1886.)

ON report, on an agreed statement of facts.
Judgment for defendant.

Trespass against a city, for entry upon lands after the expiration of two years from the taking of such lands for the purpose of street extension.

The facts are sufficiently stated in the opinion.

Messrs. H. M. Knowlton and N. E. Perry, for plaintiff.

Messrs. T. M. Stetson and L. L. Holmes, for defendant.

Gardner, J., delivered the opinion of the court:

The question at issue between the parties is: whether the defendant City, within two years from November 18, 1874, took possession of any part of the land then laid out for the extension of Hillman Street, for the purpose of constructing the way. The agreed facts find that, prior to November 18, 1874, and in October, 1874, the city authorities began work on the line of the proposed extension, in laying out a sewer through the middle portion thereof, and that, as the sewer was filled, its top was leveled off by the City and made passable for driving with carriages, teams, etc., over a part of said extension. This taking possession, even for the purpose of constructing the way, is not what the statute contemplates. The entry upon the land must be after the taking and not before; and if the only possession taken by the City was before November 18, 1874, when the extension was laid out, it will not avail the defendant. It would not be the act required by the statute, and would operate as ineffectually as if done after the lapse of the two years therein mentioned. Nevertheless, we think if the City, in contemplation of laying out a street and while legal proceedings therefor are in progress, takes possession of the land and works thereon, for the purpose of constructing the way, that these acts are not without significance.

If after the laying out, nothing more is done by the City within two years, then the previous possession taken and work done go for nothing. But such previous possession and work give some meaning to the possession taken by the City after the laying out; and, in view of such previous acts, less evidence would be required to show that the City, after the laying out, took possession for the purpose of constructing the way. These acts of the City, if found to be done before the laying out, for the purpose of constructing the way, give character and effect to the possession taken afterwards; and it can be seen, in the light of these previous entries upon the land and work thereon, for what the City afterwards took possession; whether for the purpose of constructing the way or for other and foreign purposes.

The agreed facts find in addition to what has been said that, prior to November 18, 1874, the City removed an old wall which partly obstructed the entrance to the extension from Cedar Street; that it placed curved or corner edgestones at the corner of Cedar Street and said extension, but in the line of and in Cedar Street; that the City located a place for a sidewalk on the south side of the extension and curbed it with cut edgestones for about fourteen feet west of the west line of Cedar Street and about four feet from a sand catcher built in the extension; that a paved gutter was built from Cedar Street to the sand catcher, which is a brick structure, underground, with an opening into the gutter. After November 18, 1874, and within two years therefrom, the City used the

sand catcher and cleaned it out twice a year; in the spring of 1875, the City altered the sand catcher, raised the ground of the extension of Cedar Street and near the sand catcher; and repaved the surface on the extension, where the water ran into the gutter for a few feet for the purpose of providing for the surface water and water coming from Cedar Street and Hillman Street east of Cedar. Since November, 1874, the extension has been open, passable for carriages only from Cedar to Ash Streets, and the public have largely used it for carriages.

Upon the agreed facts we have no difficulty in finding that, after November 18, 1874, and within two years therefrom, the defendant took possession of part of the land laid out for the extension for Hillman Street, for the purpose of constructing the way.

The defendant contends that the plaintiff cannot maintain this action of trespass; that his only remedy is by *certiorari* or by a writ of prohibition. As we have determined the case upon the merits, it is not necessary to consider what the remedy of the plaintiff should be. By the terms of the agreed facts there must be

Judgment for the defendant.

Caleb SAUNDERS, Appt.,

v.

CITY OF LAWRENCE.

An independent election of the same person to office, by each branch of a city council, is not a valid election of such person, under an ordinance providing for election by either branch, to be followed by concurrence of the other branch.

(Remex.—Filed March 31, 1886.)

ON appeal by plaintiff from a judgment of the Superior Court in favor of defendant, in an action for salary as city solicitor. *Affirmed.*

The case was presented on an agreed statement of facts, substantially as follows:

The ordinances of the City of Lawrence, chapter 87, in force since 1879, provide that there shall be chosen annually, in the month of January or February, by concurrent vote of both branches of the city council, a city solicitor, who shall be an attorney at law. The ordinances of the City provide that either branch of the city council may first elect said officer.

Chapter 8 of the city ordinances, in force since 1879, provides: "And unless by law or ordinance otherwise specially determined, all officers shall be removable at pleasure by the authority conferring their appointment or election; and shall hold office until their successors are chosen and qualified, unless removed from office."

No ordinance of the City determines that the city solicitor shall not be removable under the provisions of the foregoing ordinance.

The rules and orders of said city council provide that when either board shall not concur in

any action of the other, notice of such nonconcurrence shall be given the other board by written message.

On Wednesday, January 9, 1884, at a regular meeting of the common council of said City, the said common council proceeded to the election of a city solicitor, and the plaintiff received a majority of the votes cast and was declared elected on the part of that board. Notice of said election was sent on that day to the board of aldermen.

At a regular meeting of the board of aldermen on the same day, notice having been received of the election of the plaintiff to said office, on the part of the common council, the said board proceeded by a ye and a nay ballot to vote on the concurrence with the other board in said election. Three ballots were cast in the affirmative and three ballots in the negative. And the board refused to concur in said election. The board of aldermen then proceeded to ballot for a city solicitor. Several ballots were taken which resulted in no choice, and upon motion the matter of electing a city solicitor was laid on the table, and the board adjourned to January 10.

On January 10 the board of aldermen met and, after transacting various matters of business, adjourned to Friday, January 11, without taking any action upon the election of a city solicitor.

On January 11 the board of aldermen met and, on motion, proceeded to the election of a city solicitor by ballot. The plaintiff received four votes, being a majority of all the votes cast, and was declared elected on the part of that board.

No meeting of the common council was held between the said January 9, and January 10, on which day at a session of said common council, notice was received, dated January 9, that the board of aldermen at a meeting on January 9 had voted to non-concur in the election of Caleb Saunders as city solicitor. Notice was also received at the same meeting, from the board of aldermen that at a meeting of said board held January 11 Caleb Saunders had been elected city solicitor, on the part of that board.

In making up the record of the meeting of the board of aldermen, held January 11, one James E. Shepard, then the city clerk and clerk of the board of aldermen, concluded the record with these words: "And was declared elected in concurrence." Some two or three days after he had made up said record and after he had gone out of office as said city clerk and clerk of the board of aldermen, his attention was called to the records by one John J. Donovan, the assistant city clerk, who had been present at the meeting of the board on said January 11, and said Shepard, saying that it was a mistake of his, that it was a clerical error, and not in accordance with the facts, drew red lines through the words "in concurrence" and wrote "on the part of this board."

A meeting of the board of aldermen had intervened between the time when said record was made up and the time when it was so changed by said Shepard; but the attention of the board of aldermen had not been called to the record. The only vote which was taken on the subject, on January 11, was a ballot for the election of city solicitor.

In the meeting of the board of aldermen, January 21, 1884, came up notice that the common council had nonconcurrent in the election of Caleb Saunders as city solicitor and had elected Wm. F. Moyes on the part of that board; laid on the table for one week.

In board of aldermen, January 28, 1884, a communication from City Solicitor Tarbox, showing the importance of effecting a speedy election of his successor was read and accepted. A communication from Caleb Saunders, claiming to have been elected by both branches of the city government and tendering his services as city solicitor, was also read and placed on file.

In relation to the notice of the election of William F. Moyes as city solicitor by the council, the mayor was requested to procure the advice of the present city solicitor, Caleb Saunders, claiming to have been previously elected by both branches of the city council to that position.

In board of aldermen, February 4, 1884, a communication from John K. Tarbox, city solicitor, was presented giving it as his opinion that the election of a city solicitor had not been effected.

On motion, the board proceeded to ballot in concurrence in the election of William F. Moyes, as city solicitor by the council.

The plaintiff presented himself at the office of the city clerk and offered to be sworn into office, but the city clerk declined to administer to him the oath of office, and said Saunders never took the oath of office.

The ordinance establishing the office of city solicitor or any other ordinance of the city does not make any provisions in regard to qualifying by taking oaths.

At the close of the year he demanded his salary as city solicitor.

The plaintiff was a resident of Lawrence during the year 1884.

If upon the above stated facts the court is of the opinion that the plaintiff was duly elected city solicitor for the year 1884, and is entitled to the salary as such, judgment to be entered for the plaintiff for \$800 and interest from date of writ; otherwise for defendant.

Messrs. D. & C. G. Saunders, for plaintiff:

The plaintiff received the concurrent vote of both branches of the city council. On January 9, the common council did their part by electing the plaintiff city solicitor on the part of that board, and notifying that fact to the board of aldermen. On the same day, the aldermen upon receiving the notice, upon a ballot on the question of concurrence, failed to concur by a tie vote. Such action, at least until the common council had notice of it, could be reversed by the aldermen at their pleasure. *Reed v. Augusta*, 25 Ga. 386; *Locke v. Rochester*, 5 Lans. 11; *Jersey City v. State*, 1 Vroom, 521, 529; *State v. Jersey City*, 3 Dutcher, 536; *Stoddard v. Gilman*, 22 Vt. 568; *Wood v. Cutler*, 138 Mass. 149.

The act of the board of aldermen of January 11, was such a reconsideration of the action of January 9, as if the vote of that day had been formally reconsidered and the board had then voted to concur. *State v. Foster*, 2 Halsted, 101, 107.

The election subsequently of Wm. F. Moyes, as city solicitor, was not a removal of the

plaintiff from office. Such removal could only be made by concurrent vote of the city council to that effect after notice sent to the plaintiff. If the plaintiff was so removed, notice of such removal must have been sent to him. *Commonwealth v. Slifter*, 25 Pa. St. 23.

Mr. Andrew C. Stone, for defendant:

The plaintiff could receive a legal election as city solicitor of Lawrence, only in the form and manner prescribed by the ordinances of that City. *Atty-Gen. v. Simonds*, 111 Mass. 256.

Notice having been received by the board of aldermen, that the common council had made choice of plaintiff as city solicitor, the only valid action competent for the board of aldermen to take was concurrence or non-concurrence by affirmative or negative vote. § 8, city charter, Stat. of 1853, chap. 70.

The subsequent election of Wm. F. Moyes, was a removal of plaintiff from office, if he had been previously elected. *Chandler v. Lawrence*, 128 Mass. 213; *Knowles v. Boston*, 12 Gray, 339; *Wood v. Cutler*, 138 Mass. 149.

An elected officer is not entitled to compensation, without having performed the duties of the office. The plaintiff should have proceeded by information in the nature of a *quo warranto* against Moyes. *Atty-Gen. v. Simonds*, 111 Mass. 256.

W. Allen, J., delivered the opinion of the court:

The vote of the board of aldermen of January 11, was not a vote in concurrence with the common council. The board could act in the election of a city solicitor in two ways: by concurring in an election made by the common council or by making an election to be concurred in by the council. The two proceedings differ in form and in substance. One is by a yeas and nays ballot, upon the question of concurring in the election of a particular person; the other is by a ballot for persons, in order to elect one from all who are eligible.

After the vote in the negative, on the question of concurrence on January 9, the board of aldermen might, under a proper motion, have taken further action upon that question, but it did not. It chose to regard that matter as finally disposed of, and proceeded to the new and different matter of making a first election, to be sent to the common council for its concurrence.

Its further action was not upon the notice of election from the common council, but upon proceedings for a new election, and the vote of the adjourned meeting of January 11, was not upon that notice, but was a new election. Neither the intention nor the power of the aldermen to make it so is doubtful.

If the record shows that the plaintiff was declared to have been by that vote, elected in concurrence, it also shows that the declaration was not true. The records of both branches show that the plaintiff was not elected by concurrent vote of both.

We need not consider whether the subsequent concurrent action of both branches in electing another to the office, would have worked the removal of the plaintiff if he had been duly elected, nor whether if elected and not removed, he could have received the salary.

Judgment for the defendant affirmed.

Charles J. KIMBALL*

David L. WITHINGTON.

The owner in fee of a tract of land on which there was a house set off to and held by another in right of dower, conveyed the land by a deed, expressly reserving the house occupied by the doweress. Held, that the deed was to be construed as excepting from its operation the house and the entire estate in it and the land under it, there being nothing in the deed to limit the exception to a lesser estate; and that the reversion expectant in the dower estate did not pass.

(Essex—Filed March 31, 1886.)

APPEAL from the Superior Court by the respondent in a proceeding for partition, from a judgment granting partition. *Affirmed*.

The case was submitted upon the following agreed statement of facts:

Charles Kimball, late of West Newbury, in said county, deceased, father of the petitioner, died intestate seised of various parcels of real estate, among which was a certain piece of land about twenty-five acres, on which were two dwelling houses, a barn, shed and other out buildings. He left a widow, Lucy S. Kimball, and as heirs, two sons, John R. Kimball and Charles J. Kimball, the petitioner. To the widow there was set off, April 20, 1859, as part of her dower one of said dwelling houses "With the privilege to it and around it to pass and repass, as may be necessary in order to the full use and enjoyment of the same and a right to the well by the house for water." This dwelling house and the land under the same, being the lot described in the petition, is the property sought to be divided.

Dower was also set off in a twenty-three acre piece, excepting a shoe shop and blacksmith shop thereon, and in two other small pieces of land. June 24, 1859, John R. quitclaimed to Charles J. all the first mentioned parcel including the *locus in quo*, also the twenty-three acre piece with building thereon, both subject to the dower as set off.

March 16, 1860, Charles J. quitclaimed to John R. all his right, title and interest in one undivided half of the *locus in quo*, subject to the dower as set off, "bounded and described as in the return of the committee to set off dower, which return is duly recorded and to which reference may be had."

March 17, 1863, the probate guardian of Charles J. presented to probate court a petition setting forth "that it is necessary to sell some part of a certain piece of land containing about twenty-five acres with two dwelling houses and other buildings thereon," describing the whole lot; one of said houses being occupied by Lucy S. Kimball, held by her as dower, said ward being seised of one half of what she so holds, and praying for license to sell the whole of the real estate of said ward above described. Upon this petition, citation was issued setting forth that the petition had been presented for license to sell the whole of the real estate of said ward described in the petition. Upon this petition

license was granted to sell the whole of the real estate of said ward.

May 8, 1863, said guardian under said license sold to one Chase all said first mentioned parcel of land, with a dwelling house, barn and other out buildings thereon, reserving the house occupied by Mrs. Kimball with the privilege for the owners of said house to use the yard around said house equally with said grantee, also the same privilege in the yard front of the barn; also reserving the shed with land under it on the easterly end of the barn with the henery near it.

March 24, 1865, the guardian made return to the probate court that he, being authorized "to make sale of the real estate of Charles J. Kimball * * * for the purposes in the license set forth" gave notice by publication. The description in the notice is as follows: "A farm situated on the main road in West Newbury about one half mile from Artichoke River and about the same distance from the church and school-house. The farm contains about twenty-five acres of good land, good house, barn and other out buildings. It was formerly owned by Charles Kimball and is now owned by his son, Charles J. Kimball, and is about four and one half miles from Newburyport. For further particulars apply to Newell Ordway, guardian of Charles J. Kimball."

Sept. 11, 1869, Chase conveyed by description, if entitled to convey, to William S. McIntosh all said parcel of land, including said house occupied by Mrs. Kimball and land under the same. Charles J., after the death of his father, lived in the house with his mother, Lucy S., for some time and then moved into the other house and lived there until the sale to Chase. He then moved back into the house with his mother and has lived there ever since, he occupying one part and his mother the other, until the death of Lucy S., April 1, 1881. The shed aforesaid was always occupied by Charles J. and Lucy S., and up to present time as respects Charles J.

In 1871 said guardianship was terminated and said Charles J. became free and discharged therefrom.

John R. Kimball conveyed to the respondent, December 26, 1882, the premises conveyed to him by deed of Charles J. Kimball, dated March 16, 1860.

Messrs. David L. Withington, pro se, and Nathaniel N. Jones, for respondent:

The guardian's deed conveyed to Chase the whole interest of Kimball in the *locus in quo*. It is clear that the intention is to except the existing dower estate of Mrs. Kimball. The words reserving and excepting are frequently used indiscriminately. *Bowen v. Conner*, 6 Cush. 182; *Stockwell v. Couillard*, 129 Mass. 233; *Owen v. Field*, 102 Mass. 106; *Pettes v. Hawes*, 18 Pick. 326.

The words themselves naturally apply to that estate, and are apt words to except it from the grant. *Canedy v. Marcy*, 18 Gray, 378; *Stockwell v. Couillard*, *supra*; *Meserte v. Meserve*, 19 N. H. 240; *Crosby v. Montgomery*, 38 Vt. 238; *Swick v. Sears*, 1 Hill, 17; *Howard v. Pepper*, 136 Mass. 28.

The word owner may describe an estate less than a fee simple or fee tail. *Davenport v. Farrar*, 2 Ill. 314.

*See, Kimball v. McIntosh, 134 Mass. 362.

A widow with unassigned dower is not, nor is a mortgagee such owner. *Ermul v. Kullok*, 8 Kan. 494; *Parker v. Baxter*, 2 Gray, 189; *Tompkins v. Horton*, 25 N. J. Eq. 284.

Nor is one who has agreed to purchase. *Ruggles v. Nantucket*, 11 Cush. 483; *Loonie v. Hogan*, 9 N. Y. 435.

Under the mechanics' lien law the term owner is limited to the contractor. *Houard v. Robinson*, 5 Cush. 123.

But if these words import a reservation to Charles J. Kimball, then they only reserve a life estate, for there are no words of limitation. *Ashcroft v. E. R. R. Co.* 126 Mass. 196, and cases cited therein.

Mr. Horace I. Bartlett, for petitioner:

The deed to Chase did not change the title in the *locus*. See, *Kimball v. McIntosh*, 184 Mass. 362.

In construing that deed the intention of the parties is to govern. *Worthington v. Hylger*, 4 Mass. 205; *Adams v. Frothingham*, 3 Mass. 361; *Allen v. Holton*, 20 Pick. 463; *Jamaica Pond Aq. Co. v. Chandler*, 9 Allen, 166.

The rule of construction, most strongly against the grantor, is only to be resorted to when the language is so ambiguous that all other rules of construction fail. *Boston v. Richardson*, 13 Allen, 156.

To determine the intent, the subject matter, the situation of both parties, and the whole language of the instrument is to be considered. *Sumner v. Williams*, 8 Mass. 162.

If there was nothing else, the words, "reserving the house occupied by Mrs. Kimball with the privilege for the owners," would constitute a valid exception of the *locus*, whether the word used was reserve or except is immaterial. *Gale v. Coburn*, 18 Pick. 397; *Hurd v. Curtis*, 7 Met. 94; *Stockwell v. Couillard*, 129 Mass. 233.

An exception is separating part of that embraced in the description and already in being. *Hurd v. Curtis*, 7 Met. 110.

A reservation is to be construed an exception, if that will best effect the intent of the parties. *Bowen v. Conner*, 6 Cush. 132; *Gay v. Walker*, 36 Me. 54.

And this exception is to the petitioner in fee. It needs no words of inheritance in order that it may go to his heirs or assigns. *Winthrop v. Fairbanks*, 41 Me. 307; *Smith v. Ladd*, Id. 314; *Whitaker v. Brown*, 46 Pa. 197; *Keeler v. Wood*, 30 Vt. 245; *Randall v. Randall*, 59 Me. 340; *Cardigan v. Armitage*, 9 E. C. L. 60; *Emerson v. Mooney*, 50 N. H. 318; *Munn v. Worrall*, 53 N. Y. 48; *Wiley v. Sirdorus*, 41 Iowa, 226; *Sloan v. Lawrence Furnace Co.* 29 Ohio, 568; *Hall v. Ionia*, 38 Mich. 498; *Minor v. Sheehan*, 80 Minn. 419; *Hangs v. Parker*, 17 Me. 460; *Forbush v. Lombard*, 13 Met. 114; *Allen v. Scott*, 21 Pick. 25.

The petition of the guardian was for license to sell a certain piece of land; the license was to sell the whole of the real estate of the ward: this license was void. *Verry v. McClellan*, 6 Gray, 535.

The fee remains in the ward, it not having passed from him by a sale not authorized by statute. *Williams v. Reed*, 5 Pick. 482.

If the deed to Chase did change the title to the *locus in quo*, it left in the petitioner a life estate. *Curtis v. Gardner*, 13 Met. 457; *Bowen*

v. Conner, 6 Cush. 132; *Allen v. Scott*, *supra*; *Webster v. Potter*, 105 Mass. 414.

And a person having only a life estate may have partition. P. S. chap. 178, § 8; *Mussey v. Sanborn*, 15 Mass. 155.

W. Allen, J., delivered the opinion of the court:

The petitioner, being seised in fee of a parcel of land containing twenty-five acres, on which were two dwelling houses, one of which had been assigned to his father's widow as dower, conveyed an undivided half of the reversion of the dower estate to his brother. Afterwards, the probate guardian of the petitioner, by license of the probate court, sold and conveyed the land with one dwelling house thereon, reserving the house occupied by the widow; the question is whether the reversion expectant in the dower estate passed by the deed.

The description of the land in the deed includes the *locus*; one dwelling house is mentioned as conveyed, and the other, with certain privileges appurtenant to it, and a shed with the land under it not included in the dower estate, are said to be reserved.

The house as set off to the widow in dower, included the land under it, and the same effect must be given to the word in the deed. The word "reserving" must be construed as "excepting," because the widow had a life estate in the house which could not be reserved to the grantor, but only excepted out of the grant, and the reservation of the shed and the land under it can only operate as an exception and not as a reservation. The exception of the house and shed include the entire estate in the land under them, unless there is something to limit it to a lesser estate. It is said that the exception is of the dower estate or of an estate for the life of the widow. The language of the deed does not point to this in regard to the house. The natural expression of that intention would be to except or reserve the widow's right of dower, as in *Canedy v. Marcy*, 13 Gray, 373; or to convey the residue of the whole estate not set off to the widow as her dower, as in *Kempton v. Swift*, 2 Met. 70. The same construction must be given to the language used as applied to the house and its appurtenances and as applied to the shed and the land under it; and it would be a wholly unwarrantable construction to limit the exception of the latter, which did not belong to the dower estate, to an estate for the life of the widow.

No inference contrary to this can be drawn from the circumstances of the sale as far as they are disclosed in the statement of facts. The guardian's petition for leave to sell alleged that it was necessary to sell part of the estate, and prayed for leave to sell, and the license was to sell the whole of the real estate of the ward. The property to be sold was described in the notice of sale as a farm containing twenty-five acres, a house, barn and other buildings. It mentioned but one house; it did not mention any right of dower, or any reversion, or any undivided interest of the ward. The ward had the entire interest in severalty in all but the house occupied by the widow and its appurtenances, and owned the reversion of that in common with his brother. There is nothing disclosed to indicate any intention to sell the

undivided interest in the reversion; and when, under these circumstances, a deed was given, making no mention of dower or reversion, but expressly reserving not only the house with appurtenances occupied by the widow, in which she had a life estate, and the petitioner and his brother the reversion; and speaking of the owners of the house, but also by the same word reserving another building and the land under it in which the petitioner had the entire estate, we cannot construe the deed otherwise than excepting out of its operation the buildings and the land covered by them, so that no estate in that grant of the premises would pass by it. See, *Gale v. Coburn*, 18 Pick. 397; *Stockwell v. Couillard*, 120 Mass. 381; *Ashcroft v. Eastern R. Co.* 126 Mass. 196.

Judgment affirmed.

Orrin MESSENGER, *per pro. ami.*
v.

James DENNIE.

Where a person thoughtlessly and imprudently puts himself in a position of danger and receives injury thereby, his injury is attributable to his own carelessness and not to any negligence of defendant.

(Suffolk—Filed March 19, 1886.)

ON report from the Superior Court, on a verdict directed for the defendant. *Judgment on verdict.*

This is an action of tort to recover damages to the plaintiff from the alleged negligent driving of the defendant, and is the same case that has been once before to the supreme judicial court reported in 137 Mass. 197. After that opinion the case came again for trial before a jury in the Superior Court. At the trial, the plaintiff opened his case substantially as follows, so far as relates to the occurrences: the accident occurred Feb. 17, 1881, on Aspinwall Avenue, a public street in Brookline, at a point 140 feet, more or less, distant from Harvard Street.

The plaintiff, who was a boy then of the age of eight years and nine months, and who lived in Brookline, on Harvard Place, was standing upon Harvard Street. It was a pleasant day, and about a quarter past four in the afternoon. There came along at that time, driving towards Aspinwall Avenue, one Stewart, a skillful driver and with a sleigh and a single horse. The plaintiff, who knew him, asked him if he might ride a little way on his sleigh, and Stewart gave him permission, and drew up and stopped his sleigh to let the boy get on. The boy got upon the left-hand runner of the sleigh, the one nearest the sidewalk where he was standing, and having got on, Stewart drove slowly on down Harvard Street and around the corner down Aspinwall Avenue.

When Stewart's sleigh had got down to the point one hundred and forty-two feet from the corner of Harvard Street and Aspinwall Avenue, the defendant was driving behind Stewart, and the boy, thanking Mr. Stewart for the ride, said he would get off there; and Stew-

art held up nearly to a walk or quite a walk to let him get off.

The boy put his feet upon the ground, ran along a step or two, glanced to see what was behind him, and saw Mr. Dennie's horse some thirty odd feet behind him, coming in the track, upon the right hand side of the street, and directly behind Mr. Stewart.

After glancing round and seeing where Mr. Dennie was, he let go of the sleigh, stepped immediately to the left, and started to cross the street.

The boy had reached at least as far as the middle of the street, and then noticed that instead of keeping the track he was in when he got off the sleigh, Dennie's horse had turned out as if to pass by Stewart, and was coming directly upon him.

He had but a moment to determine, before the horse came upon him and trampled him down. The boy tried to get on his feet; he partially succeeded, but, blinded and dazed by his severe injuries, staggered and fell again.

After this opening, the counsel for defendant asked the court to rule that the plaintiff could not, as a matter of law, maintain his action in view of the former question of the supreme court herein referred to.

The presiding Justice who heard the case at the former trial, suggested that the opening left some matters uncertain, especially as to the consent of the parents to the boy's riding on sleighs under certain circumstances, which was testified to at the former trial; and said that if the only new testimony to be introduced was that of the boy, who was not a witness before, he was prepared to dispose of the case. And in reply to a direct question by the court to the plaintiff's counsel, whether "the evidence as to the consent of the parents and all the circumstances will be the same as before," the counsel replied, "substantially."

The presiding Justice being then of opinion that upon the opening and statement of counsel he was bound so to rule, under the decision above referred to, held that the plaintiff could not maintain his action, and directed a verdict for the defendant, which was rendered.

Mr. B. Wadleigh, for plaintiff.

Messrs. C. F. Kittredge and C. A. Williams, for defendant:

The case is controlled by the decision reported in 137 Mass. 197.

The plaintiff's counsel, when asked by the court "whether the evidence as to the consent of the parents and all the circumstances will be the same as before," replied, "substantially."

"Substantially the same" means "the same in substance." Thus it appears that the substance of the plaintiff's case has been passed upon by this court in the former trial. Therefore, the plaintiff is concluded by that decision. *Fogg v. Nahant*, 106 Mass. 278, 280.

There was no evidence of negligence on the part of the defendant. *Cotton v. Wood*, 8 C. B. N. S. 568; *Smith v. Nat. Bank*, 99 Mass. 605.

By the Court:

When this case was before the court at a former term, it was decided that upon the facts there appearing, the plaintiff was not entitled to recover. *Messenger v. Dennie*, 137 Mass. 197.

The facts offered to be shown at the second trial do not in any material particular differ from those shown in the first trial.

The plaintiff was engaged in the dangerous sport of riding upon the runners of a sleigh in the public streets; he suddenly left the runner of a sleigh on which he was riding, while it was in motion in front and within a few feet of the sleigh driven by the defendant, who was driving at a moderate rate of speed. If as is now claimed, the plaintiff saw the defendant's team approaching, it does not help his case. He thoughtlessly and imprudently put himself in a position of danger, and upon the facts his injury is attributable to his own carelessness and not negligence of the defendant.

Judgment on the verdict.

George P. OCKERSHAUSEN

v.

Michael DURANT *et al.*

Where the defense to the action on a contract was failure of consideration, by a false warranty of the article purchased, and the evidence was conflicting as to whether there was a warranty or not, proof that the article was not as good as defendant thought it was, and that plaintiff had bought it for a low price does not tend to show a sale with warranty, and may properly be excluded.

(Middlesex—Filed March 22, 1886.)

ON defendants' exceptions. *Overruled.*

This was an action of contract on a promissory note, the consideration for which was forty-six hogsheads of Demerara molasses, sold by the plaintiff to the defendants, and which plaintiff had purchased of a dealer in New York.

The defendants admitted the making of the note, but claimed and offered evidence tending to show that the molasses was sold under an express warranty that "it would give the best of satisfaction for distilling purposes and making vinegar," the defendants being engaged in carrying on the business of making vinegar from the distillation of molasses. The defendants also claimed and offered evidence tending to show that the molasses was not good for distilling purposes and making vinegar, and that it had no value to them for the purposes for which they claimed it was warranted.

Plaintiff contended and introduced evidence tending to show that the molasses was sold without any warranty.

As bearing on question of warranty alone and not upon the question of damages, counsel for defendants offered to show what price was paid by plaintiff for the molasses in New York a few days prior to its sale to defendants; and in offering said evidence stated that it was for purpose of showing that the price paid was so low that the molasses could not have been of the quality mentioned in the warranty claimed to have been made by plaintiff's agent.

In offering said evidence, defendants' counsel also stated that he would in connection there-

with offer thereafter other testimony tending to show that molasses of the quality which he claimed plaintiff had warranted this to be, had at the time of its purchase in New York a certain market price in open market, and claimed that the price paid for this molasses would appear by this evidence to be so low as to raise the presumption that it was not of the quality mentioned in the alleged warranty.

The court refused to admit the evidence offered, and the defendants duly excepted thereto. The jury found for the plaintiff in the full amount of said note.

Mr. Charles P. Searle, for defendants:

The price for which a thing is bought and sold constitutes its market value and ordinarily is the best and most satisfactory standard of estimating its value. *Kent v. Whitney*, 9 Allen, 62; *Wyman v. Lexington & W. C. R. R. Co.* 13 Met. 316.

In a market regularly attended by buyers and sellers a sale of an article of a recognized and uniform character, constantly bought and sold in that market so as to have a place upon price current lists, would serve to show the value of that article on the day of such sale. *Whitney v. Thacher*, 117 Mass. 523.

Demerara molasses being a staple article had at the time of the sale a fixed market price, and such market price or value in New York may be proved by evidence of sales then and there of merchandise of the same quality. *Whitney v. Thacher*, 117 Mass. 523, 527; *Paine v. Boston*, 4 Allen, 168, 170; *Shattuck v. Stoneham*, B. R. R. 6 Allen, 115; *Clark v. Baird*, 9 N. Y. 183; *Gill v. McNamee*, 42 N. Y. 45.

Messrs. Ranney & Clark, for plaintiff:

C. Allen, J., delivered the opinion of the court:

The evidence was conflicting as to whether there was a warranty or not, and the excluded evidence was offered as bearing on this question alone. We do not see that the evidence which was excluded would have had any material tendency to show the probability of the defendant's position, that the plaintiff gave the alleged warranty. It was too remote. Indeed, the argument, that, under the circumstances sought to be proved, the plaintiff would not have been likely to give the warranty, is quite as strong as any argument which occurs to us in favor of the opposite conclusion. Proof that the molasses was not as good as the defendant thought it was and that it was bought by the plaintiff for a low price does not tend to show that it was sold with warranty.

Exceptions overruled.

Edward E. PRATT

v.

American BELL TELEPHONE CO. *et al.*

1. If a party contracting to deliver stock at a future day has stock in his possession or control when he makes the contract, he is not obliged to deliver that identical stock; the contract can be performed by the delivery of any other share of the same stock.
2. The mode in which one party to a con-

tract shall enable himself to do what he has agreed to do is no concern of the other party and is no part of the contract.

3. The court is not empowered to write into a contract terms which neither party understood, at the making thereof, were any part of the same.
4. Where notes issued by a corporation obligated it to pay the bearer a certain sum of money in three years with interest, or to exchange the stock of the company therefor upon certain dates, during the running of the notes, the holder thereof is in no sense a stockholder and has no vested right or title, legal or equitable, in any particular stock.

(Suffolk—Filed February 26, 1886.)

IN equity. *Decree affirmed.*

The American Bell Telephone Company was organized on March 20, 1880, under the provisions of chapter 117 of the Acts of the year 1880, which provided that its capital stock should exceed \$1,000,000, and should not exceed \$10,000,000.

Fully paid up stock of the Company was issued, to the amount of \$7,850,000, or 78,500 shares of the par value of \$100 each.

Of this amount, 14,000 shares were held by the defendants, Forbes and others, as trustees under a deed of trust executed on February 20, 1881, which set apart 5,000 of said shares to secure "the performance for the benefit of the holders" of a certain series of notes of the company, convertible into stock at the option of the holder, in three years from their date, authorized by a vote of the directors of the Company on September 13, 1880, and which set apart the remaining 9,000 of said shares, "For the benefit of and subject to the direction and disposal of said American Bell Telephone Company."

On August 7, 1882, the directors of the defendant Company, needing further capital for the purposes of construction, voted "to issue a circular to the holders of stock and convertible notes," "offering the convertible notes of the Company to an amount not exceeding \$645,000 on such terms as might be fixed by the executive committee." The executive committee were also the trustees under the deed of trust. The circular was issued in accordance with this vote to the holders of stock and convertible notes of the Company, offering to each holder of ten shares of stock, or of \$1,000 convertible notes of the first issue, the right to subscribe for \$100 of the new issue; and accompanying the circular was a form for the transfer of the rights to subscribe to the proposed issue of convertible notes, and a form of subscription for the convertible notes.

These rights were negotiated in the market, and were bought by parties other than those to whom they were originally issued, and the convertible notes were issued to the holders of these transferred rights.

The plaintiff held about 800 shares of stock, which entitled him to subscribe to \$8,000 of the new issue, and subsequently purchased in the market sufficient additional rights to entitle him to convertible notes to the amount of \$41,200.

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The second series of convertible notes were duly issued on October 20, 1882, to the amount of \$645,000, and the plaintiff exchanged the rights he had so purchased for said convertible notes.

At the time of the issue there was no other full paid stock of said Company duly issued, owned and subject to the control of the Company, which could be appropriated to meet the obligation incurred by the issue of the second series of convertible notes, except the 9,000 shares of stock then held under said deed of trust.

These convertible notes were all of the following form and tenor:—

"\$100.

No. —

Three years after date, for value received, 'The American Bell Telephone Company,' at its treasurer's office, in Boston, will pay to the bearer in lawful money of the United States of America, \$100; and on their respective dates will pay the interest coupons, hereto attached, upon presentation and surrender thereof.

The holder thereof, may, on April 20, 1884, or on October 20, 1884, and at no other time, exchange this note, coupons not being attached, for the stock of the Company, at par; that is, for one share.

Holders who wish to convert thus are requested to give not less than five days previous notice to the treasurer.

The American Bell Telephone Company,
by Wm. R. Driver, Treasurer.

The plaintiff, before the vote for the increase of capital, filed this bill praying that the defendant Corporation might be enjoined from issuing any additional shares of capital stock prior to October 21, 1884, unless in such manner and upon such terms as should secure to the holders of the convertible notes the right to share on equitable terms in the benefits of said issue; and that said trustees might be decreed to hold the shares of stock in their names, or so many of them as may be needful to secure the performance of the contract of the Corporation contained in said convertible notes, charged with a trust for the plaintiff and others in like interest; and that in case of the issue of any shares, said trustees should be required to sell the rights attached to the shares charged with said interest, and to hold the proceeds of each sale for and on account of the plaintiff and other noteholders in like case with him; the plaintiff offering, in regard to the bonds so held by him, to make all such payments and do all such acts as might be equitably required to entitle him to the relief prayed, and for general relief.

The case is presented on appeal from a decree dismissing the bill.

Messrs. W. G. Russell, Prince & Peabody, for plaintiff:

Alternative promises made by defendant Company, giving the holder an option to call for the performance of either, on certain dates, may be treated as being two absolute promises.

Until the option is declared it is bound to keep itself in a position to carry out either of them, at the election of the holder. In the case at bar the plaintiff relies wholly upon the promise to deliver stock, and the case may be treated as though defendant had made a single absolute promise in consideration of a present cash payment to deliver stock of the Company at its

par value; that is, one share for each \$100 paid in. *Dinmore v. Duncan*, 57 N. Y. 573, 577, 578; *Hotchkiss v. Nat. Banks*, 21 Wall. 354 (88 U. S. bk. 22, L. ed. 645).

This is true, *a fortiori*, where, as in this case, the option has been declared. Such declaration relates back to the original contract, and makes the case exactly the same as if defendant had entered into a single contract to sell stock. *Re Adams and the Kensington Vestry*, L. R. 27, Ch. D. 394-399; *Lawes v. Bennett*, 1 Cox, 167; *Black v. Homersham*, L. R. 4 Ex. D. 24.

The case last cited was that of a sale by auction, August 1, upon condition that the purchaser should make a deposit at once and should pay the balance of the purchase money August 29, when the purchase should be completed. Held, that a dividend declared August 28, belonged to the purchaser, as the title related back to the time of the original contract.

To the same effect is *Harris v. Stevens*, 7 N. H. 454.

What is the meaning of the words "the stock of the Company?" The parties must be presumed to have intended that which is legal, rather than that which is illegal, and their contract will be construed accordingly. *Broom v. Batchelor*, 1 Hurl. & N. 255; *Sieele v. Hoe*, 14 Q. B. 481, 445; *Cheney v. Courtois*, 13 C. B. N. S. 634, 640; *Bank of Columbus v. Bruce*, 17 N. Y. 507; *Price v. Minot*, 107 Mass. 49.

The only possible legal contract was a contract to sell shares then owned by the Company. Any other contract must be void within the Stock Jobbing Act. P. S. chap. 78, § 6.

A has one hundred shares of stock, and contracts to sell that number of shares; he cannot afterwards legally contract to sell another hundred, since he is no longer the owner or assignee of any unincumbered shares. *Stebbins v. Leowolf*, 8 Cush. 137.

The contract could not have been intended to refer to shares to be thereafter issued, since it was made by the directors of the Company, who had no power to make such an issue, that power being vested by statute in a meeting of the Corporation called for that purpose. P. S. chap. 106, § 34.

Moreover, such new issue, if made, could only be disposed of in the manner required by law, by offering it to previous stockholders. *Gray v. Portland Bank*, 3 Mass. 864; P. S. chap. 105, § 20.

An increase of capital stock is so unusual and extraordinary an act that it cannot be presumed to have been in the minds of the parties so as to affect the meaning of this contract. *R. Co. v. Allerton*, 18 Wall. 233 (85 U. S. bk. 21, L. ed. 902).

Nor could the contract have been intended to refer to stock to be purchased by the Company. It was not competent for the Corporation to undertake to deal in its own shares by buying and selling them in the market. *Re London H. & C. E. Bank*, L. R. 5, Ch. 444; *Hope v. Inter. F. Soc.*, L. R. 4 Ch. D. 327; *Coppin v. Greenlees Co.* 88 Ohio St. 275; *State v. Oberlin Bldg. & Loan Assn.* 35 Ohio St. 258; *German Sav. Bank v. Wulfskuhler*, 19 Kan. 60; *Currier v. Lebanon State Co.* 56 N. H. 263; *Coleman v. Columbia Oil Co.* 51 Pa. St. 74-77.

Cases like *Leland v. Hayden*, 102 Mass. 542-551, which holds that a corporation having an

accumulation of funds on hand may invest in its own shares, or, *Dupes v. Boston Wat. Power Co.* 114 Mass. 37, which holds that it is competent for a land company to receive its own shares, in lieu of money, in payment for land which it has sold, do not go far towards sustaining the right of a telephone company to enter into speculative contracts for future delivery of its own shares.

Under P. S. chap. 105, § 20, stock held simply for the benefit of the company is not entitled to share the benefit of such an increase. This the Company must be presumed to have known, and to have given to this stock the benefit of such increase, upon the theory that others beside itself had rights in such stock. *Am. R.-Prog. Co. v. Haven*, 101 Mass. 398.

The term "share of stock" means a certain undivided aliquot portion of the capital stock of the company. The certificate is simply the usual, although not the essential, evidence of such stock. *Leland v. Hayden*, 102 Mass. 542; *Sealey v. N. Y. Nat. Exch. Bank*, 4 Abb. N. C. 61, 65; *Factors & T. Ins. Co. v. Marine D. D. & S. Co.* 81 La. Ann. 149; *Corwith v. Culver*, 69 Ill. 502; *Bank of Commerce's App.* 73 Pa. St. 59; *Rorer, R. R.* 165, § 9; *Ang. & A. Corp.* 8th ed. § 560.

On this ground, a subscriber to a corporation cannot be assessed until all the shares are taken; for not until then does he hold the shares of aliquot portion of the stock which alone he contracted for with its incident rights and liabilities. *Salem Mill Dam Co. v. Ropes*, 6 Pick. 23, 33; *Worcester & N. R. R. Co. v. Hinds*, 8 Cush. 110; *Stoneham Branch R. R. Co. v. Gould*, 2 Gray, 277, 278; *Oldtown & L. R. R. Co. v. Veazie*, 39 Me. 571; *Pike v. B. & C. Shore Line R. R. Co.* 68 Me. 445; *Baile v. Calvert Coll. Soc.* 47 Md. 117.

The power of the corporation to decrease the fractional proportion of the capital stock held by each shareholder, must be compensated by allowing him to take a ratable proportion of the new shares. The shareholder's position does not really change at all, except in form. In this case, instead of holding 3-78500 of the capital stock he holds 4-98000; or, in each case, 1-245 of the capital stock. *Gray v. Portland Bank*, 3 Mass. 865, 877, 378; *Eidman v. Bowman*, 58 Ill. 444; *Douman v. Wis. & L. S. M. & Smelt. Co.* 40 Wis. 418; *State v. Smith*, 48 Vt. 266, 289; *Jones v. Morrison*, 1 Am. & Eng. Corp. Cas. 313, 324-326; *Hart v. St. Charles St. R. R. Co.* 30 La. Ann. p. 1, 758.

The greater number of less valuable shares represents and in legal contemplation is the same thing as the smaller number of more valuable shares. Hence, when shares are held in trust for a life tenant, and then in remainder, it is held that the share of a new issue which comes to such shares is to be added to the capital, and not paid out as income. *Atkins v. Albee*, 12 Allen, 359; *Leland v. Hayden*, 102 Mass. 542, 551.

The right has since been recognized by statute, and the manner in which notice of an increase shall be given to stockholders regulated. P. S. chap. 105, § 20.

It is well settled that, in case of a sale of specific property, the title to pass in the future, especially where the purchase money has been paid, the vendor stands as trustee for the pur

chase money. *Hill*, Tr. 170, 171; *Dart. Vend.* 245, 5th ed. 649; *Sug. Vend.* 175; *Reed v. Lukens*, 44 Pa. St. 200; *Add. Cont.* 529.

When a bargain has been made for the sale of a certain number of ascertained shares in a particular railway company or a registered joint stock company, the property in the shares passes by the bargain to the purchaser, and the latter becomes the equitable owner of the shares and is entitled to a specific performance, when the time for the making of the transfer arrives. *Todd v. Taft*, 7 Allen, 371; *Leach v. Forbes*, 11 Gray, 506.

Both the Company and defendant trustees, therefore, became trustees for the plaintiff to the end that his rights, under his contract, might be preserved. The plaintiff was, as against the Company and trustees, the equitable owner of the stock.

See especially, *Currie v. White*, 45 N. Y. 822, 831, where the law is clearly laid down in this way, in the case of a contract to sell stocks at seller's option. The case is stronger in case of buyer's option.

This was expressly held in *Price v. Minot*, 107 Mass. 49, in a case which cannot be distinguished in principle from the one at bar.

This is a right which the court will recognize and protect, where as in this case the property is such as will entitle the contractee to specific performance. *Todd v. Taft*, 7 Allen, 371; *Leach v. Forbes*, 11 Gray, 506.

Thus where there was a transfer of possession with a privilege of becoming the purchaser at a future time, on performance of certain conditions, the court says: "Under it the vendor acquires not only the right to possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale or mortgage." *Carpenter v. Scott*, 13 R. I. 477; *Currier v. Knapp*, 117 Mass. 324.

That one who has an optional contract for the delivery of stock or the conversion of scrip into stock has the same right as a stockholder to protection in equity against acts of the corporation diminishing the value of his right, see, *Bagshaw v. Eastern U. R. Co.* 7 Hare, 114-130, 132.

The plaintiff's rights are derived under negotiable instruments, and are co-extensive with the rights of the parties from whom he purchased them, and would not, therefore, be affected by his knowledge of the terms of the former issue. *Story, Notes*, § 191; *Cromwell v. Co. of Sac.* 96 U. S. 51, 59 (bk. 24, L. ed. 681-685).

Messrs. J. E. Hudson and E. R. Hoar, for defendants.

Gardner, J., delivered the opinion of the court:

The plaintiff held certain notes with coupons attached, payable to the bearer thereof in three years after their date, issued by the defendant Corporation, October 20, 1882. Each note contained the provision "The holder thereof may, on the 20th of April 1884, or on the 20th of October 1884, and at no other time, exchange this note, coupons not due, being attached, for

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the stock of the Company at par; that is for one share." At a meeting of the stockholders of the Corporation held March 27, 1883, it was voted to increase the capital stock, and the stockholders were given the right to take shares at par therein, in the proportion of one new share to three old shares held by them respectively. The bill alleges that at the time the convertible notes were issued, there was in the hands of the defendant trustees a sufficient amount of full paid stock of the Company, subject to its control and not otherwise appropriated, to enable it to perform its contract to deliver stock for said notes; and that there was no other way in which said Corporation could lawfully perform its contract, than by the delivery of said shares so held by said trustees; that the vote to issue the notes and issuing thereon was an appropriation of said stock to the fulfillment of said contract, and that the contract became in substance a contract to deliver said stock in exchange for said notes, and charged said stock in the hands of trustees with a trust for the benefit of the holders of said notes. The plaintiff as holder of a large number of these convertible notes, claims that he had the right to share on equitable terms in the benefit of the issue of said additional shares.

The first inquiry respects the construction of the contract, between the parties. This is in writing and is embraced in the convertible notes which the plaintiff holds against the defendant. It will be seen that this writing contains no reference to the shares of stock held by the defendant. It will be seen that this writing contains no reference to the shares of stock held by the trustees when the note was issued. There is no agreement therein that the option which was given the holder should apply to any particular shares of stock of the Corporation; no express trust is created therein in relation to any shares of the defendant's stock. In all these respects the contract is bald and naked.

The plaintiff contends that the words "stock of the Company," as used in the contract, have reference to the shares there held in trust for the Company, and that the contract is to be construed as a contract to sell a specified portion of said shares; that, inasmuch as the parties must be presumed to have intended that which was legal, rather than illegal, their contract will be construed accordingly; that the only possible legal contract was a contract to sell shares then owned by the Company, and hence the presumption is that the Company intended to contract to sell a given number of the shares of which it was the owner.

The presumption is, without doubt, that the parties must have intended that which is legal, rather than illegal, and their contract will be construed accordingly. But the presumption that the Company intended to contract to sell a given number of the shares of which it was the owner when the contract was entered into, does not necessarily follow.

The Stock Jobbing Act, Pub. Sts. chap. 78, § 6, declares a contract for the sale or transfer of the stock of corporations like that of defendant's, to be void, unless the party contracting to sell or transfer the same, is at the time of making the contract, owner or has the control thereof.

It is a well recognized rule that the adjudged construction of a statute, by a foreign State or country where it was enacted, is to be given to it when it is afterwards passed by the Legislature of another State or country. *Commonwealth v. Hartwell*, 8 Gray, 450.

Before the Stock Jobbing Act of New York was enacted here in substantially the same form as there, the courts of New York had decided that if a party, contracting to deliver stock at a future day, had stock in his possession or control when he made the contract he was not obliged to keep the stock, nor to deliver that identical stock, but that the contract could be performed by the delivery of any other shares of the same stock. *Frost v. Clarkson*, 7 Cow. 24.

A contract to sell shares owned by the Company at the time the contract was made was not, as the plaintiff argues, the only possible legal contract. The party promising to deliver the stock at a future time must, under the statute, be the owner or have the control of sufficient stock to fulfill his contract at the time the contract is made. It is not to sell the same shares, because the contract can be performed by the delivery of any other shares of the same stock.

The presumption claimed by the plaintiff does not logically follow, that the Company intended to contract to sell a given number of the shares of which it was the owner. The Stock Jobbing Act did not entitle the bearer of the convertible notes to receive any specified shares, to keep them idle and useless during this three years, to await the uncertain option of the holder of the notes.

The presumption seems to be contrary to that contended for by the plaintiff. The statute created no duty and no obligation on the part of the defendant in relation to the stock held by its trustees when this contract was made. It created no express nor implied trust that the stock should be held to respond to the demands of the holders of those notes.

The plaintiff argues that until the option was declared, the Company was bound to keep itself in a position to carry out either of the promises contained in the notes, at the election of the holder. The contract does not make this requirement. The case is not one where the option may be declared at any time; one where the defendants would be bound to hold themselves in readiness to respond to the demand of the plaintiff every day and hour. It specified two days when the exchange shall be made, and carefully states that at no other time but upon those designated days can it be done.

The plaintiff argues that the contract could not have been intended to refer to shares to be thereafter issued, since it was made by the directors of the Company, and that they had no power to make issues of stock, that power belonging to the stockholders of the Corporation, Pub. Stats. chap. 106, § 84; and such new issue if made under Pub. Stats. chap. 105, § 20, could only be disposed of by offering it to previous stockholders.

These propositions may be conceded: the statutes have carefully provided for the disposition of new stock, and have marked out the manner in which it shall be distributed. The contract could not have been intended to refer to such stock, upon the presumption that the parties

must have intended that which is legal, rather than illegal. The plaintiff contends that the contract could not have intended to refer to stock to be purchased by the Company, and that it was not competent for the Corporation to deal in its own shares, by buying and selling them in the market.

There may have been other ways in which provision could have been made by the Corporation to comply with the requirement of this contract. But is it material to inquire whether the Company at the time of making the contract had then the means of possession itself of the shares of its own stock, in order to deliver them in the future? Was not that question postponed to the time when they would be demanded, and the Company be required upon the option of the holder of the note to deliver them? "The mode in which one party to a bargain shall enable himself to do what he has agreed to is no concern of the other party and is no part of the contract." *Bacon v. Parker*, 187 Mass. 809.

The contract was legal; when it was entered into the Corporation had one method of fulfilling it, and this was sufficient. The holders of the notes must rest content, until the time arrives when they can exercise their option and demand the stock granted to them.

In giving a construction to the contract contained in those convertible notes, as bearing upon the question whether the shares of stock held by the Company when the contract was made, became attached to and part thereof, the evidence in the case relating to the issue of notes of similar character in 1880, or 1881, is of some effect in showing the understanding of the parties as to this contract. The notes then issued contained the express provision that the holders thereof should have the right to convert them into any new issue of stock, prior to a given date. The plaintiff held notes of this first issue, and knew of the rights attached to them, and he also knew that the convertible notes of the issue we are now considering, contained no such right. Both parties understood that the contract by its written terms, gave the holder no such rights as were contained in the first issue of notes.

We do not think that we are empowered to write, into the contract, terms which neither party understood at the making thereof, were terms which were any part of the same.

This case is not like that of *Price v. Minot*, 107 Mass. 49, where the undertaking of the defendant was in relation to 800 shares of stock which he then held and which he promised to hold for the plaintiff, until the happening of a future and expected event; in the meantime no part thereof of the profits or dividends from the shares to belong to the plaintiff.

In the case at bar there was no appropriation of any specified stock, to be used in fulfilling the contract named in the notes. At the time the notes were issued the plaintiff was not a stockholder under the contract, nor was he such when the new stock was issued. The contract he had made obligated the Corporation to pay him a certain sum of money at the expiration of three years, with interest as appeared by the coupons attached to the notes, or to exchange his notes for the stock of the Company upon certain dates. During the time the notes

were running he was in no sense a stockholder, nor do we find upon the facts that he was an equitable stockholder. He had no vested right or title in any particular stock. His rights and interest as a stockholder of the Corporation were postponed at the time when he made his option and demanded his stock. Pending this time, the contract gave him the right to payment of the coupons attached to the notes, and nothing more. Whether he ever could acquire interest in the stock of the Company under his contract, was conditional, and depended upon the event of his option, and until that was exercised he had no claim to any stock of the Company. His contract did not attach to it the stock which the Company held when the notes were issued.

The convertible notes were independent of any particular, specified shares of stock, and the Company held the shares, free from any obligation expressed or implied in the contract. Each stood separate and alone, free from any rights or interests attaching the one to the other. The Corporation could legally treat this stock as it saw fit. It could hold, sell, hypothecate or lend it. Being subject to no trust, belonging absolutely to the Corporation, it could hold and dispose of the same at its pleasure. We do not find that this contract, contained in these convertible notes, gave the plaintiff any equitable interest in the stock of the Corporation, held by trustees for its benefit and disposal; and that holding said stock neither the trustees who held it for the Company, nor the Corporation, were clothed with any trust for the plaintiff in relation thereto.

Decree dismissing the bill affirmed.

Henry O. JACOBS

v.

Arthur E. DENISON.

The facts that the registry indorsed on the mortgage by the recording officer bore a date earlier than the mortgage itself, and that the mortgage notes seem to have been dated a year earlier than the mortgage, do not prevent its operating at once when delivered, and do not prevent its being notice that the mortgage created a present charge upon the property. The date is only material, if at all, in fixing the time for payment of the debt secured.

(Suffolk—Filed February 24, 1886.)

ON report of judgment for plaintiff. *Not affirmed.*

Both parties claimed title under one William J. Hall, formerly proprietor of the dining room at No. 83 Chauncy Street, Boston, in which the articles in controversy were used.

It appeared in evidence that in 1873, said Hall, desiring to enlarge and refurnish his business, applied to one Joy for money, and on Nov. 29, 1873, gave said Joy an agreement in writing, stipulating that, upon the completion of the contemplated repairs and improvements, he, said Hall, would give him a first mortgage upon all the personal property that should then be in his dining room, to secure Joy's advances

to the amount of \$6,000. Under this agreement, Joy advanced to Hall various sums of money, between Nov. 29, 1873, and July, 1874, aggregating \$7,750, for which Joy took fourteen notes of Hall, on all of which there were written in the margin the words: "Secured by assignment of lease of premises, No. 83 Chauncy Street, Boston, and by mortgage of personal property."

Early in May, 1874, the mortgage under which the defendant claims was made and delivered to Joy and left for record, May 16, 1874, with the records of mortgages of personal property in the City of Boston. In the mortgage the *testimonium* clause is as follows:

"In witness whereof, I, the said William J. Hall, hereunto set my hand and seal this 29th day of November, 1874."

In recording the same the record reads: "29th day of November, in the year 1873."

The alterations and refitting of the premises were completed Feb. 19, 1874, and the mortgage was given by Hall to Joy in pursuance of the written agreement of Nov. 29, 1873, and assigned by Joy to the defendant.

On the 19th of February, 1874, Hall gave to one Burnham a mortgage of the same property, to secure the payment of his note for \$1,000, and recorded the same Sep. 25, 1874. This was duly assigned to plaintiff by Burnham and duly foreclosed by the plaintiff, who had duly demanded the property of the defendant.

The court ruled that the mortgage of Hall to Joy was not a duly recorded mortgage, within the meaning of chapter 151 of the General Statutes of Massachusetts, and directed the jury to find for the plaintiff with nominal damages.

By agreement of the parties, the case is reported to the Supreme Judicial Court for its determination of the question of law herein involved.

If the ruling of the court was correct, judgment to be affirmed; otherwise, the case to stand for trial.

Messrs. Brooks, Jacob & Goodsell, for plaintiff.

Mr. Arthur E. Denison, pro se:

The certificate of the city clerk indorsed upon the instrument of assignment entered with records is conclusive. *Fuller v. Cunningham*, 105 Mass. 442 and cases cited; *Chapin v. Kingsbury*, 138 Mass. 194; *Ames v. Phelps*, 18 Pick. 314; *Adams v. Pratt*, 109 Mass. 59; *Burtis v. Bradford*, 122 Mass. 129; *Jones, Mort*, Pers. Prop. §§ 272, 273.

The mortgage to Joy, being spread upon the proper record as required, was sufficient notice to all of the fact of such a mortgage, and the plaintiff was by such record put upon his inquiry. *Denny v. Lincoln*, 13 Met. 200.

The fact that the date of the mortgage, as shown by the record, is entirely different from the actual date of it is immaterial to the rights of these parties, because the date of an instrument is not only not conclusive but is not such evidence as excludes parol evidence. *Battles v. Fobes*, 21 Pick. 240.

The real date of a deed is the time of its delivery. Delivery is the effectual execution of the bargain. *Harrison v. Phillips Academy*, 12 Mass. 456-463; *Dresel v. Jordan*, 104 Mass. 417; *Lee v. Mass. F. & M. Ins. Co.* 6 Mass. 219.

Where the intention of the parties can be discovered by the deed, the court will carry that intention into effect, if it can be done consistently with the rules of law. *Mass. Digest*, p. 1890, *title, Construction of Deeds; Chapin v. Kingsbury*, 138 Mass. 194.

Holmes, J., delivered the opinion of the court:

Both parties agree that the certificate of the city clerk upon the original mortgage from Hall to Joy, that it had been recorded, was conclusive and, could not be impeached by proof of a discrepancy between the copy in the registry and the original. *Ames v. Phelps*, 18 Pick. 314; *Fuller v. Cunningham*, 105 Mass. 442; *Adams v. Pratt*, 109 Mass. 59; *Chapin v. Kingsbury*, 138 Mass. 194, 196.

They also agree that it is to be considered as recorded at the time when left for the purpose in the clerk's office. *G. S. chap. 151, § 3, Pub. Stat. chap. 192, § 4.*

It may be doubtful whether more need be said to show that the ruling of the court below was wrong. But if the meaning was that the plaintiff was not bound to take notice of the mortgage, because the original instrument was dated November 29, 1874, seemingly by mistake for 1873, and this date was subsequent to the time of recording it and also to the execution and recording of the mortgage assigned to the plaintiff, we are of opinion that the ruling was none the less erroneous, the plaintiff being chargeable with notice that the mortgage recorded had been delivered. See, *Fowler v. Merrill*, 11 How. 875 [52 U. S. bk. 13, L. ed. 736]. It would be going rather far to say that, under these circumstances and notwithstanding the fact that the registry copy bore a date earlier than that of the mortgage held by him, and that the mortgage notes seem to have been dated 1873, the plaintiff was to be regarded as having read the original mortgage but not the notes; and as having had the right to assume and as having assumed that the date which it bore was the date intended by the parties. See, *Parke v. Neeley*, 90 Pa. St. 52.

But even if we give the plaintiff the benefit of these fictions, post-dating the mortgage did not prevent its operating at once when delivered, and the plaintiff therefore had notice that the mortgage had created a present charge upon the property, and that the date could only be material, if at all, as fixing the time for payment of the debt secured. See further, *Stonebreaker v. Kerr*, 40 Ind. 186; *Partridge v. Scazey*, 46 Me. 414.

Case to stand for trial.

Hugh McLAUGHLIN

v.

Sarah CECCONI.

1. That a wall has been built on a person's land for more than thirty years, and has, during that length of time, been maintained by his predecessor and himself, is sufficient to justify a finding that by possession alone he had a title to the land under the same.

2. To the extent to which the use of another's wall to support one's building has been practiced for thirty years. Such use may properly continue. But the right thus acquired by adverse occupation cannot be enlarged or added to except by some other title.
3. Where a deed recites the right of the grantee to erect and maintain a wall on an adjoining lot, such recitals cannot effect rights in a wall constructed under circumstances different from those therein provided for.
4. A person may be restrained in equity from interfering with or using a wall of another's house which has been maintained by the latter for thirty years.

(Suffolk—Filed February 26, 1886.)

IN equity for injunction. Granted.

This was a bill to restrain the defendant from raising and otherwise increasing the burden on a wall between the houses of the plaintiff and defendant, and from cutting away and tying in on the front wall of the plaintiff's house, which front wall covered the wall between said houses. The case is further fully stated by the court.

Mr. Owen A. Galvin, for plaintiff:

The burden is upon the defendant, on the evidence not only to show the use but that it was adverse. *O'Neil v. Blodgett*, 53 Vt. 218; *Sargent v. Ballard*, 9 Pick. 251-256; *Arnold v. Stevens*, 24 Pick. 106-108.

A secret use is not an adverse use. 2 Washb. Real Prop. 4th ed. 322, 323; *Morse v. Williams*, 62 Me. 445.

In *Charles River Bridge v. Warren Bridge*, 7 Pick. 449, the court says: "In prescription the proof is by the use, and the right presumed to be granted is co-extensive with the use." See also, *Williams v. James*, L. R. 2 C. P. 577; *Carrig v. Dee*, 14 Gray, 585; 1 Greenl. Ev. 25.

The prescription grows out of the use and intent, and not the claim or intent without the use, no matter how strongly expressed. The right is to be acquired and evidenced by use. Washb. Eas. 4th ed. 161; *Doe v. Butler*, 8 Wend. 149; *Arnold v. Stevens*, 24 Pick. 114.

In proving a prescription, the user of the right is the only evidence of the extent to which it has been acquired. *Williams v. James*, *supra*; Washb. Eas. 4th ed. 150. See also, 7 Pick. 449, cited *ante*.

Mr. A. A. Ranney, for defendant:

The common use of a wall separating adjoining lands belonging to different owners is *prima facie* evidence that the wall and the land on which it stands belong to the owners of those buildings in equal moieties as tenants in common. *Cubitt v. Porter*, 8 Barn. & C. 257.

The law presumes that what was done without opposition for a considerable time was done rightfully, and that those acts of enjoyment were lawful. There having been a joint use of the wall by both, each must have had the right originally, or have acquired the right in the course of time by legal means. *Phillips v. Boardman*, 4 Allen, 149.

Every separation wall between two buildings is presumed to be party wall, unless the contrary is shown. *Campbell v. Mesier*, 4 Johns. Ch. 334; *Schile v. Brokhahus*, 80 N. Y. 614.

Devens, J., delivered the opinion of the court:

This bill is brought to restrain the defendant from raising and increasing the burden on a wall between the houses of the plaintiff and defendant and from cutting away and tying in on the front wall of the plaintiff's house which front wall covers the wall between said houses.

The plaintiff's title is anterior to that of defendant and both claim under a common grantor, Josiah Brown who on March 5, 1842, conveyed to one Higgins, the plaintiff's grantor. The conveyance was a warranty deed, but contained an agreement that the grantee should pay a certain mortgage to one Chadwick. It did not reserve to the defendant nor her predecessors in title any rights over the plaintiff's land. The plaintiff's grantor then built a house and the wall in controversy. It is found that his wall was built entirely on his own land by plaintiff's grantor and this finding appears to us justified by the evidence. The boundary on the line of the two estates in the deed to Higgins was southeasterly of the passage way which was for the use of both the estates of the plaintiff and defendant, and the wall in controversy was entirely northwest of the way. The subsequent deed of Brown to Harris, May 28, 1848, the defendant's predecessor does indeed run his side line of the lot conveyed to him through the center of the wall; but the evidence shows that there was no building on the lot at the time of the conveyance, and when no right had been reserved by the common grantor, in the plaintiff's land or building, none could have been conveyed thereafter by him. If there was any doubt as to whether this wall was on plaintiff's land the fact that it had been built more than thirty years ago and had since been maintained by his predecessors and himself, would be sufficient to justify a finding that by possession alone he had a title to the land under the same.

Soon after the building of the plaintiff's house, that of defendant was built, and the beams of the house were let into this wall as well as the granite cap of the common passage, over which the defendant house extended, which was also inserted in plaintiff's front wall. The capstone was visible from the street, and from the situation of the passage way it was obvious that the defendant's house was more or less supported by the wall of plaintiff. Upon these facts it is not possible for the plaintiff to maintain his contention that an adverse use has not been established to the extent to which it has been found that the use existed. Admitting that it is for the party claiming an easement by user to show that such use not merely existed, but that it was adverse and not permissive only, and also that it was not secret but open, these facts were sufficiently shown. It was fairly to be inferred that when defendant rested the timbers of her building in the plaintiff's wall that she did so in the assertion of a right, no evidence of a permission from the plaintiff to do so appearing, and even if by reason of the covering of the building the plaintiff could not without examination determine the exact points where the timbers rested which supported the different stories of the defendant's house, when the location of the capstone of the passage way appeared and when it

was obvious that the whole building of defendant was more or less supported by plaintiff's wall, it cannot be said that such use was secret and not known to nor apprehended by the plaintiff.

To the extent to which this use has been practiced, the defendant may properly continue it as it has existed for thirty years; but she cannot enlarge nor add to the rights acquired by adverse occupation except by some other title.

The defendant seeks to establish her right to a larger use than this and to burden the wall by the supports required for a more weighty extension, which will to an appreciable extent weaken the wall, by cutting therein for the purpose and inserting and tying thereto additional timbers. Before making the conveyances under which the plaintiff and defendant respectively claim, their common grantor, Brown, who had purchased a large parcel of land from one Chadwick had mortgaged both lots by separate deeds to him. The mortgage of lot number three, which is the lot held by defendant, contained the following language: "Also the right to erect, maintain and use for building purposes a wall not more than one foot in thickness on the southeasterly side of lot number four, on said plan, and next to the land hereby conveyed, such wall to be built and maintained at the equal cost and expense of the owners of lots three and four on said plan."

The mortgage of lot Number four contained the provision: "The above granted lot is subject to the right of the owner of the lot number three on said plan to erect and maintain a wall on the southeasterly side of said lot number four, said wall to be built and maintained for building purposes at the equal expense of the owners of the two lots." The payment of these mortgages was charged respectively on the two lots. The wall of plaintiff having been built, the mortgage on lot number four, to Chadwick, was paid and discharged by plaintiff's grantor. The defendant's grantor built after the plaintiff's house and wall were built and after the mortgage on lot number three was paid, canceled and discharged. But although these mortgages were paid and discharged and do not affect the record title it was held at the trial by the presiding Judge who reports the case that: "On the question of the extent of the rights which defendant has acquired by adverse use, if the mortgages can be considered in connection with the rest of the evidence as bearing on the probable practical understanding with which the plaintiff's grantor built and the defendant and her predecessors in title used the wall, I find that excepting as to the front wall of the plaintiff's building as now erected the defendant and her predecessors in title have claimed and by lapse of time have gained rights to the extent contemplated in said mortgage deeds, provided that the use of the wall for the support of the beams of each story and for said granite cap (accompanied by a claim to the more extensive rights contemplated by said mortgage deed) could be sufficient to gain them." The evidence does not, however, show that any claim was made by defendant's grantor to the more extensive rights contemplated by the mortgage deed or

that such claim was ever made known to plaintiff's grantor. Such claim cannot be inferred from the use of the wall as made, although that use might be sufficient to establish a right to the extent to which it actually existed. At the time the defendant's grantor thus commenced to use the wall the mortgage on her land by which the common grantor had established for the mortgagee a right in favor of number three, over lot number four, had been paid and discharged, and the fact of the former existence of such a mortgage could not tend to show that the acts done were to be treated as an assertion of a right beyond the acts themselves and to the more extensive privileges or easements contemplated by the mortgage deed, which had been canceled. This view is much strengthened by observing that the wall actually built is not a wall built as the mortgages contemplated and, therefore, that the recitals therein cannot properly affect rights in a wall constructed under circumstances different from those therein provided for. According to the mortgages the mortgagee of the lot number three, the defendant's, was entitled to erect and maintain a wall on lot number four, the plaintiff's, next to his own land which was to be erected and maintained at the expense of the owners of the two lots. The mortgagee of lot four took, subject to the right of the owner of lot three to erect and maintain such a wall for building purposes on lot number four at the expense of the owners of the two lots. The wall actually built was not erected by the mortgagee or the owner of lot number three, but the owner of number four constructed it entirely on his own land, solely at his own expense and apparently solely for his own use. In such a wall not built or maintained as the mortgage provides, the acts of the defendant cannot be treated as establishing rights co-extensive with those contemplated by the mortgages. We are, therefore, of opinion that the defendant should be restrained from doing any acts which will further weaken or burden the wall erected by the plaintiff.

In any aspect of the case the defendant should be restrained from interfering with the front wall of the plaintiff's house which as now constructed covers the side wall in controversy to the depth of one course of brick as plaintiff has thus maintained it for thirty years, but the view we have taken disposes of the claim of the defendant to interfere with this front wall, also upon the grounds we have heretofore stated.

Decree accordingly.

William J. HOLDEN *et al.*, Receivers,
v.
Lorenzo PHELPS.

A bank is bound, in favor of one who acted in reliance thereon, by the authority appearing on its records to one of its officers to assign mortgages held by the bank, although such record of authority was, in fact, a false entry.

(Middlesex—Filed April 1, 1886.)

ON report, in equity. *Decree for defendant.*
Suit by the Receivers of the Reading Savings Bank to determine the ownership of certain
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mortgages formerly belonging to the bank, and found in the possession of the defendant on the failure of the bank.

The following facts appear from the report of the Justice of the Supreme Judicial Court who heard the case in the first instance:

The Reading Savings Bank was incorporated by the Statute of 1869, chap. 398; Nathan P. Pratt was the secretary and treasurer of the corporation, in whom general confidence was reposed up to the time of the failure of the bank in 1879. In the early part of 1878, Joseph P. Thompson, of Lowell, had a conversation with said Nathan P. Pratt in relation to mortgages of which Thompson said he understood the bank was disposing; the defendant Phelps was spoken of as one who wanted to buy some mortgages, and Pratt asked Thompson to bring Phelps to Reading, where the banking house was. Soon after Thompson and Phelps went to Reading and there met Pratt, who told him of the Case and Gray mortgages, saying that it was necessary for the bank to call in some of its mortgages; that payment had been demanded, and that the mortgagors would prefer to have some one take the mortgages and let them lie. Pratt, Thompson and Phelps then went together to the mortgaged premises of Case and Gray and examined the property; Phelps agreed to buy the mortgages if the titles thereto were right. Pratt, in answer to Phelps's question as to the assessed values of the property, answered that the assessors' books and his authority to assign the mortgages were at the bank, and that Phelps could go there and examine them for himself; Phelps and Thompson being unable to go to the bank that day, Phelps told Pratt that he should leave it all to Thompson, and if he said everything was all right he would take the mortgages. Within two days thereafter Thompson went to the bank at Reading and there met Pratt, who showed to him the assessors' books, and also the book of records of the bank; Thompson read the vote, which was recorded therein, as follows:

"Upon motion of C. P. Judd, voted that the treasurer be authorized to discharge, assign and release all mortgages belonging to the bank. It was then voted to dissolve the meeting;" Thompson testified that he made a copy of this vote, in pencil, upon a piece of paper, and afterwards copied the same in his diary. This was produced and the copy read as follows: "At a meeting of the Trustees of the Reading Savings Bank held May 8, 1878, upon motion of C. P. Judd, one of said trustees, voted that the treasurer be authorized to assign, discharge and release all mortgages belonging to the bank. A true copy of record, Nathan P. Pratt, Secretary." Upon returning home, Thompson reported to Phelps that he had been to the bank and that the records were all right, and showed Phelps what purported to be a copy in pencil of the records of the bank and also a copy of the assessors' valuation of the property.

It was found as a fact that Phelps read in the paper shown to him by Thompson the clause relating to the power given to the treasurer of the bank to assign mortgages, and relying upon this, and upon the statement made by Thompson that everything was all right, Phelps agreed to buy the mortgages, and afterwards took the assignments thereof and paid Nathan P. Pratt, in full therefor, the sum of \$3,054.

It was also found that Thompson and Phelps acted in good faith, and that neither had suspicion of any attempt on the part of Pratt to defraud the bank.

Prior to the assignment of the Case and Gray mortgages to the defendant Phelps, they were due and unpaid, and were held by the bank as a part of its assets. The trustees had passed a vote empowering the treasurer to discharge and release all mortgages belonging to the bank, and it was so recorded upon the book of records, but the word "assign," at the time Thompson examined the record had been interpolated therein without the knowledge of either of the trustees, the records of that meeting being attested by Pratt as secretary. The interpolation was not in the handwriting of Pratt and was skillfully done. No part of the money received by Pratt from the defendant Phelps ever came to the use of the bank, but forged duplicates of the notes and mortgages and of the insurance policies upon the mortgaged property had been made and placed among the mortgage securities of the bank, all of which forged notes, mortgages and policies were so well executed that the trustees were deceived thereby. No special authority was given to the treasurer to assign these notes and mortgages; no vote was passed by the trustees authorizing the treasurer to make assignments of mortgages.

At the trial it appeared that since the failure of the bank, Sydney P. Pratt had been out of the Commonwealth.

The interest due upon these mortgage notes was paid by the mortgagors to Phelps, and sometimes sent to Thompson by Nathan P. Pratt up to the time of the bank failure.

Mr. Solon Bancroft, for complainants:

It has been repeatedly held, in cases which have been cited by this court, that if the party transacting business with an officer of a bank who is dealing fraudulently relies upon such officer in any way which can be construed as making such officer his own agent, he and not the bank must bear the loss resulting from the fraud. *Moores v. Citizens Nat. Bank*, 111 U. S. 156 (bk. 28, L. ed. 385); *Wright's App.* 99 Pa. St. 425.

Messrs. J. G. Abbott and G. H. Stevens, for defendant:

C. Allen, J., delivered the opinion of the court:

It appears that Thompson made a personal examination of the records of the bank, and took therefrom what purported to be a copy of the records of the vote, and what in fact was a correct memorandum of the substance of it; and that he told the defendant that he had been to the bank and that the records were all right, and showed to the defendant his memorandum. The defendant relied on the assurance thus given and on his belief that the vote as recorded, was sufficient to authorize the treasurer to assign mortgages; and in point of fact, the vote as recorded, was sufficient for that purpose. The defendant thus relied on the record as it actually existed, a substantially true representation thereof having been made to him. The bank is, therefore, bound by the authority appearing on its records. The case falls within the principle of the decision in *Commonwealth*

v. Reading Sav. Bank, 137 Mass. 431. See also, *Holden v. Hoyt*, 184 Mass. 181.

Decree for the defendant.

Albert A. COBB *et al.*,

v.

James TIRRELL *et al.*

Although a suit is maintainable on a lost note, by filing a bond to the satisfaction of the court indemnifying the defendant against any loss or damage, if the note should afterwards be found in the possession of a *bona fide* holder, yet where it is not lost, but is actually in the possession of a third person disputing its ownership, plaintiff should first establish the fact that he is the owner of it, in a suit with the party in actual possession, before bringing his action against the maker.

(Suffolk—Decided April 2, 1886.)

ON report of verdict for defendants. *Judgment on verdict.*

The case and facts appear as follows from the opinion rendered on a former hearing of this case, reported, 137 Mass. 148:

"This action is brought by writ dated December 22, 1879, upon a promissory note for \$3,167.54, dated November 27, 1878, made by the defendants, payable to their own order and indorsed by them to the plaintiffs. The plaintiffs gave the defendants credit, in the declaration, for three promissory notes made by them payable to their own order and indorsed by them and by Fogg Brothers & Co., each dated May 1, 1879, one on six months for \$254.18, one on nine months for \$254.19, and one on twelve months for \$254.19, which the plaintiffs allege they received of the defendants in part payment of the note for \$2,167.54.

The defendants in their answer allege that the note has been settled and paid and the defendants released from any liability thereon, and deny that the plaintiffs have any title to the note or any interest in it or its proceeds.

It appeared at the trial, that, under date of May 1, 1879, the defendants entered into an indenture with their creditors, to which the plaintiffs were parties, by which they agreed to pay their creditors 35 per cent of their respective claims, made up as cash on May 1, 1879, by notes of the defendants, satisfactorily indorsed, each for one third of the 35 per cent, payable in six, nine and twelve months from May 1, 1879, without interest; and the creditors agreed to accept this composition in full satisfaction and discharge of their respective claims; and that the defendants should have the right, without interference of the creditors, to dispose of all their assets, at their own pleasure, towards the satisfaction of the 35 per cent; and that they would execute any instruments necessary to reinvest in the defendants any property theretofore conveyed by them for the benefit of their creditors; all creditors to become parties to the indenture.

On September 23, 1879, one Kyle, an agent or clerk of the defendants, and who had originally brought the composition agreement to the plaintiffs and procured their signature to it,

came to the plaintiffs and informed them that he had come prepared to carry out the composition agreement; that all the creditors had signed it; and that no one had received more than the 35 per cent. The plaintiffs gave up to Kyle their note and received from him the three notes for which they have given the defendants credit. At the same time, at Kyle's request, he saying that it was a necessary formality in order to carry out the arrangement, the plaintiffs executed an agreement, dated August 9, 1879, by which the creditors of the defendants (reciting that they were creditors for whose benefit the defendants had made an assignment of their property, dated March 26, 1879, to James R. Plumb), in consideration of the payment of 35 per cent of their respective claims by John S. Fogg, sold and assigned to him their claims against the defendants. The plaintiffs testified that they did not suppose that they were selling their note to Fogg, but supposed that they were transferring it to him as agent for the defendants, and that he held their assets.

John S. Fogg was father-in-law of one of the defendants, and was the principal partner in the firm of Fogg Brothers & Co., and the indorsements of the composition notes were made in the firm name, as that was better known in the market; but all payments made by that firm were made on account of John S. Fogg and charged to him.

On March 26, 1879, the defendants had assigned all their property, real and personal, which was mostly in New York, although they resided in this State, to James R. Plumb, under the laws of New York, in trust for the benefit of all their creditors. By an indenture between the defendants Fogg and Plumb, dated August 9, 1879, but not executed until some time in September, after the claims against the defendants had been taken up, reciting that the creditors of the defendants had assigned all their claims to Fogg by an assignment dated August 9, 1879, so that Fogg was their only creditor, Plumb conveyed to Fogg all the property of every description he had received from the defendants; and the defendants and Fogg released and discharged him from all claims and demands.

By an agreement, dated August 9, 1879, between Fogg and the defendants, Fogg recites that he has agreed to settle up the debts and liabilities of the defendants under a composition with their creditors, and has received from Plumb and the defendants all their assets, and has received an assignment of all claims against them. He agrees that all the partnership personal property shall be sold by the defendants, as his agents, for his benefit; and, after he has been fully repaid for all sums paid out by him and for his services, he will transfer any surplus of the assets that may remain, to such person as the defendants may in writing direct, and will release them from all claims he may hold as assignee of the creditors.

It appeared that some of the creditors refused to sign the composition agreement of May 1, 1879, unless more than 35 per cent of their claims was paid to them; and that, in some instances, a larger percentage was paid by the defendants and Fogg. The plaintiffs had no knowledge of any of the arrangements made

between Fogg, Plumb and the defendants, but they had been informed, before they signed the composition agreement, of the assignment to Plumb.

When the plaintiffs learned that some of the creditors had received more than the 35 per cent of their claims, they brought this suit.

Messrs. Morse & Stone, for plaintiffs:

When this case was formerly before the court it was held that the plaintiffs might recover on the note in suit upon proof of fraud by the defendants in relation to the composition agreement. *Cobb v. Tirrell*, 137 Mass. 143.

Fogg was bound to produce the note, and the court should have ordered him to do so; this is the general obligation of a witness summoned under a *subpoena duces tecum*.

It is claimed, however, that *Bull v. Loveland*, 10 Pick. 9, sustains the ruling of the court.

In that case the witness had title to the note by virtue of a contract with the plaintiff.

The general rule is that secondary evidence may be offered, to prove the substance of a document which it is out of the power of the party to produce. 1 Greenl. Ev. § 558; 1 Whart. Ev. §§ 130, 150.

This right has been held to apply to papers in the hands of an attorney who could not be compelled to deliver them up. *Lynde v. Judd*, 3 Day, 499; *Newton v. Chaplin*, 10 C. B. 356. See, *Doe v. Clifford*, 2 Car. & Kir. 448; *Jesus College v. Gibbs*, 1 Younge & Coll. Exch. 156.

At common law a peculiarly stringent rule was adopted as to negotiable paper. In England it was held, prior to the statute provisions, that no action at law could be maintained on a lost negotiable instrument; but in this country the rule has not been so harshly enforced. 1 Whart. Ev. § 149.

In this State it has been held that a party may maintain a suit on a note which he does not produce, as upon a lost note, on satisfying the court by affidavit that it was obtained from him fraudulently by the maker. *Almy v. Reed*, 10 Cush. 421.

In *Fales v. Russell*, 16 Pick. 315, it was held that a suit might be maintained on a stolen note as a lost note.

In *Grimes v. Kimball*, 3 Allen, 518, an action to foreclose a mortgage was maintained where it appeared that the mortgage and note had been obtained from the plaintiff by fraud.

In *Tuttle v. Standish*, 4 Allen, 481, it was held that the owner of a lost note could not maintain an action against the indorser; but that was because the latter could not be fully protected by a bond of indemnity.

McGregory v. McGregor, 107 Mass. 543, affirms the doctrine that an action may be maintained against the makers of a lost promissory note.

Messrs. Avery & Hobbs, for defendants.

Devens, J., delivered the opinion of the court:

When this case was last before the court it was held that the plaintiffs might recover upon the note in suit, on proof of fraud by defendants, in relation to the composition agreement; but this decision assumed that the plaintiffs were of right entitled to the note in controversy as their property and it was distinctly said that only the question raised between the plaintiffs and defendants was decided and not any ques-

tion that might arise between the plaintiffs and John S. Fogg. *Cobb v. Tirrell*, 187 Mass. 143.

At the trial we are now considering, Fogg appeared, produced the note upon which the plaintiffs have brought suit, handed it to plaintiffs' counsel upon the understanding that it should be returned to him.

The plaintiffs then claimed a right to put the note in evidence as that declared upon by them, and as the foundation of their suit, and requested the court to order the witness to produce the note for these purposes aforesaid; the witness contending and claiming that it was his own property. This was, in effect, to ask the court to decide in a suit to which Fogg was not a party, that a valuable piece of property belonged to the plaintiffs and not to the witness in whose possession it was.

Admitting that the evidence in the case, including that from Fogg, tended to show that he had been actively engaged in a transaction with the defendants by which they had induced the plaintiffs to become parties to a composition deed, under circumstances which would authorize them, if so disposed, to avoid the same, the rights of one actually in possession of property and claiming to be lawfully so, cannot be dealt with in this summary manner. He cannot be deprived of his possession without due process of law. A proceeding to which he is not a party, where he cannot call witnesses and where he cannot have a trial of his asserted rights, by jury or other regular adjudication, does not properly protect them.

The case of *Bull v. Loveland*, 10 Pick. 9, goes far to sustain the court in declining to order Fogg to produce the note for the purposes desired by the plaintiffs. In that case it is true that the plaintiffs had actually attached the property of defendants which by the assignment had been transferred to the holder of the note; and requiring of him that he should surrender it, was to require that he should fix a lien by attachment on the funds which had been placed in his hands for the benefit of creditors and upon which he had made advances.

But in the case at bar it would be most unjust to the holder of the note if, in advance of a decision between himself and the plaintiffs, he should be compelled to surrender the note that the plaintiffs might make it the foundation of an action, recover upon it and file it in their suit, thus rendering it unavailable for him as the foundation of an action for the whole or any part which might be due thereon to him, or as a voucher in his dealings with the defendants and enabling the plaintiffs to levy the execution recovered upon the note upon the property assigned to him.

The plaintiffs further contend that the actual production of the note was not essential to their case; that they should have been allowed to sue and recover upon it as a lost note. It has long been held in Massachusetts that a party, on proving that a note was lost or destroyed, might maintain an action thereon and recover judgment on filing a bond to the satisfaction of the court, indemnifying the defendants against any loss or damage if the note should afterwards be found in the possession of a *bona fide* holder.

The same principle would be applied when it was shown that a note was stolen. *Jones v. Fales*, 5 Mass. 101; *Fales v. Russell*, 16 Pick.

315; *Grimes v. Kimball*, 3 Allen, 518; *McGregory v. McGregory*, 107 Mass. 543.

In England prior to statute provisions it was held that no action at law could be maintained on a lost negotiable instrument. *Hansard v. Robinson*, 7 Barn. & Cress. 90; Common Law Procedure Act, 17 and 18 Victoria, chap. 125, § 87.

But the doctrine of the case in regard to lost notes has no application where the ownership of the note is in dispute and the party in actual possession of it is known to the plaintiff.

The defendant, even if he is bound to pay the note, is bound to pay it only once and to respond only once to suit thereon. When the note is lost the case as it is presented to the court is one where the plaintiff shows himself clearly entitled to the note and the debt secured thereby, although by accident or misfortune; and there is no one who contests his claim thereto.

But when the note is shown to be in existence and the plaintiff's title thereto is disputed, the defendants should not be called to respond to him merely because he is willing to give a bond of indemnity. He should first obtain it or at least establish the fact that he is the owner of it in a suit with him who contests his title.

That there may not be a failure of justice where it is established as between the maker and himself that he owns the note and it is lost, it is right that the maker should be contented with the bond of indemnity. It is not a perfect security, as the maker may yet be subjected to painful litigation where witnesses are dead and evidence has disappeared, while in the meantime the principal and sureties on the bond may have become insolvent; but it is the only security which the circumstances permit.

As there can be no absolute security for the maker in such a bond and as subsequent litigation may put him to inconvenience and expense, he should not be compelled to accept when it is possible otherwise fully to protect him. If the negotiable instrument has passed out of their control and into that of another, the plaintiffs should not in the case at bar be allowed to maintain an action upon it or the debt secured thereby, until in some direct controversy with the possessor they have negotiated such person's right to it. *Van Alstyne v. Nat. Com. Bk.* 4 Abb. App. Cas. 449; *Crandall v. Schreppel*, 1 Hun, 557; *Rohrer v. Turrill*, 4 Minn. 407; *McKinney v. Hamilton*, 85 Mich. 499.

It was therefore correctly ruled that on the evidence in the case the plaintiffs were not entitled to recover.

Judgment on the verdict.

John H. REED *et al.*,
v.
BOSTON MACHINE CO.

Arthur Cummings v. Same.

Alice T. Mandell v. Same.

Edward D. Mandell v. Same.

John G. Butler v. Same.

William C. Cotton v. Same.

John M. Fiske v. Same.

Helen S. Hunt v. Same.

Nancy T. Kehew v. Same.

Where "special stock" issued by a corporation is invalid and the time has passed in which it might be made good or the holders of certificates therefor be made shareholders by estoppel, the holders are entitled to recover, on the insolvency of the corporation, the amounts paid for the special stock, without interest, and less dividends received, without having returned their certificates or dividends.

(Suffolk—Decided April 1, 1886.)

ON report from the Superior Court. *Judgment for plaintiff.*

These are appeals by the assignees in insolvency of the Boston Machine Co., a manufacturing corporation, established under the general laws of Massachusetts, from decrees of the court of insolvency for said county, allowing the claims of the various plaintiffs.

The claims were all for money paid by the several claimants for special stock of said Company, which was declared to be invalid in the case of the *Am. Tube Works v. Boston Machine Co.* reported 189 Mass. 5.

Said certificates were in the following form:
No. _____ Shares.

Boston Machine Company.
200 shares. Par value, \$500.
Special stock, \$100,000.

This is to certify that _____ is proprietor of _____ shares in the special stock of the Boston Machine Company, subject to the by-laws, the same being transferable by assignment in the books of the Corporation upon a surrender of this certificate.

Said special stock is redeemable at par after the first day of July, 1885, and is entitled to a fixed half yearly dividend of 8½ per cent.

In witness whereof, the President and Treasurer have caused the seal of said company to be affixed, and have attested the same by their signatures.

Boston, _____ 188—.

Treasurer. _____ President.

Upon the trial it appeared that there was no

offer, by any of the plaintiffs, to rescind or return the certificates of special stock or the dividends received thereon, before the filing of the petition in insolvency by the Company, which took place May 12, 1883, or their offer to prove their claims in insolvency, and the only objection made to the allowance of the claims was for this reason.

The facts as to the payments by the plaintiffs in the first suit, the issue of the certificates, the dividends received, and the amounts of the claims offered to be proved and allowed, are as follows: John H. Reed and others paid in \$10,000 for twenty shares of the stock, January 18, 1881, and received a certificate for twenty shares. They received dividends of \$350 each July 1, 1881, January 1, 1882, July 1, 1882, and January 1, 1883. The claim presented and allowed was for \$10,000 and interest thereon from January 18, 1881, to May 12, 1883, less the dividends and interest thereon from the day of receipt to May 12, 1883, the balance amounting to \$9,934.51.

The facts in the other suits were similar.

When the plaintiffs took their certificates of stock and received the dividends, both the Corporation and they supposed the stock was valid.

In each case the certificates of special stock were attached to the proof of claim with an offer to return the same, and they are still on file in the court of insolvency. All the proofs were allowed by the insolvent court for the amounts claimed, and the assignees in insolvency of said Company duly appealed and entered their appeals in the Superior Court.

On the foregoing facts, against the objection and subject to the exception of the defendants the Justice of the Superior Court who heard the suits found for the several plaintiffs as above stated, to which the defendant excepted, and at the request of the parties he reported the cases to the supreme judicial court for the determination of the questions of law involved.

Mr. Geo. Wm. Easterbrook, for plaintiffs, Cummings, Mandell, Fiske and Kehew.

All the plaintiffs ever received from the defendants was certificates of special stock, and money paid as dividends thereon. They contend on the authority of *Am. Tube Works v. Boston Machine Co.* 189 Mass. 5 that any offer to return the money was unnecessary; and further contend that, since the stock was never created and the certificate was a false statement, made without authority from the Boston Machine Co., the certificates were mere scraps of paper, neither possessing nor representing any value whatever, like a counterfeit note or a forged bond, and any offer to return them was unnecessary. *Brewster v. Burnett*, 125 Mass. 68; *Kent v. Bornstein*, 12 Allen, 342.

Mr. Chas. T. Gallagher, for plaintiff, Cotton.

The certificate issued by the defendant to the plaintiff as special stock was illegally issued and void. It was practically a worthless piece of paper of no more value than a forged government bond, or a counterfeit note, the offer to return which has been held to be unnecessary in this Commonwealth to maintain an action for money had and received. The property being entirely worthless to both parties, "an offer to return would be an idle ceremony, which the law never requires." *Kent v. Born-*

stein, 12 Allen, 842. The same doctrine is laid down in *Brewster v. Burnett*, 125 Mass. 68, and *Montgomery v. Pickering*, 116 Mass. 281.

Mr. Augustus Russ, for plaintiffs, Butler and Hunt.

Mr. J. H. Benton, Jr., for defendant:

As to the claims by the persons who received dividends; the question is whether persons who received certificates which both they and the Corporation understood to be valid at the time the certificates were received, and when the dividends on the stock were afterwards paid, could hold their certificates and dividends until after the Corporation was adjudged insolvent and its property assigned for the benefit of its creditors, and then, without rescission of the contract under which the certificates and dividends were received, prove claims against the

estate of the Corporation for the balance of the sum they paid for the stock after deducting the dividends they had received. In short, whether any rescission was necessary before such persons had any claim which they were entitled to prove against the estate of the Corporation in insolvency. This case, it is submitted, is decided in the negative by the case of *Allen v. Herrick*, 15 Gray, 274, 283, which is cited and approved in the case of the *Am. Tube Works v. Boston Machine Co.* 139 Mass. 5.

C. Allen, J., delivered the opinion of the court:

These cases are virtually covered by the decision in *Am. Tube Works v. Boston Machine Co.* 139 Mass. 5*.

In that case, to be sure the plaintiff made an

* The opinion in *American Tube Works v. Boston Machine Co.* is as follows:

C. Allen, J.: The issue of special stock was invalid. This is a peculiar kind of stock, now distinctly provided for by statute, but unknown to the general laws of the Commonwealth until 1855. Its characteristics are, that it is limited in amount to two fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time, to be expressed in the certificates; the corporation is bound to pay a fixed half yearly sum or dividend upon it, as a debt; the holders of it are in no event liable for the debts of the corporation beyond their stock; and the issue of special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed. *Stats.* 1855, chap. 290; 1870, chap. 224, §§ 25, 39, cl. 4; *Pub. Stats.* chap. 106, §§ 42, 61, cl. 3; *Williams v. Parker*, 138 Mass. 204, 207.

Preferred stock, as usually understood, is something quite different from this. Special statutes have from time to time authorized particular corporations to issue preferred stock, with various special provisions; as, for example, *Stats.* 1853, chap. 1; 1855, chap. 143; 1877, chap. 170; 1878, chap. 138; 1882, chap. 177.

But authority to issue preferred stock is not conferred in express terms by any general statutes. Corporations have sometimes, no doubt, at the outset of their organization, assumed the authority to divide their capital stock into two classes, preferred and common; and when each stockholder subscribes for and takes his shares of common stock, with full knowledge and consent, there is perhaps no legal objection to this course. The question is a different one, whether a corporation, with an existing capital stock all subscribed for and taken, can increase its capital by the issue of further shares which shall be preferred; and, if so, under what circumstances this may be done, and whether by a mere majority or only by a unanimous vote of the existing stockholders.

This question need not be considered here, though it has arisen elsewhere. *Kent v. Quicksilver Mining Co.* 78 N. Y. 159.

It is sufficient for the present purpose to call attention to the marked distinction between preferred stock, as usually understood, and special stock, as authorized by legislation in this Commonwealth. Special stock could only be issued by the Boston Machine Co. by a vote of three fourths of its general stockholders, at a meeting duly called for the purpose. *Stat.* 1870, chap. 224, § 25. The meeting of December 30, 1880, at which the original vote to issue

special stock was passed, was called to consider whether the Corporation would issue \$100,000 of preferred stock. This call did not authorize a vote to issue special stock, and the vote was accordingly invalid. See, *People's Mut. Ins. Co. v. Westcott*, 14 Gray, 440; *Wiggin v. Lowell Freewill Bap. Ch.* 8 Met. 801, 810; *Re Bridport Old. B. Co. L. R. 2 Ch. App. Cas.* 191.

A new meeting was called in due form for June 8, 1882, at an adjournment of which a vote was passed for the issue of special stock; but the difficulty with this meeting is that it does not appear by the record that three fourths of the general stockholders voted for such issue, although more than that number were present at the meeting. It is essential to the validity of the vote that this fact should appear of record. It is contended by the defendant, that the presumption is that all the shareholders who were present voted for the issue of the special stock, since nothing appears to the contrary. But in several cases quite similar to this, so far as the principle is concerned, it has been held otherwise. *Morrison v. Lawrence*, 98 Mass. 219; *Andrews v. Boylston*, 110 Mass. 214; *Judd v. Thompson*, 125 Mass. 553.

It was required by statute that this corporation should have a clerk, who should be sworn and who should record all votes in a book to be kept for that purpose. *Stat.* 1870, chap. 224, §§ 15, 18; *Pub. Stats.* chap. 106, §§ 23, 26.

No authority has been cited to us, in this State or elsewhere, supporting the view of the defendant.

The strongest case that we have seen, looking in that direction, *Commonwealth v. Woelper*, 3 Serg. & R. 29, is quite distinguishable, both on the ground assigned by *Chief Justice Tilghman*, that inasmuch as no meeting for the transaction of ordinary business could be held without the presence of two thirds of the ministers, elders and church wardens, who constituted the corporation, and inasmuch as the custom had been not to mention how many attended, the record that, after due invitation, "The ministers, elders and church wardens met," was sufficient to show that two thirds of them met; and especially on the ground assigned by *Gibson, J.*, who presided at the trial, that it was not open to the defendant, under the particular circumstances of that case, to take the objection. In the present case, the record of the vote is entirely consistent with the construction that the vote was passed merely by a majority of those who attended the meeting. The vote at the third meeting, at which the subject of special stock was acted on, is open to the same objection as that at the second meeting.

election to repudiate its stock, and offered to return it before the adjudication in insolvency, under the circumstances then existing; this was a fact of some importance because, as stated in the opinion in that case, "this special stock might have been made good, so that the plaintiff would be content or be bound to keep it." But in the present case the time for doing this had passed. The stock was invalid and nothing could be done by the corporation to make it valid. It was no longer possible to make the plaintiffs shareholders by estoppel. Under these circumstances, there was no occasion for the plaintiffs to return their certificates of shares which were valueless, or the dividends which

they had received, which were less than the sums they were entitled to receive, the stock being and remaining invalid. See, the former case and also, *Brewster v. Burnett*, 125 Mass. 68; *Kent v. Bornstein*, 12 Allen, 342.

In *Allen v. Herrick*, 15 Gray, 284, the plaintiff had received and held notes indorsed by another party, for the dividends.

The sums for which the plaintiffs are respectively entitled to prove their claims, are the amounts paid by them for the special stock, without interest, which is not insisted on, and which would not run until after a demand, deducting the dividends received.

Judgment to be entered accordingly.

There was no other action at any of the meetings of the Corporation which could have the effect to make the special stock valid, by way of ratification. There is, indeed, no reference to special stock in the reports of the treasurer, but only to "capital stock" and "preferred stock." It is difficult to see how any action at a corporate meeting can have a greater effect, by way of ratification, than a direct vote passed at such meeting would have; and a direct vote at any such other meeting than those herein before referred to would have been invalid, for want of due notice that the subject would be acted on as well as for want of a record showing a vote of three fourths of the stockholders.

The issue of special stock being invalid and being open to repudiation by the Corporation itself or by dissenting stockholders, the plaintiff had an election to rescind the contract under which the special stock was taken and to be restored to its original position. *Allen v. Herrick*, 15 Gray, 274, 284. It was not bound by any estoppel. In all the cases which have come under our observation where one has been held to be deemed a stockholder by estoppel, there has been a legal creation of the capital stock. Such was the case in *Turnbull v. Payson*, 95 U. S. 418 [bk. 24, L. ed. 437]. But where the issue of the shares is illegal, where no sufficient steps have been taken to authorize the creation of the capital stock, where a person has acted and been treated as a stockholder in respect of shares which the company had no power to issue, and where the shares cannot legally exist, the person taking them cannot, by estoppel or otherwise, become a member in respect to them. *Lindl. Part. 134*. Moreover, in the case be-

fore us, the defendant Corporation has no equity to insist that the plaintiff Corporation should be treated as a stockholder. It failed to issue the number of shares contemplated by its vote. It has been in no respect misled by any act of the plaintiff. It has not changed its position for the worse. It has had the plaintiff's money, and has simply paid what is equivalent to interest upon it. No rights of third parties have intervened. The consideration upon which the plaintiff parted with its money has failed. The defendant corporation issued special stock, which was at the time supposed by both parties to be valid, but which was invalid. Under such circumstances, an action lies to recover back the money. *Dill v. Wareham*, 7 Met. 438; *Earle v. Bickford*, 6 Allen, 549.

The election by the plaintiff to rescind the contract was exercised within a reasonable time. Formal notice was given on April 23, 1883, or about twenty-seven months after the first issue of special stock to the plaintiff. The special stock might have been made good, so that the plaintiff would be content or be bound to keep it. The defendant twice endeavored, without success, to effect this result. It has suffered nothing from the delay. The notice of rescission was sufficient in form, and the offer to return all considerations received was also sufficient. Indeed, since the money received by the plaintiff as interest or dividends was not equal to the amount of money which the plaintiff was and now is entitled to receive, no offer to return the same was necessary. *Montgomery v. Pickering*, 116 Mass. 227, 231.

Judgment affirmed.

SUPREME COURT OF VERMONT.

STATE of Vermont

v.

John O'NEIL.

Same v. Same.

Same v. Four Jugs of Intoxicating Liquor;
National Express Co., *Claimant*.Same v. Sixty-eight Jugs of Intoxicating Li-
quors; National Express Co., *Claimant*.

1. **Whether or not the legal title to property in goods passes by sale is a question of intent, to be gathered from the act of the parties, and all the facts and circumstances of the cases taken together, showing that the owner intended to part with the property, and the purchaser to become its immediate owner.**
2. **When there is a condition precedent attached to the transaction, the title does not pass to the purchaser until performance or waiver of the condition, even although there be actual delivery; hence, where delivery was made to the carrier, with the condition of payment for the goods before delivery to the consignee, the title does not pass to the purchaser until performance of the condition.**
3. **If an express company or other carrier or person, natural or corporate, has in possession in this State, an article in itself dangerous, or an article not in itself dangerous, but intended for unlawful use within the State, it is subject to seizure for the protection of the community or to prevent its unlawful use, under statutes passed in the exercise of the police power of the State, and such statutes are not in conflict with the commercial clause of the Federal Constitution.**
4. **In such case the carrier is agent of the seller in the matter of delivery; and the purchaser by what he did in respect of the transactions in question made the carrier his agent; and as what was done by such agent in the execution of the authority and instructions directly given by him, constituted offenses against the statute, the purchaser as his principal must be held responsible. That he was innocent of intent to break the law, cannot avail him in defense.**
5. **Section 2 of No. 43 of the Acts of 1882, by which an officer may seize intoxicating liquors, under certain conditions, without a warrant, but which does not purport to confer the power of search, is constitutional.**
6. **Under a state statute which provides for the prosecution of a second offense for the sale or furnishing of intoxicating liquors, or holding or keeping them for purposes of sale, the reason for the lim-**

itation of such prosecutions to a period within three years from the time of commission of the offense, **has no application to a case where the only proof that can be used on the one side or the other is matter of record.** Hence, **proof of a former conviction is properly admitted, notwithstanding the conviction appeared to have been more than three years before the trial in which it is offered.**

7. **The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail has no application to cumulative punishments imposed by statute for distinct offenses in the same prosecution.**

(Rutland—Decided March 10, 1886.)

THESE cases were heard together. In the first case, No. 27 (*exceptions overruled*), the respondent was charged with selling intoxicating liquors contrary to law; in the second case, No. 28 (*exceptions overruled*), with keeping intoxicating liquors with intent to sell, etc. The other two cases, Nos. 25 and 26 (*affirmed*), were proceedings for the condemnation of intoxicating liquor. The cases were appeals from the decision of a justice of the peace. The first two cases were tried by jury, March Term, 1883, Rutland County, Veazey, J., presiding.

In the first case the jury returned a verdict against the respondent of 307 offenses; in the second case they returned a verdict that the respondent was guilty. In the first case, the court adjudged that the respondent was guilty of 307 offenses of selling intoxicating liquor without authority as of a second conviction; in the second case the court adjudged that the respondent was guilty of the offense charged, as of a second conviction. Sentence and execution were respited and stayed; and the cases were passed on exceptions to this court. The other two cases were tried by the court on an agreed statement, at the same Term in Rutland County, Veazey, J., presiding. In No. 25, the court overruled the claims of the claimant, the said National Express Co., and adjudged that the said liquors be forfeited; and in No. 26, the court adjudged that the liquors, which were paid for to the shipper at Whitehall, N. Y., be returned to the claimant, and the remainder of the liquors be forfeited. These cases were numbered 25, 26, 27 and 28. No. 27 was a prosecution for selling liquor; No. 28, for keeping it, etc.; No. 25 was a proceeding to condemn and forfeit four jugs of intoxicating liquors shipped by Shehan & Co., dealers in liquors and cigars at Troy, N. Y.; and No. 26 was a like proceeding to condemn and forfeit liquors shipped by the respondent, O'Neil, a dealer in liquors and cigars at Whitehall, N. Y.

Section 2 of No. 43 of the Acts of 1882 is "In all cases where now, by any of the provisions of said chapter, 169 R. L. an officer is authorized to seize intoxicating liquors, or the casks or vessels containing the same, by virtue of a warrant therefor, he may seize the same without a warrant and keep the liquors, casks or vessels so seized in some safe place, and shall forthwith procure such warrant, and he shall thereupon make return of his doings under said warrant in the same manner as he would have

done had the issuing of the warrant preceded such seizure."

Section 8818 R. L. is: "If three voters in a town make complaint, under oath or affirmation, before a justice in the county, that they have reason to believe and do believe that intoxicating liquor is kept or deposited in a dwelling house, store * * * or other building or place in said town, and intended for sale or distribution among others, by a person not authorized to sell or distribute the same, said justice shall issue a warrant to any sheriff or constable to search the premises described in such complaint; and if intoxicating liquor is found therein under circumstances warranting the belief that it is intended for sale or distribution contrary to the provisions of this chapter, such officers shall seize the same," etc. "The respondent admitted, on the trial for selling liquor, that he was a wholesale and retail dealer in wines and liquors at Whitehall, N. Y. and that he had been engaged in business there for more than three years; that his said business was lawful in the State of New York; and that during said time he had received at his store in Whitehall, three hundred and seven separate and distinct orders by mail, telegraph and express for specified and designated small quantities of intoxicating liquors from as many different parties residing in Rutland in the State of Vermont.

It was further admitted by the respondent: "The orders so sent by express were in the form of a letter addressed to the said John O'Neil at Whitehall aforesaid, and the letter attached to a jug, and the jug with the letter attached was delivered by said parties to the National Express Co. in Rutland, and charges thereon paid by the parties so sending the order. Orders sent by mail were by letters or postal cards, deposited in the postoffices at said Rutland, directed to John O'Neil at Whitehall, New York, and postage paid thereon. Orders sent by telegraph were delivered by the sender at the telegraph offices in said Rutland, directed to said John O'Neil, Whitehall, N. Y. and charges paid by the sender—which orders requested the respondent to send said intoxicating liquors to the parties ordering the same at said Rutland; and in more than one half the number of instances, said orders directed him to send said liquors by express, C. O. D.; and in the other instances, where the orders did not specify, it was the intention of the purchaser to have the goods so sent to him."

"It is the usual course of trade for merchants, receiving an order from a considerable distance for goods in small quantities, to send the same by express, C. O. D., when the order is not from a regular customer, or a party of known responsibility."

"Upon the receipt of said orders, the respondent has, in each case, measured out the liquors called for in the order at his store in Whitehall aforesaid, and packed the same in jugs or other vessels and attached to each package a tag, upon which was written the name and address of the party ordering the same, and delivered each package so directed and addressed, at Whitehall aforesaid, to the National Express Co., a New York corporation, a common carrier, doing business between New York and Montreal, and including the route between

said Whitehall and said Rutland; and each of said packages also had upon said tag the name and business card of the respondent; and none of said packages were in any manner disguised, and all of them were sealed with wax. It was not stated on the jugs or tags what they contained."

"The respondent at the same time delivered to said Express Co. a bill of said liquor; which said carrier placed in an envelope, marked C. O. D., which envelope had indorsed thereon among other things the following instructions: 'Do not deliver the whole or any part of the goods accompanying this bill until you receive pay therefor; be careful to notice what money you receive and, as far as practicable, send the same as received and follow the special instructions of the shipper, if any are given on the bills. If goods are refused or the parties cannot be found, notify the office from whence received with names and dates, and await further instructions;' meaning thereby that said Express Co. should receive the amount of said bill upon the delivery of the package to the consignee and that, without payment of said bill, the said liquor should not be delivered. In the usual and ordinary course of business of said carrier in such cases, the said Express Co. delivered each of said packages to the consignee named upon said tag at Rutland, and at the same time and concurrently with such delivery received the amount of the said bill in the C. O. D. envelope, the amount of freight for the transportation of said package from Whitehall to Rutland, and the charges for returning said money to the respondent at Whitehall. The Express Co. placed said money for the payment of said bill in the same envelope and returned it to the respondent at Whitehall."

"The respondent did nothing to or with said liquors after the said packages were delivered by him at said Whitehall to said common carrier; and the said several consignees received the same and made payment as aforesaid at Rutland, as and under the contract made as aforesaid through their said orders so sent to the respondent at Whitehall."

"It is the usual and ordinary course of business of said Express Co., in case goods are refused, or the consignees cannot be found, for the office to which goods are sent to notify the office from which they were shipped to notify the consignor of the facts, and the consignor would be consulted and his orders taken and followed as to the disposition of the goods. And this would be the same, whether goods were sent C. O. D. or otherwise."

"The respondent gave no special directions as to any of the packages shipped as aforesaid."

The respondent requested the court to instruct the jury that the facts set forth in said admission did not constitute an offense against the statute, under the complaint in this cause. The court declined to so hold, to which the respondent excepted.

The respondent also requested the court to instruct the jury that, under the facts set forth in said admission, they ought to find the respondent not guilty. The court refused to so instruct the jury; to which the respondent excepted.

The court charged the jury that if they be-

lieved the facts set forth in said admission to be true, the same made a case upon which the jury should find a verdict of guilty against the respondent. To all which the respondent excepted.

The jury returned a verdict of guilty against the respondent, of three hundred and seven offenses of selling intoxicating liquor without authority.

After the verdict was returned into court, the State's attorney offered in evidence a record, showing that at the March Term of Rutland County Court, A. D. 1879, this respondent was convicted of selling, furnishing and giving away intoxicating liquors. This evidence was offered for the purpose of showing a former conviction as set forth in the complaint. The respondent objected to this evidence, upon the ground that the former conviction, set forth in the complaint and offered to be proved by the evidence, occurred more than three years before the making of the complaint in this cause, and that no evidence was admissible under the complaint to show a former conviction. The court overruled the objection and admitted the evidence, to which the respondent excepted.

In the case No. 28, where the respondent was charged with keeping liquors, contrary to law, the State introduced evidence tending to show that the respondent shipped liquor to a party in Rutland in a manner similar to that described above in the case of illegal sale of liquor; and that said liquor was seized by the sheriff under a warrant for that purpose at the office of the National Express Co. at Rutland, Vt. The court charged the jury in part:

"The only ground upon which it is claimed the respondent is not liable, if he sent this liquor here to be delivered to Hopkins, is that it was a sale in New York; a completed sale there, and the title passed to Hopkins when the respondent delivered the liquor to the Express Co. at Whitehall; that the fact that he sent it marked C. O. D., which means collect on delivery, does not change the character of the transaction; that the sale was just as complete in New York as though the liquor had been sent without any such directions to the express company, or as though the money had been sent with the order, or an absolute credit had been given. If this is the correct view then our law was not violated. The transaction in New York, if it was a complete sale, was a lawful one. But we do not think this is the correct view; and we hold and instruct you that when the respondent sent the liquor with instructions to the Express Co. to deliver it to the person to whom it was addressed only on being paid for, or in other words: not to deliver it unless paid for on delivery, the title remained in O'Neil. It remained his property until delivered to Hopkins. As soon as it passed the line into this State it was O'Neil's liquor in this State. By sending it in response to Hopkins' letter, with the instructions indicated by C. O. D., as testified to by Mr. Barker, the express agent, O'Neil but filled the order conditionally; and the effect of this condition was to keep the title and control of the liquor within himself. If the liquor had been destroyed on the way it would have been his loss, as between him and Hopkins. He, under this condition, was never obliged to deliver the liquor to Hopkins, but

after it got here he could have countermanded the delivery to him and caused it to be delivered to any other person or to be returned to himself. If in response to Hopkins' letter O'Neil had taken the jug in his hand and come here with it, with a view of delivering it to Hopkins upon payment, probably no one would say but that at any time previous to the delivery it was his liquor; and if it was his intent to deliver it here, then he was owning and keeping it here with that intent. If instead of coming himself with it he had sent a clerk in his store with it, it would have been just as much his liquor as though he had brought it in person. It would have been his act by his agent. Instead of sending it by his own clerk, he makes the Express Company his agent to bring it, with precisely the same instructions."

The respondent excepted. The cases involving the seizure and forfeiture of the liquors were heard on an agreed statement. The jugs of liquor were seized by the sheriff while in the possession of the National Express Co., at the railroad depot at Center Rutland. The four jugs were delivered to said company at Troy, N. Y.; and nearly all of the others were delivered by said O'Neil at Whitehall, N. Y., to said express company. The persons ordering the liquors ordered them for their own use and not for sale or distribution contrary to law. The express company had no intention of violating the law. The liquors were shipped in a manner similar to that described above in the case of *State v. O'Neil*.

The claimant was accustomed to receive all kinds of goods for transportation on the C. O. D. plan above described. Some of the jugs of liquor were consigned to parties living in East Dorset and Manchester, towns in Bennington County.

Further facts are sufficiently stated in the opinion of the court.

Mr. J. C. Baker, for the respondent:

To warrant a conviction, the crime must have been committed in the County of Rutland. R. L. §§ 799, 1624, 1627. Every act of the respondent was done in Whitehall, N. Y., and was legal and right where it was done. He did not have any clerk, servant or agent in Rutland to sell liquors for him. No person appointed by him had any connection with the acts charged to be criminal. The whole contention on the part of the State is to make the respondent constructively present in Rutland selling liquor, and by a fiction make him a criminal. What he did was no crime *per se*; and the cases which hold a man responsible in one jurisdiction for acts of innocent agents, where he has contrived and procured them to commit an offense for him, while he remains out of the jurisdiction, do not apply. *People v. Adams*, 3 Denio, 190; *Adams v. People*, 1 N. Y. 173.

The sales were made by written orders addressed to the respondent at Whitehall, and cannot be held void. *Orcutt v. Nelson*, 1 Gray, 587; *Backman v. Musey*, 81 Vt. 547; *Gaylord v. Sorageu*, 82 Vt. 110; *Tuttle v. Holland*, 43 Vt. 542.

An act, legal as a contract, cannot be punished as a crime. The sales were wholly New York transactions and governed by the laws of New York. *McIntyre v. Parks*, 8 Met. 207; *Pine v. Smith*, 11 Gray, 88; *Miliken v. Pratt*,

125 Mass. 374; *Magruder v. Gage*, 33 Md. 844; *Frank v. Hoey*, 128 Mass. 268.

When the orders were received and acted upon as they were, the contract became complete at the place where the proposition was accepted. Story, Sales, § 131.

Acceptance of the terms of the contract made it complete. The acceptance need not be by words, but any act in compliance with the order is an acceptance. Story, Sales, § 132; *Brisban v. Boyd*, 4 Paige, 17; *Joyce v. Swann*, 17 C. B. N. S. 84.

A delivery by a vendor to a specified carrier, of the goods purchased in pursuance of an order and direction of the purchaser, is in law a delivery to the latter, and *ipso facto*, an acceptance by him of the property. *Glen v. Whitaker*, 51 Barb. 451; *People v. Haynes*, 14 Wend. 547; *Whiting v. Farrand*, 1 Conn. 60; *Bligh v. James*, 5 Allen, 106.

The goods were delivered to and accepted by the common carrier for transportation; and the carrier was either named by the purchaser, or was the one that the usual course of trade would indicate; and the one in every case that the purchaser intended they should be delivered to for transportation. These facts would sustain a count for goods sold and delivered. *Atkinson v. Bell*, 2 Mann. & Ry. 292; *Thompson v. Maceroni*, 3 Barn. & C. 1; *Dutton v. Solomonson*, 3 Bos. & Pul. 582; *Downer v. Thompson*, 2 Hill, 137; *Grossenor v. Phillips*, 2 Hill, 147; *Hague v. Porter*, 3 Hill, 141.

And this is a delivery sufficient to satisfy the Statute of Frauds. *Spencer v. Hale*, 30 Vt. 314; Bro. Fr. § 327, a.

So in the light of the authorities and in the manifest intention of the parties, the goods were sold and delivered in New York; and *assumpsit* would lie to recover the price. An act cannot be legal and a crime at the same time. *Holman v. Johnson*, 1 Cowp. 341; *Territt v. Bartlett*, 21 Vt. 184.

The property in and title to the goods passed to the purchaser by virtue of the contract. Delivery of the goods to the buyer is not necessary in order to transfer the title. 2 Add. Cont. § 569; Story, Sales § 300; *Arnold v. Delano*, 4 Cush. 33; *Joyce v. Adams*, 8 N. Y. 291; *Parsons v. Dickinson*, 11 Pick. 352; *Goddard v. Binney*, 115 Mass. 450; *Meade v. Smith*, 16 Conn. 346; *Hatch v. Oil Company*, 100 U. S. 124. The contract was not conditional, but absolute. *G. W. R. Co. v. Crouch*, 3 H. & N. 183; Hutch. Car. § 392.

The title may pass to the purchaser and the seller retain possession until his lien for the price is discharged. Story, Sales, §§ 282, 404; *Audens Reid v. Randall*, 3 Cliff. 99; *Gregory v. Morris*, 96 U. S. 619 (bk. 24, L. ed. 740); *Emery v. Bank*, 25 Ohio St. 860.

Sending goods marked C. O. D. did not prevent the passing of the title. *Higgins v. Murray*, 4 Hun, 565.

This doctrine is affirmed by the Court of Appeals, and seems to distinctly overrule *Baker v. Bourieault*, 1 Daly, 23; *Higgins v. Murray*, 73 N. Y. 252; 1 Benj. Sales, § 587.

In those cases where it has been held that the title does not pass by reason of some condition attached to the delivery, it will be seen that only the seller can set up that claim. 1 Benj. Sales, §§ 319, 335.

The purpose in sending the goods C. O. D. is

to preserve the lien. Hutch. Car. § 390; *Meyer v. Lemcke*, 31 Ind. 208; *Cross v. O'Donnell*, 44 N. Y. 661; *Gibson v. Ex. Co.* 1 Hun, 387.

The relation of the carrier to the goods is the same whether he is to collect the price or not. *Nollinger v. The Emma*, 3 Cent. L. J. 286; Hutch. Car. 392, n. 2; *The Hardy*, 1 Dill. 400.

The express company was a common carrier, exercising its public employment. *Am. Ex. Co. v. Leese*, 39 Ill. 812.

Stoppage of the goods *in transitu* does not rescind the contract of sale. *Guilford v. Smith*, 30 Vt. 49; *Cooper v. Bill*, 3 H. & C. 722; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Martindale v. Smith*, 1 Q. B. 592; *Stanton v. Eager*, 16 Pick. 467; *Rogers v. Thomas*, 20 Conn. 53; Story, Sales, § 320; *Newhall v. Vargas*, 15 Me. 314; 1 Sm. L. Cas. 1115, 1236.

No man can have a lien on his own goods. Story, Sales, § 282; 1 Sm. L. Cas. 1236. See, *Arnold v. Delano*, 4 Cush. 33; Hutch. Car. §§ 390, 420.

Intoxicating liquor is as much a subject of sale as other species of property. *Hove v. Stewart*, 40 Vt. 145.

The State cannot prohibit nor regulate interstate commerce. *R. R. Co. v. Husen*, 95 U. S. 465 (bk. 24, L. ed. 527); 1 Rorer, Inter-St. L. 309.

This statute is repugnant to art. 8, U. S. Constitution, and chap. 2, § 32, Vt. Constitution, in that it allows "cruel and unusual punishments."

The money penalty in this case is more than three times the limits that can be imposed for misprision of treason, or rape. It is six times as large as any court in Vermont can impose for such high crimes as manslaughter, burglary, forgery, perjury, etc.

Messrs. Prout & Walker, for claimant: The *situs* of the contract was in New York, where the sale was lawful. *Tuttle v. Holland*, 48 Vt. 542; *Backman v. Mussey*, 31 Vt. 547; *Gaylord v. Soragen*, 32 Vt. 110.

The liquors were not ordered "for sale or distribution contrary to law." The transportation was lawful. R. L. § 3381.

It was not a crime to buy the liquors in New York, as these were, nor for a carrier to bring them into this State. R. L. § 3380.

The carrier was bound to protect its possession of the goods. Its title is good against any person, save the real owner. *Campbell v. Conner*, 70 N. Y. 424.

It is difficult to see how it can be said that the liquors were intended for an illegal sale, when, according to the agreed statement, they were not ordered for sale "contrary to law." The claimant was bound to receive the goods on the C. O. D. plan when tendered, for it was accustomed to so receive all the goods for transportation. The contract between the shipper and the carrier was made in New York, and is governed by the laws of that State. The vendors could have collected their bills for these goods by an attorney. *Tuttle v. Holland, supra*; *Hill v. Spear*, 50 N. H. 253; *Hove v. Stewart*, 40 Vt. 145.

But if the collection was legal when made by an attorney, it was so when effected through the Express Company. In collecting the bills the Company acted as a common carrier. Hutch. Car. 318; Edw. Bail. § 607.

It is doubtful where this relation can properly be called an agency. If so, it was a mere agen-

cy to collect the debt, but not to effect a sale. The Company was bound to surrender the goods to vendees. Story, Sales, § 806.

In the light of decided cases, the sale was in New York, and the title passed there. *Strong v. Dodds*, 47 Vt. 348; *Merchant v. Chapman*, 4 Allen, 364; *Bligh v. James*, 5 Allen, 106; *Finch v. Mansfield*, 97 Mass. 89; *Garland v. Lane*, 46 N. H. 245; *Milliken v. Pratt*, 125 Mass. 374; *Frank v. Hoey*, 128 Mass. 263; Benj. Sales, §§ 181, 863; 12 Allen, 548; 109 Mass. 50; *Spencer v. Hale*, 80 Vt. 314.

Sales often take place without the right to actual visible possession, and so that an action for goods bargained and sold can be maintained. 1 Chit. Pl. 345; Benj. Sales, § 675; 1 Chit. Cont. 11th ed. 520, 536; Story, Sales, § 800; *Arnold v. Prout*, 51 N. H. 587; *Bemis v. Morrill*, 88 Vt. 153.

Certain cases are to be distinguished, as where an article is ordered to be manufactured, etc.; but this case is within none of the exceptions; and in fact there was a delivery to the party designated by the vendees, whose receipt of the goods bound them beyond question. *Cross v. O'Donnell*, 44 N. Y. 661; Benj. Sales, § 170, note (o), § 899; *Spencer v. Hale*, 80 Vt. 314; *Wilcox S. P. Co. v. Green*, 72 N. Y. 17; *Barney v. Brown*, 2 Vt. 374; Ang. Car. § 497; *The Mary & Susan*, 1 Wheat. 25 (14 U. S. bk. 4, L. ed. 27); *Higgins v. Murray*, 73 N. Y. 252; S. C. 4 Hun, 565.

The case, therefore, reaches the precise position developed by Benjamin in his lucid exposition of the law concerning sales: "There has been an actual transfer of title, and an actual transfer of the right of possession by the bargain, so that in pleading and for all purposes, save that of the vendor's lien for the price, the buyer is considered as being in possession by virtue of the general rule of law 'that the property of personal chattels draws to it the possession.'" Story, Sales, § 281; Benj. Sales, §§ 677, 678; *Grice v. Richardson*, 24 Moak, 214; *Thompson v. Gray*, 1 Wheat. 75 (14 U. S. bk. 4, L. ed. 41). See also, Benj. Sales, §§ 315, 796, 825, 826.

In every case of sale unless longer credit is stipulated for, the vendor has a lien upon the article for his pay, so long as he retains possession. This lien is in the nature of a pledge or mortgage.

The county court confounded this vendor's lien with a conditional sale; whereas the two are totally distinct. In the latter the possession passes without the title; in the former the title passes without the possession. In the case of a conditional sale the vendee takes the property under an agreement that the title shall remain in the vendor until paid for, or some other condition is performed.

It is a perversion of law and sense to say that the sale is made over the Express Co.'s counter. The sale is made when there is a mutual assent to agreed terms, intended to bind both sides, and not open to modification. *Tarling v. Barter*, 6 B. & C. 360; 1 Chit. Cont. 11th ed. 517-522; *Marble v. Moore*, 162 Mass. 448; *Willis v. Willis*, 6 Dana, 49; *Martindale v. Smith*, 1 Q. B. 592; *Bemis v. Merrill*, 88 Vt. 153; Benj. Sales, 238, note (f).

That there was a transfer of the property, see, Blackb. Sales, 66, 70, 80, 100, 153; that it vested in the vendee, see, Leigh, N. P. 1469; that an action would lie to recover the price, see, Vt.

Slade's Case, 2 Co. 505; 2 Chit. Pl. 56; Steph. N. P. 278, 294; Mayne, Dam. 88; Sedg. Dam. 2d ed. 281; *Turley v. Bates*, 2 Hurl. & C. 200; *Bement v. Smith*, 15 Wend. 493; Benj. Sales, §§ 808, 815; that the property was at the risk of the vendee, see *Tome v. Dubois*, 6 Wall. 553 (73 U. S. bk. 18, L. ed. 946); 1 Chit. Cont. 11th ed. 518, 526.

A binding contract may be made through the mail or telegraph. A proposal to buy, when accepted, binds both parties. *Barney v. Bliss*, 1 D. Chip. 399; *Babcock v. Boudell*, 80 N. Y. 244; Benj. Sales, §§ 308, 815; *Fletcher v. Howard*, 2 Aik. 115; *Lincoln v. Johnson*, 43 Vt. 74; *Lanfear v. Sumner*, 17 Mass. 110; *Bailey v. Smith*, 43 N. H. 141; *Brooks v. Coquard*, 5 McCrary, 588.

For Vt. cases, see, Rob. Dig. 618.

Section 2, Acts of 1882, is unconstitutional, in allowing a seizure without a warrant. Art. 11, Const. Vt.

There is a right of property in intoxicating liquors. It is not prohibited to our citizens to use liquors, nor to our carriers to transport them. *Lincoln v. Smith*, 27 Vt. 338; *Carrigan v. Ins. Co.*, 53 Vt. 418; *Hove v. Stewart*, *supra*; *Harrison v. Nichols*, 81 Vt. 709.

There can be no constitutional search or seizure without a judicial warrant. *Fisher v. McGerr*, 1 Gray, 1, 31; Cooley, Con. Lim. (4th ed.) 367, 727; U. S. Const. art. 4, Amend.; *State v. Prescott*, 27 Vt. 194; *Gill v. Parker*, 81 Vt. 610; 25 N. H. 542.

Congress has exclusive power to regulate commerce among the States. *Gibbons v. Ogden*, 9 Wheat. 1 (22 U. S. bk. 6, L. ed. 23); *Passenger Cases*, 7 How. 395 (43 U. S. bk. 12, L. ed. 479); *State Freight Tax*, 15 Wall. 232 (82 U. S. bk. 21, L. ed. 146); *Henderson v. Mayor of N. Y.*, 92 U. S. 259 (bk. 28, L. ed. 543); *Chy Lung v. Freeman*, Id. 275 (Id. 550); *People v. Compagnie Generale Transatlantique*, 107 U. S. 59 (bk. 27, L. ed. 384).

A statute that should forbid express companies to bring any goods into Vermont, C. O. D., would be clearly void. Just so a statute forbidding any particular kind of goods to be introduced, would be equally void.

Messrs. W. C. Dunton and L. H. Thompson, for State:

"Where goods are delivered by a vendor to a common carrier, consigned to the vendee, the question whether the title thereby passes from the vendor to the vendee, depends upon the intention of the vendor, which intention is to be gathered from all the circumstances of the transaction. * * * If the vendor, however, in making the consignment and delivering the goods to the carrier does not intend to part with his title to or control over them, the carrier must be regarded as the agent of the consignor and not of the consignee." *Emery's Sons v. Bank*, 25 Ohio St. 860.

Thus, in New York, it makes no difference that the goods sold have been sent by a particular carrier, named by the buyer, if the carrier is instructed by the seller that the goods are to be paid for on delivery. In such cases the carrier becomes the seller's agent. *Baker v. Bourcicault*, 1 Daly, 23.

And when the delivery and payment of the price are to be simultaneous acts, the title remains in the seller until delivery or payment.

Ferguson v. Clifford, 87 N. H. 87; *Kelley v. Upton*, 5 Duer, 836; *Benedict v. Field*, 16 N. Y. 596; *Conway v. Bush*, 4 Barb. 564; *Benj. Sales*, §§ 398, 399.

Even the delivery of the goods on a sale, with the expectation of receiving immediate payment, is not an absolute delivery, and no title vests in the purchaser until the price is paid or payment waived. *Adams v. O'Connor*, 100 Mass. 515; *Tyler v. Freeman*, 3 Cush. 261; *Whitney v. Eaton*, 15 Gray, 225; *Farlow v. Ellis*, 15 Gray, 229. See, *Herrick v. Gallagher*, 60 Barb. 578; *Wagner v. Hallack*, 3 Col. 184; *Adams v. O'Connor*, *supra*; *Benj. Sales*, § 320; *Beauchamp v. Archer*, 58 Cal. 431; *E. & F. H. R. Co. v. Elcain*, 84 Ind. 457; *Clark v. Hayward*, 51 Vt. 14.

A conditional assignment and delivery of goods to carrier does not vest the title in the consignee until performance of the condition, although the goods were shipped in pursuance of a prior agreement upon a good consideration. *Kelly v. Deming*, 2 McCrary, 453; *Osborn v. Gautz*, 60 N. Y. 540; 80 Ill. 511; *Bank v. Daniels*, 47 N. Y. 631; *Bank v. Jones*, 4 N. Y. 497; *Kinsey v. Leggett*, 71 N. Y. 887; *Smith v. Lynes*, 5 N. Y. 41; *Russell v. Minor*, 22 Wend. 659; *Keeler v. Field*, 1 Paige, 312; *Haggerty v. Palmer*, 6 Johns. Ch. 487; *Bank v. Wright*, 48 N. Y. 1; *Allen v. Williams*, 12 Pick. 297; *Pierson v. Hoag*, 47 Barb. 243; *N. Y. Guaranty Co. v. Flynn*, 55 N. Y. 653; *Lees v. Richardson*, 2 Hilton (N. Y.) 164; *Scudder v. Bradbury*, 106 Mass. 422; *Whitwell v. Vincent*, 4 Pick. 451; *Dresser Mfg. Co. v. Waterston*, 3 Met. 9; *Hill v. Freeman*, 3 Cush. 257; *Hammett v. Linneman*, 48 N. Y. 399; *Barrett v. Goddard*, 3 Mason, 111; *Stollenwerck v. Thacher*, 115 Mass. 224; *Armour v. Pecker*, 128 Mass. 143; *Solomon v. Hathaway*, 126 Mass. 482; *Kenney v. Ingalls*, 126 Mass. 438; *Hirschorn v. Canney*, 98 Mass. 149; *State v. Comings*, 28 Vt. 508; *Benj. Sales*, § 320 note (d); *Winter v. Coit*, 7 N. Y. 288; *Goodall v. Skelton*, 2 H. Bl. 316; *Boulter v. Arnott*, 1 Crompt. & M. 338; *Benj. Sales*, § 698; *Clark v. Lynch*, 4 Daly, 88.

The Express Co. acted as the agent of the respondent. 121 Mass. 40; *Schoul. Per. Prop.* 291; 52 Cal. 475; *Benj. Sales*, § 320; *Reynolds v. B. & M. R. R.* 43 N. H. 580.

An order by letter, telegram or express is simply an offer which may be withdrawn at any time before acceptance, and the bargain is not completed until acceptance. 1 Pars. Cont. 483, 525; *Benj. Sales*, § 398; *Hutch. Car.* § 398; *Lyons v. Hill*, 46 N. H. 49.

O'Neil did not in any instance accept the order so as to complete the contract of sale. The delivery to the Express Co. to be delivered to the purchaser only upon payment of the price and under the conditions stated constituted the Express Co. the agent of O'Neil, and the contract was finally completed in Vermont. *Taylor v. Jones*, 16 Moak's Eng. Rep. 487.

The illegal acts complained of in this case are sales of intoxicating liquor in Vermont and not contracts for such sales. The contracts for sales if any in this case being executory, the sales were completed in Vermont by delivery of the liquors and receipts of payment therefor by the Express Co., the agent of O'Neil. *State v. Comings*, 28 Vt. 508.

The Act, No. 43 of 1882, is constitutional. *Spalding v. Preston*, 21 Vt. 9; *Lincoln v. Smith*, 62

27 Vt. 387; *Gill v. Parker*, 31 Vt. 610; *State v. Lovell*, 47 Vt. 493; *State v. Intor. Liq.* 55 Vt. 82; *Thorpe v. R. R. Co.* 27 Vt. 140; *Potter, Dwar. chap. 14*; *Cooley, Const. Lim.* 714.

Article II. of the Constitution is directed against general warrants. *Redfield, Ch. J.*, in *Re Powers*, 25 Vt. 265; *Pott. Dwar.* 450; *Varick v. Smith*, 9 Paige, 547; *Cooley, Const. Lim.* 368; 2 May's Const. Hist. of England, 245; 4 Bancroft's Hist. U. S. 414.

The Massachusetts Constitution contains a provision similar to ours in regard to seizures and searches without warrant; and the Supreme Court of Massachusetts has held that the statute is constitutional which authorizes "officers, without a warrant, to arrest any person found in the act of illegally selling or transporting intoxicating liquors, and seize the liquors, vessels and implements of sale in the possession of such person, and detain them in some place of safe keeping until warrants can be procured for the trial of the person and the seizure of the liquors." *Jones v. Root*, 6 Gray, 435; *Mason v. Lathrop*, 7 Gray, 354; *Smith v. Maryland*, 18 How. 71; (59 U. S. bk. 15, L. ed. 269); *U. S. v. Coombs*, 12 Pet. 72 (37 U. S. bk. 9, L. ed. 1004); *Cooley, Const. Lim.* 220; *Fletcher v. Peck*, 6 Cranch, 128 (10 U. S. bk. 3, L. ed. 175); *License Cases*, 5 How. 577 (46 U. S. bk. 12, L. ed. 289); *Commonwealth v. Blood*, 11 Gray, 74; *Commonwealth v. Intor. Liquors*, 122 Mass. 36; *Commonwealth v. Trombly*, 119 Mass. 104; *State v. Intor. Liquors*, 44 Vt. 208.

Royce, Ch. J., delivered the opinion of the court:

The first and most important question presented by these cases is, whether or not the intoxicating liquors in question were, in the first two cases, in contemplation of law sold, or furnished, by the respondent in the County of Rutland and State of Vermont; or, in the last two cases, held and kept for the purpose of sale, furnishing or distribution contrary to the statute, within said county and State. The answer depends upon whether the National Express Co. by which some of said liquors were delivered to the consignees thereof, and in whose possession the remainder were found and seized before the delivery, was in law the agent of the vendors or of the vendees. If the purchase and sale of the liquors was fully completed in the State of New York, so that upon delivery of them to the Express Company for transportation the title vested in the consignees, as in the case of a completed and unconditional sale, then no offense against the laws of this State has been committed. If, on the other hand, the sale by its terms could only become complete so as to pass the title in the liquors to the consignees upon the doing of some act, or the fulfilling of some condition precedent after they had reached Rutland, then the rulings of the county court upon this question were correct.

The liquors were ordered by residents of Vermont from dealers doing business in the State of New York, who selected from their stock such quantities and kinds of goods as they thought proper in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the Express Company as a common carrier of

goods for transportation, accompanied with a bill or invoice for collection. The shipment was, in each instance which it is necessary here to consider, C. O. D. and the cases show that the effect of the transaction was a direction by the shippers to the Express Company not to deliver the goods to the consignees except upon payment of the amount specified in the C. O. D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by the Express Company, which received the shipments coupled therewith.

Whether or not and when, the legal title in property sold passes from the vendor to the vendee, is always a question of the intention of the parties, which is to be gathered from their acts and all the facts and circumstances of the case taken together.

In order that the title may pass, as was said by Morton, J., in *Mason v. Thompson*, 18 Pick. 305: "The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point, and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale." The authorities seem to be uniform on this point; and the acts of the parties are regarded as evidence by which the court or jury may ascertain and determine their intent. Benj. Sales, §§ 311, 319, *note c*. When there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until performance or waiver of the condition, even though there be a natural delivery of possession. Benj. Sales, § 320, *note d*. The Vermont cases to the above points are referred to in Roberts' Digest, 610, *et seq.*, and need not be specially reviewed here.

In the cases under consideration the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered the packages of liquors, properly addressed to the several persons ordering the same, to the Express Company, to be transported by that Company and delivered by it to the consignees upon fulfillment by them of a specified condition precedent, namely: payment of the purchase price and transportation charges and not otherwise. Attached to the very body of the contract and to the act of delivery to the carrier was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee and, if he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise to notify the consignor and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods, until payment of purchase price, than by this method of shipment. We do not think the case is distinguishable in principle from that

of a vendor who sends his clerk or agent to deliver the goods, or forward them to, or make them deliverable upon the order of his agent, with instructions not to deliver them except on payment of the price or performance of some other specified condition precedent by the vendee. The vendors made the Express Co. their agent in the matter of the delivery of the goods with instructions not to part with the possession of them, except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory, while the goods were in transit or in the hands of the Express Co., and could only become executed and complete by their delivery to the consignees. There was a completed executory contract of sale in New York; but the completed sale was or was to be in this State.

The authorities upon the above points and principles are so numerous and are so fully collated in the brief of the learned counsel for the State, and in the text and notes of Benjamin on Sales, 4th Am. ed. bk. 2, that we refrain from specific references in support of the conclusions at which we have arrived. These are fully supported by the decision of the U. S. District Court in Illinois in *People v. Stricker*, 81 Alb. L. J. 163, a case involving precisely the same question. Treat, J., says in the opinion: "In the case of liquor shipped by the defendant to Fairfield by express, C. O. D., the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and on its reaching Fairfield it is there held by the company, as the agent of the seller, until the consignee comes and pays the money; and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such case the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price. An order from a person in Fairfield to the defendant at Shawneetown for two gallons of liquor to be shipped to Fairfield C. O. D. is a mere offer by the person sending such order to purchase two gallons of liquor from the defendant, and pay him for it when he delivers it to him at Fairfield; and a shipment by the defendant according to such order is practically the same as if the defendant had himself taken two gallons of liquor from his store in Shawneetown, carried it in person to Fairfield, and there delivered it to the purchaser and received the price of it. It would be different if the order from Fairfield to the defendant was a simple order to ship two gallons of liquor by express to the person ordering, whether such order was accompanied by the money or not. The moment the liquor under such an order was delivered to the express company at Shawneetown it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser; the sale would be a sale at Shawneetown, and if it were lost or destroyed in transit the loss would fall upon the purchaser. But in the case at bar, the shipping of the liquor to Fairfield, C. O. D., the defendant made no sale at Shawneetown; the right of property remained in himself, and the right of possession, as well as the actual possession, remained in him through his agent. Had it been lost or destroyed in transit the loss would have fallen upon him.

self. He simply acted upon the request of the purchaser, and sent the liquor to Fairfield by his own agent, and there effected a sale by receiving the money and delivering the liquor."

2. It is insisted on the part of the claimant in the case of the *State v. Sixty-Eight Jugs, etc.*, that § 2 of No. 43 of the Acts of 1882, under which the liquors in that case were seized, is unconstitutional. Conceding the points contended for by the learned counsel for the claimant, that there is a well recognized right of property in intoxicating liquors, that they are not *malum in se*, and that their use is not by law prohibited to citizens of this State, these propositions are nevertheless clearly subject to the qualification that when kept and intended for unlawful use, such liquors fall at once under the ban of the law and become subject to seizure and confiscation by such methods as are provided by law in conformity with the Constitution. That intoxicating liquors when once branded with this unlawful intent on the part of the owner or possessor become subject to confiscation by the Government, and that the methods and means of their seizure and condemnation are within the police powers delegated to the Legislature by article 5, pt. 1 of the Constitution, is too well settled in this State and elsewhere to require extended discussion. *Spaulding v. Preston*, 21 Vt. 9; *State v. Conlin*, 27 Vt. 318; *Id.* 325, 327; *State v. Comstock*, *Id.* 553; *Gill v. Parker*, 31 Vt. 610; *Potter*, *Dwar. Stat. chap. 14*; *Cooley*, *Const. Lim.* 4th ed. 714, 727.

This section gives the officer power to seize without warrant liquor found under circumstances warranting the belief that it is intended for sale or distribution contrary to the provisions of chap. 169, R. L. It does not purport to confer the power of search; nor does anything appear to show that the officer assumed to exercise such power in this case. It simply provides for the seizure, without warrant previously issued, of something which the law has declared subject to seizure and condemnation, under the police power delegated by the Constitution, as an instrument intended by the owner or possessor for a use unlawful by express statute, and dangerous to the peace, health and good morals of the community. That the article in itself may be innocuous, may be the subject of lawful ownership, or may even be susceptible of beneficial use, can no more affect the question than could the fact that certain tools were susceptible of lawful and beneficial use in mechanics save them from becoming subject to seizure and confiscation if intended by their owner or possessor for use as the instruments for accomplishing a contemplated burglary; or the harmless character of the metal and its owner's right of property therein to protect his ownership when fashioned and intended for passing as counterfeit coin.

It cannot be doubted in this State, since the case of *Spaulding v. Preston*, 21 Vt. 9, and has not been elsewhere, so far as we are aware, that articles or instrumentalities once impressed with the characteristics of adaptation and intended use for purposes prohibited by law and contrary to the public peace, health or morals, are subject to summary seizure under statutory, or even general police regulations. That the liquors in question were intended for such use has been determined in this case as a question

of fact by the tribunal designated by law, and that adjudication is conclusive.

The scope and application of article 5, pt. 1 of the Constitution have been defined by this court in the cases above referred to, and in *Re Powers*, 25 Vt. 265, which has ever since been regarded as conclusive against such application of that section of the Bill of Rights as is here contended for by the claimant. See, *Gill v. Parker*, 31 Vt. 610; *State v. Peterson*, 41 Vt. 504; *State v. Intox. Liq.* 55 Vt. 82.

In Massachusetts a statute practically identical with the one in question has been held not to contravene a similar constitutional provision. *Jones v. Root*, 6 Gray, 435; *Mason v. Lathrop*, 7 Gray, 354.

The decisions in Maine are to the same effect. *State v. McCann*, 59 Me. 388; *State v. Howley*, 65 Me. 100.

3. Concerning the claim that § 8 of the Federal Constitution, conferring upon Congress the exclusive right to regulate commerce between the States has application; it is sufficient to say that no regulation of or interference with interstate commerce is attempted. If an express company, or any other carrier or person, natural or corporate, has in possession within this State an article in itself dangerous to the community, or an article intended for unlawful or criminal use within the State, it is a necessary incident of the police powers of the State that such article should be subject to seizure for the protection of the community. It would certainly be a strange perversion of language to claim that if this Express Company was to hold in possession within this State clothing infected with the small-pox or yellow fever, or tools with which it was intended to commit a burglary, the State Government should be powerless to protect its citizens by seizing and rendering harmless such articles, simply because they might have been brought in the ordinary course of business from another State. If the Express Company has in possession within the State liquor, with intent to make unlawful use or disposition of it, then the right to seize it and prevent such unlawful use attaches. If it were competent for persons or companies to become superior to state laws and police regulations, and to override and defy them under the shield of the Federal Constitution, simply by means of conducting an interstate traffic, it would indeed be a strange and deplorable condition of things. The right of the States to regulate the traffic in intoxicating liquors has been settled by the United States Supreme Court in the *Licence Cases*, 5 How. 577 [46 U. S. bk. 12, L. ed. 299].

4. Proof of the former conviction in the case of the *State v. O'Neil* was properly admitted, notwithstanding the conviction appeared to have been more than three years before the trial. No provision of the statute requires that the former conviction must have been within three years; and we have no authority to add such a provision to the law, as it is plainly and unambiguously framed by the Legislature. The reason for the limitation of prosecutions for the offenses charged in these cases to a period within three years from the time of commission, as for all similar limitations, is that a person should not be called upon to answer to a legal accusation after such a long time has elapsed as would, in the estimation of the law, make it difficult or impossible, by reason of the

death or removal of witnesses, the loss or destruction of evidence, or the various embarrassments likely to arise from a considerable lapse of time, for him to establish his innocence. This reason has no application to a case where the only proof that can be used on the one side or the other is matter of record. We should, therefore, have no justification, even if we deemed it within the scope of our power and duty, for making application of a rule of limitation by analogy in these cases.

5. The constitutional inhibition of cruel and unusual punishments or excessive fines or bail has no application. The punishment imposed by statute for the offense with which the respondent O'Neil is charged cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed a great many such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted upon him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a single offense, the constitutional question might be urged, but here the unreasonableness is only in the number of offenses the respondent has committed.

The inevitable deduction from what has been said under the first point is, that the respondent O'Neil, by what he did in respect of the transactions in question, made the Express Company his agent; and as what was done by such agent in the execution of the authority and instructions directly given by him constituted offenses against the statute, O'Neil must be held responsible. That he was innocent of any purpose or intent to break the law, and was unaware that what he did was contrary to law, cannot avail him in defense. *State v. Comings*, 28 Vt. 508.

The result is that in cases of State v. O'Neil, Nos. 27 and 28, the respondent takes nothing by his exceptions; and in the cases of State v. Intoxicating Liquor, Nos. 25 and 26, the judgments are affirmed.

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Ellen L. BENTON

v.
U. S. HOLLAND.

Philander HANKS, Admr.,

v.
HOLLAND & Parker.

A payment made by an assignee under order of court in a proceeding in insolvency will not interrupt the running of the Statute of Limitations; and this is so although the United States Bankrupt Act was in force at the time.

(Addison—Decided March 11, 1886.)

ASSUMPSIT. Heard on an agreed statement, June Term, 1885, Addison County, Veazey, J., presiding. Judgment for the defendant. *Affirmed.*

VT.

The facts in their legal effect were similar in both cases. In both, the Statute of Limitations was a bar, unless the payments made by the assignee had interrupted its running. The defendants were partners and were adjudged insolvent debtors, August 20, 1877, on a creditor's petition, by the court of insolvency for the district of New Haven, under the State Insolvent Act, approved November 28, 1876. Amos Wetherbee was chosen and appointed assignee, who took possession of the debtor's estate under an order of assignment by the said court, and converted the same into money. The assignee settled his account with the court, January 29, 1878; and thereupon the court ordered him to pay fifteen cents and two mills on each dollar of debts proved. "In pursuance of said order of dividend, and without objection or resistance by said debtors said assignee paid such dividend; and as the dividend of the notes in suit, paid on said first note February 19, 1878, \$26.59; and on said second note February 19, 1878, \$110.56."

Mr. J. H. Lucia, for plaintiffs:

The payments delayed the operation of the Statute six years from their respective dates. R. L. § 975; *Ayer v. Hawkins*, 19 Vt. 26; *Goodwin v. Buzzell*, 35 Id. 9.

"Payment of part of a promissory note, unaccompanied by any fact or circumstance at the time of payment to show that the remainder is not due, implies that the rest of the note is due." See, *Minniece v. Yeter*, 65 Ala. 222.

The English, Massachusetts and other cases cited by the defendant were under valid laws.

The payments in those cases were by virtue of legal and binding orders of courts having jurisdiction both of the person and the subject matter. The U. S. Bankrupt Act continued in force until September 1, 1878. Laws of 45th Congress, 2d sess. chap. 160, p. 99.

A national bankrupt law supersedes or suspends a state insolvent law; and while such national law is in force, proceedings against a debtor under the insolvent laws of a State are unauthorized and void. *Griswold v. Pratt*, 9 Met. 16.

The Legislature had no authority in 1876, when the national Act was in force, to pass an insolvent law. The payment of the dividend was a part payment on account of the debt. *Kimberly v. Ely*, 6 Pick. 440.

So when a debtor assigns his property to an assignee and directs him to apply the proceeds of the assigned property to the payment of his debts, a payment by such assignee will be a good answer to a plea of the Statute of Limitations. *Letson v. Kenyon*, 18 Rep. 302. See, *Creighton v. Vincent*, 10 Oreg. 56; *Burnett v. Snyder*, 45 N. Y. Sup. Ct. 577; *Wisner v. Stein*, 97 Pa. St. 322.

Messrs. Wales & Wales and W. L. Bur-nap, for defendants:

A payment works a renewal of a debt only when made by the debtor, or under his authority, and when it implies a promise to pay the balance. It is the promise which reanimates the debt. *Goodwin v. Buzzell*, 35 Vt. 9; *Deyo v. Jones' Exr.* 19 Wend. 491; *Bell v. Morrison*, 1 Pet. 351 (26 U. S. bk. 7, L. ed. 175).

The assignee is not the agent of the debtor, but an officer of the law. A payment of dividends by him does not imply a promise by the

debtor to pay the balance. At any rate, such assignee is not clothed with authority to extend or renew the liability of the debtor. He is the mere trustee to hold and distribute the estate. *Roscoe v. Hale*, 7 Gray, 274; *Stoddard v. Doane*, Id. 397; *Richardson v. Thomas*, 13 Gray, 381; *Roosevelt v. Mark*, 6 Johns. Ch. 291; *Re Hingley*, 1 Low, 216.

Even in voluntary assignments, where the assignee is chosen by the debtor, payments of dividends by the assignee do not extend or renew the liability of the debtor. *Pickett v. Leonard*, 34 N. Y. 175; *Marienthal v. Masler*, 16 Ohio St. 566.

Taft, J., delivered the opinion of the court: *Assumpsit* to recover the amount due on promissory notes. Plea, Statute of Limitations. The claims in suit are barred unless kept alive by payment made by an assignee in a proceeding in insolvency, which, the plaintiff claims, was invalid for the reason, that it was had while the United States Bankruptcy Law was in force. It is conceded in argument that payment made by an assignee under valid proceedings is not such a payment as to interrupt the running of the Statute as against the original debtor. The plaintiff claims that by reason of the alleged invalidity of the proceedings, the payment made by the assignee had the same effect to keep the claim alive as though made by the debtor himself. It is law in this State that part payment of a debt, if made without protestation against further liability, as a recognition and acknowledgment of the debt from which a promise to pay the residue will be implied. *Ayer v. Hawkins*, 19 Vt. 26; *Goodwin v. Buzzell*, 35 Id. 9.

A part payment of a debt must be made under such circumstances that a promise to pay the remainder can be implied from them. The case at bar does not depend upon the validity or invalidity of the insolvency proceedings, but upon the circumstances attending the payment. Can you imply from them a promise to pay the amount remaining due on the note? We think not. The payment was made by one who was not a party to the contract, and under no obligation to pay the debt; and it would be unreasonable to say that it carried with it any evidence of a renewed promise of the defendants to pay what remained due. After the insolvent proceedings were commenced the defendants did nothing, save to submit to them. They permitted their property to be taken and applied upon the claims against them for the purpose of extinguishing the demands, not as recognizing them as continuous liabilities. Their whole purpose was to end them.

The creditors took the defendant's property at the time the proceedings were begun, and took it, the debtors not objecting, by force of, or rather under the forms of, law; and the assignee acting for the creditors made the payment; and, as was said in *Bouker v. Harris*, 30 Vt. 424: "It would be doing violence to the obvious reason and sense of the transaction to imply from it a promise to pay. The implication is directly the other way."

It has been held in Iowa that an enforced part payment will not affect the running of the Statute. *Thomas v. Brewer*, 7 N. W. Rep. 571.

The payments in the case at bar bear a strong resemblance to enforced ones.

Let the judgments be affirmed.

N. S. STEARNS, Assignee,

v.

Joseph GOSSELIN.

In an action by an assignee to recover money claimed to have been paid in preference to other creditors and in fraud of the insolvent law, it is proper for the debtor to testify to his intent at the time he made the payment.

(Decided March 10, 1886.)

A SSUMPSIT to recover certain moneys alleged to have been paid to the defendant by Edward Gosselin, an insolvent debtor. Plea, general issue, trial by jury, September Term, 1885, D. E. Nicholson, presiding Judge. Judgment for the plaintiff. *Reversed.*

Mr. J. C. Baker, for plaintiff.

Mr. W. C. Dunton, for defendant.

Royce, Ch. J., delivered the opinion of the court:

This was an action to recover back money claimed to have been paid to the defendant by Edward Gosselin, an insolvent debtor, in preference to his other creditors, and in fraud of the insolvent law. The only controversy appears to have been as to whether the payment made by Edward Gosselin to Joseph was so made. As tending to show that it was not, the defendant offered to show by Edward that at the time he made the payment, he did not intend to prefer Joseph to his other creditors. The court excluded the evidence; and the only question is as to the correctness of that ruling.

The right of an assignee to recover back money in such cases is conferred by §§ 1960 and 1861, R. L. To warrant a recovery under either of said sections, it must appear that the payment was made with a view to give a preference to the creditor to whom it was made; and as characterizing the act of making a payment, it is proper to ascertain and consider the intent with which it was made. If a payment is made to any person who has reasonable cause to believe that the person making it is insolvent, or it is made in contemplation of insolvency, it may be recovered back, if made with a view to prevent the property of the payor from coming to his assignee in insolvency. The intention of the party making the payment is material, although not conclusive.

The question of the right to prove the intention of a party was before the court in *Hulett v. Hulett*, 37 Vt. 581; and the rule was there stated to be that, "Where a person's intent, in a particular transaction, is a question in issue to be tried, we see no ground upon which he can be excluded from testifying to his intent."

It was error to exclude the evidence offered, and the judgment is reversed and cause remanded.

SUPREME COURT OF MAINE.

BOSTON & Maine R. R. CO., *Appt.*,
v.
COUNTY COMRS. of York County.

When an **appeal** is taken and prosecuted, under the statutes of Maine, from the **decision of the county commissioners in locating and laying out a way**, any person aggrieved at the commissioners' estimate of damages may file notice of appeal therefrom at any time within sixty days after final decision in favor of such way.

(York—Decided March 15, 1886.)

APPPEAL from an award of County Commissioners of damages, on location of way on petition of A. G. Prentiss *et al.* *Exceptions sustained.*

Mr. G. C. Yeaton, for appellant:

The motion to dismiss the appeal, as not seasonably filed under R. S. chap. 18, § 8, petitioners claiming that R. S. chap. 18, § 8, which originated in 1883, chap. 175, by implication repealed R. S. chap. 18, § 47, which originated in 1880, chap. 218, should have been refused.

There was no repeal of the Act of 1880, by the Act of 1883 by implication, because there is no plain or necessary conflict or irreconcilable repugnance between the two, in the absence of which no legislative intent to repeal by implication will be inferred. Dwar. Stat. 2d ed. 530, 531, 533; Wilberf. St. 318; *Escott v. Mastin*, 4 Moore, P. C. 180; *Chorlton v. Tonge*, L. R. 7 C. P. 183. See also, Broom, L. Max. 23, *et seq.*; Sedg. Stat. & Const. L. 123, *et seq.*; Bish. Wr. L. 154; *Pratt v. Atlantic & St. L. R. R. Co.* 42 Me. 579, 587; *Martin v. Penob. M. F. Ins. Co.* 53 Me. 419, 420.

No such implication can arise here, because the former Act, 1880, was special, applying by its express terms to only a single limited class of appeals, to wit: "where an appeal is taken on the location and the latter, 1883, general; hence, there being a class of appeals to which the latter may apply, without including the limited class expressly mentioned in the former, to wit: "when no appeal is taken on the location," sound rules of construction require its scope to be restricted to the class not so mentioned in the former, thus leaving both statutes in full force in its own proper field. Dwar. Stat. 532; Maxwell, Interp. Stat. 66, 157, 158. And see, Hardc. Stat. L. 174, citing *Thorpe v. Adams*, L. R. 6 C. P. 135; *King v. Poor Law Commrs.* 6 A. & E. 1; *London & Blackwall R. Co. v. Limehouse Board of Works*, 8 Kay & J. 128; *Taylor v. Oldham*, L. R. 4 Ch. D. 410; *Fitzgerald v. Champneys*, 30 L. J. Ch. 782; *S. C. 2 J. & H.* 54, 55; Wilberf. Stat. 330, 331, 334; Bish. Wr. L. §§ 112, 126, 152, 156; *State v. Cleland*, 68 Me. 258; *Smith v. Goodwin*, 5 Allen, 409, 410; *Carver v. Tracy*, 90 Ind. 222; *State v. Sturges*, 10 Or. 58.

The Act of Revision, August 29, 1883, being subsequent to the Act of March 7, 1883, mentioned above, is unqualified evidence of what has been termed "legislative exposition," and of the legislative intent in latter Act. *Battersby v. Kirk*, 2 Bing. N. C. 584; *Sandiman v. Breach*,

7 Barn. & C. 99; *Swift v. Jewsbury*, L. R. 9 Q. B. 312; Hardc. Stat. L. 67.

Mr. R. P. Tapley, for respondents:

Prior to 1883 a revision of damages estimated by county commissioners in laying out public ways was had by a petition to the county commissioners presented within a given time. The commissioners then appoint a committee, if the parties agree, to determine the issue; if they did not agree a jury was to be summoned and presided over by a person appointed by the commissioners. R. S. chap. 18, §§ 5, 8-18.

In 1883 an entire and radical change was made in the provisions of law in this regard. The jurisdiction was withdrawn from the county commissioners, and jurisdiction was conferred upon the supreme judicial court, chap. 175, Laws 1883. By that chapter §§ 8 to 13 inclusive, above cited were repealed. See also, Revision of 1883, chap. 18, § 8.

Virgin, J., delivered the opinion of the court:

When county commissioners, on due preliminary proceedings and hearing, decide to lay out a highway, they are required to make a correct written return of their doings including the amount of damages allowed to each person. R. S. chap. 18, § 4.

At their next regular session after the hearing, their return must be filed with their clerk and remain there unrecorded for inspection, and the case continued to their next regular session. § 5.

In the meantime, after their return is filed, and on or before their next regular session, two appeals from their decisions are open to the various parties: one from that on location and the other from that on damages, as follows: 1. Any party who appeared at the hearing may appeal from their decision on location, § 48; and 2. Any person aggrieved by their estimate of damages may appeal therefrom, § 8, both to the supreme judicial court held in the county where the land lies. §§ 8, 48.

1. An appeal on location must be taken after the return is placed on file, and before the next term of the supreme judicial court, when it may be entered and prosecuted; § 48; and if not then entered and prosecuted, "the judgment of the commissioners may be affirmed," § 49, if then entered and prosecuted, "all further proceedings before the commissioners shall be stayed until a decision is made in the appellate court," § 48.

2. Any person aggrieved by the commissioners' estimate of damages who would appeal therefrom must "file notice of appeal with the commissioners" at any time after their return is placed on file and before, at the latest, the third day of the next regular term. §§ 5, 8. And the appeal must be to the next term of the supreme judicial court first held more than thirty days, excluding the first day thereof, after the third day of the commissioners' term above mentioned, § 8; at which term of the court the "appellant shall file a complaint setting forth substantially the facts." § 8. If no such notice is presented or pending at the term of the commissioners above mentioned, "the proceedings shall be closed and recorded; and all claims for damages not allowed by the commissioners shall be forever barred." § 5.

Such are peremptory requirements regulating the taking and prosecuting an appeal on damages, in all cases prior to 1880.

In 1880, the Legislature enacted a statute therein providing: "When an appeal is taken on the location of a way, petitions for increase of damages may be filed within sixty days after final decision in favor of such way." Stat. 1880, chap. 218, subsequently incorporated in the new revisions as R. S. chap. 18, § 47.

When this statute was enacted in 1880, appeals on damages were taken by presenting a petition for increase. R. S. 1871, chap. 18, §§ 5, 6. But by Stat. 1888, chap. 175, §§ 1, 2, filing notice of appeal was substituted for presenting a petition for increase in §§ 5, 6; but the corresponding change was not made in the Stat. 1880, chap. 218; hence the slight want of harmony in the mode of instituting an appeal for damages in the two classes of cases.

But a more serious incongruity appears between the provisions of R. S. chap. 18, §§ 5, 8 and those of § 47. The former prescribes the only general mode for taking and prosecuting an appeal on damages. As already seen, an appeal under the general provisions must be taken to the next term of the supreme judicial court first held more than thirty days after the third day of the commissioners' session held next after their return is filed; while under the latter, the appellant not being required to file his petition for increase or its equivalent notice of appeal before "sixty days after the final decision in favor of the way," which decision need not be made until the second term of the court next after the appeal on location was entered (R. S. chap. 18, § 49), it will be impossible for him to "file his complaint," etc., at the term specified in § 8, for that term will have long since passed. Hence a strict construction encounters grave difficulties as to matters of time.

While these somewhat incongruous provisions were enacted at different dates, one in 1880 and the others in 1883, they were both reenacted on the same day in the new revision of 1888; and as they pertained to the same subject, although applicable to different circumstances, they were incorporated into the same chapter. And considering all these provisions together, the intention seems quite obvious, viz.: to change the time when the initiatory steps of appeal from damages shall be taken in case an appeal on location is also taken; so that when no appeal on location is taken and hence the fact of the construction of the way has been made certain, unless it shall be prevented by reason of excessive damages (§ 6), then the question of damages, being the only one, shall be determined without delay. But when such an appeal has been taken, then the Legislature seems to have deemed it the better policy to relieve a person whose land is sought to be taken by eminent domain, from what may prove to be useless and expensive action in relation to damages.

In accordance with well established rules of construction these sections must all stand if possible, unless they are so inconsistent and repugnant that a construction cannot be given which shall reconcile them.

Now, viewing §§ 5, 8 as general provisions, applicable to all cases except so far as they may

be modified by §§ 47, 48, 49; and § 47 as special in its terms, and as modifying §§ 5 and 8 only in respect of the time when an appeal on damages shall be entered and prosecuted in case an appeal on location has been taken, and particularizing the provisions with this object in view, it appears:

1. The requirement of § 5, that "if no notice of appeal is presented or pending" at the term of the commissioners held next after the filing of their return, "the proceedings shall be closed," etc., is modified by § 48, that when a party has appealed from the decision on location after it has been placed on file and before the next term of the supreme judicial court, "all further proceedings before the commissioners shall be stayed until a decision is made in the appellate court;" and

2. The requirements of § 6, that the appeal on damages be taken "at any time before the third day of the regular term succeeding that at which the commissioners' return is made, to the term of the supreme judicial court, first held more than thirty days (excluding the first day of the session)" thereafter, at which term of the court "the complainant shall file a complaint," etc., are applicable only when no appeal on location has been taken; but when an appeal has been entered and prosecuted under §§ 48, 49, then the above provisions of § 6 are modified by § 47; so that, in such case, instead of taking any action whatever in relation to damages at the time prescribed and limited in §§ 5, 6, the appellant on damages may file notice of appeal or its equivalent, petition for increase, "within sixty days after final decision in favor of the way" and his complaint, at the term of the supreme judicial court "first held more than thirty days, excluding its first day," after that. Hence the phrase, "within the time limited," in § 8, will refer, in case an appeal on location has been taken, to the "time limited" in § 47.

Such a construction gives full force to all the provisions relating to the times for taking and prosecuting appeals from the decisions of the commissioners, both as to location and damages, and carry out what seems to have been the intention of the Legislature as indicated by these disjointed provisions. To be sure, § 47 cannot be in terms incorporated into § 8, without considerable verbal change, which the Legislature will probably do if it adheres to the policy as indicated.

Looking at the facts, we learn that the regular sessions of the commissioners in York County are held on the second Tuesday of April and October. R. S. chap. 78, § 6. They made their return on location and damages at their October Term, 1883. December 9, 1883, this appellant appealed from their decision on location and also filed "notice of appeal" from their award on damages. The location was sustained and certified by the clerk to them at their October Term, 1884. R. S. chap. 18, § 49. October 21, 1884, the appellant filed in the clerk's office of the supreme judicial court its complaint addressed to the January Term thereof, which was the first term of that court "held more than thirty days, excluding its first day," after the final decision in favor of the way." Applying the construction given to the statu-

tory provisions before mentioned, the appellants seasonably complied therewith.

Exceptions sustained.

Peters, Ch. J., Danforth, Libbey, Emery and Foster JJ., concurred.

James F. SMITH,

v.

Elizabeth HODSDON.

H. conveyed to S. a parcel of real estate, the deed for which was not recorded. The mother of H., who had previously levied an execution upon the same real estate without notice of the unrecorded deed, brought an action against H. for the possession of the estate. After that action was entered in court, S. recorded his deed. Held, that S. could be regarded in no other light than as purchaser *pendente lite*, and as such was chargeable with notice of the character of the suit and of the extent of the plaintiff's claim asserted in the pleadings, and was bound by any judgment rendered against H. in that action.

(Franklin—Decided March 18, 1886.)

ON report. Ejectment. *Plaintiff nonsuit.*

The facts are stated in the opinion.

Mr. H. L. Whitcomb, for plaintiff:

The disability of Susan J. Hodsdon to convey were removed by divorce, and she and her real estate was thereafter in the same situation as if her husband was dead. See, *Webster v. Webster*, 58 Me. 139; *Blake v. Blake*, 64 Me. 177; *Carlton v. Carlton*, 72 Me. 115.

In order to require the husband's assent to make the wife's conveyance valid, the relation of husband and wife must exist, both when she receives the land and when she makes the conveyance. *Reed v. Reed*, 71 Me. 156.

A conveyance from a husband to a wife will always be sustained when there is no evidence to impeach it. *Grant v. Ward*, 64 Me. 239; *Randall v. Lunt*, 51 Me. 246.

The oath to the appraisers not being recorded on the back of the execution but on a paper attached, the levy cannot avail the defendant. *Hall v. Staples*, 74 Me. 178; *Brackett v. Ridlon*, 54 Me. 426.

Mr. S. Clifford Belcher, for defendant.

Foster, J., delivered the opinion of the court:

For a correct understanding of the question involved in this case, the following statement is necessary:

The source of title to the land in controversy is from Charles H. Dyer, who conveyed it to Joseph H. Hodsdon, April 9, 1873; Joseph H. Hodsdon conveyed it to his wife, Susan J. Hodsdon, September 3, 1875, and upon that day both deeds were recorded. Elizabeth Hodsdon, mother of Joseph H. Hodsdon, claiming to be a prior creditor, and that the sale by her son to his wife was without consideration and fraudulent as to herself, brought suit against her son upon an account annexed,

for money loaned and advanced to him prior to said conveyance, the writ in said action bearing March 22, 1878. Judgment thereon was recovered March 17, 1879, and a levy upon the land in dispute made May 17, 1879, and duly recorded. The son's wife, Susan J. Hodsdon, having obtained a divorce from her husband in the meantime, held possession of the land. The old lady, Elizabeth Hodsdon, being unable to obtain possession otherwise, on September 14, 1880, brought a writ of entry against Susan J. Hodsdon for the land, claiming title and right of possession thereto under and by virtue of her judgment and levy against Joseph H. Hodsdon. During the pendency of this writ, Susan J. Hodsdon died; her two heirs were cited in, and a guardian *ad litem* appointed by the court; an administrator having been appointed also appeared and was defaulted; and finally on March 28, 1884, judgment was rendered in favor of Elizabeth Hodsdon against the heirs of Susan J. Hodsdon. A writ of possession was issued, and upon April 25, 1884, Elizabeth Hodsdon was given the possession of the premises. The validity of the levy and the title to the land was in issue in that suit.

But Susan J. Hodsdon had, on June 28, 1880, made and delivered a deed of the premises to James F. Smith, the present plaintiff, which deed was not placed upon record, however, till long after the commencement of the real action by Elizabeth Hodsdon against Susan J. Hodsdon, and while that action was pending in court, viz.: March 2, 1881. It appears from the docket entries in said action that notice was ordered by the court on Smith at the March Term, 1883, and at the September Term of that year he appeared in the suit by his attorney; but there is no evidence that judgment was ever rendered against him in that action.

It is under that deed of June 28, 1880, given by Susan J. Hodsdon before the institution of the real action by Elizabeth Hodsdon against her, but not recorded till it had been pending in court some time, that James F. Smith, the plaintiff in this action, claims title and possession against Elizabeth Hodsdon, the present defendant.

We are satisfied that he can legally maintain this action. The record in the action brought by Elizabeth Hodsdon against her son shows that she was a creditor prior to his conveyance to his wife by the deed of September 3, 1875. That the conveyance was claimed to be fraudulent as against this defendant appears, not only by the act of levying upon the property as that of the son but also in the fact of the suit subsequently brought against the wife for its recovery. The judgment in that suit conclusively settled the title and right of possession as being and belonging to the plaintiff in that action, Elizabeth Hodsdon, as against the party to whom the son had conveyed it. That judgment, based upon the allegation of title and right of possession, is held to conclude all parties and privies thereto in representation or estate. *Gilman v. Stetson*, 18 Me. 428; *Hurd v. Coleman*, 42 Me. 182.

But it is urged that this plaintiff holds his title, unaffected by that judgment, by deed from Susan J. Hodsdon who had the record

title. To this it may be answered: 1. This plaintiff's deed, although given before, was not recorded till after the commencement of the real action in which this defendant claimed title to the land; and by R. S. chap. 73, § 8, "No conveyance * * * is effectual against any person, except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded," as therein provided. Elizabeth Hodsdon was not one of those embraced within the exception named in the foregoing statutory provision. Nor is it claimed that she had notice of that conveyance prior to the commencement of her suit in which her title to the land was established. If such claim were relied on, it would be incumbent on the party asserting such notice to establish that fact.

In *Spofford v. Weston*, 29 Me. 140, the court held that it was for the party relying on an unregistered deed, against a subsequent purchaser or attaching creditor, to prove that the latter had actual notice or knowledge of such deed. None is attempted to be shown in this case. Here, both parties claim title through different channels, from a common source. This deed, then, unrecorded, could not be effectual against the plaintiff in that suit, the defendant in this. It was recorded during the pendency of proceedings in which the plaintiff therein established her title to these premises. Hence, 2, this plaintiff can be regarded in no other light than as a purchaser *pendente lite*. As such he would be held chargeable with notice of the character of the suit and of the extent of the claim asserted in the pleadings in reference to the land, even without express or implied notice in point of fact. This rule is founded in necessity, and is statutory in its operations, for it would be impossible to terminate any suit successfully if alienations were allowed to prevail during its pendency. This principle has long been established, and is explicitly laid down by Lord Justice Turner in *Bellamy v. Sabine*, 1 De G. & J. 584.

And although he was notified that he might appear in that suit, when the fact became known from the records that he claimed title under the defendant in that action, yet such notice was unnecessary. His deed did not become effectual, so far as affecting the rights of the plaintiff in that action, till after the commencement of proceedings by her to establish her title to the land in controversy. As such purchaser during the pendency of that action, he is bound by any judgment that may have been entered against the person from whom he derived his alleged title, equally as if he had been a party to it from the beginning. *Tilton v. Coffield*, 98 U. S. 168 [bk. 23, L. ed. 859].

"The litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the suit." 1 Story, Eq. § 406; 1 Washb. Real. Prop. *593, *594.

This rule is held to be founded upon great public policy; otherwise alienations made during the pendency of a suit might defeat its whole purpose, and there could be no end to litigation. This doctrine is common to the courts both of law and equity, as was held in the case of *Bellamy v. Sabine*, *supra*, and is

thus expressed by a learned writer: "In actions of ejectment, if the plaintiff recovers a judgment against the defendant, he has also a perfect title against any alienee of the defendant, since he must necessarily recover upon the strength of his own legal title; in other words, the defendant can never give to an assignee or alienee a better title against the plaintiff than that which he himself holds." 2 Pom. Eq. Jur. § 633.

Therefore, while it may be true that this plaintiff was not a party to the judgment in the former suit, it is equally true that, in his relation to the subject matter of that suit, he has no rights as against this defendant, superior to those of his grantor. In that suit the plaintiff was the prevailing party. So long as that judgment stands unreversed it must be considered as conclusive and importing absolute verity. The plaintiff is not in a position to impeach that judgment in this action. *Bairdell v. Pray*, 68 Me. 272.

Another objection raised by the plaintiff is that the certificate of the oath administered to the appraisers in the defendant's levy was not made upon the back of the execution. If this objection is now open to the plaintiff, if the judgment in the former suit may not be conclusive upon that question, still it cannot avail him in this. While admitting the correctness of the decision in the case of *Hall v. Stepien*, 74 Me. 178, that the certificate of oath must be upon the back of the execution, nevertheless in this case, from an inspection of the original papers we think that there is a substantial compliance with the requirements of the statute in that respect.

In accordance with the agreement in the report the entry must be,

Plaintiff nonsuit.

Peters, Ch. J., Walton, Virgin and Libbey, JJ., concurred.

Haskell, J., concurred in the result.

Wilfred E. GRINDLE

v.

Henry N. STONE.

1. A stockholder is liable in an action against him by a judgment creditor of a corporation, under the statutes of Maine, when he has a lawful judgment against the corporation based upon a claim in tort or contract, or for any penalty recovered within two years next prior to the commencement of the action; when the defendant agreed to take stock in the corporation and has not paid for the same, as payment is defined in R. S. chap. 46, § 45; when the cause of action against the corporation accrued during the defendant's ownership of such unpaid stock; when the proceedings to obtain the judgment against the corporation during the defendant's ownership of such unpaid stock or within one year after its transfer were recorded in the corporation books.
2. In such an action, the certificate of organization of the corporation is prima

facie evidence that the defendant had not fully paid for his stock, when it shows that the defendant took 13,832½ shares of the par value of \$5 each, and that the whole stock consisted of 100,000 shares upon which there had been paid in all \$1,000 in money and \$10,000 in land.

3. In such an action, the fact that the plaintiff took out execution against the corporation and seized and sold corporate property thereon in part satisfaction thereof does not prevent the plaintiff from recovering the balance of the judgment.
4. In such an action, the defendant is *prima facie* shown to be one of the persons who signed the certificate of organization by the identity of name, in the absence of any evidence that there was another person of that name in the place of his residence.

(Hancock—Decided March 16, 1886.)

ON exceptions by the plaintiff to the ruling of the court upon the facts stated in the opinion, directing a nonsuit to be entered. *Sustained.*

The case is stated in the opinion.

Mr. H. A. Tripp, for plaintiff:

The situation of the parties shown to exist on February 23, 1880, is to be presumed to have existed all the time until the date of the writ in this suit, no proof being introduced to show the contrary. 1 Greenl. Ev. § 41.

Defendant is precluded from making any other defense than that set out in the brief statement. *Fox v. Ins. Co.* 53 Me. 107; *Cutler v. Currier*, 54 Me. 81.

Nothing shall be intended to be out of the jurisdiction of a superior court but that which expressly appears to be so. *Gosset v. Howard*, 0 Q. B. 458, cited in *Freem. Judg.* 2d ed. § 124.

It is a matter of no consequence whether the jurisdiction of the court affirmatively appears upon the judgment roll or not, for if it does not it will be conclusively presumed. *Freem. Judg.* § 182; *Granger v. Clark*, 22 Me. 128; *Simms v. Slacum*, 8 Cranch, 300 (7 U. S. bk. 2, 2d ed. 446). And see also, *Pratt v. Dow*, 56 Me. 81; *Stetson v. Corinna*, 44 Me. 42; *Love-roe v. Brown*, 60 Me. 592.

The issuing of an *alias* execution is at least *prima facie* proof that the first execution had been returned unsatisfied for the amount which appears by the *alias* execution to be due and unpaid, and that the *alias* execution was issued by order of the court. *Bryant v. Johnson*, 24 Me. 804.

Messrs. Hale & Hamlin, for defendant:

The writ against the Granger Copper Mining Co. and the first execution issued on judgment recovered thereon were objected to because of the fatally defective return of service; thirty days not being given by the officer upon the writ. *Abb. Tr. Ev.* 768.

The Judge at *nisi prius* ordered a nonsuit upon the testimony produced. The plaintiff has no right to introduce the certificate of the clerk as to appearance, a document not produced at the trial. 42 Me. 577; 64 Me. 175.

The Statute of 1871, chap. 205, applies to sub-

scriptions, fraudulent dividends, withdrawal of stock, etc., but not to the case in hand. In suits of this kind, the statute requirements must be strictly complied with. *Morawetz, Corp.* §§ 616, 618 *et seq.*

Virgin, J., delivered the opinion of the court:

The plaintiff having, in April, 1888, recovered a judgment, on an account annexed, for \$800.86 debt, and \$17.87 costs, against the Granger Copper Mining Co., and satisfied in part his execution by a levy upon the personal property of the company, seeks by this action a judgment for the balance thereof against the defendant, to whom, it is alleged, the company issued 13,832 1-8 shares of its stock, which he has not paid for in accordance with R. S. chap. 46, § 45.

The action being founded on R. S. chap. 46, §§ 46, 47, the plaintiff must by evidence bring his case within those provisions, by showing:

1. That he has a lawful and *bona fide* judgment against the corporation "based upon a claim in tort or contract, or for any penalty," recovered within two years next prior to the commencement of this action.

2. That the defendant subscribed for or agreed to take stock in the corporation and has not paid for the same, as payment is defined in § 45.

3. That the cause of action upon which his judgment against the corporation was founded was contracted during the defendant's ownership of such unpaid stock; and,

4. That his proceedings to obtain his judgment against the corporation were commenced during the defendant's ownership of such unpaid stock or within one year after its transfer was recorded on the corporation books. With proof of such facts the action may be maintained "without demand or other previous formalities." § 47. What is the proof?

1. Copies of the writ and record show a judgment in favor of the plaintiff against the corporation, recovered at the April Term, 1888, on an account annexed; and this action was commenced by writ dated July 30, 1888.

2. The certificate of organization shows that the defendant took 13,832 1-8 shares of the capital stock, each of the par value of \$5; and that of the whole 100,000 shares issued, the stockholders paid in \$1,000 cash and \$10,000 in land, leaving the remainder unpaid for. This makes a *prima facie* case of unpaid stock, in the absence of any evidence to the contrary. 2 Whart. Ev. § 1284. If the defendant had paid for his, he could have shown it as a defense, and it would have been a full defense. § 48.

3. The account annexed, upon which the judgment against the corporation was based, as shown by copy of the writ in that action, accrued between December 9, 1880, and November 14, 1881, or during the defendant's ownership of unpaid stock.

4. Copies of the writ and record show that the proceedings to obtain the plaintiff's judgment against the corporation were commenced during the defendant's ownership of such unpaid stock, his ownership shown by the certificate of organization being presumed to continue until the contrary is shown.

All that is required by the plaintiff to lay the foundation for this action is a seasonable recovery of the kind of judgment mentioned in § 46. It was not necessary for him to take out an execution on that judgment and take any action thereon, as in case of debt created before 1871. And the fact that he did so and caused a seizure and sale thereon of the personal property of the corporation, in part satisfaction thereof, cannot prejudice the plaintiff. That was for the benefit of the defendant. The officer returned the execution satisfied in part, viz.: for \$40.05. If anything more has been paid thereon, the defendant, being as the certificate of organization shows president of the corporation, will be able to show it at the next trial.

That the defendant is the same Henry N. Stone who signed the certificate of organization is *prima facie* shown by the identity of the name, in the absence of any evidence of another person of that name in Boston where he is alleged to reside. 3 Phillips, Ev. Cow. ed. 1801-2; Lawson, Pres. Ev. 248.

Exceptions sustained.

Peters, Ch. J., Danforth, Foster and Haskell, JJ., concurred.

Moses CHESLEY

v.

John J. PERRY.

An action against the indorser of a writ for costs recovered by the defendant in the suit may be maintained under R. S. chap. 81, § 7, when the return of the proper officer upon the execution for such costs shows that the officer demanded payment of the indorser and he neglected to pay or to show personal property sufficient to satisfy the execution.

(Cumberland—Decided March 10, 1886.)

ON exceptions by the plaintiff to a ruling of the court in ordering a nonsuit, in an action on the case to recover costs against the indorser of a writ. *Sustained.*

The plaintiff put in evidence the record of the former suit and judgment for costs, the execution and return of the officer as stated in the opinion, and the defendant's admission that he indorsed the writ; all of which were made a part of the bill of exceptions.

Mr. David Dunn, for plaintiff.

Mr. John J. Perry, for defendant:

The liability of an indorser of a writ is regulated by statute. Chap. 59, § 8, Laws of 1821; R. S. 1841, chap. 114, § 16; R. S. 1857, chap. 81, § 10; R. S. 1871, chap. 81, § 7; R. S. 1883, chap. 81, § 7.

The undertaking of an indorser of a writ is in its nature conditional, depending on the avoidance or inability of the plaintiff of which certain statute proof is required; and it is also a collateral undertaking of one man, for the conditional payment of the debt of another. *Reid v. Blaney*, 2 Me. 128. See also, *Pallister v. Little*, 6 Me. 352; *Dillingham v. Codman*, 18 Me. 75; *Wilson v. Chase*, 20 Me. 385; *Thomas v. Washburn*, 24 Me. 223; *Neal v. Washburn*, 24 Me. 331; *Ruggles v. Ives*, 6 Mass. 494.

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Under the law of 1821, *scire facias* was decided to be the proper remedy against the indorser of a writ. *Reid v. Blaney*, *supra*; *How v. Codman*, 4 Me. 79.

By the revision of the statutes in 1841, it provided that the suit should be an action on the case and be brought within one year after the original judgment and brought in the court where the original judgment was rendered.

That part of the Act of 1821 which makes the indorsement of the writ a conditional collateral undertaking is retained *verbatim et literatim*. The whole section must be taken and construed together. See, Spauld. Pr. 87.

There is no allegation in the writ in this suit that the original plaintiff avoided or was unable to pay the costs. "One of these facts must be alleged or the writs would be adjudged bad on demurrer." *Ruggles v. Ives*, *supra*. And see, *Craig v. Fessenden*, 21 Me. 34; *Harkness v. Farley*, 11 Me. 491.

Haskell, J., delivered the opinion of the court:

Case, to recover costs of the defendant, as indorser of a writ.

By the Act of 1821, chap. 59, § 8, writs in certain cases were required to be indorsed. Under that Act, the court held that *scire facias* was the proper and only proceeding by which costs could be collected from an indorser; but that method required so exact compliance with technical rules of law that the Legislature in the revision of 1840-41, enacted (chap. 114, § 18), that the remedy should be an action on the case, and that "A return upon the execution issued in any such case, by an officer of the county where said indorser lives, that he had demanded payment of the same of said indorser, and the said indorser had neglected, either to pay the same or to show said officer personal property of the plaintiff sufficient to satisfy said execution, or that he cannot find said indorser within his precinct, shall be *conclusive evidence* of the liability of said indorser in said suit." This enactment has been continued without change to the present day. R. S. 1857, chap. 81, § 10; R. S. 1871, 1883, chap. 81, § 7.

True, the revision of 1857 omits in terms to require a return of the failure of the indorser to show personal property of the plaintiff, but requires a return of the failure to show personal property, that is, property that can be taken upon the execution, and property of the plaintiff can only be so taken, so that the meaning of the Statute of 1840-41 is retained in the subsequent revisions, and a return of an officer, in the language of these revisions, complies with their requirements, and takes to itself their meaning. Since the enactment of 1841 no case cited at the bar pretends to hold any other prerequisite necessary to charge an indorser than the provisions of that statute define. The officer's return upon the execution in evidence complies in every particular with the terms of the statute, and is conclusive evidence of the liability of the indorser. The defendant admits that he indorsed the writ, and no good reason is shown why he should not abide the terms of his contract.

Exceptions sustained.

Peters, Ch. J., Walton, Virgin, Libbey and Foster, JJ., concurred.

ROCKLAND, Mt. Desert & Sullivan STEAM-
BOAT CO.

v.

Arthur SEWALL, Admr.

If the whole capital named in a subscription agreement is not subscribed, a signer who took no part in the organization of the corporation cannot be held upon his subscription.

(Knox—Decided March 15, 1886.)

ON report, upon defendant's exceptions. *Exceptions sustained.*

This is an action of *assumpsit*, to recover assessments upon ten shares, of \$100 each, in the capital stock of plaintiff Company.

The first objection to the maintenance of the action made by defendant, presented in his first four points in the exceptions is, that Edward Sewall, his intestate, made no contract with the plaintiff, because there was no such corporation existing when the agreement was signed by him.

The facts are further stated in the opinion.

Mr. C. W. Larrabee, for defendant:

No question is raised as to the appointment of the administrator and his qualification, nor is there any evidence of the date of the death of decedent. The general issue is pleaded, thereby admitting the capacity of plaintiff to sue as a Corporation. *Penobscot R. R. Co. v. Dummer*, 40 Me. 172.

The general issue admits the capacity of plaintiff to sue as a Corporation but nothing more.

In *K. & P. R. R. Co. v. Palmer*, 84 Me. 366, there was an express agreement "That payment shall be made as shall hereafter be required by a vote of said company." The action was for assessments and the charter had been granted before the agreement was made. It differs from the case at bar.

Penobscot R. R. Co. v. Dummer, 40 Me. 172, was for assessment perforce of an agreement made after the charter had been granted and where there was an express and definite promise to pay.

New Bedford & B. Turnpike Co. v. Adams, 8 Mass. 141, was not unlike this case. That was no express promise to pay; only an agreement to take a certain number of shares. In this case if the court holds that the signature of intestate, Edward Sewall, ten shares, is a promise to pay \$100 a share, then we say that the promise was not an unconditional one.

In *Andover & Medford Turnpike Corp. v. Gould*, 6 Mass. 40, the agreement was: "We the subscribers, etc. * * * agree to take in said road the number of shares set against our names and to be proprietors therein." *Parsons, Ch. J. Id.* 44: "The agreement thus expressed is that the subscribers will take in the said road the number of shares set against their names and will be proprietors therein. These words certainly cannot amount, upon any reasonable construction, to a promise to pay."

Andover & Medford Turnpike Corp. v. Hay, 7 Mass. 102; *New Bedford & B. Turnpike Corp. v. Adams*, 8 Mass. 187. "There is no express promise to pay, nor is any language used from which the law can raise an implied promise." It was also noticed that the contract was prior

to the organization and therefore not admissible to support the declaration for assessment on stock subscribers.

Essex Turnpike Corp. v. Collins, 8 Mass. 291; *Middlesex Turnpike Corp. v. Swan*, 10 Mass. 884. Parties were held strictly to the letter of the contract; nothing was taken by implication. This last case cited is in point that the court will not hold a party to an agreement like the present, by implied or constructive evidence of assent, when one is sought to be charged who had signed an agreement prior to the existence of the company as such.

The doctrine is clearly laid down that, unless there had been an express assent none would be inferred. *Taunton & South Boston Turnpike Corp. v. Whiting*, 10 Mass. 327. In all these cases, express promise and express assent are required.

We have every right to infer that the capital stock was never subscribed for. In fact the evidence on this point from plaintiff's records and Lovejoy, its clerk, is conclusive that its capital was never filled. Therefore, the action cannot be sustained. *Salem Mill-Dam Corp. v. Ropes*, 9 Pick. 187.

In *Ripley v. Sampson*, 10 Pick. 873, Shaw, *Ch. J.*, says: "But where the shares are confessedly of no value after the assessment may have been paid, an administrator is not at liberty to take money out of the general assets of the estate to pay such assessments."

Mr. A. P. Gould, for plaintiff:

The Corporation was duly organized, and shares subscribed recognized as shares of its stock, and the subscribers as corporators. This was an acceptance of the proposal of the defendant's intestate, and was sufficient to complete the contract. *Kennebec & P. R. R. Co. v. Palmer*, 84 Me. 366; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172.

In such case, the subscriber may be held by a corporation after its organization, upon an agreement entered into by him before the Act of incorporation was granted by the Legislature. *Thompson v. Page*, 1 Met. 565.

Sewall did not merely promise to take the number of shares set against his name, as in the case of *New Bedford & B. Turnpike Co. v. Adams*, 8 Mass. 188, but he promised to pay for them.

The words in an agreement, to "take and fill" a number of shares set against the subscriber's name, have been several times held to be equivalent to an express promise to pay assessments legally made upon the shares represented. *Bangor Bridge Co. v. McMahon*, 10 Me. 478; *Buckfield Branch R. R. Co. v. Irish*, 39 Me. 44; *Penobscot & K. R. R. Co. v. Dunn*, 39 Me. 587.

In the demand or notice, it is not necessary to set out the contract in detail, which constitutes the claim against an administrator. The substance of it is sufficient.

The failure to give any notice at all does not defeat the action, under our present statute. Stat. 1888, chap. 243; R. S. chap. 87, § 12.

This Corporation was organized under the statutes as they stood in 1878. They were: R. S. chap. 48, §§ 18-20; Stat. 1876, chap. 65; Stat. 1878, chap. 19.

The associates in this case seem in their agreement of association to have followed the

requirements of the original Act for the formation of corporations, under a general law. Laws, 1862, chap. 152.

This need not be inquired into, as the general issue admits a legal organization. *Penobscot & K. R. R. Co. v. Dunn*, *supra*.

Virgin, J., delivered the opinion of the court:

Assumpsit to recover the par value of ten shares, at \$100 each, of capital stock which the plaintiff alleges the defendant's intestate agreed to take and pay for by executing certain articles of agreement, of November 7, 1878, mutually entered into by him and sundry other persons.

When the plaintiff's evidence was closed, "The case was withdrawn from the jury and submitted to the presiding Justice for decision, with the right to except thereto, and to have the whole case reported to the law court."

The plea of general issue admits the plaintiff's corporate existence and power to sue. *Ticonic Bank v. Bailey*, 68 Me. 251.

By the second and third articles of the Association executed prior but with reference to its organization the parties thereto agreed "That the capital stock of the Company, on its organization into a corporation, shall be \$40,000, divided into shares of \$100 each; and the parties to the agreement shall contribute toward the capital such sum of money as they may severally place against their names," etc. The agreement was signed by sundry persons, and by the defendant's intestate as follows: "Edward Sewall, ten shares."

Assuming a fair construction of the agreement to be that the defendant's intestate thereby agreed to take and pay for, or take and fill ten shares at \$100 each; that the Association was duly organized under the general law, as contemplated by the stipulations in the articles of agreement; and that the shares thus subscribed were recognized as shares of its stock and the subscribers as corporators or shareholders; still we are of opinion that the defendant's intestate, who never took any part in the organization, cannot be held upon his subscription, since it does not appear that the whole capital was subscribed.

The agreement is to take a certain number of shares of the capital stock; and that must have reference to the capital stock fixed in the agreement and subsequently placed at the same sum in the vote of the Corporation. "There must, therefore, have been such a capital stock obtained before the subscriptions could be binding." *Oldtown & Lin. R. R. Co. v. Veazie*, 39 Me. 571, 577-8.

It cannot be presumed that persons agreeing to become shareholders in a corporation with a fixed capital intend to become members of a corporation with a less capital. *Morawetz, Corp.* 259.

"It is a rule of law too well settled to be now questioned," says Shaw, *Ch. J.*, "that when the capital stock and number of shares are fixed by the Act of incorporation or by any vote or by-law passed conformably to the Act of incorporation, no assessment can be lawfully made on the share of any subscriber, until the whole number of shares has been taken. This is no arbitrary rule; it is founded on a plain dictate of justice and the strict principles regulating the

obligations of contracts. When a man subscribes a share to stock to consist of 1,000 shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only 500 shares are subscribed for, he would be held, if liable to assessments, to pay a five hundredth part of the cost, besides incurring the risk of entire failure and loss of the amount advanced toward it." *Stoneham B. R. R. Co. v. Gould*, 2 Gray, 278; *Cabot & W. S. Bridge v. Chapin*, 6 Cush. 50; *Atlantic Cotton Mills v. Abbott*, 9 Cush. 423; *Salem Mill-Dam Corp. v. Ropes*, 6 Pick. 23; *S. C.* 9 Pick. 187; *Central Turnpike Corp. v. Valentine*, 10 Pick. 142; *N. H. Cent. R. R. v. Johnson*, 30 N. H. 390.

This rule may be changed by a provision in the articles of subscription; or if a subscriber, with a full knowledge of the want of the requisite amount of subscriptions, attend meetings of the corporation, and co-operate in such of its acts as could only be properly done on the assumption that the subscribers intended to proceed with the stock partially taken up, he might be estopped from setting up such defense. *Cabot & W. S. Bridge v. Chapin*, *supra*.

In the case at bar, the defendant's intestate agreed to become responsible for one fortieth of the cost of the plaintiff's enterprise. There is no evidence that the whole capital stock was taken. If all have paid who subscribed, except the defendant's intestate, then the maintenance of this action would oblige him to become responsible for one thirtieth; which contract he never made.

Exceptions sustained.

Peters, Ch. J., Walton, Libbey, Foster and Haskell, JJ., concurred.

INSURANCE. CO. of NORTH AMERICA v.

William ROGERS.

1. The insured in a marine insurance policy is liable in an action for pro rata premium under the continuation clause of a policy when the vessel was at sea at the expiration of the term of insurance, although a previous action has been brought on the premium note and judgment has been rendered thereon.
2. In an action for the premium due upon a marine insurance policy in the name of a part owner for the benefit of whom it may concern, the defendant offered evidence to show other insurance which would make an overinsurance upon his part of the vessel and claimed to be liable for only a ratable proportion of the premium. Held, that if this proposition is sound in law, the burden is upon the defendant to show that the policies were simultaneous and not intended to cover the interests of some other owners.

(Sagadahoc—Decided April 7, 1886.)

ON report. Judgment for plaintiff.
The facts are stated in the opinion.

Mr. William E. Hogan, for plaintiff:

When a policy of marine insurance, issued primarily as a time policy, provides: "if on a passage at the end of the term, the risk to continue as *pro rata* premium," etc., the risk assumed attaches if the vessel be at sea, immediately upon the expiration of the time originally set out, and terminates only when the ship reaches her port of destination. *Cole v. Union Ins. Co.*, 12 Gray, 501; *Gookin v. New Eng. Ins. Co.*, *Id.*

The intention in providing for a continuation of the risk, when the ship happens to be at sea when the twelve months expire, is unquestionably to give the ship protection and the clause providing for such continuation is one in the interest of the insured. *Wood v. New Eng. Marine Ins. Co.* 14 Mass. 86.

A vessel is on a passage after she has left her port of lading, prepared to proceed to her port of destination. *Bowen v. Hope Ins. Co.* 20 Pick. 275.

The question to be settled is this: did the policy in this case ever attach or take effect so as to charge the insurers, in case there had been a loss while said ship was on her passage from San Francisco to Liverpool? If the policy did attach, the insurer has a claim for the whole premium. *Merch. Ins. Co. v. Clapp*, 11 Pick, 58.

Mr. C. W. Larrabee, for defendant:

Double insurance takes place when the assured makes two or more insurances on the same subject, and the same risk. *Arn. Ins.* 2d ed. 296, § 5; 1 Marshall, *Ins.* § 4.

When a double insurance has thus been effected in two valued policies, the party who has received the full extent in one of the policies could recover nothing on the other. 1 *Arn. Ins.* (2d ed.) 302; *McKim v. Phoenix Ins. Co.* 2 Wash. C. C. 89; *Murray v. Ins. Co. of Pa.* *Id.* 186; *Wiggin v. Suffolk Ins. Co.* 18 Pick. 153.

There was a double, or overinsurance on the same subject, and the same risk to the amount of \$5,750 and, therefore, there was a diminution *pro rata* in the several premiums. 2 *Marsh. Ins.* § 15.

The contract was entire and not divisible and or one consideration. And if plaintiff has made his election and brought suit and recovered judgment on the premium note, he must abide by his choice. See, *Wiggin v. Suffolk Ins. Co. supra*.

Libbey, J., delivered the opinion of the court:

On the 25th of May, 1882, the defendant procured of the plaintiff insurance on the ship, *Levi C. Wade*, valued at \$48,000, in the sum of 6,500, for one year from April 28, 1882, payable to himself and whom it might concern. The policy contained the usual clause in marine policies as follows: "If on a passage at the end of the term, the risk to continue at *pro rata* premium, until twenty-four hours after arriving at port of destination, but no longer, than on hull or freight, and in case of loss under this clause, three months' additional premium is warranted by the insured."

The ship sailed from San Francisco, April 5, 1883, for Liverpool, and arrived September 3, 1883.

The defendant gave his note for the premium for one year, which was indorsed by the plaintiff.

and judgment recovered on it by the indorsee, in 1885.

This action is to recover a *pro rata* proportion of premium from April 28, 1883, to September 19, 1883.

By the terms of the policy the defendant was insured during that time for a *pro rata* premium, and accepting the policy with that clause he must be held as promising to pay the premium. He certainly cannot hold the insurance without promising to pay the consideration for it.

But it is claimed in defense that the defendant owned only twenty-seven sixths of the ship and had on her a further insurance in another company for the sum of \$16,500, making in all \$23,000, while his interest in the value of the ship was only \$17,250; and that, there being an overinsurance of \$5,750, in case of loss he could recover only a ratable proportion of the policies; and, therefore, is liable for only a ratable proportion of the premium. If this proposition is sound in law, the burden is on the defendant to prove that the policies were simultaneous. This he fails to do. Again; the insurance was on the ship and not on the defendant's interest only, for the benefit of the defendant and whom it might concern. It does not appear that it was not intended to cover the interest of some other owner, as well as that of the defendant.

Judgment for plaintiff for \$179.50, with interest from date of the writ.

Danforth, Walton, Virgin, Foster and Haskell, J., concurred.

George W. JOHNSON *et al.*

v.

Thaddeus H. DAY.

1. The declarations of a son of one of the parties made to the father in the presence of the other party is admissible in evidence, if the father remains silent, the jury being instructed that it is for them to determine what significance they would attach to it.
2. Exceptions were taken to the ruling of the court in excluding as evidence an alleged conversation; The exceptions did not disclose what the conversation was. **Held**, that the exceptions cannot be sustained; that the error must affirmatively appear in order to sustain exceptions; it cannot be assumed.

(Kennebec—Decided April 7, 1886.)

ON exceptions and motion by defendant to set aside the verdict. *Overruled.*

The case and facts are stated in the opinion.

Mr. A. M. Spear, for defendant.

At the time the statement of defendant's son is alleged to have been made, the defendant was asserting his right to an ownership in the property by word and act in the most forcible manner.

Such testimony as that objected to is admissible on two conditions only: 1. "Where si-

lence is of such a nature as to lead to the inference of assent," or "if a party is silent when he ought to speak." 2 Wharton's Ev. § 1186, 2. That the party upon whom a reply rests heard the statement to which a reply should be made. *Id.*

Neither of these conditions was satisfied. The defendant's silence could not, under the circumstances, lead to an inference of consent, and there was no proof that the defendant heard the alleged statement.

Plaintiffs had no lien by finding, either by statute or common law. Story, Bail 126, 129; 8 N. H. 325; 1 Cush. 536; 62 Me. 275.

If plaintiffs had a lien they lost it by parting with possession of the goods. 42 Me. 50; 39 Me. 285; 32 Me. 211; 63 Me. 116; 11 Cush. 231.

Lost goods belong to the owner. 1 Chit. 4th ed. 191, *note u.*; 2 Kent, Com. 536; 62 Me. 276; 74 Me. 452.

Messrs. Beane & Beane, for plaintiffs:

The admission of the evidence complained of was proper. Best, Ev 895, § 519, from which we quote, says: "The rule of law with respect to self-regarding evidence is, that when in the self-serving form it is not in general receivable; but that in the self-disserving form it is, with few exceptions, receivable and is usually considered proof of a very satisfactory kind."

Walton, J., delivered the opinion of the court:

This is an action of trover for a quantity of old iron of the alleged value of \$28.06. The iron was once a part of the toll bridge at Hallowell, which was carried away by a freshet in the fall of 1869 or the winter of 1870. The iron had laid at the bottom of the Kennebec River for over fourteen years; and, so far as appears, no one had during all that time made any effort to recover it, or to ascertain even where it lay. But in August, 1884, the plaintiffs, one of whom appears to have been a professional diver, by the aid of a diving suit and other apparatus, found the iron and removed it to the shore. The defendant then claimed it as his property, saying he had bought it of the bridge company some fourteen years before; and he afterward took the iron and hauled it away and converted it to his own use. The plaintiffs claimed that the iron had for a long time been totally abandoned, and had become derelict, so that anyone who should search for it and find it and take possession of it, would become its owner; and that they had in this way become the owners of it themselves. This issue was tried by the jury and they found in favor of the plaintiffs.

During the trial, the plaintiffs offered evidence that at one time when the defendant was claiming that he had bought the iron of the bridge company, one of his sons spoke up and said: "Father, you never bought any such stuff as that. You only bought what was afloat. You didn't buy anything on the bottom." That the defendant turned round, but said nothing. To the admission of this evidence the defendant excepted.

We think the evidence was admissible. True, it does not appear that the defendant made any reply, but silence may sometimes be regarded as an admission. Whether it should be regarded so in this case was a question for the

jury. We think that under the circumstances presented by this case, the Judge acted correctly in admitting the evidence, and that the jury were properly instructed that it was for them to determine what significance they would attach to it.

While the defendant was upon the stand as a witness in his own behalf, his counsel asked him to state a conversation he had with one Eugene Lewis. The question was objected to and the answer excluded. To this exclusion the defendant excepted. We are unable to say whether the answer was rightly excluded or not. The exceptions do not show what the proposed conversation related to. Counsel stated that it was offered on the question of abandonment; but he did not state, so far as appears by the exceptions, what the conversation was which he proposed to prove and we cannot know, therefore, that it would have had any probative force upon that question. Error must affirmatively appear; it cannot be assumed. The exceptions therefore must be overruled.

We have carefully examined the evidence, and we think it justified the jury in returning a verdict for the plaintiffs.

Motion and exceptions overruled; judgment on the verdict.

Peters, Ch. J., Danforth, Libbey, Emery and Foster, JJ., concurred.

Andrew J. HINKLEY *et al.*

v.

Dexter BLETHEN *et al.*

The court will not appoint a receiver for an unincorporated joint stock company, to sell the property and divide the proceeds among the members, on a bill brought by a minority of the company, where equity does not require it.

(Decided March, 1886.)

BILL in equity praying for the appointment of a receiver for a joint stock company. *Dismissed.*

The case is stated in the opinion.

Messrs. Savage & Oakes, for plaintiffs:

Jurisdiction is claimed, under R. S. chap. 77, § 6, cl. 6.

"In chancery, the common practice is, where property is of such a character as to be injured or greatly reduced in value, by division, to decree a sale of the whole estate and divide the proceeds." *Wood v. Little*, 35 Me. 111.

By process in equity, the whole may be sold for the most that can be obtained for it and, the proceeds divided among the owners. Such is the usual course in England and most of the States in this country. 1 Story, Eq. Jur. chap. 14.

And this court now has equity jurisdiction in such cases. *Wilson v. E. & N. A. R. R. Co.* 62 Me. 114.

Story, 1 Eq. Jur. § 647, says: "The reason given at common law against partition was more specious than solid. It was that a joint tenancy being an estate originally created by the act or agreement of the parties, the law

would not permit any one or more of the tenants to destroy the united possession without a similar universal consent."

See also, 1 Schouler, Personal Property, 2d ed. 187 189, 190, where the power of a court of equity to make partition of personal property, by decreeing a sale, is distinctly declared.

Messrs. Frank W. Dana and Willard F. Estey, for defendants:

If the court can entertain this bill at all, it is by virtue of R. S. chap. 77, § 6, cl. 6, which restricts the equitable jurisdiction of the court to cases between part owners of personal property, for the adjustment of their interests in the property and accounts respecting it.

Jurisdictional statutes should be construed strictly. *Jones v. Newhall*, 115 Mass. 244.

In *Carter v. Bailey* 64 Me. 465, the court says: "This court, as a court of equity, has jurisdiction of matters of account between owners in common of personal property; and when such a case is presented wherein is involved a variety of adjustments, limitations, cross claims or other complications, it will afford to the parties the superior facilities of equity in effecting distributive justice among them, although as a court of law it also has jurisdiction of the subject matter. But when the account, if any, is simple and all on one side and can be fully and readily adjusted by a judgment in an action of *assumpsit* and no discovery is sought, the necessity for exercising equity jurisdiction of the case does not exist and the court will decline it."

Neither, in the absence of any allegation of fraud, can the general equity powers of this court conferred by clause 11, § 6, chap. 77, be successfully invoked, for the same reason. Equity jurisdiction is therein limited to cases where there is not a plain, adequate and complete remedy at law. *Hayden v. Whitmore*, 74 Me. 284.

Had fraud been alleged, the complainants might have had a choice of remedies and brought suit, either at law or in equity. *Taylor v. Taylor*, 74 Me. 587.

There is no pretense of fraud set up in the bill; and the court can grant relief only according to the allegations and the proof. *Storer v. Poole*, 67 Me. 217.

It is contrary to the policy and practice of the courts to meddle between tenants in common of personal property; and the owner out of possession is left to await his opportunity and take the chattel when he can. *Carter v. Bailey*, *supra*.

Although it is said that where the chattel is in danger of being injured or destroyed by a party in possession who would be unable to respond in damages, possibly a court of equity might require him to deliver possession to the other owners, or else give security against its injury or destruction. Schoul. Pers. Prop. 197, 198.

But no such relief is asked for in the bill. It is conceived that the court would not go so far as to appoint a receiver to take possession of the property and order a sale of it, merely because it was managed improvidently and was in danger of deterioration or even destruction. Nor will a receiver be appointed in any case, unless it is made to appear that there is an im-

perative necessity for the step. *First Nat. Bank of Sioux City v. Gage*, 79 Ill. 207.

The court must be convinced that the appointment of a receiver is needful and is the appropriate means of securing a proper end. It is a strong measure and not to be exercised doubtfully. *Chicago & A. O. & M. Co. v. U. S. P. Co.* 57 Pa. St. 88.

Chapter 81, § 41, R. S., which provides that a part owner who is not sued may have the property delivered to him on giving bond, recognizes the principle that the law is unwilling to disturb the possession of personal property held in common. And, although no bond is given in such case, the officer, on the levy of the execution, can sell only the share or interest of the judgment debtor, and the purchaser acquires only the right of a part owner. *Rich v. Roberts*, 50 Me. 895.

Mr. Schouler remarks: "To adjust controversies between those who are so unfortunate as to have once become chattel communists, and to determine how far each proprietor shall enjoy or dispose of what ought to be either sold and divided or else managed upon some special agreement, is a task which our courts are reluctant to assume." Schoul. Pers. Prop. 208.

Walton, J., delivered the opinion of the court:

This is a suit in equity. The plaintiffs appear to be members of an unincorporated joint stock company; and they pray that a receiver may be appointed, the property of the company sold and the proceeds divided among the members.

We are not satisfied that the prayer of the plaintiffs ought to be granted. The only property of the company is a building and its fixtures and a small amount of furniture and less than \$100 in its treasury, worth, altogether, not more than \$1,000 or \$1,200. The building was erected by members of the Patrons of Husbandry and has always been used by them as a place for holding their meetings; and apparently it is still needed by them for that purpose. The stock was divided into \$10 shares, of which the plaintiffs, four in number, own only twelve, the balance of the stock being owned by the defendants, thirteen in number, all of whom are members of the Patrons of Husbandry. The plaintiffs were also members of the same society at the time when they acquired their interest in the property but have since ceased to be such. The plaintiffs' bill of complaint contains an allegation "That said property is being mismanaged, wasted and lost." This allegation is not proved. The net income of the property is not large; and we do not suppose its owners ever expected it would be. The building seems to answer well the principal purpose for which it was erected, and we do not think it would be just or equitable to deprive so large a majority of its owners of their interest in it, to gratify the wishes of so small a minority. The minority can sell their interest if they do not wish to retain it; and probably they could realize as much for it in that way as they would be likely to if the whole property should be put into the hands of a receiver and be by him sold. The expenses

attending the latter mode of disposing of the property would be very likely to absorb any additional price obtained in consequence of selling the whole instead of a part.

The bill, when presented, contained a prayer for an injunction against a proposed removal of the building from the lot on which it then stood to another. But a temporary injunction does not appear to have been obtained, and the removal has been effected; and it is agreed that under the circumstances the removal was proper; and the claim for such an injunction is abandoned.

As the question has been very fully argued by counsel, it may not be improper to add that we do not doubt our jurisdiction in this class of cases. The ground of our decision is: not want of jurisdiction but the absence of equity in the plaintiff's case sufficient to require us to exercise it in the manner prayed for in their bill of complaint.

Bill dismissed, with one bill of costs for the defendants.

Peters, Ch. J., Virgin, Libbey, Foster and Haskell, Jr., concurred.

Elvira G. GREGORY

v.

Melville J. GREGORY.

The findings of the courts of other States upon the jurisdictional question of the residence of the parties are not binding upon the courts of this State in suits for divorce, where such other courts have no authority to make decrees between citizens of this State.

(Penobscot—Decided, March 27, 1886.)

ON defendant's exceptions. *Overruled.*

This is an action of dower. The defense to the action was a loss of dower by a divorce of John N. Gregory from the plaintiff, obtained by him in Illinois, while she was residing in Maine, the plaintiff claiming the dower under the said John, as her late husband.

The husband and wife, citizens of Maine, were married and lived together in this State for several years, when in September, 1868, he went into the Western States, and died in Wisconsin, April, 1871, without returning to Maine. During his absence he obtained a divorce: For what alleged cause or causes the divorce was obtained did not appear, on account of a loss of records. The wife was never out of this State from the time of his leaving this State until he died. It was not pretended that she had any actual personal notice of, or that she entered any appearance in the proceedings of divorce, or actually knew of the proceedings until after the divorce. It was admitted that the recorder's court mentioned in the certificate of divorce had general jurisdiction to grant divorces. There was no evidence that John N. Gregory was not in Chicago, in Cook County, State of Illinois, when he applied and obtained the divorce.

The answer set up to the decree of divorce by the plaintiff was that the divorce was fraudulently obtained, in that the said John N. Gregory

went out of the State for the purpose of appearing to have a domicile in such other State, and thereby obtaining a divorce while retaining and having his actual and real domicile in Maine.

It was ruled by the trial court that if the husband really obtained a domicile in Illinois as a foundation for the divorce, it would be a valid divorce, although he went out of the State to obtain a domicile in order to obtain a divorce; that the motive for obtaining a new domicile would be immaterial; but that if he went off to be gone only temporarily, in order to acquire a divorce, not really and actually renouncing his domicile here, or gaining another elsewhere, his wife having her domicile here all the time, then there was not domicile or jurisdiction in Illinois; and in such case the divorce was fraudulently obtained, and it would not be a defense to the claim of dower in the present action.

But the defendant contended that even if only a temporary or conditional and not a real domicile was the ground of jurisdiction for the divorce, in the manner before recited, still that the divorce was valid, unless it was obtained for some cause or alleged causes which occurred in this State while the parties lived in this State, or for some cause or alleged cause which would not authorize a divorce in this State; and the defendant requested such a ruling.

The court declined to give such an instruction or ruling, and the defendant excepted.

Mr. Josiah Crosby, for defendant:

The Maine Statute refers only to those residents of the State who leave it for a temporary purpose, viz.: to get a divorce and then return with a clandestine and unauthorized divorce. *Clark v. Clark*, 8 Cush. 387.

The divorce decreed "was according to the law of the place." *Hunt v. Hunt*, 28 Am. Rep. 129; 72 N. Y. 217.

The Illinois court had jurisdiction. *Hunt v. Hunt*; note to *Mills v. Duryee*, 7 Cranch, 481 (11 U. S. bk. 8, L. ed. 412). And see, *Zepp v. Hager*, 70 Ill. 223; *Crafts v. Clark*, 81 Iowa, 77; *Westcott v. Brown*, 13 Ind. 83.

A court has jurisdiction of any subject matter if by the law of its organization it has authority to take cognizance of, try and determine cases of that description. *Cool. Const. Lim.* 5th ed. 498.

"Subject matter" and "cause" have the same meaning. *Penobscot R. R. Co. v. Weeks*, 52 Me. 464.

In divorce suits and in some others a substituted notice by publication or the like is a matter of necessity. No State has the authority to invade the jurisdiction of another and serve process, etc. *Cool. Const. Lim.* 2d ed. 403, 404. And see, *Harden v. Alden*, 9 Me. 140; *Hood v. Hood*, 11 Allen, 196; *Hood v. Hood*, 110 Mass. 463; *Hood v. State*, 26 Am. Rep. 24; *Hawkins v. Ragsdale*, 44 Am. Rep. 483; *Roth v. Roth*, 44 Am. Rep. 81; *Buffum v. Stimpson*, 5 Allen, 591; *Bisell v. Wheelock*, 11 Cush. 277.

Any State or Nation in which either of the parties is found can dissolve a marriage on a proper state of facts. Were it not so, it would follow that the joint action of both parties would be required. *Harding v. Alden*, 9 Me. 140; *Strader v. Graham*, 10 How. 93 (51 U. S. bk. 18, L. ed. 841).

Consequently the divorce not being one of the inhibited cases was valid in Maine under R. S. chap. 60, § 1515.

In this State a record of a domestic judgment apparently sound on inspection cannot be set aside collaterally but only "when proceedings are instituted for the express purpose of setting it aside." *Penobscot R.R. Co. v. Weeks*, 52 Me. 459.

The "full faith and credit clause," Constitution of United States, prevents the judgment of another State having jurisdiction of the cause and of the parties from being impeached for fraud, or on any other ground. *Sewall v. Sewall*, 122 Mass. 161; *Christmas v. Russell*, 5 Wall. 290 (72 U. S. bk. 18, L. ed. 475); *Maxwell v. Stewart*, 22 Wall. 77 (89 U. S. bk. 22, L. ed. 564).

The clause itself and the legislation of Congress thereon seem plain: "They shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." R. S. U. S. 170, § 905.

Messrs. Barker, Vose & Barker, for plaintiff:

Domicil is defined as the place where a person has fixed his ordinary dwelling, without a present intention of removal. 10 Mass. 497; 1 Bouv. L. Dic. 443.

Divorce is always measured by the law of domicil. Browne, Dom. Rel. 66.

To give jurisdiction in a divorce suit the plaintiff, the petitioning party, must be a resident of the State or Territory where the divorce is obtained. This fact gives jurisdiction of such person, and renders the divorce, notice by publication or otherwise having been given to the defendant, valid as to the plaintiff; and being valid as to one, public policy demands that it should be held valid as to both parties. *Tolen v. Tolen*, 2 Blackf. 407; *Jenness v. Jenness*, 24 Ind. 355; *Ewing v. Ewing*, 24 Ind. 468; *Hood v. State*, 26 Am. Rep. 24.

The whole theory of the divorce law is, that the petitioner shall be a *bona fide*, permanent resident of the State in which he seeks to obtain the divorce, and not that he shall establish a temporary residence, for a time; just long enough to give the court jurisdiction. *Litovich v. Litovich*, 27 Am. Rep. 145, and cases there cited; *Gettys v. Gettys*, 81 Am. Rep. 637.

Emery, J., delivered the opinion of the court: Marriage is a civil *status*. The rights and obligations of the parties are not merely contractual, but are fixed, changed or dissolved by law. In case of a conflict of laws, the *lex domicilii* controls the *status* of the person, though his contractual or property rights may be subject to other laws. The State has the absolute right to determine or alter the civil *status* of all its inhabitants, no matter where they may temporarily be, and no matter where the contracts or acts giving rise to such *status* may have been made or done. Other States or countries will in this matter accept without question the decrees of the courts of the home State. *Harding v. Alden*, 9 Me. 40; *Gregory v. Gregory*, 76 Me. 535, and cases cited.

But the State has this power only over its own inhabitants; the mere presence within its territory of the inhabitants of other States gives it no authority to fix or change their *status*. The State of their residence still retains its control

over that. It alone can free its citizens from marital obligations. Any proceedings of another State to that end will be ineffectual and will be disregarded elsewhere. *Gregory v. Gregory*, *supra*; *Sewall v. Sewall*, 122 Mass. 156; *Gettys v. Gettys*, 81 Am. Rep. 637; R. S. chap. 60, § 10.

In this case, the marriage was in this State and both parties to it were for a time inhabitants of this State. The defendants allege that their ancestor, the husband, was effectually divorced in Illinois. They produce a copy of a decree for such a divorce upon the libel of the husband, made in the proper court of Illinois, which decree, we may admit for the purposes of this case is regular and effectual, if the husband was at the time an inhabitant of the State of Illinois.

Was he then an inhabitant of that State? The Illinois court found and declared that he was. The defendants say that finding is conclusive, that it cannot be questioned by our courts. They rely upon the U. S. Constitution, art. 4, § 1, requiring full faith and credit to be given in each State to the judicial proceedings of every other State.

It has been well settled, by judicial construction, that the constitutional provision above quoted only applies when it appears that the court, whose judgment is invoked, had jurisdiction in fact. The clause quoted does not make a court's own declaration of its jurisdiction binding on the courts of other States. One court cannot by a simple *ipse dixit* compel other courts to yield jurisdiction. It has been repeatedly held, therefore, that a court's jurisdiction can always be inquired into, even against the express recitals and findings of the court. *Thompson v. Whitman*, 18 Wall. 457 [85 U. S. bk. 21, L. ed. 897]; *Pennoyer v. Neff*, 95 U. S. 714 [bk. 24, L. ed. 565]; *Sewall v. Sewall*, 122 Mass. 156; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30.

In the case at bar, the residence of the husband at the time was the one fact which would uphold or defeat the jurisdiction of the Illinois court. The Judge declined to be bound by the recitals of the Illinois court, and submitted the question of residence to the jury, instructing them that if the husband was not an inhabitant of Illinois at the time, the Illinois decree of divorce was invalid. The Judge did rightly and the instruction was correct.

If the Illinois court had no jurisdiction over the *status* of the husband, Gregory, by reason of his non-residence in that State, he being an inhabitant of this State, that court could not effectually make any decree of divorce for any cause. Its decree, for whatever cause would be void for want of jurisdiction over the person of the libellant. The requested instruction was therefore properly refused.

Exceptions overruled.

Peters, Ch. J., Danforth, Virgin, Foster, and Haskell, JJ. concurred.

Catherine CONLEY, Admr.,

v.
City of PORTLAND.

Earth fell upon one of the laborers engaged in constructing a city sewer and injured him so that he died. Held,

that the City was not liable for the injury although it was caused by the carelessness of the person who had the oversight and direction of the work.

(Cumberland—Decided April 7, 1886.)

ACTION on the case. *Nonsuit.*

This was an action for an injury occasioning the death of James Conley, alleged to have been caused by the carelessness of the person having the oversight and direction of constructing a sewer on Adams Street in Portland, August 31, 1883.

Mr. Harvey D. Hadlock, for plaintiff :
1. The injury sustained by the decedent was caused by the defendant Corporation.

It is a general principle of law, founded in reason, that when one suffers an injury by the neglect of any duty owing to him, which rests upon another, the person injured has an action.

This doctrine applies, not only to individuals but to corporations; and it obliges such corporations to respond to such action, although such action be not expressly given by statute. 2 Dillon, Municipal Corp. § 761.

Municipal corporations, under the conditions herein stated, fall within the operation of this rule of law. 2 Dillon, § 766.

It may be observed that when it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is whether they are the servants or agents of the corporation. If the corporation appoints or elects them, and can control them in the discharge of their duties, then they are the agents or servants of the corporation. 2 Dill. Mun. Corp. § 772.

Corporations act through their agents and are liable when the agents inflict an injury while in the performance of some corporate duty. 2 Thompson, Neg. 888.

Somers was the superintendent appointed by the defendant for the construction of the drain, and his negligence towards the plaintiff's intestate was the negligence of the defendant Corporation. Wharton, Negligence, § 282, p. 220.

The defendant Corporation in constructing the sewer was in the exercise of a power conferred upon it for its private benefit, and the injury which resulted from its negligence and from the misfeasance of its superintendent made it liable as in the case of a private corporation, or an individual.

The act of the Corporation described in the plaintiff's writ was not an act done by it in its sovereign capacity, and thus in the construction of a sewer, if the act be so negligently performed that the plaintiff is injured by reason of such negligence, he may recover his damages. *Donohue v. New York*, 8 Daly, 65; *Jacksonville v. Lambert*, 62 Ill. 519; *Merrifield v. Worcester*, 110 Mass. 216; *Wendell v. Mayor, etc. of Troy*, 4 Abb. App. Dec. 563.

And while a municipality is not liable for collateral injuries from the exercise of its lawful authority, it is otherwise as to special damages caused by negligence in the construction or repairs of its public works. *Allentown v. Kramer*, 78 Pa. St. 406.

Where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private

benefit, and injury ensues from the negligence and misfeasance of such officer or servant, the corporation is liable. *Martin v. Brooklyn*, 1 Hill, N. Y. 550; *Richmond v. Long*, 17 Gratt. 375; *Sherbourne v. Yuba Co.* 21 Cal. 113; *Dargan v. Mobile*, 31 Ala. 469; *Prather v. Lexington*, 13 B. Mon. 559.

The court of last resort in the State of Ohio, in the case of the *City of Dayton v. Pease*, 4 Ohio St. 100, said: "When a municipal corporation undertakes to exert its authority over prescribed regulations by controlling improvements for the especial interest or advantage of its own inhabitants, the authorities are all agreed that it is to be treated merely as a legal individual and, as such, owing all the duties to private persons and subject to all the liabilities that pertain to private corporations or individual citizens."

I submit that the defendant Corporation is liable for the negligence of Somers in the course of the construction of the sewer by which the plaintiff's intestate was injured. *Murphy v. Lowell*, 124 Mass. 584; *Hill v. Boston*, 122 Mass. 844; *Emery v. Lowell*, 104 Mass. 13; *Child v. Boston*, 4 Allen, 41.

In *Hill v. Boston*, *supra*, the court in tracing the line of municipal liability, says: as to common sewers built by municipal corporations under a power conferred by law, the power of determining where the sewer shall be made involves the exercise of quasi judicial discretion; and therefore no action lies for defect or want of sufficiency in the place or system of drainage adopted within the authority so conferred; but the duty of constructing the sewers and keeping them in repair is merely ministerial; and therefore for neglect in the construction or repair of any particular sewer where private property is injured, an action may be maintained against the city.

In the case of *Toledo v. Cone*, 41 Ohio St. 149, 5, Am. & Eng. Corporation Cases, 624, the City of Toledo owned a cemetery which was managed by a board of trustees elected by the people. They employed a superintendent and workmen. The superintendent had control of the workmen, who were required to obey his orders; they were engaged in making an excavation under his direction, when a portion of the embankment fell in and injured one of them. The injury was caused by the negligence of the superintendent in prosecuting his work. It was held that the workman was entitled to recover damages of the city.

The principles of law regarding the doctrine of *respondent superior*, in its application to municipal corporations, are well sustained. *Barnes v. Dist. of Columbia*, 91 U. S. 540 (bk. 23, L. ed.); *Ronell v. Williams*, 29 Iowa, 310; *Van Fleet v. Davenport*, 47 Iowa, 97; *Russell v. Mayor, etc. of New York*, 2 Denio, 461; *Tone v. Mayor, etc. of N. Y.* 70 N. Y. 157; *Ham v. Mayor, etc. of N. Y.* 70 N. Y. 459; *New York, etc. Co. v. Brooklyn*, 71 N. Y. 580; *Campbell v. Montgomery*, 58 Ala. 527; *Chicago v. Joney*, 60 Ill. 383; *Chicago v. Dermody*, 61 Ill. 481; *Wood on Master and Servant*, § 459; *Aldrich v. Tripp*, 11 R. I. 141; *Moulton v. Scarborough*, 71 Me. 267.

2. Somers, as superintendent, stood in the place of defendant Corporation, and was its vice-principal.

If a master employs inexperienced workmen and directs them to act under a superintendent and to obey the orders of him whom he puts in his place, they are not engaged in a common work with the superintendent, and the master is liable for the superintendent's negligence. Wharton, Neg. § 235, p. 222.

The defendant is liable for the negligence of the superintendent, on the ground that his negligence is that of the principal, and not of a fellow servant of the plaintiff. *Id.* § 241 p. 229.

Somers, by the nature of his employment and the power given to him over the other workmen, must be deemed the vice-principal of the defendant Corporation; and as such the injury of the decedent, who was an inferior servant, through the negligence of the superior servant, is the negligence of the defendant, and the defendant Corporation is liable. Thompson, Neg. 1028, and cases cited; *Railroad Company v. Fort*, 17 Wall. 553 (84 U. S. bk. 21, L. ed. 789).

The act of Somers, who had charge of the construction of the trench and sewer, must for all practical purposes be regarded as the act of the Corporation itself. Thompson, Neg. 1081.

Corporations act by agents and are bound by their acts. *Frazier v. Penn. R. R. Co.* 88 Pa. St. 104; *Adesco Oil Co. v. Gilson*, 64 Pa. St. 146, 150; *Cumberland R. R. v. Hogan*, 45 Md. 229; *Patterson v. Pittsburgh R. R.* 76 Pa. St. 889; *Brickner v. N. Y. R. R. Co.* 49 N. Y. 672.

8. The superintendent was not a fellow servant of the decedent.

When the employer leaves everything in the hands of a middleman, reserving to himself no discretion, then the middleman's negligence is the employer's negligence, for which the latter is liable; and this rule holds, although such superintendent was engaged at the same work with the servant injured. Whart. Neg. § 229. *Mullan v. Phila. etc. Steamship Co.* 78 Pa. St. 25; *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Spelman v. Fisher Iron Co.* 56 Barb. 151; *Kansas Pac. v. Little*, 19 Kan. 267; *Malone v. Hathaway*, 64 N. Y. 5.

In the case of the *Chicago R. R. v. Bayfield*, 37 Mich. 213, the court, by Cooley, C. J., says: "But we also think that when the superior servant, by means of the authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risk and injury, the master must respond."

In *Ashworth v. Stanwitz*, 3 El. & El. 706, 107, the court said: "Though the chance of injury from the negligence of fellow servants may be supposed to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of the master when engaged with him in their common work, enters in like manner into his speculation."

The court, in *Mayhew v. Sullivan Mining Co.* 76 Me. 109, says: "The generally received doctrine is as stated in Wharton on Negligence, § 229, 'When the employer leaves everything in the hands of the middleman, reserving to himself no discretion, then a middleman's negligence is the employer's negligence, for which the latter is liable.' *State v. Jewell*, 5 Am. & Eng. R. R. Case, 527.

In *Malone v. Hathaway*, 64 N. Y. 5, in the ME.

Court of Appeals, Judge Allen says: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employes, provide material and machinery for the service of the corporation, and generally direct and control, under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals; and, within the limits of the delegated authority, the acting principal. These acts are in such case the acts of the corporation, for which and for whose neglect the corporation within adjudged cases must respond as well to the other servants of the company as to strangers."

In the case of *Little Miami Railroad Company v. Stevens*, 20 Ohio, 415, the Supreme Court of Ohio held that when a railroad company placed the engineer in its employ under the control of a conductor of its train, who directed when the cars were to start and when to stop, it was liable for all injury received by him, caused by the negligence of the conductor.

In *C. B. & C. R. R. Co. v. Keary*, 3 Ohio St. 201, the court said, in commenting upon the duties of a conductor, whose duties were analogous to the duties of the superintendent in the case at bar: "The conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner; and in its exercise he stands in the place of the owner and is in the discharge of a duty which the owner, as a man and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the results. It is his to command, and theirs to obey and execute. No service is common that does not admit a common participation; and no servants are fellow servants when one is placed in control over the other."

In *L. & N. R. R. Co. v. Collins*, 2 Duvall, 114, the court of appeals of Kentucky held that in all those operations which require care, vigilance and skill and which are performed through the instrumentality of superintending agents, the invisible corporation, although never actually, is yet always constructively present through its agents who represent it, and whose acts within their representative spheres are its acts."

In the case of *Chicago M & St. P. R. Co. v. Ross*, 112 U. S. 390 (bk. 28, L. ed. 787), the Supreme Court of the United States said: "There is in our judgment a clear distinction to be made in their relation to the common principal between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty

is entirely that of direction and superintendence."

Mr. Joseph W. Symonds, City Solicitor, for defendant:

The authorities pertinent to a case like this are so full and familiar and have been so recently reviewed by this court that the defendant deems it necessary to do no more than to cite them.

In *Farwell v. Boston & Wor. R. R. Corp.* 4 Met. 49, after an elaborate examination of authorities and upon grounds of reason, policy and justice, the general rule was established by *Chief Justice Shaw*, in an action in which he referred to as one of new impression at that time in that State, "That he who engaged in the employment of another for the performance of specific duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such service; and in legal presumption the compensation is adjusted accordingly; and we are not aware of any principle which should except the perils arising from the carelessness or negligence of those who are in the same employment. These are perils which the servant is as likely to know and against which he can as effectually guard as the master."

In *Hayes v. Western R. R. Corp.* 3 Cush. 272, the court held, the defendant was not responsible to the plaintiff, a brakeman, for any damage suffered by him in consequence of neglect of duty and breach of orders by the acting conductor of a train, and the case of *Farwell v. Boston & Worcester R. R. Corp.* 4 Met. 49, was referred to as "Thoroughly considered and believed to be fully sustained by reason and authority, and the court has no disposition to disturb the authority or to depart from the decision in that case."

In *Albro v. Agawam Canal Co.* 6 Cush. 75, the same principle was applied in a case where the plaintiff was an operative in a manufacturing establishment, and the fellow servant whose negligence was alleged to have caused the injury was the superintendent, having general supervision and charge of the establishment and of the manufacturing there carried on, who had the authority and was accustomed to hire and discharge the overseers in the rooms in the factory, who also had authority and were accustomed to hire and discharge the operatives. See also, *King v. Boston & Worcester R. R. Corp.* 9 Cush. 112.

In *Gilman v. Eastern R. R.* 10 Allen, 286, the same principle is applied between a switchman and a workman employed to repair the cars of the defendant corporation, with citations of English and American authorities.

In *Hodgkins v. Eastern R. R.* 119 Mass. 419, it was held that "A brakeman in the employment of a railroad corporation cannot maintain an action against the corporation, for personal injuries caused by the making up of a train of cars with platforms of unequal height, by the ordinary servants of the corporation, under the direction of one of its station masters."

In *O'Connor v. Roberts*, 120 Mass. 227, it was held: "A laborer cannot recover against a firm of contractors for personal injuries resulting from the negligence of their foreman, who is their fellow servant."

In *Holden v. Fitchburg R. R. Co.* 129 Mass.

268, the court referring to this rule says: "It makes no difference that the servant whose negligence causes the injury is a submanager or foreman of higher grade or greater authority than the plaintiff." See also, *Floyd v. Sugden*, 184 Mass. 563; *Johnson v. Boston Tow Boat Co.* 185 Mass. 209.

We cite from our own reports: *Beaulieu v. Portland Company*, 48 Me. 291; *Eaton v. E. & N. A. R. R. Co.* 59 Me. 520; *Lawler v. Androscoggin R. R. Co.* 62 Me. 463; *Shanny v. Androscoggin Mills*, 66 Me. 420.

Also, *Blake v. Main Central R. R. Co.* 70 Me. 60, where it is said: "It is settled law that a master is not liable to a servant for an injury resulting from the negligence of a fellow servant in the same general employment. When there is one general object in attaining which a servant is exposed to risk, if he is injured by the negligence of another servant while engaged in furthering the same object, he is not entitled to sue the master; and it does not matter that they were not employed in the same kind of work. Nor is this rule altered by the fact that the servant guilty of such negligence is a servant of superior authority, whose lawful directions the other is bound to obey." See also, *Holmes v. Halde*, 74 Me. 29; *Mayhew v. Sullivan Mining Co.* 76 Me. 109.

But perhaps the latest case in our own reports is the one most directly in point of determining the sufficiency of the plaintiff's declaration. We refer to the case of *Doughty v. Penobscot Log Driving Co.* 76 Me. 143, in which the authorities in this State are carefully reviewed, and where it is said "That persons who are employed under the same master, derive authority and compensation from the same common source and are engaged in the same general business, although one is a foreman of the work and the other a common laborer, are fellow servants and take the risk of each other's negligence; the principal not being liable to the injured servant therefor." See also, *Cassidy v. Maine Central R. R. Co.* 76 Me. 488.

Walton, J., delivered the opinion of the court:

Earth fell upon one of the laborers engaged in constructing a sewer in the City of Portland and injured him so that he died soon after; and the question is whether, assuming that the injury was caused by the carelessness of the one who had the oversight and direction of the work, the City is liable for it. We think it is not.

It is settled law in this State that an employer is not responsible to an *employee* for an injury received through the carelessness of a fellow laborer; and it is equally well settled that the foreman, superintendent or overseer of a job of work, is not on that account to be regarded as other than a fellow laborer with those who are at work under him. Such an employment does not elevate him to the dignity of a vice-principal. And these questions have been so fully and so recently discussed by this court that a further discussion of them cannot be profitable. See, *Doughty v. Log Driving Co.* 76 Maine, 143; *Cassidy v. Railroad*, 76 Maine, 488, and cases there cited.

Plaintiff nonuit.

Peters, Ch. J., Virgin, Libbey, Foster and Haskell, JJ., concurred.

SUPREME COURT OF RHODE ISLAND.

HAMMOND

v.

HAMMOND.

A petition by a wife for divorce, alleging as a cause the statutory ground of neglect to provide the necessities of life, the husband not having the ability so to do, will be dismissed, where it is shown that the neglect was caused by his being incarcerated in prison, although such incarceration may have been produced by his own fault. The cause of the inability of the husband to provide is immaterial.

(Washington—Decided June 5, 1885.)

PETITION for divorce. *Dismissed.*

The case and facts are stated in the opinion. Mr. Charles T. Baldwin, for petitioner. Messrs. A. & A. D. Payne, for respondent.

Durfee, *Ch. J.*, delivered the opinion of the court:

Two causes for divorce are assigned in the petition, namely: extreme cruelty and neglect or refusal to provide necessities, the respondent being of sufficient ability. Extreme cruelty has not been proved. The only proof of neglect to provide is that about a year and half before the preferring of the petition, the respondent was arrested in Albany, N. Y., for burglary in the third degree, so called, convicted and imprisoned in New York for two years. He was destitute of property of any sort, and of course could not while in prison have the fruit of his labor. Clearly, therefore, he did not have sufficient ability to provide necessities for his wife; and we do not see how it can be said that the statutory cause has been proved.

It is urged that the lack of ability ought not to avail the respondent, because he lost the ability by his own fault. We do not think any stoppel can be applied in a divorce case. The question of divorce is not a matter which is merely personal to the parties. The State has an interest in it, and has clearly specified the causes, one or more of which must be shown to exist, to the satisfaction of the court, before the divorce can be granted. We cannot hold that the respondent had sufficient ability, when it is clear that he did not have it, merely because he lost it by his own fault. The fact that the fault was also a crime makes no difference in a legal point of view; for it is not the crime which the statute makes a cause for divorce, but neglect or refusal to provide, being of sufficient ability. If the divorce were grantable in this case, notwithstanding the husband's lack of ability, we do not see why it would not be grantable for a like reason if the husband had simply disabled himself by breaking an arm or leg, by assuming an unnecessary risk or by falling sick from a reckless exposure to contagious disease.

Petition dismissed.

Charles H. HILDRETH

v.

Anson W. ALDRICH.

1. A party cannot impeach his own witness by proof, through other witnesses, of contradictory statements, unless the witness is one whom the law obliges the party to call.
2. A party disappointed in his witness may, to refresh the witness' recollection, ask him if he has not made contradictory statements; but he cannot prove such statements by other witnesses.

(Providence—Filed October 17, 1885.)

ON defendant's exceptions taken at trial in the Court of Common Pleas. *Sustained.*

The case and facts are stated in the opinion. Messrs. Wilson & Jenckes, for defendant. Messrs. Ballou & Jackson, for plaintiff.

Durfee, *Ch. J.*, delivered the opinion of the court:

This is an action of trespass *de bonis asportatis*, the property alleged to have been taken being a horse, wagon and harness. The defendant pleaded in justification that the property was taken under a writ of attachment in an action brought by him against the plaintiff in the Court of Common Pleas. The replication was that the defendant fraudulently procured the property to be brought into the State from Massachusetts so that he could attach it.

In trial to the jury the plaintiff called one Ebenezer Allen as a witness, for the purpose of proving that the defendant had gotten him to send a Mr. Parker, who was in his, Allen's, employ, to Worcester to procure and bring a horse and wagon belonging to the plaintiff into the State, for the defendant to attach. The witness Allen denied having done so. He was then asked if he had not told the plaintiff's counsel that he had done so, and answered that he did not remember. The plaintiff then called another witness and asked him to state whether or not the witness Allen said so. The question was allowed after objection, and the defendant took an exception.

We think the court below erred. There are doubtless some cases which support or countenance the ruling, but the weight of authority, both English and American, is against it. The decisions on the point are very fully cited and reviewed in *Cox v. Eayres*, 55 Vt. 24; also in 45 Am. Rep. 589; the conclusion of the court there being that a party cannot be permitted to impeach his own witness by proof, by other witnesses, of prior contradictory statements, unless the witness is one whom the law obliges the party to call. We think this is the rule which has been observed by the courts here, though we have no reported decision on the subject. And see, besides cases cited in *Cox v. Eayres*, *supra*, Whart. Ev. § 559; *Hull v. State*, 98 Ind. 128; 2 Phillips, Ev. *985, *et seq.* and Cowen & Hills, note 5 on p. *995.

The plaintiff, however, says that his object was not to impeach his witness but to refresh his witness' recollection. We think a party who is disappointed in his witness may be al-

lowed to ask him if he has not made contradictory statements, for the purpose of refreshing the witness' recollection. The plaintiff was allowed to do so without objection.

We know of no case which holds that if the witness' recollection is not thus refreshed, the contradictory statements may be put in evidence by other witnesses. It is very clear that if the only purpose is to refresh the witness' recollection, the purpose can be served as well by questions in regard to the statements as by proof of them; whereas, if proof of them be allowed, the jury is very likely to take it as proof of the facts stated, thus giving to mere hearsay the effect of sworn testimony.

Exceptions sustained.

Jude TAYLOR

v.

Anthony J. O'NEIL *et al.*

1. A declaration in trespass and ejectment must show the nature and character of the plaintiff's estate.

(Providence—Filed December 10, 1886.)

TRESPASS and ejectment. On demurrer to the declaration. *Sustained.*

The declaration was as follows:

"In an action of trespass and ejectment for that the said defendants at said Lincoln on the 28th day of February, 1885, with force and arms wrongfully detained from the plaintiff possession of a certain lot of land with a house and other improvements thereon, to the plaintiff belonging (describing lot) and with like force and arms still wrongfully detain possession of the same from the plaintiff against the peace, *ad damnum* \$1,000."

Mr. William H. Clapp, for defendants.

Mr. Thomas W. Robinson, for plaintiff.

Per Curiam:

The court thinks that the declaration should set forth the title of the plaintiff in terms so explicit that a judgment in his favor will determine the character of his estate and not simply his right of possession. Stephens, Pleading, *304-308.

Demurrer sustained.

Philip D. ARMOUR *et al.*

v.

Francis KENDALL *et al.*

1. A legatee owing the testator's estate is entitled to only the excess of the legacy over his debt.
2. A, owing B, received by B's will a legacy less in amount than the debt. Judgment creditors of A filed a bill against B's executors to subject the legacy to the payment of their judgment. Held, that the bill could not be maintained.

(Providence—Filed December 10, 1886.)

BILL in equity to subject a legacy to the payment of a judgment. *Dismissed.*

The facts are stated in the opinion.

Messrs. James M. Ripley and John D. Thurston, for complainants.

Messrs. Thomas C. Greene and John F. Lonsdale, for respondents:

1. The general doctrine that the executor of a creditor can retain a legacy to the debtor for the satisfaction of the debt is well established. Waterman, Set-Off, §§ 200, 210; Williams, Executors, (marg.) 1804; Adams, Equity (marg.) 222, 223; *Jeffer v. Wood*, 2 P. Wms. 128; *Smith v. Smith*, 3 Giffard, 263; *Smith v. Kearney*, 2 Barb. Ch. 538-549; *Willes v. Greenhill*, 29 Beav. 376, 382, 383; *Re Bogart*, 28 Hun, 466, 468.

2. Courts of equity have always applied the doctrines of equitable set-off, retainer and stoppage, independently of and antecedently to any statute of set-off, and still continue to do so, independently of and even contrary to the statutory provisions, wherever the equities of the case require it. And the very fact that the right of set-off or retainer was not allowed by the Statute of Set-Off and the decisions thereunder is a ground of equitable jurisdiction, when the right claimed is in accordance with equity. Story, Eq. Jur. §§ 1437 a, 1437 b; Adams, Equity, (marg.) 223; *Moore v. Jervis*, 2 Coll. 60; *Lindsay v. Jackson*, 2 Paige, 581; *Gay v. Gay*, 10 Id. 369, 376, 377; *Jeffer v. Wood*, 2 P. Wms. 128-131; *Ferrie v. Burton*, 1 Vt. 439, 450-455; *Foot v. Ketchum*, 15 Vt. 258; *Lee v. Lee*, 31 Ga. 26, 32, 33; *Ainslie v. Boynton*, 3 Barb. 258-263; *Merrill v. Souther*, 6 Dana, 305, 306; *Tusumbia, etc., R. R. Co. v. Rhodes*, 8 Ala. 206, 211-212, 217-221; *Irons v. Irons*, 5 R. I. 267.

3. Courts of equity have set off joint and separate debts against each other, when the equities of the case required it, although at law no such set-off would be allowed. Babington, Set-Off (marg.) 166-170; *Mitchell v. Oldfield*, 4 T. R. 123; *Dennie v. Elliott*, 2 H. Bl. 587; *Ex Parte Stephens*, 11 Ves. 24-26; *Ex Parte Hanson*, 12 Ves. 845-848; *Simson v. Hart*, 14 Johns. 68, 75; *Fulkerson v. Davenport*, 70 Mo. 541, 542-544; *Jeffries v. Evans*, 6 B. Mon. 119-120; *Pond v. Smith*, 4 Conn. 297, 302; *Spurr v. Snyder*, 85 Conn. 172, 173-175; *Smith v. Felton*, 48 N. Y. 419, 422-424; *Smith v. Fox*, 48 N. Y. 674.

4. In the present case the complainants seek to apply the individual legacy to the payment of a firm debt. Their equity can be no better, in any event, than that of the defendant executors to retain such legacy for the payment of the firm debt held by themselves. *Vide* cases cited last above; and *Whitcomb v. Gaugain*, 3 Hare, 416, 425-426; *Hart v. Farmers, etc. Bank*, 38 Vt. 252, 265-267; *Reynolds v. Tucker*, 18 Wend. 591, 594-595; *Miller v. Flores*, 15 Ohio St. 153, 154; *Smith v. Smith*, 3 Giffard, 263, 266-271; *Shipman v. Lansing*, 25 Hun, 290-293; Story, Eq. Jur. § 64 c.

Durfee, Ch. J., delivered the opinion of the court:

The complainants are creditors of Henry L. Kendall, of New York, and Henry S. Whitcomb, by judgment confessed by said Kendall and Whitcomb in Illinois. The defendants are executors of the will of Henry L. Kendall, late of Providence, who died July, 1883, bequeathing by said will \$10,000 to Henry L. Kendall, of Chicago, who was his nephew.

Henry L. Kendall, of Chicago, and Henry S. Whitcomb were indebted to the testator at the time of his decease and still continue indebted to the estate to an amount exceeding the legacy, to wit: to the amount of \$12,500 with interest. They have no visible property. The object of the suit is to subject the legacy to the payment of the complainants' judgment. The defense is that the legacy is not chargeable in favor of the complainants, so long as the debt to the estate remains unpaid.

Where a legatee is a debtor to the estate, he is entitled to only the excess, if any, of the legacy over the debt. *Williams, Executors*, 1804; *Jeffer v. Wood*, 2 P. Wms. 128; *Smith v. Kearney*, 3 Barb. Ch. 583, 549; *Re Bogart*, 28 Hun, 466, 468; *Wiles v. Greenhill*, 20 Beav. 376, 382; *Smith v. Smith*, 3 Giffard, 263.

The right, it has been said, is rather a right to pay out of the fund in hand than a right to set off. It has also been said that the right rests upon the equitable principle that the legatee is not entitled to the legacy while he retains a part of the assets out of which it ought to be paid. The legacy is, accordingly, regarded as applied *pro tanto* in payment of the debt; and it has been held that it may be so regarded even when the debt is barred by the Statute of Limitations. *Tourney v. Williams*, 8 Hare, 539, 639, note; *Coates v. Coates*, 33 Beav. 249; *Re Bogart*, *supra*.

In *Smith v. Smith* the principle was applied when the legacy was to a member of an insolvent firm which was indebted to the estate. The Vice Chancellor said: "It seems to me that the principle which governs the case is this: that he legatee shall not be entitled to receive out of the estate of the testator any part of the bounty intended for him by the testator, until he has paid all his obligations in the shape of debts which may be due to that estate." See also, *Ex Parte Stephens*, 11 Ves. 24, 26; *Fulkerson v. Davenport*, 70 Mo. 541; *Smith v. Felton*, 43 N. C. 419.

It is clear therefore that if the legatee were himself suing for the legacy in equity, he could not recover it, the joint debt remaining unpaid. How do the complainants get, under this proceeding, any higher equity? Their counsel make two suggestions:

The first is that the complainants are entitled to priority because their claim has been reduced to a judgment. A sufficient answer to this is that the defendants do not need any judgment, their right of retainer being equivalent in equity to a judgment.

The second suggestion is that equality is equity and that the complainants are, therefore, entitled to share the legacy ratably with the defendants. We do not think this position tenable. The defendants are entitled to their right, which, whether the legacy is sued for by the legatee or by his creditors, remains unaltered.

The bill is dismissed, with costs.

Leonard TILLINGHAST

v.

Whipple V. PHILLIPS.

1. A received a bond, made an assignment for the benefit of his creditors,

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settled with his creditors, received back the bond from his assignee and brought suit thereon. At the trial he testified that he gave new notes for his old indebtedness; whereupon, he was asked by the defendant what was the tenor of these notes and whether he had paid them. Held, that the question was immaterial and was properly excluded.

2. The bond must be sued in the name of A, whether the suit is for the benefit of A or of the assignee; and the return of the bond to A is proof of authority from the assignee to A to bring suit.

(Providence—Filed October 17, 1885.)

ON defendant's exceptions to Court of Common Pleas. *Overruled.*

The case is stated in the opinion.

Mr. Dexter B. Potter, for defendant:

The giving of a promissory note is not the payment or settlement of a debt. *Sweet v. James*, 2 R. I. 271, 294; *Wheeler v. Schroeder*, 4 R. I. 383, 388.

The conveyance to the assignor before the debts were paid was void *Burrill, Assignments*, 2d ed. chap. 45, 548.

Mr. James C. Collins, for plaintiff.

Durfee, Ch. J., delivered the opinion of the court:

This is an action of debt for the breach of a bond or of a contract in the nature of a bond. One of the defenses is that after the bond or contract was given, the plaintiff made a personal assignment for the benefit of his creditors, and therefore has no right to prosecute the action for himself. The plaintiff's answer is that after making the assignment he "settled with his creditors" and that thereupon the assignee gave him back the contract or bond. In the trial to the jury the plaintiff so testified and also testified in cross examination that he gave new notes for the old indebtedness.

The defendant asked if the notes so given had been paid and what was their tenor. The court ruled the question out as immaterial. The defendant excepted and now, after verdict for the plaintiff, moves for a new trial for error in the ruling. We do not find any error. The action has to be brought in the plaintiff's name, whether it is brought for the plaintiff or for the assignee. It makes no difference therefore to the defendant whether it is brought for the one or the other, if it is authorized, so that the defendant will be protected in satisfying the judgment. According to the testimony, it was authorized by the assignee; the restoration of the contract being tantamount to authorization.

The assignee is trustee for the creditors, and it must be assumed, in the absence of any proof to the contrary, that he properly acts for them. Proof that the notes remain unpaid is not proof to the contrary; for, even if the notes were not given and received as "absolute payment," it cannot be thence inferred that "the settlement" was not intended to have at least the effect of releasing the assigned property from the trust. And see, *Moore v. Coughlin*, 4 Allen, 335; *Goodrich v. Stevens*, 116 Mass. 170.

Exceptions overruled.

Warren A. M. STEERE

v.

Mark H. WOOD, Admr.

1. A pecuniary legatee may, within three years from the grant of letters testamentary, bring an action against the executor for his legacy, without giving or offering to give bond, under Pub. Stat. R. I. cap. 187, § 10.
2. Review of the statutory provisions of Pub. Stat. R. I. cap. 187, § 10, from A.D. 1798.

(Providence—Filed December 21, 1885.)

ASSUMPSIT. On demurrer to the plea.
Demurrer sustained.

The question presented is stated in the opinion.

Messrs. Browne & Van Slyck, for plaintiff.

Mr. Edwin Metcalf, for defendant.

Durfee, Ch. J., delivered the opinion of the court:

The question raised by the demurrer is: whether a pecuniary legatee is entitled to bring an action at law for his legacy, within three years after letters testamentary have been granted, without first giving or offering to give bond, under Public Statutes R. I. cap. 187, § 10.

Section 10 is as follows:

"No person entitled to a share in the estate of any deceased person shall have a right to demand the same within three years after administration or letters testamentary granted on such estate, unless he shall give bond to the administrator or executor, with sufficient surety, to be approved by the court of probate, to refund the proportionate share of the estate, in case any debt or debts shall afterwards appear against the same, and the executor or administrator should not have a sufficiency of the estate in his hands undivided for the payment thereof; *Provided*, That the heirs at law or devisees may, during said term, take the rents and profits of the real estate as heretofore."

Chapter 187 is entitled, "*Of Descents, Distribution, Division and Advancement*," and relates almost exclusively to intestate estates. Section 10 is under the head of "Distribution," next after the provision for the distribution of surplus personality not bequeathed. It makes no mention of legatees but only of persons entitled to a share in the estate of any deceased person; language which more fitly designates persons entitled to distribution shares than persons entitled to legacies, especially pecuniary or specific legacies.

It will also be observed that the bond is to be given "To refund the proportionate share of the estate in case of any debt or debts" afterwards appearing. The language applies perfectly to the case of a distributee but very imperfectly to the case of a pecuniary legatee; for such a legatee would not have to contribute proportionately; he would not have to contribute at all so long as there were any intestate or residuary personality left; and even after the exhaustion of the intestate and residuary personality, he would not necessarily have to contribute proportionately, some legacies being entitled to priority over others.

In the case of an estate where the executor, being a residuary legatee, has given bond to pay debts and legacies, the bond would be useless; since an executor who has given bond to pay debts and legacies is bound to pay them whether he has assets enough or not. *Cotwell v. Alger*, 5 Gray, 87.

The provision for a bond, as also that for an action at law for a legacy, appears in the digest of 1798, pages 804 and 285 respectively. They likewise appear in the digest of 1822, pages 235 and 220; and in the digest of 1884, pages 247 and 234. In the latter digests the provision for bond is the same as now, except that the language is, "No person entitled to a share in an intestate estate" instead of "No person entitled to a share in the estate of any deceased person."

The provision as it existed in these digests could not be construed to apply to legacies. If it applies to legacies now, it applies because of the verbal change noted. Of course the question arises: why the change unless the purpose was to extend the provision to legacies? The change first occurs in the revision of 1857. In that revision the statutes were carefully rearranged according to subject matter and revised in point of expression, often without any intent to alter their meaning. The statutory provisions regulating the distribution of intestate personality and the statutory provisions for a bond already spoken of were separated by several sections in the earlier digests, and were first brought into juxtaposition in the revision of 1857, Rev. Stat. R. I. cap. 159, §§ 9, 10, evidently because of their relation to the same subject, namely: the distribution of intestate estate.

Of course the revisers must have been sensible, when they put the two provisions together under the same head, that the words "share" and "proportionate share" in the provision for the bond would or at any rate might naturally be read as having reference to the preceding provision for distribution, and so be construed to mean distributive share and the proportion of such share needed to supply a deficiency. And in this view it seems to us that if they had intended to have the provision extend to legacies as well as distributive shares, they would not have relied on the uncertain change which they made, but would have rendered their purpose plain beyond question by directly saying: "No person entitled to any legacy or share, etc.," and by adapting the rest of the section more exactly to their design.

This view is strongly corroborated by the fact that the subsequent provision, Pub. Stat. R. I. cap. 189, § 23, for an action at law for a legacy, gives the action without any mention of a bond, though the action is subject to the same limitation in respect of time as an action for debt by a creditor. An executor is not liable to the action within a year after the probate of the will. The law apparently assumes that by the end of the year the executor will have ascertained what the estate is and what debts there are and whether the estate will suffice to pay both debts and legacies. Of course the executor may without fault have failed to get this knowledge. If so the case will have to be continued until the judgment can be safely rendered.

In some States the courts have power by statute to exact a refunding bond, if necessary for

the security of the executor, before entering judgment. Whether, independently of any statute, it would be possible to exact such a bond we leave for decision when, if ever, the question is raised. *Smith v. Lambert*, 80 Me. 137; *Dean v. Nunnally*, 86 Miss. 358; *Magee v. Gregg*, 11 Sm. & M. 70; *Farwell v. Jacobs*, 4 Mass. 634; *Brooks v. Lynde*, 7 Allen, 64.

Demurrer sustained.

David M. COGGESHALL, City Treasurer of
the City of Newport,

v.

Samuel POLLITT *et al.*

To maintain suit on a bond given to obtain a liquor license, under Pub. Stat. R. I. cap. 87, it is not necessary to show, either that the principal debtor has been convicted of a violation of the provisions of cap. 87, or that the bond has been approved by the town council or board of aldermen, or that the sureties on the bond have been notified that their suretyship has been accepted and that the license has issued.

(Newport—Filed October 24, 1885.)

DEFENDANTS' petition for a new trial.
Dismissed.

The questions presented are stated in the opinion.

Messrs. William P. Sheffield and William P. Sheffield, Jr., for defendants.

Mr. Francis B. Peckham, City Solicitor, for plaintiff.

Stiness, J., delivered the opinion of the court:

Three requests for instructions to the jury were made and refused, which raise the following questions:

First: is it necessary, in a suit upon a bond given for a liquor license, under Pub. Stat. R. I. cap. 87, that the principal must be convicted of a violation of the provisions of said chapter, before the bond can be sued?

Second: is it necessary to show that such bond was approved by the board of aldermen, before an action can be maintained upon it?

Third: is it necessary to show that the sureties on such bond were notified that their security had been accepted or that the license had been granted?

The statute requires the condition of the bond to be that the licensee "will not violate any of the provisions of this chapter." Among the provisions is one prohibiting the sale of liquor on Sunday, which is the breach declared upon in this case, followed by a penalty of fine and imprisonment, for its violation. Other violations are also made criminal offenses, for which the offender may be convicted and sentenced, *e. g.*: selling liquor to minors and ejecting intoxicated persons.

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But, besides these, there are requirements of the statute which may be violated without involving a criminal liability, to which the condition of the bond equally applies; *e. g.*: that a licensee shall not connect his place with a dwelling house; that he shall post his license in a conspicuous position in the place where the sales are made and exhibit it on demand to certain officers; that he shall not sell liquor to a person of notoriously intemperate habits; that he will not keep a disorderly house, to the annoyance of neighbors, or permit gambling therein. No distinction is made, in the provisions about the bond, in regard to the different forms of violation but, on the contrary, the bond is made to cover the violation of any provision of the statute.

The defendants contend that, because section 16 says: "If any licensed person shall be convicted of the violation of any of the provisions of this chapter, his bond shall be put in suit," there can be no suit without the previous conviction. If this is so, the city has no security under the bond against those violations for which there can be no conviction. We do not think that this was the intention of the statute. The bond, like any other bond, stands upon its own condition. Upon breach of that condition, an action arises.

The fact that a suit must be brought when the principal has been convicted does not prevent a suit, where a violation of the law has been shown, which no one has seen fit to prosecute. If prosecuting officers neglect their duty the town has still a remedy upon the bond. It is evidently required as an additional and independent security for conformity to the law, given to the representative of the town which grants the license, as one form of protection to the town against violations of the law. It may be sued when there has been a violation of the statute; it must be sued when there has been a conviction under the statute; but otherwise the one does not depend upon the other.

With reference to the second and third questions; the statute requires that the person applying for a license shall give bond, with at least two sureties satisfactory to the town council or board of aldermen. This must be done before the license is issued. It is a condition precedent to the license. It is the obligation of the parties, made requisite by law, upon which the grant of a license depends. The issuing of a license upon such obligation is at once its approval and acceptance. No vote of approval could be more significant and no more formal notice is required, because it is the accepting and acting upon the offer of the parties.

In *Wilson v. Ireland*, 4 Md. 444, it was held that the signing, sealing and delivery of a bond are *prima facie* evidence of its acceptance and approval.

To the same effect is *State v. Ingram*, 5 Ired. 441. See also, *Angell & Ames, Corp.* § 252, 10th ed. and cases cited. The only cases referred to by the defendants relate to the simple offer of guaranty for the debt of another, which must be accepted before it is binding, and they have no application to the case before us. We therefore find that there was no error in refusing to give the instructions asked for.

Petition dismissed.

William MORRISSEY, By His Next Friend,
Dennis Morrissey.

v.

PROVIDENCE & WORCESTER R. R. CO.

1. A young child strayed from its home upon a railroad track, crossed the track and fell into an adjoining trench. The track was not fenced on the trench side. In an action against the railroad company for damages, the plaintiff child claimed that his fall was caused by the company's negligence in not fencing the track on the side of the trench. Held, on demurrer to the declaration, that the company was, as to the plaintiff, under no obligation so to fence its tracks that the plaintiff could not get from them upon the adjoining land, and that the action could not be maintained.
2. On demurrer to a declaration against a corporation, the charter of the corporation is not before the court.

(Providence—Filed February 13, 1886.)

TRESPASS on the case. On demurrer to the declaration. *Demurrer sustained.*

The facts are stated in the opinion.

Mr. Edwin Metcalf, for defendant.

Mr. Hugh J. Carroll, for plaintiff.

Stiness, J., delivered the opinion of the court:

Upon demurrer to the declaration, the following facts are before us: the plaintiff, a child of about four years, living upon the line of a railroad, strayed across the track, in front of his home, to the opposite side of the railroad, where there was no fence, it being the duty of the defendant to maintain one; thence into land adjoining, where, within a few feet of the railroad, was a trench filled with water, into which the child fell, receiving injury.

The defendant cites, upon the brief, a provision of the charter of the Company, requiring a request from an adjoining owner, before the obligation to fence arises. But the charter is not before us. Assuming the duty, as set forth in the declaration, the question is, whether the action can be maintained.

A fatal objection to the plaintiff's case is that the injury was not the result of any breach of duty which the Company owed to the plaintiff. The obligation of a railroad company to guard its track by fences is chiefly for the purpose of protecting persons and cattle from harm to which they would there be liable. The duty of the company is to keep people from danger on its own premises and not from danger on the premises of its neighbors. The Company is not bound so to guard its road that children or cattle cannot get across it to the land of other persons; and yet, in order to state a case, the plaintiff, under the facts before us, would be obliged to set out such a duty.

The case is radically different from one where a child strays upon an unguarded track, which he might reasonably be expected to enter, and there receives an injury. Here the child crossed the track in safety; and, having entered upon land on the other side, the injury was caused

by the fall into the trench. But the fall was not the fault of the Company and was not consequent upon the fact that there was no fence within a few feet of it, on the side towards the railroad. The real complaint, therefore, is that the defendant did not, by a fence, prevent the child from crossing the track into another's land and there falling into a trench. The defendant was under no such duty.

"In an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty, and that he would not have been injured if the duty had been performed; but he must also show that the duty was imposed for his benefit or was one which the defendant owed to him for his security from the injury." *Smith v. Tripp*, 13 R. I. 152; *O'Donnell v. Providence, etc. R. R. Co.* 6 R. I. 211.

We think the principle which is so clearly set forth in these cases is decisive in the present case and the demurrer must be sustained.

Demurrer sustained.

Benjamin TRIPP, Treasurer of the City of Providence,

v.

James C. GOFF.

Where the meaning of an Act is ambiguous, the preamble may be resorted to, to explain it. Where the body of an Act provides for the abatement of an evil by the town council "of any such place or places," in case the owner neglects to abate it, upon notice to do so, and for the recovery of the cost of such abatement; and the preamble refers to "certain low grounds in the compact part" of the town; an action to recover the cost of the abatement does not lie, unless the evils alleged are stated to be within the designated locality, according to the preamble.

(Providence—Filed April 1, 1886.)

ASSUMPSIT. On demurrer to the declaration. *Demurrer sustained.*

The case is stated in the opinion.

Mr. Benjamin N. Lapham, for defendant.
Messrs. Nicholas Van Slyck and Stephen S. Cooke, Jr., City Solicitors, for plaintiff.

Per Curiam:

This is an action, under a local Act, entitled "An Act for Filling up Certain Low Grounds, Covered with Stagnant Water, in the Compact Part of the Town of Providence," to recover the amount expended, under the Act, in filling up certain low grounds covered with stagnant water, belonging to the defendant.

The Act was passed in 1822. It is preceded by a preamble, which is as follows: "Whereas it hath been represented unto this Assembly that certain low grounds in the compact part of the Town of Providence are covered with stagnant water, to the great prejudice of the inhabitants in the vicinity of such places; for remedy whereof." The body of the Act provides, upon in-

formation being given "of any such place or places," to the town council of said town, for the abatement of the evil by the town council, in case the owner neglects to abate it upon notice to do so, and for the recovery of the cost of abatement by the town. The declaration does not allege that the grounds filled are within what was the compact part of the city in 1823, and it is conceded that they are not within it. The declaration is demurred to on the ground that the action does not lie under the Act.

It is very clear that the action does not lie, unless the Act is broader in its scope than the preamble. The Act is unintelligible without reference to the preamble, inasmuch as it provides for actions only in regard to any such place or places, clearly meaning any such place or places as are designated in the preamble; and cannot be any wider in scope than the preamble, unless by the words "such place or places" the intention is to indicate the character of the places only and not their locality. We do not see any sufficient reason for making this distinction. The Act is local. It may well be construed as intended to apply only to evils then existing within a designated locality. According to the preamble, its purpose was to remedy the evils mentioned in the preamble. The operation of an Act is not to be restrained by the preamble where the meaning is clear, but where the meaning is ambiguous the preamble may be resorted to, to explain it. Here the preamble not only may be but must be resorted to, and we think that the statute must be construed as an Act which simply gives a remedy for the evils mentioned in the preamble.

Demurrer sustained.

Michael MCGARRAHAN

v.

William A. LAVERS.

Every private person is responsible for a wrongful imprisonment directed or authorized by him.

(Providence—Filed April 3, 1886.)

ON plaintiff's exceptions to the Court of Common Pleas. *Sustained.*

The case and facts are stated in the opinion. *Messrs. Charles H. Page and Franklin P. Owen*, for plaintiff.

Mr. Stephen O. Edwards, for defendant.

Per Curiam:

This action comes up from the Court of Common Pleas on exceptions. It is an action of trespass for assault and battery and false imprisonment. At the trial in the court below, testimony was introduced to show that the plaintiff, at a restaurant, ordered a rare steak. The waiter brought him one which was well done, which the plaintiff refused to take. He repeated his order and the waiter brought him another steak which was rare and which he accepted and offered to pay for, but refused to pay for the one which was well done. The defendant, a clerk having charge of the restaurant, directed an officer to take the plaintiff into custody. The officer obeyed and took the

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plaintiff to the police station, from which he was removed to the jail. On trial for the offense, he was acquitted. The plaintiff in the court below rested, after the production of this testimony; and, thereupon, the court, on motion of the defendant, granted a nonsuit. The ground of the nonsuit was that the defendant Lavers simply gave the direction for the arrest and did not otherwise participate in it.

We think the nonsuit was erroneous. The law is well settled that every private person is responsible for a wrongful imprisonment directed or authorized by him. *Barker v. Braham*, 2 W. Bl. 866; *Collett v. Foster*, 2 H. & N. 356; *Burnap v. Marsh*, 13 Ill. 535; *Clifton v. Grayson*, 2 Stew. (Ala.) 412.

Exceptions sustained and case remitted to Court of Common Pleas for a new trial.

William J. BRIGHTMAN

v.

Daniel A. CHAPIN.

A tract of land bounded east and west by highways was platted into house lots and streets. A, an owner by purchase of several of these lots, brought trespass *quare clausum* against B, who had purchased one of them, for using the platted street in front of the lots of A and B as a means of access to a house and lot owned by B, situated on the east side of the east bounding highway and not on the plat in question. Held, that A was entitled to recover, notwithstanding B passed over or along his lot on the plat in going to and from his house.

(Newport—Filed October 24, 1885.)

TRESPASS *quare clausum fregit*. Judgment for plaintiff.

The case is stated in the opinion of the court. *Messrs. William P. Sheffield & William P. Sheffield, Jr.*, for plaintiff.

Messrs. Browne & Van Slyck, for defendant.

Durfee, Ch. J., delivered the opinion of the court:

This is an action of trespass *quare clausum fregit*. The defendant pleads the general issue and a special plea justifying the acts complained of as committed in the exercise of a right of way over the plaintiff's said close; said right of way being appurtenant to land belonging to the defendant and described in the special plea as lot thirty-one on a plat of house lots, etc. The plaintiff replies that the acts complained of are not the acts mentioned in the special plea but other acts not committed in the exercise of said right of way. The defendant rejoins that he is not guilty. The case is tried to the court on both law and fact, jury trial being waived.

At the trial it appeared that the plaintiff's close was part of a tract of land in Tiverton, lying between two public roads and bounding easterly on one and westerly on the other; that said tract had been platted into house lots intersected by ways or avenues; that several of these lots

bounding northerly on North Avenue, so called, being one of said ways, had been conveyed as platted to the plaintiff; and that another of said lots, bounding northerly on said North Avenue and easterly on one of said public roads, to wit: lot No. 51 had been sold and conveyed as platted to the defendant. The defendant claims a right of way as appurtenant to lot No. 81 along said North Avenue, and the plaintiff does not dispute the right. It also appeared that the defendant is the owner of a house and land on the east side of the public road which bounds said tract and said lot No. 81 on the east. Testimony was submitted to show that the defendant had, at divers times, used North Avenue for the purpose of going from his said house and land to the public road west of said platted tract and of returning therefrom.

We think that such a use of North Avenue was proved, and that, though the defendant passed over or passed lot No. 81 in going and returning, it was also proved that he did so without any purpose connected with lot No. 81 but only as a way to and from his house as aforesaid. It is this use of North Avenue which is complained of by the plaintiff, and the question is whether the ownership of lot No. 81 justifies the defendant in such use of it, no question being raised but that the fee of North Avenue, subject to the right of way, rests in the abutters.

The leading case on the subject is *Howell v. King*, 1 Mod. 190, decided by the English court of common pleas two centuries ago. The case was: A had a way over B's ground to Blackacre and drove his cattle over B's ground to Blackacre, then to another place beyond. The question was whether this was lawful. It was urged for the defendant that when his cattle were at Blackacre, he might drive them whither he would. On the other side, it was said that, if so, the defendant might purchase 100 or 1,000 acres adjoining Blackacre, to which he prescribed to have a way, and so the plaintiff would lose the benefit of his land; that a prescription presupposed a grant and ought to be continued according to the intent of the original creation. To this the court agreed and gave judgment for the plaintiff. The case states the law and the reason of the law, and it has been followed uniformly in both England and America. *Lawton v. Ward*, 1 Ld. Raym. 75; *Skull v. Glenister*, 16 C. B. N. S. 81, 105; *Allan v. Gomme*, 11 Adol. & E. 759; *Davenport v. Lamson*, 21 Pick. 72; *Shroder v. Brennenman*, 28 Pa. St. 848; *French v. Martin*, 24 N. H. 440.

Judgment for plaintiff for ten cents damages and costs.

Louis W. ANTHONY, Collector of Taxes,
v.
John R. CASWELL, Trustee.

A trustee resident in another State, who holds as trustee no property in this State, is not liable to taxation in the town where his *cestui que trust* resides in this State.

(Newport—Filed October 3, 1885.)

ON plaintiff's exceptions to Court of Common Pleas. *Overruled.*

The case is stated in the opinion.

Messrs. William P. Sheffield and William P. Sheffield, Jr., for plaintiff.

Mr. Francis B. Peckham, for defendant:

In this State, such personal property only as belongs to the inhabitants of the State is liable to taxation; Pub. Stats. chap. 41, § 1; unless it be personal property permanently located here and described in section 9 of chapter 42.

Both real and personal property is to be taxed to the owner. §§ 4, 9.

Our statutes in these respects conform to the general rule of the laws of taxation, which prescribe that personal property not visible or tangible, and therefore incapable of having a *situs* apart from its owner, can only be taxed to its owner in the State where he resides. *Dyer v. Osborne*, 11 R. I. 325.

As soon as a man ceases to be an inhabitant of the State, his liability to taxation for personal property also ceases. *Barber v. Potter*, 8 R. I. 15.

By owner is meant legal owner. Taxes are not laid on *cestui que trust*. Unless by force of special statute, attachments, assessments or levies on equitable rights are unknown. *Burroughs, Tax*, 223, and cases cited; *Dorr v. Boston*, 6 Gray, 181.

The provisions of sections 12 and 13 of chapter 42 accord with this doctrine and are inconsistent with any other, providing as they do for charging the tax against the trustee, even when the beneficiary resides in this State and the tax is to be made in the town where the latter resides.

Durfee, Ch. J., delivered the opinion of the court:

This is an action for taxes assessed against the defendant as Trustee of Philip Caswell and Elizabeth Caswell, under the will of Philip Caswell, Jr. The taxes were assessed in 1881, 1882, 1883 and 1884, in the Town of Jamestown, where the said Philip and Elizabeth then resided.

The defendant pleads a special plea setting forth that for more than fifteen years last past he has not owned any real or other property as Trustee in Jamestown or in the State; and has not resided in the State but has been a domiciled inhabitant and citizen of the State of New York.

The plaintiff demurs to the plea.

The question is whether a trustee, resident in another State, who has no property as trustee in this State, is liable to taxation in the town where his *cestui que trust* reside, if they reside in the State. Our statutes provide that "All real property in the State and all personal property belonging to the inhabitants thereof shall be liable to taxation, unless otherwise specially provided;" that "All real estate shall be taxed in the town where the same is situated;" and that "All ratable personal property shall be taxed in the town in which the owner shall have had his actual place of abode for the larger portion of the twelve months next preceding the first day of April in each year, unless otherwise provided." Pub. Stat. R. I. cap. 41, § 1 and cap. 42, §§ 1, 9.

These provisions accord with the usual rule that real estate shall be taxed where it is situated; and personal estate to the owner where he has his domicile.

In *Barber v. Potter*, 8 R. I. 15, it was decided that a person not an inhabitant of the State where the tax is assessed is not liable to be taxed for personal estate in general, in any town.

There are special provisions that certain kinds of personal property shall be regarded as real estate for the purposes of taxation, and that certain other kinds, capable of having a local *situs*, shall be taxed in the towns where they are situated. Pub. Stat. R. I. cap. 42, §§ 8, 9, 10. The defendant is clearly not liable to taxation as Trustee under any of these provisions. The plaintiff does not claim that he is liable under them, but claims that he is liable under cap. 42, § 12, which is:

"All personal property held *in trust* by any executor, administrator or trustee, the income of which is to be paid to any other person, shall be assessed against the executor, administrator or trustee, in the town where such other person resides; but if such person resides out of the State, then in the town where the executor, administrator or trustee resides; and if there be more than one such executor, administrator or trustee, then in equal proportions to each of such executors, administrators and trustees, in the towns where they respectively reside."

The provision, taken literally, extends to trustees wherever resident and to property wherever situated, if only the *cestuis que trustent* reside in this State. The statutes, however, must be understood to extend only so far as they are operative, namely: to persons and things within the State or to persons subject to the jurisdiction of the State by reason of their domicile.

An inspection of our statutes will show that they do not in express terms limit their own operation to the State, the limitations being implied as a matter of course. The only reason suggested for not implying it here is that the taxes, though assessed against the nonresident trustee, are virtually assessed against the resident *cestuis que trustent*, being payable out of the trust property. And it is strongly urged that if the limitation is implied, taxpayers will be tempted to transfer their ratable personal estate to nonresident trustees for the purpose of escaping taxation.

We acknowledge the force of these arguments but we are not convinced by them. The statute, following the common rule, clearly recognizes executors, administrators and trustees as the owners, for the purposes of taxation, of the property held in trust by them. And see, *Greene v. Mumford*, 4 R. I. 818, 819.

It is against them that the taxes are ordered to be assessed, and no remedy is provided for the collection of taxes, assessed against them, from resident *cestuis que trustent*. It will be noticed too, that section 12 provides that when the *cestuis* are nonresident, the trustees shall nevertheless be taxed in the towns where they severally reside. It is fair to suppose that the State intends to allow to other States the same right which it claims for itself and does not contemplate a double taxation. And see, *Dorr v. City of Boston*, 6 Gray 181.

Our conclusion is that the purpose of section 12 is simply to determine where property held in trust shall be taxed, not to extend the liability to taxation. The demurrer will therefore be overruled and the special plea sustained.

Exceptions overruled.

Clara S. BULLOCK

William H. WHIPP *et al.*

1. A made a loan of money to B and received B's note accompanied by a paper signed by B and his wife, acknowledged and recorded, and which would have been a valid mortgage had it been sealed. C attached B's interest in the realty described in the paper; whereupon A filed a bill in equity against B and his wife and C; charging accident and mistake as the cause of the paper not being sealed, and actual notice of the paper on the part of C; and praying that the paper might be reformed by affixing seals. C demurred to the bill. Held, that the demurrer must be overruled.
2. A man cannot allow another to part with money on the faith of a conveyance and then, taking advantage of some defect known to himself, claim to have acquired, by a subsequent conveyance, a title better in equity than that obtained by such other.

(Providence—Filed December 10, 1885.)

BILL in equity to reform a mortgage. On demurrer to the bill. *Overruled.*

The facts are stated in the opinion.

Messrs. Wilson & Jenckes, for respondent, George B. Peck:

The bill is demurrable for the following reasons: equity will not relieve against mistakes arising from negligence. *Brown v. Fagan*, 71 Mo. 568; *Atlantic F. & M. Ins. Co. v. Wilson*, 5 R. I. 479; *Graham v. Berryman*, 19 N. J. Eq. 29; *Dillett v. Kemble*, 25 N. J. Eq. 66; *Voorhis v. Murphy*, 26 N. J. Eq. 484.

A mortgage executed without a seal is not a legal mortgage. In equity it amounts to a compact for a mortgage, and as such creates no lien. *Jones, Mort.* § 81; *White v. Denman*, 16 Ohio, 59; *Goodman v. Randall*, 44 Conn. 821; *Bloom v. Noggle*, 4 Ohio St. 45; *Erwin v. Shuey*, 8 Ohio St. 509; *Van Thornesley v. Peters*, 26 Ohio St. 471.

It cannot be maintained, that any legal estate was passed to the mortgagee by this defective conveyance. *Mayham v. Coombs*, 14 Ohio, 428; *Stansell v. Roberts*, 18 Ohio, 148; *Lessee of Johnston v. Haines*, 2 Ohio, 55.

The requirements of the statute must be complied with in every particular, or the record of the instrument will be inoperative as constructive notice. *Shulte v. Moore*, 1 McLean, 520, 527; *Pringle v. Dunn*, 37 Wis. 449; *Galpin v. Abbott*, 6 Mich. 17; *Graves v. Graves*, 6 Gray, 891; 1 Story, Eq. Jur. § 404; *Herndon v. Kimball*, 7 Ga. 482.

The record of any instrument which discloses a defect in its execution is a mere nullity and is not notice for any purpose. *Parret v. Shaubhut*, 5 Minn. 828; *Thompson v. Morgan*, 6 Minn. 292; *Harper v. Barsh*, 10 Rich. Eq. 149.

The court is here asked to contravene the express provisions or policy of the law; and this a court of equity has no power to do. *Price v. Cutts*, 29 Ga. 142; 2 Washb. Real Prop. 47, 59; *Dickinson v. Glenney*, 27 Conn. 104.

The complainant is not entitled to relief, on account of laches. *Sable v. Maloney*, 48 Wis. 331.

Mr. James Tillinghast, for complainant:

Equity will reform a deed to make it conform to the real contract between the parties, against all persons except *bona fide* purchasers for value without notice. 1 Story, Eq. Jur. §§ 152, 153, 165; *Adams, Eq. *168, note 1*; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Allen v. Brown*, 6 R. I. 886; *Whitehead v. Brown*, 18 Ala. 682; *Stone v. Hale*, 17 Ala. 557; *Wall v. Arrington*, 18 Ga. 88; *Alexander v. Newton*, 2 Gratt. 266; *Taylor v. Wheeler*, 2 Vern. 565; 1 Jones, Mort. § 99; *Ruhling v. Hackett*, 1 Nev. 860; *Willis v. Henderson*, 4 Scam. 13; *Taylor v. Luther*, 2 Sumner, 228; *Blodgett v. Hobart*, 18 Vt. 414; *Hart v. Farmers & Mech. Bank*, 33 Vt. 252, 264; *Conyers v. Mericles*, 75 Ind. 443.

Equity will affix seals as well as correct other mistakes. *Springfield Savings Bank v. South Cong. Soc.* 127 Mass. 516; *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 322; *Beardsley v. Knight*, 10 Vt. 185; *Harding v. Jewell*, 78 Me. 426; 13 U. S. Digest, N. S. 803; *Kennard v. George*, 44 N. H. 440; *Burgh v. Francis*, 1 Eq. Ca. Ab. 320, cited by Mr. Vernon in *Finch v. Winchelsea*, 1 P. Wms. 279.

Were this otherwise, the complainant's mortgage, although defective as a legal conveyance, gave her an equitable lien upon the estate, superior to all other liens except those of *bona fide* purchasers for value without notice. Cases *ante*, and 1 Jones, Mort. § 168 and cases cited; *Id.* §§ 166, 167, 169, 170, 188; 2 Pow. Mort. 453, 456; *Hackett v. Reynolds*, 4 R. I. 512; *Finch v. Winchelsea*, 1 P. Wms. 278; *Burn v. Burn*, 3 Ves. 581; *Lake v. Doud*, 10 Ohio, 415; *Bank of Muskingum v. Carpenter's Admrs.* 7 Ohio, 21, 69; *Bloom v. Noggle*, 4 Ohio St. 45; *Patterson v. Pease*, 5 Ohio, 190; *Err. of Polony v. Keenan*, 3 Desaus. 74; *Browne, Stat. Frauds*, § 354 a; 1 Story, Eq. Jur. § 788.

An execution creditor is not a *bona fide* purchaser for value. Cases cited *ante* and *Greene v. Haskell*, 5 R. I. 447; *Allen v. Brown*, 6 R. I. 886, 889; *Cook v. Corthell*, 11 R. I. 486, 493, 494; *Adams, Eq.* 148, 149; 2 Story, Eq. § 1503 b; *Holroyd v. Marshall*, 10 H. L. Cas. *227; *Langton v. Horton*, 28 Eng. Ch. 549, 562; *Whitworth v. Gaugain*, 25 Id. 416; *Hackett v. Callender*, 32 Vt. 97; *Berry v. Sowell*, 72 Ala. 14; *Sample v. Rowe*, 24 Ind. 208; *Reed's App.* 18 Pa. 476, 478; *Lowe v. Allen*, 68 Ga. 225.

Stiness, J., delivered the opinion of the court:

The complainant, in September, 1875, loaned \$1,800 to William H. Whipp, and received his note for that amount, together with a paper purporting to be a mortgage of certain real estate, as security for the note. This paper, in the ordinary form of mortgage, duly signed, acknowledged and recorded, did not bear the seals of Whipp and his wife. In August, 1884, the respondent Peck attached all the right, title and interest of Whipp in said real estate, which he subsequently purchased under a sale by the sheriff. The complainant now prays for a reformation of the mortgage, by affixing the seals, on the ground that they were

omitted by accident and mistake, charging that Peck had actual notice of the mortgage. Peck demurs to the bill, raising the question whether the complainant is entitled in equity, to hold a lien or claim upon the estate and to have the same perfected, in preference to an attaching creditor who has actual notice of the claim.

Under our statute, conveyances of land must be sealed, as well as signed, acknowledged, delivered and recorded. The respondent contends that an instrument lacking either one of these requisites is void and, therefore, that it cannot be reformed; hence, that the instrument before us is not a legal mortgage but, at most, only an agreement to give a mortgage which, though good as between the parties, is not good and not enforceable against third parties, whether creditors or others.

It is well settled that a person who takes a conveyance, with notice of a prior unrecorded transfer, takes it subject to such transfer. A man, knowing that another has paid money for the deed or mortgage of an estate, could not, by procuring another deed and getting it first recorded, defeat the title of the prior grantee. Nor could a man stand by and see another part with his money upon the faith of a conveyance and then, taking advantage of some defect known to him, claim that under a subsequent conveyance he had acquired a title superior in equity to that of the first purchaser. This is the law, even in the case of a purchaser for value. His title is affected by the notice which he has of the prior equitable title.

The reason for this is forcibly stated in *Hart v. Farmers & Mech. Bank*, 33 Vt. 252. Judge Redfield says: "Where a party proposes to take advantage of the literal application of the provisions of the registry system to perpetrate a fraud, by levying upon the land or purchasing it, after he has knowledge of an unregistered deed, the law interferes by mere construction, and engrafts an exception, not named in the statute but which it is necessary to imply, in order to defeat the fraudulent use of the provisions of the statute, which it is always safe to presume that the Legislature did not intend."

We think that this principle is decisive of the question raised by the demurrer. Thus in *Graves v. Graves*, 6 Gray, 391, an assignment of an equity of redemption was not acknowledged and, therefore, though recorded, was not constructive notice to the plaintiff, an attaching creditor; but a new trial was granted, to enable the defendant to prove actual notice to the plaintiff, prior to his attachment.

The case of *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 322, is precisely like the one before us. The court held that an unsealed mortgage could be reformed and enforced as against a subsequent mortgagee and also against judgment lien holders, who were chargeable with notice of the plaintiff's equities in the premises. The respondent refers us to several cases in Ohio, in which it is held that, under the registry law of that State, a mortgage which is not duly executed and delivered for record has no validity, either in law or equity, against a judgment lien. But in *White v. Denman*, 1 Ohio St. 110, the court says, after reviewing cases upon this point: "If

the question involved here had not been determined by adjudication in this State, and affirmed and adhered to for a number of years, a majority of this court would feel constrained to take a different view of it." In *Prutt v. Clemens*, 4 W. Va. 448, no reference is made to notice and the opinion rests solely upon *White v. Denman*, 16 Ohio, 59. In *Goodman v. Randall*, 44 Conn. 321, also cited by respondent, the paper was not signed and was, therefore, within the Statute of Frauds. Moreover, the contracting party, who should be required to reform the mortgage, was not before the court. We do not think the authorities support the respondent's claim. Whether the instrument be treated as an agreement for a mortgage, or a mortgage defectively executed, the complainant has under it an equitable claim upon the property, if the respondent, as is admitted by the demurrer, had knowledge of the fact before he took his title. As against the debtor the complainant might have the mortgage reformed by affixing the seal. See, *Springfield Sav. Bank v. Springfield Cong. Soc.* 127 Mass. 516.

An attaching creditor, with notice, has no greater rights than the debtor. *Greene v. Haskell*, 5 R. I. 447.

Demurrer overruled.

John McGRATH

v.

Lawrence KENNEDY.

1. The provision in Pub. Stat. R. I. cap. 246, § 16, "**All bonds, notes, judgments, mortgages, deeds or other securities, as well as promises, given or made for money * * * won at any game or by betting at any race or fight * * * shall be utterly void,**" **applies to wagers on the result of a game made by others than the players of the game as well as to wagers made by the players themselves**
2. **A deposited with a stakeholder the amount of his wager on a match at pool between C and D. While the games were being played but after it was clear that A would lose, A denounced the match to the stakeholder as a fraud and notified the stakeholder not to pay the money over. At the close of the match, the stakeholder paid over the amount to the winner of the wager; whereupon, A sued the stakeholder for his deposit. Held, that A should recover.**

(Providence—Filed January 2, 1886.)

DEFENDANT'S petition for a new trial.
Dismissed.

The case and facts are stated in the opinion.
Mr. John M. Brennan, for defendant.
Mr. Dexter B. Potter, for plaintiff.

Durfee, Ch. J., delivered the opinion of the court:

This is an action to recover of the defendant the sum of \$500 delivered to him as stakeholder by the plaintiff. At the trial the plaintiff submitted testimony to show that the

money was delivered in pursuance of a bet, each party to which put up \$500; that the bet was on certain games of pool, to be played by one Shaw against one Sullivan; the plaintiff betting that Sullivan and the other party that Shaw would be the winner, in the contest of forty-one games; that after thirty or more games had been played, while the contest was still undecided but after it had become apparent that Shaw would probably be the winner, the plaintiff went to the defendant and told him he thought the game was a "skin game" or a "snide game," and that he must not pay the money over; that the defendant replied that he should pay it over to the winner and asked the plaintiff whether if his man won he would take the whole of the money or only his part, which inquiry the plaintiff answered by saying that he should take only his part; and that the plaintiff then left, the contest being still undecided.

The plaintiff subsequently made a demand upon the defendant for the \$500 delivered to him, and the defendant having failed to repay, brought this action, claiming that the bet had been rescinded before the money was paid upon it. The money was in fact paid over to the other party the day the games were played, Shaw being the winner.

At the close of the plaintiff's testimony in chief, the defendant moved for a nonsuit, contending that if the money was put up on a bet, the bet was legal and that he, therefore, had a right to pay it over; and further contending, on a construction which he put upon certain parts of the testimony, that there was no bet, the money having been put up to insure the playing of the games, under an agreement that if Sullivan won the plaintiff was to have the money which he had put up returned to him, Sullivan taking the other \$500; and *vice versa*, if Shaw was the winner.

The court ruled that the statute was broad enough to cover a bet of the character in evidence; that the bet being illegal, the plaintiff had a right to withdraw from it; and if he notified the defendant of his withdrawal, while the money was in the defendant's hands, he had a right to recover. The defendant excepted to this ruling.

We do not think there can be any doubt that there was a bet, even if the terms were as argued. If such were the terms, nevertheless the money of each party was hazarded upon the uncertain result of a series of games; and to the loser the effect was the same, whether the money lost went to the other party to the wager or to the victor in the games. If there was no bet, it must be because neither party was to gain by it, though one or the other must lose, and because it was therefore *nudum pactum*. If this were so, it would not help the defendant; for if the bet, being *nudum pactum*, was not binding, the plaintiff of course had a right to withdraw his money. The important question is whether the bet was illegal under the statute, Pub. Stat. R. I. cap. 246, § 16, which provides as follows, to wit:

"All bonds, notes, judgments, mortgages, deeds or other securities, *as well as promises, given or made for money * * * won at any game or by betting at any race or fight * * * shall be utterly void.*"

The answer to this question depends upon the construction given to the words italicized. A bet is a promise on the part of each of the betting parties, to pay to the other party the amount of his bet if he loses. The promise may be contingent in its inception, but it becomes absolute as soon as the bet is determined. We do not see that putting the money in the hands of a stakeholder, to be paid over by him when the bet is determined, changes the character of the promise.

The question, therefore, turns on the meaning of the words "money won at any game." Do the words include money won by betting on the game as well as money won by playing it? A reference to the earlier forms of the section affords light on this point. The section in its earliest form appears in the Digest of 1844, pp. 396, 397. In that digest the playing of certain games for money or the betting on them was prohibited under a penalty. Then followed the section declaring that "All bills, bonds, notes, judgments, mortgages, deeds or other securities, given for money or lands, houses or other things, won by playing at any of the aforesaid games or by betting on either side of such as play at any of the aforesaid games * * * shall be utterly void."

The language is unambiguous. It plainly extends to money won, not only by playing but also by betting without playing. The statute remained down to 1857. In the revision of 1857, cap. 218, the provisions prohibiting the playing of certain games for money or the betting on said games were omitted. The section under consideration was revised and, with some differences immaterial here, was expressed as now, except that the words "or by betting at any game" immediately followed the words "won at any game." Rev. Stat. R. I. cap. 216, § 16.

We think there can be no doubt that the section as then expressed extended to money won, not only by playing but also by merely betting. The words "or by betting at any game" were struck out in 1872, in the General Statutes. The question is therefore whether they were struck out to change the meaning or because they were thought to be superfluous, the meaning being the same without them. We know of no change of public sentiment which makes it probable that the General Assembly could have intended to change the meaning by narrowing it. We feel bound, therefore, to treat the change as a mere verbal change, if we can reasonably do so. We think we can; for, though it is doubtless more usual to say that a person has won money at a game when he has won it by playing the game than when he has won it by betting on another's play, yet it is doing no violence to the language to find that the phrase "money won at any game" includes money won by betting at the game as well as money won by playing it. Strictly speaking, indeed, the money is won by betting when it is played for, the players being the betters; the only difference between such a bet and a bet by the bystanders being that when the players bet, they play to win the bet as well as the game, but without the bet there would be no money to win.

The first exception is therefore overruled.

The defendant makes the point that the

plaintiff was not entitled to a verdict because the money was not demanded by the plaintiff before it was paid over. The plaintiff, however, though he may not have demanded the money before it was paid over, did, according to his evidence; notify the defendant not to pay it over; and after such notice we think the defendant had no right to pay it over; and if he did, he did it at his own risk. *Adkins v. Fleming*, 29 Iowa, 122.

No question is made in regard to the demand subsequently made, except that it was too late.

Other exceptions were taken, but we do not think they show a case for a new trial. Nor do we think that the defendant is entitled to a new trial because the verdict is against the evidence in the respects pointed out by him.

Petition dismissed.

James FALLON

v.

Patrick McALONEN *et al.*

1. Under the Rhode Island Statutes, a married woman can create a charge on her realty by executory contract, only by incorporating such contract in a deed executed jointly by herself and husband and acknowledged by her, as the statutes prescribe.
2. A married woman cannot bind her realty by a contract made directly with her husband.

(Providence—Filed January 23, 1886.)

BILL in equity to establish a lien on realty and for an injunction. On demurrer to the bill. *Sustained.*

The case is stated in the opinion.

Messrs. Louis L. Angell and Nicholas Van Slyck, with *Mr. George J. West*, for respondents:

As it was real estate, and complainant's wife died intestate without children, during their marriage, complainant has no interest whatever in the property; even as against creditors his rights were always defeasible. *Martin v. Pepall*, 6 R. I. 92.

The fact that such payments, if made, were beneficial to her estate, gave him no security, not even a lien. *Cozens v. Whitney*, 3 R. I. 79; *Cameron v. McCullough*, 11 R. I. 178.

The wife does not have a separate estate, under our statute and cannot bind her estate by any contract or agreement, except as the statute gives her authority to do so. The statute is construed strictly. Her express agreements, although she may receive great benefit to her estate, cannot be enforced as to her real estate even although parties relied upon such agreements. *Cozens v. Whitney et ux*, 3 R. I. 79; *Cameron v. McCullough*, 11 R. I. 178; *Angell et al. v. McCullough*, 12 R. I. 47.

Mr. James M. Ripley, for complainant.

Durfee, Ch. J., delivered the opinion of the court:

This is a suit in equity heard on demurrer to the bill. The bill alleges that on January 12,

1871, the complainant was married to Mary Barker of Providence, R. I.; that said Mary died September 14, 1884, never having had issue by him; that said Mary at the time of their marriage owned in fee certain real estate in Providence, subject to a mortgage for \$1,500; that on January 8, 1872, he lent her the sum of \$1,100 to enable her to discharge said mortgage, upon her written agreement to repay the loan with legal interest within ten years, or else to convey the estate to him, and she also gave him then her deed of the estate as additional security; that on January 9, 1882, the said Mary, having failed to repay the loan, agreed with him in writing to give him the right and title in said estate until the loan was repaid; that on January 24, 1872, he joined with her in a mortgage for \$700 on said estate for the purpose of paying the balance of said \$1,500 mortgage and some other debt, and that afterwards he advanced \$700 to her to enable her to take up said \$700 mortgage, upon her agreement that he should have a further lien upon the estate for the same; that he has also advanced from time to time moneys to the amount of \$600 or \$700 for repairs and improvements, under a similar agreement; and that none of the moneys advanced have ever been repaid. The object of the suit is to have the defendants enjoined from prosecuting an action of trespass and ejectment which they, as heirs at law of said Mary, have commenced against him for the estate; and to establish and enforce an equitable lien on the estate for his advances; or to have the estate conveyed to him under the agreements of said Mary.

The agreements of January 8, 1872, and January 9, 1882, were in writing; but unsealed and unacknowledged. The other agreements above mentioned seem to have been oral, though this is not averred.

The question is whether a married woman can, by such agreement with her husband, create a charge, lien or trust on or in her separate statutory estate, for the repayment of money borrowed of him, which a court of equity will enforce. The question is virtually answered in former decisions. *Coxens v. Whitney*, 3 R. I. 79; *Angell v. McCullough*, 12 R. I. 47.

The doctrine of the earlier decision is that a married woman has no other power over her real estate to bind it by her contracts than is conferred upon her by the statute securing the estate to her. The doctrine was reaffirmed in the later case, in which the object of the suit was to charge the separate statutory estate of a married woman in equity, for the price of a house built upon it, under a written contract with her.

Under the statute, a married woman has no power to bind her real estate by her executory contracts, unless they are by deed executed jointly with her husband and acknowledged privily and apart from him. The statute makes no provision under which a married woman can bind her land by contract directly with her husband.

The complainant cites and especially relies upon the case of *Livingston v. Livingston*, 2 Johns. Ch. 587. In that case, a married woman agreed with her husband by parol that he should buy a lot in her name and build a house on it and that he should be repaid the cost of the house out of the proceeds of the sale of

another house and lot belonging to her. The husband carried out the agreement on his part, but the wife died before she could carry it out on her part. She left infant children to whom the legal estate in both lots descended. In a suit by the husband against them, it was decreed that the house and lot originally belonging to the wife should be sold and the husband reimbursed out of the proceeds. In that case, however, the second house and lot was paid for by the husband; so that there would have been a resulting trust beyond any question, if the grantee had been a stranger; and the court was of opinion that, though the presumption was that a purchase in the name of a wife is intended as a gift to her, yet that the presumption is rebuttable by counter proof; and that in that case it was rebutted by proof of the agreement. The husband was therefore entitled to the second house and lot by way of resulting trust, unless the agreement was performed; and the performance, being advantageous to the infants was therefore decreed, the court electing for them. The principle of the decision is explained in *Townsend v. Townsend*, 2 Sandf. Sup. Ct. 711; 1 Bishop, Law of Married Women, § 483.

Our opinion is that the complainant is not entitled to relief as sought. His case is a hard one, but we see no remedy for him unless, by reason of his marital right, he may be entitled to partial relief by subrogation. *Jones, Mortgages*, 3d ed. 874.

Demurrer sustained.

RE LIQUORS OF YOUNG & LYON.

1. **A, duly licensed to sell liquors in Providence, sent liquors in bulk to B in Hopkinton, where no licenses were granted, with the agreement that they should remain the property of A, but that B might draw ten gallons at a time as he wished, paying therefor when drawn. Held, that A was illegally keeping for sale and selling liquor in Hopkinton; and that the liquors were properly seized and were forfeited to the State.**
2. **An information for the forfeiture of liquors, under Pub. Stat. R. 1. cap. 87, charged that they were kept for the purpose of sale, without authority, within this State, against the statute. Held, that the charge was sufficient.**

(Washington—Filed January 30, 1886.)

ON claimants' exceptions to the Court of Common Pleas in proceedings for forfeiture, under Pub. Stat. R. 1. cap. 87. *Overruled.*

The case is stated in the opinion.

Messrs. Crafts & Tillinghast, for claimants:

The taking of a man's property, *in invitum*, on execution for debt, is *stricti juris*, and all the requirements of the statute must be strictly pursued. *Metcalf v. Gillet*, 5 Conn. 408; *Hobart v. Friebe*, 5 Conn. 595; *Mitchell v. Kirtland*, 7 Conn. 280.

A fortiori, is a measure of this kind matter of strict law. By omitting to return *mesne process*, the officer becomes a trespasser *ab initio*. *Williams v. Ives*, 25 Conn. 568.

The officer must comply with all the requirements of the statute, from the commencement of the service to the close of the proceeding. *Halsey v. Huse*, 46 Conn. 890.

In *Encings v. Walker*, 9 Gray, 95, a similar error was committed by the officer; and the court held that on abatement of the process in the higher court, the officer had no longer any legal claim to the custody of the goods seized; and that, having refused to deliver them to the owner, he was responsible for their conversion.

In *Kent v. Willey*, 11 Gray, 369 *et seq.*, an officer, by virtue of authority given by statute, seized certain liquors, etc., while being transported, but neglected to procure a warrant within a reasonable time. The court held him responsible as a trespasser.

The statute of this State provides that the officer making the seizure shall forthwith proceed to prosecute, etc. Chapter 87, § 89, Pub. Stat., as a special provision on this subject, would doubtless control, but chapter 251, § 15, which requires him to file an information without unnecessary delay, would better his position but little.

Section 65, chap. 87, Pub. Stat. prohibiting actions for the possession or value of liquors held, purchased or sold contrary to law, does not apply to such a case. *Fisher v. McGirr*, 1 Gray, 47; 88 Me. 562, 563.

Liquors, before judicially and finally confiscated, are property. 1 Gray, *supra*, 83.

It is only a lawful possession that will support this information. § 39, chap. 87, 239.

Nobody except an officer making seizure is authorized to file an information. *Fenner v. State*, 8 R. I. 107.

If the officer seizing does not take the liquors, the magistrate acquires no jurisdiction. 30, *supra*, 1 Gray.

All willful or unnecessary injury to wrong doers or their property is itself a wrong. *State v. Keeran*, 5 R. I. 510.

The cause of forfeiture was not properly stated. Although a process *in rem*, to procure the condemnation and forfeiture of intoxicating liquors, etc., it involves in it a criminal charge, which must be specifically set forth, of which the forfeiture is the punishment. 13 Allen, 562.

In order to the validity of any judicial trial, the parties interested in the subject of the adjudication should be informed of the nature and cause of the charge upon which the adjudication is to be made. *State v. Snow*, 3 R. I. 74.

The prosecutor is bound to give as good a description of the offense as he can. *Commonwealth v. Intox. Liquors*, 116 Mass. 22.

No time is alleged as the time when the offense was committed for which forfeiture is asked. Time should be stated with such certainty that no doubt can be entertained as to the period really intended. *Commonwealth v. Adams*, 1 Gray, 488; *Commonwealth v. Dillane*, 1 Gray, 485; Heard, Crim. Pl. 1879, 61.

The information should have shown that the offense was committed at a time since the passage of the law making forfeiture a penalty therefor, as time is essential and material. *Commonwealth v. Maloney*, 112 Mass. 284.

The time of the commission of an offense must be alleged to be within the period of limitations. Heard, Crim. Pl. 72.

No keeper or owner of the liquors is named; nor is the keeper or owner alleged to be unknown to the informant. "The complaint for forfeiture must state who kept the liquors for sale, if known; and if not known, it is sufficient to say that they were kept by some person unknown. The prosecutor is bound to give as good a description as he can." *Commonwealth v. Intox. Liquors*, 116 Mass. 22.

Even in the complaint of the legal voter and the search warrant based thereon, which are but initiatory proceedings and on which no judgment is to be rendered and therefore not so great particularity necessary, the name of the owner or keeper is required by statute to be stated if known. Chap. 87, § 36, Pub. Stat. 239. See also, *Fisher v. McGirr*, 1 Gray, 1, 29.

Such a proceeding as this is *quasi* criminal. The expression "as prescribed in other criminal cases," chap. 87, § 41, 239, shows the character of the proceedings. See also, *Parker v. Barstow*, 5 R. I. 238.

Proceedings for forfeiture of intoxicating liquors have been considered in Massachusetts of a criminal nature, in every aspect in which they have been viewed. *Commonwealth v. Intox. Liquors*, 14 Gray, 875.

In relation to jurisdiction of courts. 13 Allen, 561; 107 Mass. 216; 113 Mass. 23; 105 Mass. 595; 115 Mass. 142; 122 Mass. 8, 36; 13 Allen, 562.

The forfeiture is a punishment for crime, and all the requirements of the statute and safeguards of liberty must be strictly observed. *Fisher v. McGirr*, 1 Gray, 85.

Whenever the forfeiture depends on the illegal intent in the owner's breast, then the question is one of criminal law, and the forfeiture is a penalty for crime. Bish. Crim. Law, 7th ed. § 884.

Mr. Charles C. Mumford, Asst. Atty-Gen., for the State:

As to the time when complainant shall file information, the statute is directory, not mandatory; and assuming the information to have been filed not without unnecessary delay, it was properly filed later. Bishop, Statutory Crimes, § 255; *People v. Allen*, 6 Wend. 487.

So as to sale of real estate on execution. *Jackson v. Young*, 5 Cow. 269.

So as to execution of prisoner. *Seaborn v. State*, 20 Ala. 15. See also, *Striker v. Keily*, 7 Hill 9; *Wiggin v. Mayor*, 9 Paige, 16; *Pond v. Negus*, 8 Mass. 230; *Rex v. Justices*, 7 B. & C. 6; *People v. Cook*, 14 Barb. 259; *Colt v. Eyes*, 12 Conn. 248; *People v. Lake Co.* 83 Cal. 487.

"Forthwith" and "unnecessary delay" are relative terms. "Forthwith" means within a reasonable time. *Pa. R. R. Co. v. Reichert*, 58 Md. 261, 275.

The cause of forfeiture was properly stated. The words "with force and arms" are not necessary, even at common law, where the offense is not of a forcible nature. *Rex v. Burks*, 7 T. R. 4; 2 Hawkins, Pl. chap. 25, § 90.

Stiness, J., delivered the opinion of the court:

In this case the information sets forth that certain liquors were kept for the purpose of sale, without authority, within this State, against the statute. As the charge conforms almost exactly to that provided in Pub. Stat. R. I. cap.

87, § 28, it is sufficient. The principal contention in this case arises from the refusal of the court below to admit the following testimony, offered in defense:

Messrs. Young & Lyon, of Providence, appeared as claimants of a portion of the liquor seized. They offered to show that they were duly licensed by the state and city authorities, and had paid a tax to the United States to carry on the business of retail and wholesale dealers in malt and spirituous liquors, at their place of business in said City of Providence, for the year 1884; that they sent the liquor claimed by them to the defendant, Gadro, with the express understanding and agreement that the said liquors should remain the property of said Young & Lyon till paid for; that said Gadro should have the privilege of drawing ten gallons at a time from said liquor, whenever desired, to be paid for as soon as drawn out, the balance remaining the property of the claimants; that this arrangement was made to save the trouble of sending small amounts of ten gallons each, as usually ordered, by said Gadro; that Gadro represented himself as steward of a club called the "Rendezvous Club;" that said claimants had no knowledge or suspicion that Gadro was buying for illegal sale.

The testimony was excluded as immaterial, and the claimants excepted. If the testimony had been admitted it would have shown two things: first, that the claimants, licensed liquor dealers in Providence, sent liquor to Gadro in Hopkinton for the purpose of sale, in quantities of ten gallons at a time; and second, that they had no knowledge that the quantities so sold were to be used for unlawful purposes. We cannot see how either of these points, if established, would have been of advantage to the claimants. They were licensed to sell in Providence, not in Hopkinton. Their license, by the terms of the law, Pub. Stat. R. I. cap. 87, § 2, is expressly confined to the town in which it is granted.

The leaving of the cask with Gadro was a continuing offer of sale of the contents, completed by his acceptance in drawing off the quantity he desired to take. The contract and delivery thus became complete in Hopkinton, without authority by license and therefore contrary to law.

As to the second point: what the law prohibits is a sale or keeping for sale, in a town which grants no license therefor to the person charged with selling or keeping for sale. If one keeps liquor for sale, contrary to law, that is the offense. His ignorance of any improper or illegal use to which it may be put is no defense. He has violated the law in keeping liquor for sale without authority, and therefore testimony that he did not know it was to be used still further in violation of law is wholly immaterial. We think the testimony was properly excluded. It could not have availed the claimants anything in defense. Of the other exceptions taken, none were pressed, excepting those which raised the questions now decided in *State v. Hozie*, R. I. Index X. 71; *S. C. 1* New Eng. Rep. 29 [ante].

Exceptions overruled.

Henry L. GREENE

v.

Mary L. WILBUR et al.

Realty was devised to a trustee in fee, to pay over the income to certain named *cestuis que trustent*, no time being limited during which payment was to continue. Provision was made by the will as to one of the *cestuis que trustent* that in case of his insolvency or of an attachment of his equitable estate, his right to income should terminate and his share be paid by the trustee to A, B and C, their heirs and assigns; also, that the trustee might in certain contingencies pay over to the *cestui* his whole interest in the trust property "In fee simple for his own use" free from all trusts. Held, that the *cestuis que trustent* took an equitable estate in fee simple.

(Providence—Filed February 6, 1886.)

BILL in equity for instructions as to the construction of a will.

The provisions of the will are stated in the opinion.

Mr. Dexter B. Potter, for complainant.
Messrs. Ziba O. Slocum, Clarke H. Johnson and Stephen A. Cooke, Jr., for different respondents.

Matteson, J., delivered the opinion of the court:

This is a bill for instructions. The complainant is trustee, appointed by decrees of this court, under the wills of Oliver C. Wilbur and Lucy A. Wilbur, his wife, both of which bear date June 25, 1878. As such trustee, he has propounded to us certain questions involving the construction to be given to said wills.

The portions of the will of Lucy A. Wilbur material to be considered are as follows, viz.:

"I give and devise unto Oliver C. Wilbur, my husband, his heirs, executors, administrators and assigns, all my right, title and interest in (follows a description of the property) in trust. For the said trustee and other the trustee or trustees, for any time being to take possession and charge of all said trust property and estate, and to receive and collect all the income of said trust property and estate, and after paying therefrom all sums necessary for taxes and other expenses and all such other sums as may be required for the proper care and management of said trust property and estate and for the execution of the trusts hereby created, including a reasonable compensation for services as trustee, to pay over the residue of said income as and when received in the following manner, viz.: to Marcy G. Greene, wife of Henry Greene, one fourth part, to Geo. A. Wilbur, son of Oliver C. Wilbur, Jr., deceased, and William A. Wilbur, son of Oliver C. Wilbur, Jr., deceased, one fourth part, to Richard H. Whittier, son of Lucy A. Whittier, deceased, one fourth part, to Geo. G. Wilbur one fourth part. Provided, nevertheless, that if at any time the said Geo. G. Wilbur shall alien, incur, or anticipate the said income or any part thereof, or if by reason of his insolvency

or bankruptcy, or by any attachment or other proceeding by creditors or other cause whatever, said income or any part thereof shall or but for this present proviso would become vested in or payable and pass to or for the benefit of any other person other than the said Geo. G. Wilbur, then the said Geo. G. Wilbur's right to and interest in said income or so much thereof as shall, or but for this present proviso would so become vested in or payable to and pass to or for the benefit of any other person, shall thereupon forthwith cease and determine, and thereafter during the remainder of the life of the said Geo. G. Wilbur, the said income or so much thereof as shall have or become so forfeited or lost by the said Geo. G. Wilbur, shall be by the said trustee paid to and shall be received by the children of Marcy G. Greene, wife of Henry L. Greene, and to the children of Oliver C. Wilbur, Jr., deceased, and to the child of Lucy A. Whittier, deceased, to be divided equally among them, their heirs and assigns. Provided, nevertheless, that it shall be lawful for the said trustee or trustees hereunder for any time being, at any time or from time to time during the life of the said Geo. G. Wilbur, and before the forfeiture or loss by him of said income or any part thereof as aforesaid, and after any such forfeiture or loss, upon his obtaining by law or otherwise a full release and discharge from all his existing debts and liabilities for the then time being, upon his request in writing, to convey, transfer and deliver to the said Geo. G. Wilbur, his whole interest in said trust property in fee simple for his own use, free and discharged of all trusts.

I hereby appoint Marcy G. Greene, wife of Henry L. Greene, my residuary legatee, to whom I give and devise all the rest and residue of my estate, real and personal, of whatever nature and wherever the same may be found, after paying all of my just debts and all the expenses in the settlement of my estate and meeting all the provisions herein contained, to her and to her heirs and assigns."

The portions of the will of Oliver C. Wilbur material to be considered are as follows, viz.:

"I give, devise and bequeath unto ——— his heirs, executors, administrators and assigns, all my interest in (follows a description of the property) in trust. For the said trustee and other the trustee or trustees hereunder for the time being, to take possession and charge of all said trust property and estate, and to receive and collect all the income of said trust property and estate, and after paying therefrom all sums as may be required for taxes and other expenses and all such other sums as may be required for the proper care and management of said trust property and estate and for the execution of the trusts hereby created, including a reasonable compensation for services as trustee, to pay over the residue of said income as and when received in four equal parts, to George G. Wilbur one fourth part, to Marcy G. Greene, wife of Henry L. Greene, one fourth part, to Oliver C. Wilbur, Jun., deceased, heirs, one fourth part, and to Lucy A. Whittier, deceased, heir, one fourth, to them their heirs, executors and assigns. Provided, nevertheless, that if at any time the said George G. Wilbur shall alien, incur, or contemplate the said income or any part thereof of his portion, or by reason of his insolvency

or bankruptcy, or by any attachment or other proceeding by creditors or other cause whatever said income or any part thereof of his interest shall or but for this present proviso would become vested in or payable and pass to or for the benefit of any other person other than the said George G. Wilbur, then the said George G. Wilbur's right to and interest in said income, or so much thereof as shall or but for this present proviso would so become vested in or payable or pass to or for the benefit of any other person, shall thereupon forthwith cease and determine, and so much thereof as shall have become so forfeited be received by the children of Marcy G. Greene, wife of Henry L. Greene, and the children of Oliver C. Wilbur, Jun., deceased, and the child of Lucy A. Whittier, deceased, to them equally and their heirs and assigns. Provided, nevertheless, that it shall be lawful for the said trustee or trustees hereunder for time being, at any time or from time to time, and before the forfeiture or loss by the said George G. Wilbur of said income or any part thereof as aforesaid, or after the such forfeiture or loss, upon the said George G. Wilbur obtaining by law or otherwise a full release and discharge from all his existing debts and liabilities for the then time being, upon his request in writing to convey, transfer and deliver to the said George G. Wilbur his interest in the above said income for his own use, free and discharged from all trusts to his heirs and assigns. * * *

I hereby appoint Lucy A. Wilbur, my wife, residue legatee, to whom I give and devise all the rest of my estate."

The bill shows that Lucy A. Wilbur, the testatrix, died October 16, 1878; that Marcy G. Greene, wife of the complainant, and one of the *cestuis que trustent* in both of said wills, and also named as residuary legatee in the will of Lucy A. Wilbur, died July 23, 1881, leaving four children, viz.: the respondents, Susan A. Greene, Lucy A. Jackson, wife of Benjamin A. Jackson, Caroline C. Greene and Francis W. Greene; that Oliver C. Wilbur, the testator, died Feb. 7, 1882; that George G. Wilbur, another of the *cestuis que trustent* named in said wills, died February 10, 1882, intestate, without issue and without having incurred or suffered any forfeiture of the benefits of the provisions of said will, and that his heirs at law were the children of Marcy G. Greene named above, Richard H. Whittier, the son of Lucy A. Whittier, and the sons of Oliver C. Wilbur, Junior, deceased, viz.: George A. Wilbur and William A. Wilbur; that said William A. Wilbur died May 8, 1885, leaving a will which has been duly admitted to probate, wherein he devises and bequeaths all his estate of every kind and nature, absolutely and in fee simple, to his mother, Mary L. Wilbur, also a respondent in this suit.

The complainant asks the instruction of the court upon the following questions, viz.:

First. What kind of an estate did the *cestuis que trustent* take under the wills of said Lucy A. Wilbur and Oliver C. Wilbur?

Second. What estate in the real property described belongs to Marcy G. Greene, her heirs and assigns, as residuary legatee under the will of the said Lucy A. Wilbur.

Third. What estate in the real property described belongs to said Lucy A. Wilbur or her

heirs at law, or devisees, by virtue of her husband's devise to her as residuary legatee in his said will?

Fourth. Did said George G. Wilbur take any estate under either of said wills different from the other *cestuis que trustent*; and if so, what was the kind of estate?

Fifth. Did said William A. Wilbur take any estate under either of the said wills, or as heir at law of his uncle, George G. Wilbur, under said wills, that he could devise to his mother, said Mary L. Wilbur?

Sixth. When does the complainant's office of trustee terminate under said wills?

The complainant is in doubt whether the *cestuis que trustent* in said wills took equitable estates for life or in fee. The doubt arises because the gifts to them are of income only; and in the will of Lucy A. Wilbur, without words of inheritance.

We do not think the fact, that the gift is of income only, significant in determining the question whether the *cestuis* took estates in fee or for life merely. The legal estate in the property devised is given to a trustee, on whom is devolved the care and management of the property and who is charged with the collection of the income. The equitable estate or beneficial interest in the property, which is the subject of the gift to the beneficiary, consists solely in the right to receive the income. This equitable estate or beneficial interest is, therefore appropriately created by a mere direction to the trustee to pay over the income to the *cestuis*. It has repeatedly been held that a devise of the income, or what is equivalent, of the rents and profits, or use and occupancy of land is, in legal effect, a devise of the land itself. *Sammis v. Sammis*, 14 R. I. 123, 128, and cases cited; *Anderson v. Greble*, 1 Ashmead, 186, 188; *Reed v. Reed*, 9 Mass. 372, 374; *Blanchard v. Brooks*, 12 Pick. 47, 63; *Blanchard v. Blanchard*, 1 Allen, 233, 235; *Fox v. Phelps*, 17 Wend. 393, 402; *Diamant v. Lore*, 31 N. J. Law, 220, 222; *McClure v. Melendy*, 44 N. H. 469, 471; *Wood v. Griffin*, 46 N. H. 230, 232.

If such a devise is sufficient to pass the land itself, *a fortiori* will it pass a mere equitable interest in land. Whether or not under such a devise the estate is for life or in fee must be determined by the limitations expressed in the devise, or the intention of the testator is to be gathered from the will.

In the wills under consideration it is to be noted that no period is limited in the trusts created during which the trustee is to pay over the income to the beneficiaries, but such payment is to continue indefinitely.

The will of Oliver C. Wilbur, expressly limits the payments of the income in the proportions specified to the *cestuis* "to them, their heirs, executors and assigns." The proviso in this will for a forfeiture by George G. Wilbur of his share upon the happening of the contingencies therein expressed, limits his share over to the other beneficiaries named, "to them equally and their heirs and assigns."

Again; the proviso to the proviso last mentioned, authorizes the trustee, upon the existence of the conditions set forth in it and upon the request in writing of said George G. Wilbur, to convey, transfer and deliver to him, his interest in said income for his own use, free and

discharged from all trusts to his heirs and assigns. This use of the word "heirs" by Oliver C. Wilbur, in the connections pointed out, would seem to indicate with sufficient clearness an intention that the beneficiaries under the trust in his will should take estates in fee.

In the will of Lucy A. Wilbur, although the gifts to the *cestuis* are unaccompanied by words of inheritance, the legal estate is given to the trustee in fee, and he is directed to pay over the income to the beneficiaries, without limitation as to the time such payment is to continue. In *Moore v. Cleghorn*, 10 Beav. 423, 425, 426, the devise was to trustees in fee, upon trust for the use and benefit of the testator's three natural sons, the rents, issues and profits to be paid for their maintenance and education, or to the survivor or survivors of them, share and share alike; and it was held that the sons took equitable estates in fee, as joint tenants.

In *Newland v. Shephard*, 2 P. Wms. 194, the testator devised the residue of his real and personal estate to trustees in fee, to pay and apply the produce and interest thereof for the maintenance and benefit of his grandchildren, until they should come to the age of twenty-one, or be married; and it was held that the absolute right and property of the real and personal estate passed to the grandchildren, upon attaining the age of twenty-one years. In *Earl v. Grim*, 1 Johns. Ch. 494, 499, *Chancellor Kent* says of *Newland v. Shephard*: "This case has been questioned and, perhaps, very justly; for there was an express limitation of the period of payment of interest to the minority of the children; but in a case in which there is no such limitation, I apprehend the decision would be deemed correct." And when lands are devised in fee in trust for another, without words of inheritance, the *cestuis que trustent* will take an equitable estate in fee. *Challenger v. Shephard*, 8 T. R. 597; *Knight v. Selby*, 3 M. & G. 92, 98, 99; *Smith v. Smith*, 11 C. B. N. S. 121.

But, independently of these authorities, we think that it is sufficiently evident that the testatrix intended that the *cestuis* should take the estates in fee. The proviso in relation to the forfeiture by George G. Wilbur of his share, upon the happening of the contingencies set forth, as in the corresponding proviso in the will of her husband, limits the share of the said George upon such forfeiture, to the other beneficiaries, to be divided equally among them, their heirs, and assigns. And again; the proviso to this proviso authorizes the trustee, upon the existence of the conditions set forth, and upon the request in writing of said George, to convey, transfer and deliver to him, his whole interest in said trust property, in fee simple, for his own use, free and discharged of all trusts. The gift to George G. Wilbur is in the same form as the gifts to the other *cestuis*. If it had not been the intention of the testatrix that he should take a fee under the gift to him, why should the limitation over, in the first proviso, in case of his forfeiture of his share, have been of such share in fee; and why should the trustee have been authorized in the second proviso to convey, transfer and deliver to him his whole interest in the trust estate in fee? If it was her intention that he should take his share in fee, it is not unreasonable to infer a like intention as to the other *cestuis*, the lan-

guage of the gifts to them being identical with that of the gift to him.

We therefore answer to the questions propounded:

First. That the *cestuis que trustent* under the said wills took equitable estates in fee.

Second. That no estate in the real property described belongs to Marcy G. Greene, her heirs and assigns, as residuary legatee under the will of Lucy A. Wilbur.

Third. That no estate in the real property described belongs to said Lucy A. Wilbur, or her heirs at law, or devisees, by virtue of her husband's devise to her as residuary legatee in his said will.

Fourth. That said George G. Wilbur took under said wills the same and no different estate from that taken by the other *cestuis que trustent*.

Fifth. That said William A. Wilbur took, under each of said wills, an equitable estate in fee in one eighth of the trust estate, and as heir at law of the said George G. Wilbur, an equitable estate in fee under each of said wills, in one twenty-fourth of said trust estate, and that he could devise his said equitable interests in said trust estates to his mother, the said Mary L. Wilbur.

Sixth. That no period being fixed by said wills for the termination of the trusts created, the complainant's office of trustee will continue until said trusts shall be determined by the parties interested therein, they being competent to act, or by the court, upon a proper proceeding for that purpose, or until he shall be removed or discharged from said trusts and a new trustee appointed in his stead.

Decree accordingly.

PEOPLES SAVINGS BANK in Providence

Holder N. WILCOX *et al.*

1. **W. died a resident of Providence.** Letters of administration were granted to A in Tiverton where W. had formerly resided, and subsequently letters of administration were granted in Providence to B. In a bill of interpleader against A and B to determine which was entitled to the assets of W., held, that the letters of administration granted in Tiverton were void; and that want of jurisdiction in the Probate Court of Tiverton could be shown collaterally, although the decree of the Probate Court described W. as "late of Tiverton."
2. **Probate Courts in Rhode Island are courts of limited jurisdiction.**
3. When the jurisdiction of a court of limited jurisdiction depends on some fact which can be decided without deciding the case on its merits, the jurisdiction may be questioned and disproved collaterally, although the jurisdictional fact is averred of record and has been on evidence actually found by the court.
4. But when the question of jurisdiction is so involved in the subject matter of the suit that it cannot be separately decided,

the judgment rendered is conclusive in collateral proceedings.

(Providence—Decided February 13, 1886.)

BILL of interpleader.

The facts are stated in the opinion.

Mr. James Tillinghast, for complainant.

Mr. Edwin D. McGuinness, for respondent, Wilcox.

Mr. George T. Brown, for the other respondents.

Durfee, Ch. J., delivered the opinion of the court:

Mary A. Wilcox died November 4, 1882, leaving on deposit in the Peoples Savings Bank in the City of Providence, the sum of about \$800. Shortly before her death she made a gift *causa mortis* of the money to the defendant, George A. Sayer, delivering to him the bank book to that intent; in trust, nevertheless, to pay from said money her debts and funeral expenses, and to pay the residue over to one Emma B. Moshier, her cousin. She was, when she died, and for some time had been a domiciled inhabitant of the City of Providence, resident therein, though she had at a previous period resided in the Town of Tiverton. Shortly after her death, to wit: on December 4, 1882, the defendant, Holder N. Wilcox, her uncle and one of her next of kin, was appointed administrator on her estate by the Court of Probate of Tiverton, on his application, wherein she was described as "late of Tiverton, deceased." Subsequently, to wit: on March 11, 1885, the defendant, George A. Sayer, was appointed administrator on her estate by the Municipal Court of the City of Providence, a court exercising probate jurisdiction in said city. The defendants both claim the deposit; Wilcox as administrator and Sayer both as administrator and as donee *causa mortis*. The question is: which of the two is entitled to it?

Sayer contends that the Court of Probate of Tiverton had no jurisdiction to appoint Wilcox, and that his appointment is, therefore, null and void. Wilcox contends that his appointment cannot be questioned collaterally, but must be presumed to be valid until it is set aside in some direct proceeding. There is a diversity of decision upon the question raised by this contention. The conflict is irreconcilable. The reasons are strong on both sides.

On the one side it is urged that when a court, even though it be an inferior tribunal, has jurisdiction under particular circumstances, its decision that the circumstances exist ought to be as conclusive, until set aside in some direct proceeding, as its decision on any other question of fact in the case. This is a view which strongly commends itself when the parties have been heard; but the question may be decided by default, although the practice is a bad one, without hearing and without any actual notice, when the notice is by publication or posting, the parties having no reason to be on the lookout for notice from a court which has no jurisdiction. The appointment of Wilcox was made without hearing.

Again; it is urged that for the security of persons dealing with the administrator on the supposition that he had been properly appointed,

ed, the appointment ought to be sustained. There is great cogency in point of policy in this argument. We have been greatly inclined to yield to it. But on the other hand, the question arises: how, upon principle, can a court acquire jurisdiction by simply deciding that it has it, when the circumstances which are necessary to give it do not exist?

We have come to the conclusion, after much consideration, that the rule, applicable to courts of limited jurisdiction, which is the better established on principle and authority is this: that where the jurisdiction depends on some collateral fact which can be decided without deciding the case on its merits, then the jurisdiction may be questioned collaterally and disproved, even though the jurisdictional fact be averred of record and was actually found upon evidence by the court rendering the judgment. *Chew v. Holroyd*, 8 Welsb. Hurl. & G. Exch. 249; *Bunbury v. Fuller*, 9 Id. 111; *Wanzer v. Howland*, 10 Wis. 8; *Clark v. Holmes*, 1 Doug. (Mich.) 390; *Holyoke v. Haskins*, 5 Pick. 20; *Jochumson v. Suffolk Savings Bank*, 3 Allen 87; *Sears v. Terry*, 26 Conn. 273, 285; *Fowle v. Coe*, 63 Me. 245; *Salladay v. Bainhill*, 29 Iowa, 555; *Wyatt's Admr. v. Rambo*, 29 Ala. 510, 520; *Wilson v. Frazier*, 2 Humph. 80; *Johnson v. Corpenning*, 4 Ired. Eq. 218; *Moore v. Smith*, 11 Rich. 569, 577; *Burns v. Van Loan*, 29 La. Ann. 560; *Miller v. Jones' Admr.* 26 Ala. 247; *Brown v. Foster*, 6 R. I. 564; 1 Smith, Lead. Cas. *820.

But on the other hand, where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the latter question, then the judgment is collaterally conclusive, because the question of jurisdiction cannot be retried without retrying the case on its merits, which is not permissible in a collateral proceeding. *Brittain v. Kinnaird*, 1 Brod. & B. 452; *Regina v. Bolton*, 1 Adolph. & Ellis, N. S. 66; *Basten v. Carew*, 3 Barn. & Cress. 649; *Cave v. Mountain*, 1 Man. & Gran. 257; *Staples v. Fairchild*, 3 N. Y. 41; *Angell v. Robbins*, 4 R. I. 493.

The distinctions recognized in the rule as stated seem to have been observed by this court in deciding the cases of *Brown v. Foster*, 6 R. I. 564; and *Angell v. Robbins*, above cited.

We think the courts of probate of this State are technically courts of limited jurisdiction. They seem to be recognized as such in Pub. Stat. of R. I. cap. 181, § 5.¹ Similar courts have been treated as or decided to be such in other New England States. *Wattles v. Hyde*, 9 Conn. 10; *Sears v. Terry*, 26 Conn. 273; *Over-*

seers of Fairfield v. Gullifer, 49 Me. 380; *Fowle v. Coe*, 63 Me. 245; *Holden v. Scanlin*, 30 Vt. 177; *Hathaway v. Clark*, 5 Pick. 490; *Jochumson v. Suffolk Savings Bank*, 3 Allen 87.

Mary A. Wilcox, it is admitted, did not reside in Tiverton when she died, although such residence was necessary to give the Court of Probate of Tiverton jurisdiction. It follows that the grant of letters of administration to the defendant Wilcox was void and may be treated as a nullity in the present suit; for the question of residence is a collateral question which can be tried by itself.

A decree will therefore be entered directing the payment of the deposit to the defendant Sayer, but under the circumstances, it will be without costs.

Richard J. BURGES

v.

Charles E. SOUTHER *et al.*

1. An action for debt on judgment will not lie upon a decree in the alternative rendered on a bill to foreclose a mortgage.
2. Foreclosure proceedings in equity are of the nature of proceedings *in rem* and are not ordinarily intended to act *in personam*.

(Providence—Decided December 23, 1885.)

DEBT on judgment. *Judgment for defendants.*

On a bill to foreclose, a decree was entered ordering the respondents to pay a certain sum to the complainant within a certain time, and in default of such payment appointing a master to sell the mortgaged premises and to deposit the proceeds in the registry of the court. Subsequently this action of debt on judgment was brought by the complainant against the respondents to recover the sum mentioned in the above decree. The respondents pleaded *null tiel record*.

Mr. Charles H. Parkhurst, for plaintiff.
Messrs. Edwin Metcalf, Charles E. Souther, Charles Bradley and Walter F. Angell, for defendants.

Durfee, Ch. J., delivered the opinion of the court:

We do not think the action lies. The decree must be construed as a decree entered in pursuance of the bill which is a bill for the foreclosure of a mortgage. It consists of two parts. The first orders the defendants named to pay the complainant one sixth of the sum due on the mortgage notes, to wit: \$1,216.67 with interest since June 30, 1880, on or before April 15, 1885. The second part orders, in default of such payment, that the mortgaged premises be sold and a certain part of the proceeds paid into court. The second order does not come into operation if the first is performed. If the first is not performed, the second becomes operative instead of it; and when performed, the decree is executed. This results from the alternative character of the two parts. This character would be at once apparent if in-

1.—As follows:

"No order, judgment or decree of a court of probate or town council, which may be appealed from, or in any collateral proceeding when the same shall not have been appealed from, shall be deemed to be invalid, or be quashed for want of proper form, or for want of jurisdiction appearing upon the face of the papers, if the court or council had jurisdiction of the subject matter of such order, judgment or decree; and in cases appealed from, the appellate court having jurisdiction of the parties may allow amendments to be made in the papers filed in any such case to supply any deficiency or correct any errors therein, upon such terms and conditions as the appellate court may deem proper, and may proceed, without reference to the order, judgment or decree of the court of probate or town council, to enter such judgment as the justice of the case may require."

R. I.

stead of the words "and in default thereof" at the beginning of the second part, the language had been "or in default thereof."

But in our opinion the meaning is the same whichever phrase is used, because the two parts are alternative. Indeed the first part, although mandatory in form, is an alternative in favor of the defendants, giving them time to avoid foreclosure by paying the debt. Some of the defendants here are married women, incapable of binding themselves personally for the debt, and the court could not have intended to make an absolute personal judgment against them. The cases accord with this view. They hold, where the proceeds of sale under a decree of foreclosure by sale are deficient, that an action lies for the deficiency on the mortgage note or bond. *Globe Insurance Co. v. Lansing*, 5 Cow. 880, 580; *Lansing v. Golet*, 9 Cow. 346; *Stevens v. Dufour*, 1 Blackf. 387; *Porter v. Pillsbury*, 36 Me. 278; *Tooke v. Hartley*, 2 Bro. Ch. 125.

So, likewise, in case of strict foreclosure. *Hatch v. White*, 2 Gallison, 152; *Amory v. Fairbanks*, 8 Mass. 562; *Dunkley v. VanBuren*, 3 Johns. Ch. 830.

There are States in which the courts are empowered by statute to enter judgment for deficiency in foreclosure suits. In South Carolina the courts enter such a judgment as a matter of practice, *Wightman v. Gray*, 10 Rich. Eq. 518, but the practice is contrary to the precedents.

A foreclosure in equity, it is said, though not a proceeding *in rem*, is in the nature of such a proceeding, and is not intended ordinarily to act *in personam*. 2 Jones, Mortgages, 1709-1711; Wiltse, Mortgage Foreclosure, §§ 85, 86.

The decree here may be more peremptory in terms than such decrees usually are, but we do not think it can be held to be any different in meaning.

Plea of nul tiel record sustained. Judgment for defendants.

STATE

v.

Samuel E. GROVES. *

State v. Orville E. Stone.

State v. William M. Cutting.

State v. George H. Hunter.

A statute forbidding and punishing the sale of adulterated milk provided:

* See, *State v. Smyth*, 14 R. I. 100.

NOTE.—The statutory provision as to adulterated milk under consideration in the above cases is in almost the same terms as the New York Statute (Laws of 1884, chap. 202, § 13), which was declared constitutional by the Court of Appeals of that State in *Peo-*

"In all prosecutions under this Act, if the milk shall be shown upon analysis to contain more than 88 per cent of watery fluids or to contain less than 12 per cent of milk solids, or less than 2½ per cent of milk fats it shall be deemed for the purpose of this Act to be adulterated." Held, that the provisions were constitutional.

(Providence—Decided December 31, 1885.)

CONSTITUTIONAL question certified to the Supreme Court under Pub. Stat. R. I. cap. 220, §§ 1-9.

The cases are stated in the opinion.

Mr. Stephen A. Cook, Jr., for plaintiff.

Mr. William G. Roelker, for defendants.

Per Curiam :

These cases come before us upon a constitutional question certified to this court under Pub. Stat. R. I. cap. 220, § 2, from the justice court of the City of Providence. They are complaints, each of which charges that the defendant "did, at said Providence, have in his possession, with intent to sell in said Providence, adulterated milk, in this: that said milk being in said [defendant's] possession [naming him] with intent to sell as aforesaid, did then and there contain more than 88 per centum of watery fluids and less than 12 per centum of milk solids as shown by analysis of said milk, etc.

The question arises under Pub. Stat. R. I. cap. 127, as amended by Pub. Laws, R. I. cap. 276, § 3, of March 28, 1882, which is as follows: "In all prosecutions under this Act, if the milk shall be shown upon analysis to contain more than 88 per centum of watery fluids, or to contain less than 12 per centum of milk solids, or less than 2½ per centum of milk fats, it shall be deemed, for the purpose of this Act, to be adulterated."

The argument is that this section is unconstitutional because it virtually confines the testimony to the analysis of the samples taken by the inspector, which samples are destroyed in the making of the analysis, so that the testimony cannot be controverted.

The court is of the opinion, however, that the testimony, though it may not always be practicable to controvert it directly by another analysis, can be controverted by evidence of collateral facts going to prove that the analysis is incorrect; and, therefore, that the Act is not unconstitutional for the reason alleged.

The cases are remanded to the justice court of Providence for sentence.

Order accordingly.

ple v. Clipperly, 1 Cent. Rep. 805.

The similar Massachusetts Statute (P. S. chap. 57) is examined and construed in *Commonwealth v. Tobias*, ante, 506; *Commonwealth v. Bowers*, ante, 576.

SUPREME COURT OF CONNECTICUT.

Hubert W. TODD, *Appt.*,
v.

Hendrick H. MUNSON *et al.*

1. It seems that instructions by a grantor to an attorney drawing a deed are not, ordinarily, privileged communications.
2. An express trust in real estate cannot be proved by parol, in a case brought simply to establish or enforce the trust.
3. Evidence to prove a trust in real estate by the declarations of the grantors, after they had parted with all interest in the property, is inadmissible.
4. The fact that an agreement or contract sued on, incidentally involves a trust will not prevent the plaintiff proving the contract, and a complaint thereon is good.

(New Haven—Filed April 5, 1886.)

APPEAL by plaintiff from a judgment of the Superior Court in favor of defendants. *Affirmed.*

The case is stated in the opinion.

Messrs. E. P. Arvine and Talcott H. Russell, for plaintiff:

If the deed of June 11, 1881, was obtained by Emily C. Munson on the understanding and agreement that she should give half to Hubert W. Todd, and she refuses or neglects so to do, or if she knew that the grantors intended the deed for that purpose and expected that she would carry out such intention, and she obtained possession of said deed knowing that such was the expectation and belief, and now refuses to carry out the same, then she is guilty of fraud, and the court will either enforce the agreement specifically or set the conveyance aside for fraud. *Dowd v. Tucker*, 41 Conn. 204; *Peck v. Hoyt*, 89 Id. 9.

Defendant's objection that the agreement could not be moved by parol should have been taken by demurrer. He cannot now raise the question, especially when he has once demurred and then withdrawn his demurrer, as in this case. *Powers v. Mulvey*, 51 Conn. 482; *Merwin v. Richardson*, 52 Conn. 224; *Troubridge v. True*, Id. 190.

But this objection would amount to nothing even if it had not been waived. *Dowd v. Tucker*, 41 Conn. 201; *Peck v. Hoyt*, 89 Id. 18; *Collins v. Tillow*, 26 Id. 368; *Crocker v. Higgins*, 7 Id. 847; *Hubbard v. Ensign*, 46 Id. 582; *Clarke v. Tappin*, 82 Id. 66; *Meeker v. Meeker*, 16 Id. 883; *Parsons v. Camp*, 11 Id. 524; *Belden v. Seymour*, 8 Id. 804; *Church v. Sterling*, 16 Id. 888; *Williams v. Fitch*, 18 N. Y. 548; *Chamberlain v. Same*, Freem. Cas. Ch. 84; *Booth's App.* 35 Conn. 168; *Oldham v. Litchfield*, 2 Vern. 506; *Hoge v. Hoge*, 1 Watts, 163; 1 Story, Eq. 256; *Foot v. Foote*, 58 Barb. 258.

When it would work a fraud to deny the trust, defendant will not be allowed to set up the statute. 2 Story, Eq. 972, note a; *Haigh v. Kaye*, L. R. 7 Ch. R. App. 469.

The English Statute of Frauds enacted "That all declarations or creations of trust or confi-

dence in any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." Perry, Tr. § 73.

Our statute in this State expressly leaves out this class. See, G. S. 41.

Many of the States have followed the English Statute. Perry, Tr. §§ 80, 81.

In States where the Statute of Frauds is not in force, trusts may be proved by parol. Perry, Tr. § 85.

Even if the trust claimed in this case should for any reason fail, grantee would not take for his own benefit. The deed itself would be void. *Sheedy v. Roach*, 124 Mass. 472.

There is a presumption in this case against the deed having been intended for the sole benefit of grantee. The grantee is bound to show, affirmatively, that a voluntary conveyance obtained under such circumstances is fair. *Cooke v. Lamotte*, 15 Beav. 244; *Miller v. Simonds*, 72 Mo. 687; *Haydock v. Haydock*, 34 N. J. Eq. 571; *Allore v. Jewell*, 94 U. S. 506 (bk. 24, L. ed. 260); *Duncombe v. Richards*, 46 Mich. 168.

The evidence of declarations of grantor, as to the purpose of the deed and disposition of the property, was admissible to show the intent of the deed. *Russell v. Jackson*, 17 Eng. L. & E. 590; *Whitney v. Wheeler*, 116 Mass. 492; *Canada's App.* 47 Conn. 462.

The evidence of the attorney was not inadmissible, for it was not against the client's interest, but in furtherance of his intentions. All that the client says to his attorney is not privileged. 74 Me. 548.

The rule is that professional communications are only privileged when their disclosure is objected to by the client, or would be prejudicial to his interests. 1 Phill. Ev. 162; *Rowland v. Plummer*, 50 Ala. 194.

The privilege is meant only to protect the living in their business relations and cannot be invoked when the question arises as to the intention of a deceased person, in respect to the disposition of his estate. Whart. Ev. § 591, and cases cited; 1 Phill. Ev. 162.

An attorney may be called to prove his instructions in reference to drawing a deed. The right to object dies with the client. *Whelpley v. Loder*, 1 Dem. 374.

On an allegation of fraud, forgery or mistake, instructions received by an attorney for making the will are not privileged, within any just and proper construction or understanding of the rules. 27 Hun, 575.

An attorney may give evidence as to his instructions received from the parties for the drawing of a deed. 70 N. Y. 61; *De Wolf v. Strader*, 26 Ill. 230.

A communication made to a lawyer as to the purpose of a deed is admissible. *Hatton v. Robinson*, 14 Pick. 422, 423.

Or in regard to the intention of a note. *Borum v. Fouts*, 15 Ind. 52.

A communication of the fact of the payment of a judgment made to an attorney is not privileged. *Clark v. Richards*, 3 E. D. Sm. 89.

Messrs. C. S. Bushnell and J. S. Beach, for defendants:

The testimony of the attorney was not admissible under the well settled general rules of

law, as applied to such communications. *Ohirac v. Reinicker*, 11 Wheat. 294 (24 U. S. bk. 6, L. ed. 477); *State v. Barrows*, 52 Conn. 326.

Upon principle and by logic, as well as by precedent, this excluded testimony is within the class of communications privileged from disclosure. *Sandford v. Remington*, 3 Ves. Jr. 189; *Linthicum v. Remington*, 5 Cranch, C. C. Rep. 548; *Lockhard v. Brodie*, 1 Tenn. Ch. 384; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; *Whiting v. Barney*, 38 Barb. 397.

The declarations claimed to have been made by the grantors to the plaintiff and to the plaintiff's wife, after the execution and delivery of the deed to the grantee, were rightly excluded. *Dean v. Dean*, 6 Conn. 285; *Vail's App.* 37 Conn. 198.

But even if the law was not so settled, and if it was open to the plaintiff to offer parol testimony of the declarations of the grantors to prove the claimed trust, such declarations to be admissible must be of a time prior to, or contemporaneous with, the execution and delivery of the deed. *Perry, Tr.* § 77.

Messrs. Talcott H. Russell and E. P. Arvine, for plaintiff in reply:

Even in those States where the English Statute of Frauds prevails, a distinction is taken between those cases where there is any fraud involved and where there is none. *Williams v. Fitch*, 18 N. Y. 548.

But it is a sufficient answer to all defendant's claims on this subject that they have been waived by his pleadings. *Adams v. Way*, 32 Conn. 161; *Canterbury v. Bennett*, 22 Id. 628.

Carpenter, J., delivered the opinion of the court:

This action as originally brought was to set aside a deed for fraud and undue influence. The defendants in their answer set up another and prior deed; and the plaintiff, in an amended complaint, asks: 1, to have the prior deed reformed, so as to express an alleged trust; and 2, that the trust be enforced.

On the trial the plaintiff offered to prove the supposed trust by parol, and by the testimony of the attorney who drew the deed. An objection to this testimony was sustained by the court, and judgment having been rendered for the defendants, the plaintiff appealed.

The objection to the evidence is twofold: first, that the offer called for privileged communications; second, that parol evidence is inadmissible to prove an express trust. The court below excluded the evidence on the first ground.

Instructions by a grantor to an attorney drawing a deed are not, ordinarily, privileged communications. *Hutton v. Robinson*, 14 Pick. 416; *Hebbard v. Haughian*, 70 N. Y. 54.

The tenth paragraph of the complaint alleges an agreement between the grantors and the grantee that the grantee should hold one half of the property conveyed in trust for the plaintiff. Now if the grantors pursuant to such an agreement had instructed the attorney to prepare a deed expressing therein such a trust, we do not see why it would not be competent for the attorney to testify that such were his instructions. But the difficulty is, that the record does not show the precise nature of the communications from the grantors which the

plaintiff expected to prove. It appears that he offered to prove by the declaration of one of the grantors made at the time the deed was executed, "That the purpose of the deed was that Mrs. Munson could hold the property, and, subsequent to the death of Mr. and Mrs. Todd, sell or divide the property and give half to the plaintiff."

Now it may be that that purpose was the result of his consultation with his attorney; that it was what his attorney advised or directed; and, on the other hand, it may be that the declaration, whatever it was, was intended as an instruction to the attorney to prepare a deed expressing therein such a trust as the purpose contemplated. This latter supposition however seems to be excluded by the pleadings; for it is not alleged that the deed was not written according to the instructions; it is not alleged even that the deed is not just as the grantors intended it should be. We are thrown back, then, upon an express parol trust as the object of the proof, to be gathered from the declarations. As it is possible that such a trust can only be shown by bringing before the court the private conferences between the client and his attorney, it is not clear that the court erred in excluding the evidence on that ground.

But we think the evidence was inadmissible for the reason that an express trust in real estate cannot be proved by parol. It was so decided in *Dean v. Dean*, 6 Conn. 285; and that was recognized as law in *Vail's Appeal from Probate*, 37 Conn. 198.

We are aware of no case in which a contrary doctrine has been held. The plaintiff's counsel cite several cases which seem to be inconsistent with this principle, but the conflict is in appearance only and is not real. Property held in trust, like other property, may be the subject of contracts, of mistakes and of fraud. In suits to enforce contracts, correct mistakes and punish or prevent fraud, it is often necessary to show incidentally an express trust by parol. In considering this subject the distinction between such cases and cases brought simply to establish or enforce a trust must be borne in mind; and this distinction will reconcile the cases. We will briefly notice some of the more prominent cases referred to:

Crocker v. Higgins, 7 Conn. 342. A conveyed land to B, B paying therefor about one half the value of the land in money and agreeing to give C a life lease of the premises. The court enforced the agreement to give a lease. Performance by A took the case out of the Statute of Frauds.

Collins v. Tillon, 26 Conn. 368. A constituted B his agent to sell real estate and account to him for the proceeds. The land was conveyed to B for that purpose by an absolute deed. In a suit against B for not accounting, it was held that the purpose for which the deed was given, and the consideration, might be shown by parol. The fact that he held the real estate in trust did not prevent A from proving B's contract to account for the proceeds of the sale. Moreover, the trust in that case may be regarded as an implied one, being a contingent resulting trust arising from the want of a consideration.

Booth's App. from Probate, 35 Conn. 168. Several brothers and sisters purchased land under an agreement that one of their number

should take the title and hold it in trust for the mother during her life and after her death for themselves. The property came into the hands of a sister, who received it with knowledge of the trust, and she sold it to a stranger. After the death of the mother she was held liable to the brothers and sister for the money received for the land. Two things are noticeable: first, that the trust for themselves after the death of the mother was a resulting trust, implied from their payment of the consideration, as well as an express one; second, that there was a contract obligation on the part of the first trustee, which, by the *scienter*, bound the second. To allow her to repudiate the trust would operate as a fraud upon the others.

Peck v. Hoyt, 89 Conn. 9. A widow deeded land to a person not a relative, upon no other consideration than that she supposed he would be to her a son, and care for and support her as his mother during life. This he refused to do. On a bill to set aside the deed it was held that the circumstances were equivalent to a contract by the grantee to do what the grantor supposed would be done, and the deed was set aside. In that case too, the consideration failing, it may properly be regarded as the case of an implied trust, rather than an express one.

Dowd v. Tucker, 41 Conn. 197. A testatrix being about to make a codicil to her will in favor of another, the beneficiary under the will promised, if the will was allowed to stand, that he would carry out her intentions. On a bill in equity it was held that he held the property in trust for the proposed devisee. But the trust was not express, it was implied. The promise was not to hold the property in trust but to convey it. Until he did so the law raised the trust. Again; unless he did convey, his promise was a fraud upon the proposed devisee; and on that ground the decision rests.

The plaintiff here, for the purpose of proving the alleged trust, offered in evidence the declaration of Mrs. Ambrose Todd to himself and the declaration of Ambrose Todd to the wife of the plaintiff; both declarations having been made some time after the deed was given. This evidence was objected to and excluded. It is difficult to see how these declarations could even tend to prove the agreement to hold a trust alleged to have been made at or before the time the deed was given. In addition to the objection that it is an attempt to prove an express trust by parol, it is open to the further objection that it is an attempt to prove it by the mere declarations of the grantors long after they had parted with all interest in the property.

It has been suggested that the deed being without consideration, the purpose of the grantors in giving the deed, as soon as known to the grantee, at any time, became binding upon her. The suggestion is sufficiently answered by saying that it does not appear that any such question was made in the court below, and the reasons of appeal present no such question.

The plaintiff makes another question in reply to the objection to the evidence, and that is, that the complaint having alleged that the trust was by parol, and the defendants not having demurred, the objection is waived and was not properly taken on the trial. In support of this proposition he cites:

Powers v. Mulvey, 51 Conn. 432; *Merwin v.*

Richardson, 22 Conn. 224, and *Troubridge v. True*, 52 Conn. 190.

The leading case and the one principally relied on is *Powers v. Mulvey*. That case seems to have been understood as going further than the court intended to go. The point decided was that a sufficient defense having been found true, judgment should have been rendered for the defendant. It does not follow that a complaint or defense, found true on a traverse, and which is manifestly insufficient in substance, entitles the party to a judgment. The reasoning of the court must be understood with reference to the facts of the case, and must not be applied to facts materially different, especially if such an application will lead to absurd consequences. But, without noticing that case further, we think the complaint in this case is not demurrable. It alleges an agreement by the grantee to own one half of the premises in trust for the plaintiff, and, after the death of the grantors, to sell the same and give one half the avails thereof to the plaintiff. It presents the ordinary case of one party having received the benefits of a contract, refusing to perform it on his part. The fact that the agreement incidentally involved a trust will not prevent the plaintiff from proving the contract. *Crocker v. Higgins*, 7 Conn. 342, is a direct authority for holding such a complaint good.

The difficulty with the plaintiff's case is that he does not attempt to prove the case he has alleged. The testimony offered totally fails to establish any contract. It is a bold attempt to prove a trust by the mere naked declarations of the grantors, made in the absence of the grantee, at the time, and after the deed was given. We think that cannot be done.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred, except *Park, Ch. J.*, who dissented.

John ALEXANDER

v.

Sarah C. CHURCH, *Appt.*

1. Where plaintiff had an **inchoate mechanic's lien** on defendant's property, for materials used thereon by a contractor, and was engaged in perfecting it, but was **stopped** in doing so by the **false and fraudulent declarations** of defendant that he had paid the contractor in full, whereby the plaintiff lost his lien and security, he can **maintain an action for such fraud**.
2. It is **immaterial** to the maintenance of the action that it **does not appear** that the contractor was **unable to pay** the debt, or that any demand had been made upon him for it.

(New Haven—Filed April 16, 1886.)

A PPEAL by defendant from a judgment of the Common Pleas of New Haven County. *Affirmed.*

The case is stated in the opinion. *Messrs. C. H. Fowler and D. W. Tuttle*, for defendant:

The defendant has paid more than the contract price to the parties legally entitled to receive the money. Streeter has received his pay in full, and for all that appears is able and willing to pay the plaintiff if aught be due. *Smith v. Skeary*, 47 Conn. 47, 53.

Plaintiff had no claim on the funds which defendant has paid over. Statutes, 861, § 12; *White v. Wash. School Dist.* 42 Conn. 541, 545.

The right of lien is discharged by non-compliance with statute. Phillips, Liens, 421, §§ 297, 307.

The court cannot measure such an uncertainty as the value of a mere possibility that the plaintiff may at some future time endeavor to secure a lien on the property of one who is not and never has been his debtor. *Austin v. Barrows*, 41 Conn. 296; *Adler v. Fenton*, 24 How. 407 (65 U. S. bk. 16, L. ed. 696); *Marble v. Worcester*, 4 Gray, 397; 1 Hill, Torts, 8, note.

The court cannot give damages for a falsehood which has neither damaged the plaintiff nor benefited the defendant. *Hemingway v. Coleman*, 49 Conn. 390; *Phelps v. Stearns*, 4 Gray, 105; *Grove v. Brandenburg*, 7 Blackf. 284; *Dunlap v. Glidden*, 31 Me. 435; 2 Hill, Torts, 185, §§ 8, 4.

Only when deceit is used in the creation of a liability will action lie. 1 Hill, Torts, 8 note; *Otis v. Raymond*, 3 Conn. 413, 417; *Austin v. Barrows*, 41 Conn. 296.

Such effect would appear to be a great distance from the cause. 1 Hill, Torts, chap. 8, 78, 81.

Messrs. E. P. Arvine and E. C. Dow, for plaintiff:

We have here all the elements of an actionable fraud. Cool. Torts, 474, 475; *Adams v. Paige*, 7 Pick. 542; *Moody v. Burton*, 27 Me. 436.

The cause of action in this case is not necessarily the loss of the debt, it is the loss of the security.

The lien dates back to the commencement of the work, or the furnishing of materials, and takes precedence of any other incumbrance originating thereafter. R. S. 360, § 9.

Park, Ch. J., delivered the opinion of the court:

Very little need be said in this case to vindicate the judgment of the court below.

The defendant demurred to the complaint in that court, but it was adjudged sufficient; and this action of the court is made the ground for the claim of error in this court.

The principal allegations of the complaint are the following:

First. That the plaintiff had an inchoate mechanics' lien on the premises of the defendant for materials furnished and labor performed as a subcontractor in the construction of a building on the premises.

Second. That the premises were amply sufficient in value to secure the plaintiff's claim.

Third. That the plaintiff had taken some of the steps provided by the statute towards the perfecting of his lien.

Fourth. That he was induced not to perfect the lien by the false and fraudulent declarations of the defendant that she had paid the contractor in full for the building, and did not owe him anything on account of it, such payment having been in part by accepting orders drawn

by him in favor of other parties, and in part by the payment of money; both of them before the plaintiff had given notice of his lien.

Fifth. That these declarations were made, with the intent to deceive the plaintiff and induce him to forego the perfecting of his lien.

Sixth. That the representations had the desired effect in deceiving the plaintiff and in causing him to desist from the perfecting of his lien.

Seventh. That in consequence of these false and fraudulent representations the plaintiff lost his security upon the property, which he had in an inchoate condition when the representations were made; and lost the debt which was justly due him for labor performed and materials furnished in the construction of the building.

These are the principal allegations of the complaint; and they seem to us amply sufficient to constitute a cause of action against the defendant.

Cooley on Torts, 474, says: "Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end desired."

According to this definition it is manifest that here are all the elements of actionable fraud. False representations were made by the defendant with the intention to deceive the plaintiff and thereby prevent his acquiring a lien upon her property, which he had then but partially accomplished; and the representations had their intended effect.

The defendant likens this case to that of *Austin v. Barrows*, 41 Conn., 287; but the distinction between the cases is obvious. In that case no action whatever had been taken to acquire a lien by attachment of the debtor's property; and there was nothing to indicate with any degree of certainty that an attachment would ever have been made, if the acts of the debtor and others assisting him in concealing his property had not been done. Here the plaintiff's inchoate lien had attached to the defendant's property, and he was engaged in perfecting it, but was stopped in doing it by the false and fraudulent declarations of the defendant.

In *Adams v. Paige*, 7 Pick. 541, it was held that an action would lie for fraud in defeating an attachment by means of a collusive prior attachment; and clearly such would be the case if the same end was accomplished by fraudulent representations. See also, *Marshall v. Buchanan*, 35 Cal. 264.

We think the complaint is sufficient, and the court below committed no error in so deciding.

The remainder of the case requires but little comment. The court has found all the material allegations of the complaint true, except the one that the contractor for the construction of the building was irresponsible at the time that notice of the plaintiff's intent to claim a lien on the property was served upon the defendant, and continued to remain irresponsible. The court finds that no evidence was offered to show that the contractor was unable to pay the plaintiff's claim, or that any demand to pay it had been made upon him.

We think the finding of the court in this respect makes no material difference in the case.

The plaintiff was entitled to his lien as security

for his claim, however it may have been in regard to the ability of the contractor to pay it.
There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

Henry FIELDS, *Appt.*

v.

HARTFORD & Wethersfield HORSE R.R. CO.

The giving of the written notice prescribed by statute, Laws 1883, p. 288, is a condition precedent to the right to maintain an action for damages against a railroad company, based upon its statutory liability, for an injury alleged to have been caused by the defendant's track creating a defect in a highway.

(Hartford—Filed April 16, 1886.)

APPEAL by plaintiff from a judgment of the Superior Court sustaining a demurrer to the complaint. *Affirmed.*

The case is stated in the opinion.

Messrs. Case, Maltbie & Bryant, for plaintiff: Cited: *Hewison v. New Haven*, 84 Conn. 142; *Davis v. Bangor*, 42 Me. 522; *Sikes v. Manchester*, 59 Iowa, 66; *Hutchinson v. Concord*, 41 Vt. 271; *Pierce v. New Bedford*, 129 Mass. 584; *Ray v. Manchester*, 46 N. H. 59; *Lafayette v. Timberlake*, 88 Ind. 830; *Vinal v. Dorchester*, 7 Gray, 421.

Mr. Henry C. Robinson, for defendant:

The liability of the defendant to keep the highway along the margin of its tracks in repair is purely a creature of statute, and an action for breach of that duty is purely statutory. G. S. 836, § 4; 5 P. L. 8; G. S. 232, § 10; Acts, 1869, chap. 140, p. 850; Laws, 1883, chap. 105, p. 288.

The notice, therefore, became a condition precedent to any right of action. *Hoyle v. Putnam*, 46 Conn. 61; *Shaw v. Waterbury*, 46 Id. 266; *Cloughessey v. Waterbury*, 51 Id. 405.

To the same effect in Massachusetts, where they have a like law, see, *Gay v. Cambridge*, 128 Mass. 387; *Shea v. Lowell*, 132 Id. 187.

The proper way to take advantage of such an omission in the complaint is by demurrer. *Dickie v. B. & A. R. Co.* 181 Mass. 516; *Commonwealth v. Dracut*, 8 Gray, 455; *Wall v. Toomey*, 52 Conn. 35.

It is a first principle of pleading at common law that allegations of torts and breaches of duty must set forth facts with certainty and particularity. 1 Chit. Pl. 232, *et seq.*; 1 Maule & S. 441; 3 Id. 114; 1 Mees & W. 218; 11 Price, 235; 3 Taunt. 423; *Carpenter v. Alexander*, 9 Johns. 291.

General allegations of negligence, breach of duty, etc. are held to be utterly insignificant. 2 Thomp. Neg. § 1247; *Nickerson v. B. H. Co.* 46 Conn. 27; *McCune v. N. C. Gas Co.* 30 Id. 523; *Hayden v. Smithville Mfg. Co.* 39 Id. 580; *Hewison v. New Haven*, 84 Id. 138; *Treat v. Richardson*, 47 Id. 586; *Lee v. Barkhamsted*, 46 Id. 215; *Healey v. New Haven*, 47 Id. 816.

The act of negligence causing the collision must be stated correctly. This wholesome rule is not relaxed nor intended to be relaxed by the Practice Act. *Wall v. Toomey*, *supra*; *Hanton v. B. H. R. Co.* 129 Mass. 310.

CONN.

Granger, J., delivered the opinion of the court:

This is a complaint in a civil action for negligence. The defendant demurred. The superior court sustained the demurrer and the plaintiff appeals.

The demurrer presents but a single point, which is, that the complaint does not aver that written notice of the injury and of the nature and cause thereof, and of the time and place of its occurrence, was given to the defendants as required by law.

If the injury complained of resulted from a defective highway, which it was the duty of the defendant to keep in repair, then the defendant was entitled to have the notice prescribed by the statute as follows: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair, but no action for any such injury shall be maintained against any town, city, corporation or borough, unless written notice of such injury and of the nature and cause thereof, and of the time and place of its occurrence, shall within sixty days thereafter or, if such defect consist of snow or ice or both, within fifteen days thereafter, be given to a selectman of such town or to the clerk of such city, corporation or borough, and when the injury is caused by a structure legally placed on such road by a railroad company, it and not the party bound to keep the road in repair, shall be liable therefor." Laws of 1883, p. 283.

By the General Statutes and by the charter of the defendant, Gen. Stat. 329; 5 Priv. Laws, 3, it is made the duty of the defendant to grade and keep in repair the surface of the street adjoining the rails of its railroad, for a space not less than two feet in width on each side of each rail, and construct all crosswalks so that all vehicles can conveniently cross or turn off from such track.

The plaintiff alleges that "The defendant so improperly and negligently maintained and operated its railway in said highways as to render the use of said highways by the public, dangerous, and that the plaintiff while passing in his sleigh along said highways, and near the intersection thereof, by reason of the negligence and carelessness of the defendant was overturned and thrown from his sleigh and received many and severe bodily injuries."

This is the substance of the plaintiff's complaint. What the pleader intended to prove under this statement we can only conjecture. We think the only fair import of the language is, that the defendant had so negligently constructed and kept, or maintained, its railroad track in relation to the highway on each side, as to render the crossing unsafe at the place where the plaintiff's sleigh was overturned; that the railroad track was raised above or depressed below the adjoining grade of the street so as to constitute a defect in the highway, for which the statute referred to makes the defendant alone responsible.

The complaint we conclude, therefore, is a complaint founded upon the statutory liability of the defendant, and before the plaintiff can enforce its provisions against the defendant he must perform his own duty under it; he must give the written notice prescribed; and the giving of such notice is a condition precedent to

his right to maintain the action. This has been so often and so recently decided that it needs no further consideration. *Hoyle v. Putnam*, 46 Conn. 61; *Shaw v. Waterbury*, 46 Conn. 266; *Cloughessey v. Waterbury*, 51 Conn. 405; *Wall v. Toomey*, 52 Conn., 35.
There is no error.

In this opinion the other Judges concurred.

William NOLAN

NEW YORK & N. H. R. R. CO.

John NOLAN, Admr.

SAME.

1. The **finding** of the court on the question of negligence so far as it is a question of **fact cannot be reviewed**; but so far as it is a question of **law it may be**.
2. **Negligence is the failure to perform some act required by law, or doing the act in an improper manner.** The law determines the duty, the evidence shows whether the duty was performed. **Where the court required of defendant some act which the law did not require, it erred in matter of law,** and the question may be reviewed. If the court finds that defendant failed to do some required act, that is a finding of fact and cannot be reviewed.
3. A **question of duty, not of performance, is a question of law.**
4. A railroad company is under **no obligation** to locate its tracks and adjust the running of its trains so as to make it safe for **persons unlawfully to trespass** on its right of way.
5. **Fences** along the line of railways are required, not to protect rational beings but **animals** incapable of protecting themselves.
6. The duty in regard to the **rate of speed, the arrangement of tracks, the meeting of trains, and the absence of a fence, has not for its object the protection of persons** who have no excuse for being in the way of passing trains.
7. The **tenderage** of a person cannot have the effect to **raise a duty** where none otherwise existed. In cases where a duty exists, infants may require greater or a different kind of care than adults.
8. While a **demurrer to a complaint admits** a cause of action, in the absence of proof the **plaintiff is entitled to recover only nominal damages**; to recover more, he must show the extent of the damages, which defendant may controvert.

(Fairfield—Decided January 25, 1886.)

THESE actions were brought, one by the administrator of Daniel Nolan, deceased, to recover damages for injuries resulting in his death, and the other by William Nolan by guardian, to recover damages for injuries claimed to have been occasioned by the defendant's negligence in operating its railroad. The cases were tried and argued together.

The facts sufficiently appear in the opinion.

Mr. Robert E. DeForest, for John Nolan:

The plaintiff was entitled to recover substantial damages, unless the defendant proved either that it was itself not negligent, or that the deceased, Daniel Nolan, contributed to his injuries by his own want of ordinary care. *Crane v. East. Transp. Line*, 48 Conn. 361.

A single train of cars, a single locomotive engine, is, of itself a highly dangerous thing, however slowly it may be moving; and to propel it at the most moderate speed in a place comparatively unfrequented, where, however, children or even adults would be likely to come in unsafe proximity with it, without taking every precaution that human foresight and skill could suggest and provide to prevent accident, would upon principles of the common law be condemned as actionable carelessness. *Johnson v. Hudson River R. R. Co.* 20 N. Y. 65; *Hydraulic Works Co. v. Orr*, 88 Pa. St. 332; *R. R. Co. v. Stout*, 17 Wall. 657 (84 U. S. bk. 21, L. ed. 745); 2 Dill. 294; 1 Cent. L. J. 202; 17 A. M. L. Reg. 226; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207; *Whirley v. Whiteman*, 1 Head, 610; *Mulaney v. Spence*, 15 Abb. Pr. N. S. 319; *Birge v. Gardiner*, 19 Conn. 507; *Lynch v. Nurdin*, 1 Ad. & Ell. N. S. 29; *Clark v. Chambers*, L. R. 8 Q. B. Div. 359.

For the defendant to fence its tracks at the place of the accident would have been a simple and inexpensive precaution, and upon the plainest principles of the common law it was its obvious duty; and its neglect to do this, in the absence of any statute, would have been culpable negligence. 28 Vt. 887; 24 Vt. 487; *Isbell v. N. Y. & N. H. R. R. Co.* 27 Conn. 393, 403; 3 Ohio St. 199; 23 Wis. 186; 4 Paige, Ch. 553; *Pierce*, R. R. 409.

But beyond all this, at the time of this accident a positive statute of the State expressly required such fencing. G. S. Rev. 1875, 326, § 42, repealed April 5, 1881. See, Acts 1881, ch. 66, p. 36. See also, chap. 51, p. 290, Acts. 1878.

The decision in other States upon this point: ordinary care, are entirely in harmony with our own. 79 Pa. St. 83; 64 N. Y. 524; 72 Ill. 319, 348; 29 N. Y. 326; 71 Ill. 412; 95 U. S. 164, (bk. 24, L. ed. 405); 43 Ill. 418; 58 Ill. 226; 63 Ill. 440; 84 Ill. 484, 126; 70 N. Y. 124; 71 Ill. 348; 75 Pa. St. 265, 367; 22 N. Y. 191; 54 Ill. 484; 58 Ill. 226; 71 Ill. 601; *Shear. & Red. Neg.* 542, note; 82 N. J. L. 91.

That it was and is a question of fact, whether a child ten years of age, in attempting to cross the tracks of a railroad under the circumstances of this case, exercised ordinary care, we think is settled beyond all room for controversy. *Brennan v. Fair Haven & W. R. R. Co.* 45 Conn. 284; *Beers v. Housatonic R. R. Co.* 19 Conn. 566; *Park v. O'Brien*, 23 Conn. 846; *O'Mara v. Hudson River R. R. Co.* 38 N. Y. 445; *Mangam v. Brooklyn R. R. Co.* 38 N. Y. 455; *Eaton v. Erie R. Co.* 51 N. Y. 544; *Mowrey v. Cent. City R. Co.* 51 N. Y. 666; *State v. M. & L. R. R.* 52 N. H. 528, 534, 563, 564; Id. 252; *R. R. Co. v. Gladmon*, 15 Wall. 401 (83 U. S. bk. 21, L. ed. 114).

Will it be said that this child when injured was trespassing on the defendant's property, and that such fact in law constitutes contributory negligence? Such a proposition cannot stand for a moment. *Daley v. Norwich & W. R. R. Co.* 26 Conn. 591; *Birge v. Gardiner*, 19 Conn. 507; *Woelf v. Chalker*, 81 Conn. 121.

A person walking upon a railroad right of way at such a place, which has been thrown open to public travel and which the railroad company has allowed to be used by the public as a thoroughfare, is not to be treated, even technically, as a trespasser. *Ill. Cent. R. R. Co. v. Hammer*, 72 Ill. 347; *Kay v. Pa. R. R. Co.* 65 Pa. St. 269; *Pa. R. R. Co. v. Lewis*, 79 Pa. St. 38; *Dublin W. & W. R. Co. v. Slattery*, L. R. 8 App. Cas. 1155.

In emergencies, where a life is in jeopardy, and a chance, even if it be a slight one, presents itself to save that life, great risks may be incurred, and the law in favor of human life and for the encouragement of human heroism refuses to put the brand of negligence upon noble sacrifice. *Linnehan v. Sampson*, 126 Mass. 506; *Eckert v. L. I. R. R. Co.* 43 N. Y. 502.

In *Daley v. Norwich & W. R. R. Co. supra*, the plaintiff was a child under three years of age. The court said that it might almost be assumed as a matter of law that the child, although it had strayed upon the defendant's track and placed itself in the way of the cars, was guilty of no neglect or culpability whatever.

It does not appear and cannot be made to appear from the record that the plaintiff in this case was contributorily negligent. We refer, in support of our position, to the following well considered cases: *Thurber v. Harlem Bridge M. & F. R. R. Co.* 60 N. Y. 326; *1st v. 42d St. & G. S. F. R. R. Co.* 47 N. Y. 317; 75 Pa. St. 367; *R. R. Co. v. Gladmon*, 15 Wall. 406 (82 U. S. bk. 21, L. ed. 115); *R. R. Co. v. Stout*, 17 Wall. 657 (84 U. S. bk. 21, L. ed. 745); *Robinson v. Cone*, 22 Vt. 225; *Lynch v. Nurdin*, 1 Ad. & E. N. S. 29; 84 Ill. 484; 54 Ill. 484; 58 Ill. 226; 71 Ill. 601; *O'Mara v. H. R. R. Co.* 88 N. Y. 445; *Birge v. Gardiner, supra*; 88 N. Y. 620; 90 N. Y. 670; *Lovett v. Salem & S. Danvers R. R. Co.* 9 Allen, 557; *Drew v. 6th Ave. R. R. Co.* 26 N. Y. 51; *Oldfield v. N. Y. & Harlem R. R. Co.* 14 N. Y. 814; *Lynch v. Smith*, 104 Mass. 56; *Brennan v. Fair Haven & W. R. R. Co.* 45 Conn. 284.

Messrs. G. H. Watrous, H. S. Sanford and M. W. Seymour, for defendant:

Both these cases depend on the same questions of law and fact, and do not require separate arguments, whether they reach the legal standard of actionable negligence or fall below the legal standard of contributory negligence. That standard the law has prescribed. Judges and juries must conform to the standard which the law raises. They cannot find anything negligence which is less than a failure to discharge a legal duty. *Phila. & R. R. Co. v. Hummell*, 44 Pa. St. 375.

Negligence, such as charged here, is the omission of duty; the absence of that care which excludes all intentional wrong. *Shear. & Redf. Neg. § 2; Whart. Neg. § 1.*

The law prescribes the duty, but no one can complain of an omission of that duty which is not due to him.

"Action on the case for that he digged a pit in such a common, by occasion whereof his mare being strayed there, fell into the said pit and perished. The plaintiff moved in arrest, for when the mare was straying, and he shows not any right why the mare should be in that common.

common, the digging of the pit is lawful against him, and although his mare fell therein he hath not any remedy." *Blith v. Topham*, Cro. Jac. 158.

By this standard, too, the cases, and certainly the Connecticut cases, on this title may be reconciled. In *Birge v. Gardiner*, 19 Conn. 512, the court does not decide whether the plaintiff was a trespasser or not and holds the defendant for gross negligence, on the ground that defendant might easily have foreseen and guarded against the danger by the exercise of ordinary care, in making the gate a little stronger.

In *Brennan v. F. H. & W. R. R. Co.* 45 Conn. 284, Brennan's injury might readily have been prevented in the ordinary discharge of duty by the servants of the *Horse R. R. Co.* Nolan's could not.

We distinguish our case, too, from *Daley v. N. & W. R. R. Co.* 26 Conn. 591, for there Judge Ellsworth turned the case on the negligence of the engineer.

In *Peck v. N. Y. N. H. & H. R. R. Co.* 50 Conn. 392, Peck and his wife cast themselves on the railroad track in a vehicle at a crossing where the defendant had the right of way, and the gates closing, Mrs. Peck became frightened and jumped and hurt herself. This court declared that Peck and his wife had no business to be on the track and must bear their own misfortune.

If one trespass on the track of a railroad he is where he has no right to be; and if hurt by negligence of the company, not wanton, he cannot recover; no matter what may be the negligence of the company, if not wanton. *Wilds v. Hudson River R. R. Co.* 24 N. Y. 430.

It is settled by abundant authority that to enable a trespasser to recover for an injury he must do more than show negligence. It must appear there was a wanton or intentional injury inflicted on him by the owner. *Gillespie v. McGowan*, 100 Pa. St. 144; *S. C.* 45 Am. R. 365.

See also *Gillis v. Pa. R. R. Co.* 59 Pa. St. 129-141, where many authorities are referred to.

In *Hydraulic Works Co. v. Orr*, 2 Norr. 382, there was a recklessness which may be said to partake of the nature of wantonness; and it is only on this principle that judgment can be sustained.

It is, however, well settled that the owner of property is not liable to a trespasser or to one who is on the property by mere permission or sufferance, for negligence of himself or servants. *Gillis v. Pa. R. R. Co.* 59 Pa. St. 141, citing *Hounsell v. Smith*, 7 C. B. N. S. 781; *Binks v. South Y. R. & R. D. Co.* 8 Best & Sm. 244.

Even an express permission given to the plaintiff by the defendant's servant to occupy a place to which she had no right, would not cast responsibility on the master. *Lygo v. Newbold*, 9 Exch. 802.

Closely analogous to the case at bar is the *Phila. & R. R. Co. v. Hummell*, 44 Pa. St. 375. The plaintiff was about seven years old when he got upon or under the cars in motion, on a track where he had no right to be, and was badly hurt. Judge Strong says: "Ordinary care they (railroad companies) must be held to; but they have a right to presume and act on the presumption that those in the vicinity will not violate the laws; will not trespass upon the right of a clear track; that children of tender years will not be

there, for though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians." There is as perfect a duty to guard against accidents to a night intruder into one's bedchamber as there is to look out for trespassers upon a railroad, where the public has no right to be. And the rule must be the same whether the railroad is in the vicinage of few or many inhabitants. *Brown v. Lynn*, 7 Casey, 510; *Reeves v. Del. L. & W. R. R. Co.* 6 Id. 454."

If this be sound law, it must rule the case at bar, and rule it without adverting to any question of negligence at all. Any use of railroads, except by their owners, is unlawful. *R. R. v. Norton*, 12 Harr. 465.

In *Singleton v. East. Counties R. Co.* 7 Com. B. N. S., 97 E. C. L. 287, a child only three years and a half old, strayed upon a railway and had its leg cut off. Earle, C. J. "The plaintiff was wrongfully upon the railway, and without saying anything to detract from the cases cited (*Lynch v. Nurdin*, 41 E. C. L. 422, etc.), I must confess I was wholly unable to discover any evidence of negligence on the part of the servants of the company."

In order to recover more than nominal damages the burden of proving negligence on the part of the defendant, as an element of his case, rested on the plaintiff and never shifted from first to last. *Park v. O'Brien*, 23 Conn. 339, above cited; *Batchelder v. Bartholomew*, 44 Conn. 501, 502; *Shepard v. N. H. & N. Co.* 45 Conn. 58; *Button v. Frink*, 51 Conn. 350; *Button v. Hudson River R. R. Co.* 18 N. Y. 251, 252.

In regard to all the circumstances essential to the cause of action, the plaintiff held and was required to sustain the affirmative. Among those circumstances were, that the defendants were negligent and that the injury resulted from that negligence. *Button v. Hudson River R. R. Co.* 18 N. Y. 251; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236, is precisely in point.

The trial Judge has nowhere stated that the plaintiff proved, as a matter of fact, any negligence, irrespective of the proof offered by the defendant. And if it be contended that he drew the inference of negligence by the defendant from all the proof in the case, then it would appear that he lost sight of this cardinal feature, and erred in failing to recognize it and place it where it belonged: on the plaintiff. *Harlow v. Humiston*, 6 Cow. 189; *Rathbun v. Payne*, 19 Wend. 399; *Spencer v. Utica & S. R. Co.* 5 Barb. 337.

The deceased was found lying on the track. The jury should have been instructed that this being the case, the only question for them to decide was whether, by the exercise of reasonable care and prudence after the deceased was discovered, the driver might have saved his life. *Button v. Hudson River R. R. Co.* 18 N. Y. 255.

Plaintiff had unlawfully turned his horse loose on the highway. The defendant had unlawfully allowed the railroad track to remain uninclosed. There was no evidence of any negligence in conducting the engine at the time of the accident. Held, mutual negligence, and that action lay. *Button v. Hudson River R. R. Co. supra*; *Trow v. Vi. C. R. R. Co.* 24 Vt. 487.

Carpenter, J., delivered the opinion of the court:

The facts common to both cases are briefly these: Daniel and Willie Nolan were children of John and Mary Nolan and lived with their parents at Bridgeport. They were ordinarily intelligent and had the use of all their faculties. East Main Street in said Bridgeport crosses the defendant's double track railroad at nearly right angles. East Washington Street on the north of said tracks, for about 200 feet west of said crossing, lies alongside of said tracks, while Crescent Avenue on the south of said tracks lies alongside for a much greater distance westward. West of said crossing, said tracks lie nearly level with the surface of said Crescent Avenue for the entire distance. On the north towards East Washington Street there rises a bank, which at the place of the accident was about five and one half feet high above the railroad gutter. The slope of said bank is wholly within the limits of the right of way of the Railroad Company, that right extending some six feet further north than the crest of said bank. The crest is level with the surface of East Washington Street. This locality is a thickly populated district of said city, and all parts of said right of way lying contiguously to said streets were at the time of the accident and for many years prior thereto had been very largely and generally used by the public for passing and repassing on foot at pleasure and in all directions. The defendant was at all times familiar with such use. The two children who were injured had lived in this vicinity for some time, and were familiar with said public use of said right of way.

There was and had been no fence or other barrier or obstruction, except said bank and the ordinary railroad gutter between said railroad tracks and said street and avenue.

The place of the accident is about 150 feet west of East Main Street crossing. On the 15th day of October, 1890, the mother sent the two children to a drug store to make a small purchase, directing them to hurry home. They went directly to the store, crossing said railroad at East Main Street crossing, made the purchase and started to return home, when their attention was drawn to some other children a little west of the drug store at or near the crest of said bank, and on or near the right of way of the defendant. Thereupon they crossed the street and joined said other children and remained standing there a minute or two, doing nothing except to speak to the other children. At this time the express train from New York was due and came from the west on the south track, giving the usual signals. The train from New Haven was due and came from the east on the north track. The rear car of the east bound train crossed East Main Street as the engine of the west bound train came to said crossing. The attention of these two children was attracted and fixed upon the train from the west; and just after it had passed the place of the accident, Willie started to go home diagonally across said railroad track and right of way, and ran down the slope of said bank. Daniel immediately followed Willie, running down

said bank but a little to the east of Willie. The children had not quite reached the north rail of the north track, when the piston band on the bunter of the engine of said train from the east struck Daniel, inflicting such injuries that he died from the effects thereof four days thereafter. Willie was struck either by some part of said engine or Daniel was, by force of the blow given him, thrown violently against Willie. Willie was seriously injured. The engineer of the train from New Haven gave the usual and ordinary signals, and no negligence in that regard is complained of.

The place of the accident was not at any regular street crossing, but was about 150 feet west of East Main Street. There is a considerable curve in the tracks, which concave southerly, easterly from the place of the accident for some 600 or more feet.

The engineer, as he approached East Main Street crossing, stepped from the north side of the engine over to the south side to watch said crossing for persons coming from the south, as his engine was coming to and about to cross said highway just as or immediately after the rear of the train from New York was passing or had passed over said crossing. For this purpose he remained on the south side of his engine until he got to the crossing, when he returned to the north side, and then saw the boys running down the bank. No complaint is made that he did not then do all that was possible to be done to avoid the accident.

The finding continues as follows: "I find that neither of said children had their attention drawn to the train from New Haven; they did not see nor hear it nor know of its approach, until immediately before the accident, nor until it was impossible for them to avoid the collision. And I am not able to find whether they knew of the approach of the train from New Haven, until they were struck."

The train was moving about eighteen miles an hour. At that time about fifty-two trains passed the place of the accident during each twenty-four hours.

Upon these facts the court below held that the defendant was liable to Daniel for nominal damages only, and to Willie for substantial damages. The plaintiff appealed in the former case and the defendant in the latter.

Two questions arise in each case: was the defendant guilty of negligence? Was the plaintiff guilty of contributory negligence? The court below held that the defendant was negligent, and also that Daniel was guilty of contributory negligence, and that Willie was not.

The finding as to negligence, so far as it is a question of fact, cannot be reviewed by this court; so far as it is a question of law, it can be. It becomes important therefore to distinguish between law and fact. So far as the defendant is concerned, negligence may be defined to be a failure to perform some act required by law, or doing the act in an improper manner. The law determines the duty; the evidence shows whether the duty was performed. What duty rested upon the defendant? was a question of law. Was that duty properly performed? was a question of fact. If the court required of the defendant some act which the law did not require, it erred in a matter of law and the question may be re-

viewed by this court. If the court simply found that the defendant failed to do some required act, that is a finding of fact and cannot be reviewed.

The main question here is a question of duty and not a question of performance; and is therefore a question of law.

It would have simplified the case somewhat if the court had told us the specific duty or duties which the defendant failed to perform. As that was not done we are required to consider the several duties suggested and claimed by counsel. What duty therefore did the law impose upon the defendant upon these facts?

In the first place, it required the engineer, after the position of the boys was discovered, to do all that could be done to prevent the accident. On this point the finding is explicit: "As soon as he could, the engineer gave two or three sharp whistle sounds, and with the other hand turned on the air brakes. Everything possible was done to stop the train, and it was stopped as soon as it could be."

In the second place, it is claimed that the train should have been run at a much lower rate of speed. This claim stated in another form is, that the defendant should have run its passenger train at this point very slowly, so that the public might safely use the railroad tracks and right of way, "passing and repassing on foot at pleasure and in all directions." We think the law imposed upon it no such duty.

In the third place, it is said that the track was so constructed, and the arrangement of the trains was such that the attention of the engineer was required on the other side, so that there was no lookout to avert accidents on the side of the track where the accident happened; and this was negligence.

The strength of this argument lies in the assumption that men, women and children had a right at all times to be on the track at that place, and that it was the duty of the defendants servants and *employees* to be upon the watch, and run its train so as not to interfere with the exercise of that right, or at least so as to prevent accidents. We recognize no such right in the public, and fail to discover that the defendant owed any such duty. At the East Main Street crossing people had a right to pass and repass, and the engineer might well anticipate the possibility of their being about to do so as the train approached and to be on the watch so as to be prepared instantly to do everything possible to prevent a collision. It was necessary and lawful for people to cross the railroad at that point, using of course due care. On the other hand it was unnecessary and unlawful for any one to be on the track at the place where these boys were injured. The first and principal duty of the engineer was to look out for people at the regular crossing. Doubtless some attention is due to possible wrong doers, but not at the expense of others. An engineer must be diligent to see that the track is clear.

Due diligence depends upon the circumstances of each case. These boys came suddenly and unexpectedly in the way of the train. It does not appear that the engineer could have discovered that they would do so any sooner than he did. There seems to have been no duty neglected by the engineer; and

the defendant was under no obligation to locate its tracks and adjust the running of its trains so as to make it safe for persons unlawfully to trespass on its right of way.

In the fourth place, it is insisted that the defendant should have fenced its road.

It is difficult to see how a fence could have been constructed at such a place so as to keep boys off the track. No ordinary fence is much of an obstruction to a sprightly boy, and the track must necessarily be open at the street crossings. But aside from this; fences along the line of railways are required, not to protect rational intelligent beings but animals incapable of protecting themselves. Reasonable beings are not supposed to need such protection. We are aware of no instance in which a fence is required by statute for such a purpose. We will not undertake to say that there may not be cases in which it will be wise for the Legislature or the railroad commissioners, under the general police powers intrusted to them, to require fences to keep heedless and unthinking persons off from railroad tracks; but in the absence of such regulations we are not prepared to say that in this case it was the duty of the defendant to have constructed a fence.

We are further told that these circumstances combined "constitute a case of negligence, gross and criminal." But the learned counsel has not told us just what duty this combination imposes upon the defendant; and we are at a loss to know what duty is intended other than those we have specifically considered. We have endeavored to show that each circumstance is in itself insufficient to raise the particular duty named; and we are of the opinion that the circumstances do not supplement each other so as to raise any one of the alleged duties. The rate of speed, the arrangement of the tracks, the meeting of trains, and the absence of a fence, are not circumstances which are entitled to much more weight when combined than when taken singly; and so far as they do strengthen each other the same fatal vice attaches, namely: that the supposed duty has for its sole object the protection of wrong doers, or at least, of persons who have no excuse for being in the way of passing trains.

We do not think that the tender age of one of these plaintiffs can have the effect to raise a duty when none otherwise existed. The supposed duties have regard to the public at large, and cannot well exist as to one portion of the public and not to another under the same circumstances. In this respect children, women and men are upon the same footing. In cases where certain duties exist infants may require greater care than adults, or a different kind of care; but precautionary measures having for their object the protection of the public must as a rule have reference to all classes alike.

Our conclusion is that the facts stated disclose no duty which the defendant owed to either of these plaintiffs, and which was neglected.

We have thus far considered the case irrespective of the pleadings. The demurrer admits a cause of action. In the absence of proof the plaintiff can recover nominal damages only. But when the proof is in and the facts are found, the burden of proof ceases to be important, and the admission of the demurrer has

no effect except to carry nominal damages and costs, if the facts, independent of the pleadings, show that the defendant is not liable. If the plaintiff recovers substantial damages it is because he is entitled to them on the facts.

The finding as to the defendant's negligence is as follows: "Taking into account all the circumstances, the speed of the train, the fact of meeting another train at the point in question and upon this curve (which required the presence of the engineer temporarily on the south side of the engine) and at or near the crossing, the populous character of this part of the city, the known public use and unguarded and unfenced condition of the tracks, and the other facts in the case. I cannot find from the evidence that the defendant proved as a matter of fact that there was no negligence on the part of the defendant."

It will be observed that the court was careful not to find that the plaintiff proved that the defendant was negligent. Evidently in this state of things the court regarded the admission by the demurrer as entitling the plaintiff to full damages. In other words, the admission was thrown into the scale as evidence; which we think was an erroneous use of it. But this is not of any practical importance in this case, as, for the reasons stated, we think that the facts show that the defendant omitted no duty.

The view we take as to the alleged negligence of the defendant would seem to dispose of the case of Daniel; but as the plaintiff in that case appealed, and as the question raised and discussed relates to contributory negligence, it is proper that we should say a few words on that question.

The court finds as follows: "In the case of Daniel, considering his age and capacity, with the other facts in the case, I am of the opinion, and therefore find upon and from said facts, that he was contributorily negligent." We must regard that as conclusively determining that Daniel was in fact negligent. There is no question here as to duty.

The legal question is clear; it was the duty of the plaintiff's intestate, a duty which in some sense he owed to the defendant, to use ordinary diligence or reasonable care to avoid accidents. Whether he performed that duty is a question of fact and was properly disposed of as such. There is no ground for saying that the court legally erred in so holding. Indeed, assuming, as we must, that all the material and substantial facts are correctly presented to us, we do not hesitate to say that the question was properly disposed of.

In *Beers v. Housatonic R. R. Co.* 19 Conn. 566, this court, quoting from the English cases, laid down the rule as to the case required of plaintiffs in such cases, as follows: "It must be ordinary care, which means, that degree of care which may reasonably be expected from a person in the plaintiff's situation, and is synonymous with reasonable care. Apply that rule to the case at bar. Do boys ten years of age ordinarily run against a locomotive, in motion, and running eighteen miles an hour? Is that what may reasonably be expected from such boys in the situation of the plaintiff? Was that reasonable care? On the contrary, is not the instinct of self-preservation as strong at that age as it ever is? Do they not sense danger of this kind

as quickly and act as promptly to avoid harm as people generally do?

It was broad daylight; the approaching train gave the alarm; no reason appears why he could not see and hear; and yet by some strange fatality he heeds not the warnings, but rushes on until struck by the locomotive and fatally injured. Such conduct instead of being ordinary was extraordinary; instead of being usual, was very unusual; instead of being what might be expected, was unexpected and surprising.

We are not at liberty to follow counsel into the region of speculation for the purpose of finding a motive which will make his conduct free from blame. We are compelled to take the facts as they are presented to us in the record. It is a sad case and appeals powerfully to one's sympathy, but we must not allow it to be an occasion of injustice. The defendant is entitled to have the law fairly and impartially administered.

The case of William is different. The court says: "I cannot find that the defendant proved that in attempting to cross said tracks, when and in the manner he did make the attempt, the child did anything that ordinary children of like age, capacity and prudence, under the like circumstance, would not ordinarily do." Taken literally, the court required of the defendant something which the law did not require; but doubtless the usual course was taken; the facts were shown and then left for the court to say whether his conduct was reasonable care.

And yet it is quite possible that if the court had adopted this simple rule; was the plaintiff's conduct such as might reasonably be expected from one in his circumstances? the result would have been different. Again; there is some reason for thinking that the court in this branch of the case also used the admission in the pleadings as substantive evidence against the defendant; evidence which must be overcome or the plaintiff would be entitled to full damages. We cannot account for the peculiar and unusual language of the finding upon any other theory. If the supposition is correct, we think the court gave an effect to the pleadings not warranted by law. We repeat, the only legitimate effect of such an admission in a case like this is to give the plaintiff nominal damages. Actual damages must depend upon the proof. The burden is on the plaintiff to show the extent of the damage. When he has done that he may rest. Then it is competent for the defendant to show that the actual damage is less. He may also reduce the damages by showing no negligence in himself or contributory negligence in the plaintiff. In respect to negligence the defendant assumes the burden of proof; that is cast upon him by the admission. But he may prove negligence by a mere preponderance of proof, and the preponderance required is not increased by the admission in the pleadings. The question stands like any other question in any other case upon the proof alone.

The court, however, in the case of Daniel, upon precisely the same facts, except that Daniel was three years older, found contributory negligence. The difference in the age makes the difference in the two cases. It is left in doubt whether the court regarded that difference as presenting a legal question or a question.

tion of fact. If, as the defendant contends, the Judge decided it as a legal question, we think he made a mistake. But perhaps the better construction is that the court treated the tender age simply as evidence. If so, and the court weighed the fact with the other evidence and found due care, we cannot disturb the judgment on that ground.

The conclusion of the court is, that the court below erred in holding that any legal duty rested upon the defendant which was omitted, and did not err in holding that Daniel was guilty of contributory negligence.

Consequently, the judgment in the case of Daniel is affirmed, and in the case of William is reversed.

In the opinion the other Judges concurred, except **Beardsley, J.**, who dissented.

Edward E. HALL *et al.*

v.

Philando ARMSTRONG.

1. The **grant of a right of way** to certain parties named and the survivor of them, "**so long as they or either of them shall occupy**" a building described therein, "**for the grocery business,**" **does not grant a way appurtenant**, which is incident to **an estate in land and which inheres to it and goes by transfer** with it, as a thing essential to its enjoyment; **but is a right of way in gross**, personal to the grantees and **cannot be made assignable or inheritable.**
2. The **enjoyment of the right** under such grant **depends on the continued occupation** of the premises, by the grantees, **for the purpose named; and, hence, where they became insolvent and executed a deed of trust to a trustee**, of the entire property and business of the firm; **and the trustee in his turn deeded the same to a corporation; and the corporation took possession of the stock of goods, fixtures, store and business, and became the tenant of the owner of the building, and continued in possession**, doing the grocery business, as a corporation, the right of way in the original grantees ceased to exist.

(New Haven—Filed March, 1886.)

ACTION to assert a right of way under deed.
Judgment for defendant advised.

The facts are stated in the opinion.

Messrs. Alling & Webb, for plaintiffs.

Messrs. Doolittle & Bennett, for defendant.

Loomis, J., delivered the opinion of the court:

On the 21st of November, 1883, while the plaintiffs, as partners, were carrying on the grocery business, at a store leased by them fronting on Chapel Street in New Haven, they obtained from the defendant the grant of a right of way over his land, from Orange Street to the rear of their store. The deed, after de-

scribing and locating the way, contained this limitation: "To have and to hold the said right of way unto them, the said Edward E. Hall and Edward E. Hall, Jr., and the survivor of them, so long as they or either of them shall occupy said building on Chapel Street, belonging to Olivia H. English, for the grocery business now carried on by them."

On the 2d of February, 1885, the plaintiffs failed in business and made assignments of all their property in insolvency for the benefit of their creditors, and the trustee took possession of all the goods and fixtures in said store. Thereupon, certain persons, from motives of friendship for the plaintiffs, formed a joint stock corporation, under the corporate name of "The Edward E. Hall & Son Company," with a paid up capital of \$15,000.

The purpose, as expressed in the articles, was to carry on in New Haven a general grocery business, both at wholesale and retail. No mention was made of the store where the business was to be carried on, nor that the object was to employ or benefit the plaintiffs in any way. But it was found, subject to objection as to its admissibility, that there was an oral understanding that after the payment of 6 per cent dividends to the stockholders, if earned, the balance of the net profits should belong to the plaintiffs as compensation for their services in the management of the business at the store.

The corporation was legally and honestly organized, and was not intended to cover property of the plaintiffs. The corporation purchased of the trustee all the goods and fixtures and took possession of the store on the 14th of February, 1885, and has ever since carried on the grocery business in said store, and the plaintiffs from the time of their said failure have ceased to carry on said business as owners. The plaintiffs are not officers, directors or stockholders of the corporation, but assist in carrying on the business, and one of them is general manager.

Upon these facts, the contention of the defendant is that the right of way granted by him no longer exists, because the grantees and each of them have ceased to occupy the store referred to for the grocery business, which they carried on when the grant was made; and therefore he obstructed the way and did the acts in relation to it for which the complaint was brought.

From the nature and limitations of the grant, it is very clear that when each of the plaintiffs ceased to occupy the store for the grocery business, the right of way also ceased.

It is not a way appurtenant, which is incident to an estate in land, inheres in it and goes by transfer with it, as a thing essential to its enjoyment; but, it is what is called a right of way in gross, which is personal to the grantee; and being so, it cannot be made assignable or inheritable, even by words in the deed to that effect. 6 Wait, Act. & Def. p. 348; *Boatman v. Lasley*, 23 Ohio St. 614; Washb. Eas. 3d ed. 10, § 11.

It is also laid down by high authority that such a right of way is so exclusively personal that the owner of the right cannot even take another person into partnership with him. 8 Kent, Com. 9th ed. 420.

But the exigencies of this case do not require

us to resort to the technical distinctions of the law as to ways. The parties expressed their meaning so clearly that any person of ordinary intelligence, though an utter stranger to legal distinctions, could not fail to understand that the duration of the way is limited to the personal occupation of the plaintiffs or one of them for the grocery business. The plaintiffs evidently so understood it, for when they brought this suit, they distinctly alleged in the complaint an actual occupation by them as the foundation of their alleged right. The pivotal fact of the case, therefore, is the single question of continued occupation by the plaintiffs. It seems to us that this question has been settled as matter of fact against the plaintiffs by the positive finding of the trial court, that, "On February 14, 1885, said trustee, then in possession of said stock, goods and store fixtures in said store, sold the same to a joint stock corporation located in said New Haven and duly organized according to law, and known as the Edward E. Hall and Son Company. Said corporation thereupon took possession of said stock of goods, fixtures, store and business, and at once commenced to carry on a grocery business in said building, and have ever since continued so to do. * * * No grocery business but that of said corporation is carried on in said building."

But were we called upon to review this finding as to the occupancy, in the light of other special facts found, we should be unable to reach a different result. It was urged in argument that there has been no apparent change as to occupancy, because the plaintiffs in person are present in the store and wait on the customers as before. But under the grant, the question is not one of apparent but actual occupancy. It is a matter that does not concern the public, but affects only the immediate parties; and it is to be determined by words of limitation which the parties themselves adopted. It is obvious that the terms of the grant cannot be satisfied with the mere bodily presence of the plaintiffs, nor with the fact that they handle the goods and wait on the customers. The thing which the parties contemplated was the controlling mind of the plaintiffs, who were to direct the manner and extent of the business. They were to be there, not as mere servants but as masters. It is impossible to make the corporation identical with the plaintiffs without assuming that the scheme was a fraud but this is distinctly negated. The corporation is not in possession for one purpose, and the plaintiffs for another. The former alone is master and may direct the business in every respect and may at any time dismiss the plaintiffs as its hired servants.

But it is further claimed that the plaintiffs are tenants of the store and therefore in possession. It is found that, after 1879 and until the plaintiffs' failure, the latter had no written lease and the only verbal one was a tenancy from month to month. The only pretense of a lease after the failure is founded solely on a casual remark of the owner before the failure, to one of the plaintiffs, in reply to a suggestion by him that they might have to go into insolvency, and that it was very uncertain about their being able to continue the business, and to some inquiry about the store the owner said: "That is all right, Ed., you can stay there as long as you choose." It is idle to make out a tenancy from

this remark, especially in view of the further finding that "No special contract or agreement has been made since the formation of said corporation, between the owner of said building and the plaintiffs, or between said owner and said corporation, or between said Halls and said corporation, in regard to leasing said building; but the rent for said building, since the formation of said corporation, has been paid to the owner in monthly installments, in part by groceries from the store of said corporation, and by checks of said corporation for the balance payable to the order of the said owner, and signed: The Edw. E. Hall & Son Company, E. E. Hall, Jr., Supt." No rent account has been kept in the books of said corporation with the said Halls or either of them, but the same has been entered in the general expense account of said corporation. * * * Upon the above facts, the court finds that said corporation, when it took possession of said stock and fixtures became the tenant of the owner of the building, unless the law upon all the facts herein contained is otherwise."

This court surely, upon these facts, cannot find the law to be otherwise.

For these reasons, the Court of Common Pleas is advised to render judgment in favor of the defendant.

In this opinion the other Judges concurred

STATE of Connecticut

v.

David BEAUDET, Appt.

1. On a trial for assault with intent to murder, a question to a witness by the accused, as to whether he had, shortly before the assault, heard a third person make any threats against the person assaulted, was properly excluded, there being no evidence that such third person had committed the crime.
2. Declarations of a third person are not admissible as tending to prove the commission of the crime by him, in defense of the accused on trial therefor, when not part of the *res gestæ* nor definite and specific in relation to the crime.
3. An accused is not prejudiced by the exclusion of evidence which would not have impaired the circumstantial evidence against him.

(New Haven—Filed April 5, 1886.)

APPEAL by defendant from a judgment of the Superior Court, upon a verdict of guilty of assault with intent to murder. *Affirmed.*

The question presented by the appeal is fully stated in the opinion.

Messrs. Zacher & Andrews, for appellant: The question asked: "Whether Dougherty made any threats against Dr. Zink," was admissible. Stark. Ev. 9th ed. 759.

Mr. T. E. Doolittle, for the State: The admissions of other persons that they committed the crime charged against the accused are inadmissible. Whart. Cr. Ev. § 225; *Smith v. State*, 9 Ala. 990; 58 Ala. 872; *Sharp*

v. State, 6 Tex. App. 650; *Rhea v. State*, 10 Yerger, 258; *Davis v. State*, 37 Tex. 227.

The declaration of a third party that he has committed a crime is inadmissible. Much greater reason exists why the declaration of a third party that he will commit a crime, which he may or may not do, should not be admitted. Such declarations are the worst and most dangerous kind of hearsay evidence. *Thomas v. People*, 67 N. Y. 218; *State v. Duncan*, 6 Ired. 236; *State v. Haynes*, 71 N. C. 79; *State v. Davis*, 77 N. C. 483; *State v. Johnson*, 30 La. Ann. 921; *Walker v. State*, 6 Tex. App. 576; 73 N. C. 44.

To make a declaration admissible it must accompany the act done; and a threat to do an act, which act is not and may never be done, is not admissible as part of the *res gestæ*. *Greenfield v. People*, 85 N. Y. 75, and authorities cited on pages 79 and 80; *Enos v. Tuttle*, 3 Conn. 250; *Rockwell v. Taylor*, 41 Conn. 56; Whart. Cr. Ev. § 262.

Loomis, J., delivered the opinion of the court:

The prisoner was tried upon an information for an assault upon one Dr. Walter Zink, with intent to murder. He was at the time in Dr. Zink's employ and an inmate of the family, the other members being: the wife of Zink, who was very deaf, a daughter aged fifteen, and a little son much younger. The State claimed to have proved that the prisoner was present in the room with Dr. Zink a short time before the commission of the offense and was found in the house shortly after.

The assault took place in the dining room of the house, a few minutes after 11 o'clock in the evening. Dr. Zink, at the time, had upon his person two rolls of bills, one of \$56 and the other of \$200. During the daytime preceding the assault he had received \$16 or \$18 from one Robert Dougherty, who then had opportunity to see one of the rolls of bills.

On the south side of Zink's house, leading from the street to the barn, is a drive way, and on the easterly side is a fence and gate leading from the drive way to an orchard on the south. That part of the drive way opposite the gate consists of soft and sandy soil. Very soon after the assault and before any other persons arrived, the prisoner and Mrs. Zink passed out of the house and with bare feet went over the drive way and through the gate into the orchard, the prisoner going a few feet ahead. At a place about fifteen feet beyond the gate, Mrs. Zink discovered on the ground a roll of bills consisting of \$200. She also picked up a watch beside the drive way and some bills in the dining room, and the prisoner also picked up some silver money there. They both returned into the house and made no further search. Early the next morning the impression of bare feet of human beings was noticed in the sand of the drive way leading to and from the gate into the orchard. They were examined by the coroner of the county and by others; and at the coroner's suggestion Dougherty and the prisoner made impressions on the sand with their bare feet, which were measured and compared with those on the drive way. The latter indicated that the second toe was somewhat longer than the first. The experimental impressions made by Dough-

erty were nearly the same as those found on the drive way, while those made by the prisoner were a quarter of an inch less in length and a little less in width, but no other difference was mentioned. At about 10 o'clock in the evening of the assault, Dougherty was in the Linsley House, situated from 1,200 to 1,500 feet distant, and remained there until half past 10, when he left, and was last seen near there on the railroad track, very drunk, staggering, and on the road to his house.

In addition to the other circumstances, the State relied upon the confession of his guilt by the accused, as shown by the testimony of two witnesses.

Upon the trial, a witness was asked "Whether Dougherty upon that night in that saloon, between the hours of half past 9 and half past 10, made any threats against Dr. Zink." And another witness was asked "Whether on the day before the assault Dougherty, in his hearing, made any threats against Dr. Zink."

Both questions were excluded by the court and exceptions taken by the defendant's counsel; and this ruling presents the only question for review.

At the outset it should be noticed that the offer was simply to prove the threats of Dougherty against Dr. Zink. Any threats of any kind would have filled the offer. What act Dougherty threatened to do or when or how he was to do it was not indicated; nor was the offered evidence accompanied with any claim or even a hint that it could or would be supplemented by further testimony. Indeed, it nowhere appears in the record that it was even claimed in behalf of the prisoner that Dougherty committed the offense, or that any evidence admitted or to be offered would show it. The threats, whatever they were, so far as appears, were entirely isolated from the transaction in question and tended in no way to elucidate or give character to any material act or fact in the case. They could not therefore have been received as parts of the *res gestae*. As to the threats in the saloon, the only thing it would seem which they characterized was the drunken condition of the one who uttered them.

We will first consider whether the exclusion of the evidence injuriously affected the accused. If it could not properly have changed the result, then he was not aggrieved by the ruling. In this part of the discussion we assume, as the record justifies us in assuming, that no further evidence affecting Dougherty was to be offered. If then we supply the additional fact of threats made, and assume, for the benefit of the accused, beyond what the record states, that they were threats of personal violence, could they by any possibility have shown Dougherty guilty of the attempted murder, so as to relieve the accused? Would the offered evidence have rendered any of the circumstances relied upon by the State, inconsistent with the guilt of the accused or consistent with his innocence? Would it have accounted for the money found in the very path the accused took that night, soon after the offense was committed and immediately after it was discovered, as the State claimed, that Dr. Zink had recovered his consciousness? Could it possibly have tended to show that the accused had no peculiar motive hastily to rid himself of the

fruits of the crime which Dougherty might not also have had?

It does not seem to us possible that the proposed evidence could have impaired in the least the circumstantial evidence against the accused; and surely no one would claim that it could affect the evidence derived from the confessions of the prisoner.

In regard to the evidence furnished by the coroner's experiment with the tracks, it may not be amiss to remark that its only possible bearing would be to furnish presumptive evidence that Dougherty and not the accused went there that night soon after the offense was committed; but there seems to have been direct evidence to show that the accused went over the drive way in his bare feet, as did Mrs. Zink also, and it is pretty certain that they made impressions on the soft and yielding sand opposite the gate; and the difference in size which the measurements indicated could be readily explained by the fact that in one case the impressions were made while standing still and in the other when moving rapidly forward.

But the counsel for the accused, in substance, claimed before this court that the State relied upon opportunity to commit the crime in the absence of any motive attributed to the accused, and that the excluded evidence would have shown both motive and opportunity in another, and it therefore if received would have weakened the case for the State. Waiving any criticism on this imperfect statement of the claims of the State, we suggest that the threats had no bearing at all upon the question of opportunity. The opportunity of the accused, though obviously better than that of anyone else save Mrs. Zink, was far from being exclusive. It was quite possible for Dougherty or others to be there. Now, as to the motive relied upon by the State, it was not hatred or revenge but love of money.

We should not expect a person impelled by such a motive to utter threats at all; he would go stealthily to assail his victim. In this point of view, the threats uttered by Dougherty, if they might otherwise have indicated ill will on his part, could not have affected the motive that moved the accused nor have weakened the evidence relied upon to connect him with the crime. But we will forbear further discussion of this aspect of the case, as it is not necessary to place our refusal to grant a new trial on this ground, and proceed to consider the precise question raised by the appeal, namely: were the threats of Dougherty admissible at all, under the circumstances stated? And if so, upon what principle? The only plausible ground for the admission is, that as the accused might exculpate himself by showing that another was the guilty party, so any item of evidence which would have been admissible had such other person been on trial should be received in his favor. We concede the premises but not the conclusion; for under the rules of evidence it makes a vast difference whether declarations offered in evidence come from the party on trial or not. In the one case they are unconditionally admitted, unless irrelevant or self-serving. In the other, they are by general rule excluded, subject to a few well marked exceptions. In *Best on Evidence*, § 506, under the head of "*inter alios acta*," it is said: "No person is to be

affected by the words or acts of others, unless he is connected with them, either personally or by those whom he represents or by whom he is represented." Were this a civil suit in favor of Dr. Zink against the same defendant for the same assault, would it occur to anyone to offer his declarations of Dougherty that he intended to do the act, or even that he had done it? Is it any the less a matter *inter alios* when the state is a party? In either case it would be a legitimate defense that another person had committed the deed; but in neither would his threats alone be admissible.

Now, to illustrate some of the reasons for such distinction, we will add that where the threats of the one on trial are adduced against him, he is always present in court to deny or qualify them; to show that the witness misunderstood, misremembered, or was false; or to explain how the threats were uttered in a transient fit of anger or from mere bravado or for intimidation; but where the threat of a third person is introduced he may be far away, and no one can explain its real meaning; and besides, the very introduction of such collateral issue serves greatly to confuse and mislead the jurors; and justice may thereby be defeated. And if the jury were to pass on the collateral issue, it would have no other effect than to acquit the one on trial; the third person could be in no wise legally affected. If he should afterwards be indicted and put on trial for the same offense, he would still be at liberty to show his innocence, notwithstanding the fact that the former finding of his guilt caused another's acquittal. And so, if he had previously been tried and acquitted, that fact could in no wise affect the admissibility of his declarations when afterwards another person is on trial for the same offense, for the latter would be no party to the verdict. It is therefore going far enough in favor of the accused to allow him to exculpate himself by showing the fact of another's guilt, by some appropriate evidence directly connecting that person with the *corpus delicti*. The *animus* of a third person is no defense, and by itself it cannot prove the ultimate fact which is a defense. Even as to the threats of the person on trial, Wharton, in his Criminal Evidence, 3d ed. § 756, says: they "Are admissible in evidence, not because they give rise to a presumption of law as to guilt, which they do not; but because from them, in connection with other circumstances and on proof of the *corpus delicti*, guilt may be logically inferred."

Then follows a list of informative suppositions, designed to show that because one threatens to commit a crime it does not follow that such intention really existed in his mind; much less does it show the actual commission of the crime. Nearly all treatises on evidence contain similar cautions. In 3 Bentham's *Jud.* 2v. 75, it is said that "Declarations of an intention to commit a crime are no less susceptible of being false than declarations of the opposite cast, namely: declarations of an intention to abstain from the commission of that or a similar crime."

We insist, therefore, that it is reasonable to exclude the mere disconnected threats and declarations of third persons. If they are parts of the *res gestæ* or form links in a chain of evidence connecting with the crime itself, they

may doubtless be received. If the threats were to commit a crime in a particular mode and it was in fact so committed, perhaps they would then be admissible. But in the case under consideration there is nothing at all to show that the thing threatened had any sort of resemblance to the thing done, either in kind or mode.

But if we suspend our discussion of the principles which ought to be applied to the question and pass to the consideration of the decided cases as found in other jurisdictions, we shall find the ruling of the court vindicated, not simply by the preponderance of judicial authority but by absolute unanimity, save in one case in Louisiana, which, for reasons to be suggested hereafter, can have little weight in the opposing scale.

We will first cite cases precisely analogous to the case at bar, in that threats of third persons prior to the commission of the crime were offered in evidence by the accused and excluded; but the threats instead of being vague and indefinite, as in the case at bar, were generally very specific and significant.

The case of *State v. Davis*, 77 N. C. 488, was an indictment for murder. On the trial the prisoner proposed to prove by one Peck "That Geo. Nicks had malice towards the deceased and had a motive to take his life and opportunity to do so, and had threatened to do so before the court." 2. He further offered to prove by one Rice "That one Peck took a gun and went in the direction of the house of the deceased some time before the deceased was killed." The court says: "Both exceptions are untenable and have been repeatedly so held by this court; the first, because they are declarations of a third party and are *res inter alios acta*, and have no legal tendency to establish the innocence of the prisoner; and the second for the same and additional reason that the time is too vaguely and indefinitely set forth. * * * Such evidence is inadmissible because it does not tend to establish the *corpus delicti*. Unquestionably it would have been competent to prove that a third party killed the deceased, and not the prisoner. But this could only have been done by proof connecting Peck with the fact, that is, with the perpetration of some deed entering into the crime itself. Direct evidence connecting Peck with the *corpus delicti* would have been admissible. After proof of the *res gestæ* constituting Peck's alleged guilt had been given, it might be that the evidence which was offered and excluded in this case would have been competent in confirmation of the direct testimony connecting him with the fact of killing. No such direct testimony was offered here. It is unnecessary to elaborate, as the questions of evidence here made have been fully discussed and decided by this court in many cases. It is only necessary to refer to the principal ones. *State v. Bishop*, 78 N. C. 44; *State v. May*, 4 Dev. 328; *State v. Duncan*, 6 Ired. 236; *State v. White*, 68 N. C. 158."

These cases are all pertinent and supported by similar and some additional reasons. We will not take the time and space necessary for a particular statement of the evidence offered and the reasoning of the court sustaining its exclusion. To the above list we will add the case of *State v. Haynes*, 71 N. C. 79.

In *Crookham v. State*, 5 W. Va. 510, it was held that it was no error to exclude testimony offered by the prisoner, to the effect that another and a different person from himself had made threats to kill the deceased, just before the commission of the offense with which he was charged; and that immediately after the offense such other person left the country and has not since been heard from.

In *Boothe v. State*, 4 Texas Ct. of App. 202, and in *Walker v. State*, 6 Id. 578, both being indictments for murder, it was held not competent for the accused to prove that a very short time before the homicide a person other than the accused made threats to take the life of the deceased. In the last case the court supported the ruling by saying: "The issue of the trial was the guilt or innocence of the defendant on trial. Evidence is admissible if it tends to prove the issue or constitutes a link in the chain of proof; and this seems to be the limit, and excludes all evidence of collateral facts or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and for the good reason stated for the rule by Mr. Greenleaf, that such evidence tends to draw away the minds of the jury from the point in issue and to excite prejudice and mislead them. I Greenl. Ev., §§ 51, 52."

We may add that the doctrine of these cases has received the recent approval of jurists and text writers of high authority. Wharton, in his treatise on Criminal Evidence, § 225, says: "Evidence of threats by other persons are inadmissible." The same doctrine is found in Wharton on Homicide, § 698. In 2 Bishop on Criminal Procedure, § 623, it is said: "The declarations of the deceased, as of any third person, when not of the *res gestæ*, or dying declarations, or communicated to the defendant so as possibly to influence his conduct, are excluded by rules which have been supposed to promote justice on the whole; at all events, which have become parts of the common law, not within the discretion of the courts to set aside. Hence they are not admissible." And again, in the first volume of the same treatise, § 1248, it is said: "In general what one says, as for example, that he committed the crime in question, will not be admitted for or against another."

In further support of the ruling complained of, we adduce a few of the numerous decisions holding that admissions of third persons, that they and not the accused are guilty of the crime charged, are to be excluded:

In the early case of *Commonwealth v. Chabcock*, 1 Mass. 143, the prisoner was tried on an indictment for breaking into a house and also for stealing goods therein. The defendant offered to prove by a witness present that another person had owned to the witness that he had stolen some of the articles mentioned in the indictment. The court held that the evidence could not be admitted, saying: "It was no more than hearsay. If a person other than the defendant had stolen the goods, it was undoubtedly competent for the defendant to prove the fact in exculpation of himself, but not by the mode of proof now offered."

In *Smith v. State*, 9 Ala. 990, the prisoner (a slave) was indicted for the murder of one Ed-

mund (also a slave). All the evidence was circumstantial. Sam, another slave, had been tried and acquitted for the same murder previously. On the trial it seems there was a strong array of circumstantial evidence against him; but Sam stated that a few days after the murder Smith told him that he killed Edmund. The particulars of the statement we omit. But on the trial of Smith, evidence was offered in his behalf that Sam, during his own trial, had become alarmed and had told the witness that he had wrongfully accused Smith of the murder of Edmund, and he did not wish to die with a lie in his mouth, etc. The counsel for the accused claimed that it was competent for the prisoner under the circumstances to show that another committed the murder; and that in this view the declarations of Sam should have been received, as they tended to inculpate him as well as to show that the prisoner was not the offender.

Ormond, J., in delivering the opinion of the court said: "Conceding the true meaning of these declarations of Sam in jail to be an admission of his own guilt and that he had killed Edmund himself, it does not vary the case in the slightest degree. * * * The declaration of Sam was not an act within the meaning of the doctrine I have been discussing. * * * To give effect to the mere declarations of third persons would be a most alarming innovation upon the criminal law. Such a declaration would not be obligatory on the person making it. He might afterwards demonstrate its falsity when attempted to be used against him. Such testimony may be a mere contrivance to procure the acquittal of the accused."

In *West v. State*, 76 Ala. 98, the question was again before the highest court of the same State, and it was held "That the admission of a third person that he committed the offense with which the accused was charged, not made under oath, though on his death bed, is mere hearsay and is not admissible as evidence for the accused."

In *Sharp v. State*, 6 Tex. Ct. App. 650, it was held no error to refuse to allow a witness for the defense to testify that certain other men confessed that they committed the crime.

A similar ruling was also sustained in *Rhea v. State*, 10 Yerg. (Tenn.) 258.

Greenfield v. People, 85 N. Y. 75, was an indictment for murder. Upon the trial the accused offered the letter of one Royal Kellogg to his brother, in which, after alluding to the murder, he said among other things: "If they want me they can come and get me," and in connection with the above and certain anonymous letters containing confessions, they offered the declarations of Kellogg and his brother and another person, made within an hour after the murder and at a place three fourths of a mile distant. The witness being awakened at the barking of a dog at about four o'clock in the morning, on looking out of the window recognized the two Kelloggs and one Taplin, and they had a gun and a bag, etc. The witness, after giving in detail their suspicious actions at this place, was offered to prove that Taplin said to the Kelloggs on that occasion before they left: "You were damned fools to do it," and that one of the Kelloggs replied, "If we had not done it we should all have been hung."

Miller, J., in delivering the opinion of the court, said: "Even if this letter could be regarded as a confession of Kellogg that he committed the murder, it was only the declaration of a third party, merely hearsay testimony, and upon no rule of evidence admissible. If such declarations were competent upon any trial for homicide, they would tend to confuse the jury and to divert their attention from the real issue. The letter did not tend to establish that Kellogg committed the offense; was not a part of the *res geste*; and in no sense relieved the prisoner from the charge for which he was upon trial, or raised any presumption that Kellogg was the guilty party. Confessions of this character are sometimes made to screen offenders; and no rule is better established than that extrajudicial statements of third persons are inadmissible. Whart. Ev. § 644; Whart. Cr. L. §§ 662, 684; 2 Best, Ev. §§ 559, 560, 563, 565, 578. * * * While evidence tending to show that another party might have committed the crime would be admissible, before such testimony could be received there must be such proof of connection with it, such a train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party. Remote acts disconnected and outside the crime itself cannot be separately proved for such a purpose. In considering the question we have carefully examined the numerous authorities cited to sustain the position that the evidence was competent, and none of them hold that under such circumstances it could lawfully be received; and it was neither admissible alone nor in connection with the letters referred to."

In Wharton's Criminal Evidence, § 225, it is said: "Extrajudicial statements of third persons cannot be proved by hearsay, unless such statements were part of the *res geste*, or made by deceased persons in the course of business, or as admissions against their own interest, or are material for the purpose of determining the state of mind of a party who cannot be examined in court. * * * Hence, on an indictment for murder the admissions of other persons that they killed the deceased or committed the crime in controversy are not evidence; and evidence of threats by other persons are inadmissible. * * * On an indictment for larceny also, declarations of third parties that they committed the theft are inadmissible."

In all the numerous cases we have examined, where threats of third persons were excluded, there was no dissenting opinion in any instance; and after most diligent search we have been able to find but one case which furnishes any support to the claim of the accused. We refer to that of *State v. Johnson*, 30 La. 921, where the State, in a prosecution for murder based entirely on circumstantial evidence, found it necessary to trace to the accused a motive for the homicide in a previous quarrel with the deceased, when the accused while in liquor uttered threats against the deceased; and upon cross examination the witness for the State, who had in chief testified to the quarrelsome character of the deceased and to the threats of the accused, was asked what other quarrels the deceased had besides that with the accused, a few days prior to the murder; and the trial court excluded it. The court of review cites no authorities and enters into no discussion of the question upon prin-

ciple, but simply says in effect that although it was of doubtful admissibility, yet on the whole they will give the accused the benefit of a new trial.

But even this case can be widely distinguished from the one on trial. The State had put in issue the quarrelsome character of the deceased, and to that extent the cross examination was pertinent; and further, the case seemed to be controlled by the question whether the motive arising out of a recent quarrel pointed exclusively to the accused; the fact drawn out on cross examination might show that it did not, and therefore there was some force in the claim that it was admissible, in order to weaken that evidence by showing that others were also included and shared the same motive. But in the case at bar we have already called attention to the fact that the motive which moved Beaudet was entirely different from that attributed to Dougherty; and hence the evidence as to the latter in no way impaired that applicable to the former.

In regard to the admissibility of the confessions of guilt by third parties in criminal trials, there is absolute unanimity in the decisions, so far as we have been able to ascertain. In *Smith v. State*, *supra*, Goldthwaite, J., dissents from the majority opinion; but in so doing he expressly concedes "That the confession of a third person of his guilt is not evidence in favor of another, when standing alone, unaided by other facts and circumstances." Yet he contends that it is so whenever the party confessing is connected with the crime by strong presumptive circumstances.

We find also a qualification of the doctrine in the *dictum* of a distinguished reporter. It is found in a note to the case of *Spears v. Coote*, 3 McCord (S. C.), marg. 232, where the reporter gives a summary of the exceptions to the rule excluding hearsay evidence, and in paragraph 12 he says: "So confessions in *extremis* that the person himself had committed a forgery of which another was indicted, are admissible," citing as authority *Clymer v. Littler*, 1 W. Bl. 345. The reporter then adds his own opinion:—"So I should think that where a person comes forward and confesses the crime and surrenders himself to justice, such confessions would be admissible evidence for a prisoner accused of the same offense."

It should be observed that stress is placed on the fact that the person confessing also surrenders himself to justice, implying that the confession alone would be insufficient; but we ought also to add that the principle of the case cited from 1 W. Bl. 345, which led to and suggested the proposition just referred to, owing to some oversight or mistake was stated in an erroneous and most misleading manner. It would be supposed upon reading the note of the case that upon the trial of one person indicted for the crime of forgery, the confessions in *extremis* of another person were held admissible in defense of the person on trial. But it was no such case. On the contrary, it was a mere civil action based upon a controversy between adverse claimants to property under two different wills of one Clymer, deceased. The action was ejectment. The plaintiff claimed under a will made in 1748. The defendant claimed under the heir at law by an instrument dated in 1745,

very imperfect in form, but purporting to have been subscribed by Mr. Clymer and to give the property as follows: "Whereby, in consideration of natural affection, he covenants and agrees," but with nobody, "that the lands in question shall go and be given to his wife for life, and then to Elizabeth, wife of William Medlycott," she being also his heir at law, "and her heirs forever." It was attested by the said William Medlycott and Elizabeth Mitchell. The first will was concealed and William Medlycott took possession under the last one in right of his wife; but on his death bed in 1746 he declared that the instrument of 1745 was forged by himself; and he produced from under the bedclothes the first will, of 1743, and caused it to be sent to the parties interested; who had it proved and who then brought this suit; and this evidence without any objection went before the jury in connection with the inspection of the two wills, and verdict was rendered for the plaintiff.

Lord Mansfield, in giving the opinion of the court on this point, simply says: "The testator died in 1746. Both wills in the custody of Medlycott. The other subscribing witness dead. His wife to be benefited under it. He, on his death bed, sends the lessor of the plaintiff his title; which is inconsistent with that under which the defendant claims. Under all these circum-

stances I think it admissible evidence. No general rule can be drawn from it. No objection was made to its production. It came out, it seems, on the cross examination of the defendant's counsel. Unless therefore manifest injustice had been done on the whole case, there is no ground for a new trial. Here appears to be good reason for the verdict."

A further criticism of the proposition referred to may be found in 2 Phillips on Evidence, 4th Am. from 7th London ed. Carver and Hill's Notes, p. 708, note 498: "And if an actual surrender should make the declaration admissible, it would at once throw open the door for fraudulent testimony, even in exculpation of the most atrocious criminals. The self accuser is yet to be tried, and he may act under the full consciousness of having such clear proofs of his own innocence, an *alibi*, or some other evidence, that he would be risking but little by doing the whole as an act of solemn trickery in behalf of his friend. The surrender would not estop him. Even should the people prosecute, convict and execute him as the sole malefactor, the verdict would not estop them nor be any evidence whatever against the first accusation. It would be *res inter alios*."

There was no error in the ruling complained of

In this opinion the other Judges concurred.

NOTE.—Mr. Greenleaf in his work on Evidence says: "Human affairs consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances and in its turn becomes the prolific parent of others, and each during its existence has its inseparable attributes and its kindred facts materially affecting its character, and essential to be known, in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury along with the principal fact, and their admissibility is determined by the Judge in the exercise of a sound judicial discretion." 1 Greenl. Ev. 138.

The points to be considered are whether the circumstances and declarations were contemporaneous with the main fact, and whether they were so connected with it as to illustrate its character. In *Re. Taylor*, 9 Paige, 611; *Carter v. Buchanan*, 3 Kelley, 518; *Blood v. Rideout*, 13 Met. 237; *Boydén v. Burke*, 14 How. 575, 55 U. S. (bk. 14, L. ed. 548.)

Declarations to be admissible must be concomitant with the principal act, and so connected with it as to be regarded as the mere result and consequence of coexisting motives. 2 Poth. Obl. 248; *Am-brose v. Clendon*, Hardw. 287; *Doe v. Webber*, 1 Adoe. & El. 738; *Boydén v. Moore*, 11 Pick. 362; *Walton v. Green*, 1 Car. & P. 521; *Reed v. Dick*, 8 Watts, 479; *O'Kelly v. O'Kelly*, 8 Met. 436; *Stiles v. Western R. R. Corp.* Id. 44.

The same principles apply to acts and declarations of a co-conspirator, but the foundation must first be laid by proof sufficient to establish *prima facie* the fact of conspiracy between the parties. *Rex v. Watson*, 32 How. St. Tri. 7; *Rex v. Brandreth*, Id. 857; *Rex v. Hardy*, 24 Id. 451; *American Fur Co. v. U. S.*

2 Pet. 368, 365, 27 U. S. bk. 7, L. ed. 450, 458; *Crownshield's Case*, 10 Pick. 497; *Nichols v. Dowdell*, 1 Stark. 81.

In a prosecution for conspiring to assemble a large meeting, for the purpose of exciting terror in the community, the complaints of terror made by persons professing to be alarmed, were permitted to be proved by a witness, who heard them without calling the persons themselves. *Rex v. Vincent*, 9 Car. & P. 275; See, *Bacon v. Chariton*, 7 Cush. 581.

In cases of conspiracy, riot or other crime, perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration of one conspirator, or accomplice, is considered the act of all and is evidence against all. 1 Mascard & Probat Concl. 409.

Each is deemed to assent to, or command what is done by the other in furtherance of the common object. *U. S. v. Gooding*, 12 Wheat. 469, 25 U. S. (bk. 4, L. ed. 696); *Commonwealth v. Eberle*, 3 Serg. & R. 4; *Wilbur v. Strickland*, 1 Rawle, 458; *Reitenbach v. Rittenbach*, Id. 362; 2 Stark. Ev. 232; *State v. Soper*, 4 Shepl. 293.

But after the common enterprise is at an end, no one is permitted by any subsequent act or declaration of his own, to affect others. *Rex v. Turner*; *Moody*, Cr. Cas. 347; *Rex v. Appleby*, 3 Stark. 2; See, *Melen v. Andrews*; 1 Mood. & M. 336; *Reg. v. Hinks*, 1 Den. Cr. Cas. 84; 1 Phill. Ev. 198; 9th ed. Reg. v. Blake, 62 B. 126.

The declarations of a conspirator or accomplice are receivable against his fellows only when they are in themselves acts, or accompaniment and explanation of acts for which the others are responsible, but not when they are in the nature of narratives, descriptions or subsequent confessions. 1 Phill. Ev. 44; 4 Hawk. P. C. ch. 46, § 24; *Tong's Case*, Kelyng. 1.

SUPREME COURT OF NEW HAMPSHIRE.

Auburn L. SIMMONS, *Appt.*John S. GOODELL, *Exr.*

1. A decree of the judge of probate on the settlement of an administration account concludes an infant whose guardian has notice and is present.
2. If an appeal is not taken, a decree has the same effect as the judgment of a court of common law.
3. Errors in the decree can be corrected only upon appeal; errors in the record of the decree may be corrected at any time.
4. The appellant is confined to his reasons for appeal, but the whole record is open to the appellee.

(Grafton—Filed December 31, 1885.)

PROBATE appeal. *Decree modified.*

The defendant is executor of the will of George A. Simmons. He settled his first administration account in 1865, his second in 1874, and his third in 1884. The plaintiff appeals from the decree made at the last settlement, because: (1), the defendant was not charged with the amount of a note against Morse and of a note against Welsh; and (2) was credited with \$100, for money paid Davis in 1864. At the first settlement the defendant was charged with \$100, collected on the Morse note, and February 27, 1864, he collected \$29.33 on the Welsh note and might, by the exercise of reasonable diligence, have collected the remainder. At the second settlement, of which the guardian of the plaintiff, who was then a minor, had notice and at which he was present, the defendant was credited with "loss on Morse note \$125.59," and "loss on Welsh note \$39.01," being in each case the difference between the amount of the note and interest at the time the inventory was taken and the amount collected, and was also credited by "a manifest mistake" with \$100, paid Davis in 1864. August 15, 1871, he paid for a proper charge against the estate, \$117, which was not credited to him in the second or in the last settlement. The plaintiff claims that the defendant not having appealed is not entitled to have this item allowed.

Messrs. Bingham, Mitchell & Bachelor, for appellant:

If defendant was aggrieved by the decision of the probate court, he should have taken his appeal within sixty days from the time of making such decision, and not after, in writing signed by "himself" or his attorney, setting forth his interest therein, and the reason of his appeal. G. L. chap. 207, § 1, 2.

The judgment of the court upon this claim not having been appealed from by the defendant, that decree is final and conclusive upon him. *Jones v. Chase*, 55, N. H. 286.

No appeal was taken from that decree, and we cannot regard the question as before us on this appeal. *Mathes v. Bennett*, 31 N. H. 188, 201.

N. H.

All debts due to the estate, which by due diligence might have been collected, shall be accounted for in money. G. L. chap. 196; § 8; G. S. chap. 177, § 8.

A decree or settlement not appealed from is conclusive. *Jones v. Chase*, 55 N. H. 284.

To the point that the plaintiff is not concluded by the settlement of 1874, in addition to the position that he was then a minor, we contend that, there being no adjudication of these items, an appeal was not necessary; they can be allowed by the probate court at any time before final settlement. *Allen v. Hubbard* 8 N. H. 487.

Messrs. Spring & Spring, for appellee:

With regard to the questions how far the settlements of administration accounts of 1865 and 1874 can be reopened and reexamined we say the plaintiff has no right to have the items of the defendant's settlements generally reexamined as being of no force against him. This reexamination is never allowed in a general way, but is strictly confined by our court to cases where there has been a manifest mistake and the matter does not appear to have been specially adjudicated. *Allen v. Hubbard*, 8 N. H. 487; *Tebbets v. Tilton*, 24 N. H. 120; *Flanders v. Lane*, 54 N. H. 390; *Judge of Probate v. Lane*, 51 N. H. 842.

The decision of a judge of probate in all matters not strictly interlocutory is final and conclusive, unless vacated by an appeal therefrom. *Hurtburt v. Wheeler*, 40 N. H. 76; *Tebbets v. Tilton*, *supra*; *Jones v. Chase*, 55 N. H. 284; *Bryant v. Allen*, 6 N. H. 116.

The decisions are binding and conclusive upon all parties interested. They may be reheard and reexamined upon appeal, which is the mode appointed for the correction of its errors; but they may not be impeached collaterally in any course of proceedings, unless fraud is alleged. *Tebbets v. Tilton*, *supra*.

An infant is bound by a judgment or decree to which his guardian was a party. *Peters v. Peters*, 8 Cush. 529.

We make no question as to the right of the court to correct any errors or mistakes, "provided there does not appear by the records of the court to have been a particular adjudication on the subject." *Allen v. Hubbard*, *supra*.

As to the effect of the plaintiff's appeal from the decree of the Probate Court, if the cases in this State decide anything in regard to this matter, it is that the appellant in a probate appeal is confined strictly to the reasons for it as set forth therein; but that the appellee is not so confined but may show error in the decree in any particular and have it corrected. *Wendell v. French*, 19 N. H. 205; *Patrick v. Cowles*, 45 N. H. 553; *Twitshell v. Smith*, 35 N. H. 48; *Caswell v. Hill*, 47 N. H. 407.

Carpenter, J., delivered the opinion of the court:

The decree made at the second settlement has the same conclusive effect upon the plaintiff as if he had been of full age. He was represented by his guardian who had notice and was present. *French v. Hoyt*, 6 N. H. 370; *Boody v. Emerson*, 17 N. H. 577; *Robbins v. Cutler*, 26, N. H. 173; *Thompson v. Paris*; *Peters v. Peters*, 8 Cush. 529.

If no appeal is taken, a decree of the Court of

Probate has the same force and effect as a judgment of a court of common law. It is conclusive of all matters directly in issue and determined. *Poplin v. Hauke*, 8 N. H. 124; *Mathes v. Bennett*, 21 N. H. 188, 202; *Tebbets v. Tilton*, 24 N. H. 120; *Wilson v. Edmonds*, 24 N. H. 517; *Merrill v. Harris*, 26 N. H. 142; *Hurlburt v. Wheeler*, 40 N. H. 73; *Morgan v. Dodge*, 44 N. H. 255, 257, 258; *Jones v. Chase* 55 N. H. 234.

Evidence of facts inconsistent with it is incompetent. *Judge of Probate v. Briggs*, 3 N. H. 809; *Allen v. Hubbard*, 8 N. H. 489; *Parker v. Gregg*, 23 N. H. 425; *Flanders v. Lane*, 54 N. H. 390.

If the precise matter in issue does not appear upon the face of the record, extrinsic evidence may be received to show what facts were determined, as for example to show that a particular item of account formed a part of a large one. *King v. Chase*, 15 N. H. 9; *Morgan v. Burr*, 58 N. H. 470.

Erroneous decrees can be corrected only upon appeal. *Judge of Probate v. Robins*, 5 N. H. 246; *Bryant v. Allen*, 6 N. H. 116; *Kimball v. Fisk*, 39 N. H. 110; *Judge of Probate v. Lane*, 51 N. H. 342, and cases before cited.

Errors in the record of a decree may be corrected at any time. The Court of Probate has the power inherent in all courts to correct its own records and make them conform to the fact. *Allen v. Hubbard*, 8 N. H. 487; *Chamberlain v. Crane*, 4 N. H. 115; *Emery v. Berry* 28 N. H. 473; *Carlton v. Patterson*, 29 N. H. 580; *Claggett v. Simes*, 31 N. H. 56; *Wingate v. Haywood*, 40 N. H. 437, 452; *Stark v. Gamble*, 48 N. H. 467.

The plaintiff is restricted to the matters specified in his reasons of appeal. At his instance no grievances except such as he has assigned will be considered; *Bean v. Burleigh*, 4 N. H. 550; *Mathes v. Bennett*, 21 N. H. 188; *Hatch v. Purcell*, 21 N. H. 544; but the whole record is open to the defendant, and any errors which he may point out will be corrected. *Wendall v. French*, 19 N. H. 205; *Twitchell v. Smith*, 35 N. H. 48; *Patrick v. Coates*, 45 N. H. 558; *Caswell v. Hill*, 47 N. H. 407.

In the settlement of 1874 the defendant was credited with the uncollected principal of the notes in question; and the interest follows the principal. This was an adjudication that the defendant was not accountable for the remainder of the notes by which both parties are concluded.

It is not stated what the manifest mistake was by which the item of \$100 was credited to the defendant. In the absence of a more definite finding, it must be taken that it was not an error of judgment in the Judge of Probate, but an error in the record, and should be corrected. The defendant should be credited with the item of \$117.

Decree modified accordingly.

Smith, J., did not sit; the others concurred.

George PARSONS *et al.*

v.

Francis B. CRAWFORD *et al.*

A judgment in a suit in which the jury were allowed to consider the lessee's liability for rent in the assessment of the lessee's damages does not estop the lessor from asserting that liability.

(Cooe—Decided March 12, 1886.)

ON report. Case discharged.

Action for rent of the plaintiffs' land and water power for the years 1881-2-3-4, upon a lease dated February, 7, 1874, for the term of twenty years, with the privilege of terminating the same upon one year's notice, after the expiration of ten years. The defendants pleaded, in bar of the maintenance of the action, a judgment recovered by them as plaintiffs, in an action of covenant broken between the same parties, in which as lessees of the plaintiffs they claimed and recovered damages for a violation of the condition of the lease by the lessors. In assessing the damages in the former action the jury were allowed to consider the lessees' liability for rent for the time covered by the judgment, which was to March 13, 1882.

Mr. T. F. Johnson, for plaintiffs:

A judgment is conclusive on the parties thereto only in respect to the grounds covered by it, and the facts necessary to uphold it. *People v. Johnson*, 38 N. Y. 63.

The records of this case are conclusive only so far as to show interruptions of defendants' rights and that they sustained damages thereby; but are not evidence of any matter to be inferred by argument from the government. 1 Greenl. Ev. § 528.

The matter in issue is either that which the record and the pleadings show clearly to be so; or a question which extrinsic evidence shows to have been actually tried and shown to have been absolutely essential to the case in so much that the answer to it decided the case and if it had not been contested the case could not have been tried. 2 Pars. Cont. 732.

There can be but one recovery. *Goodrich v. Yale*, 8 Allen, 454.

This action is brought to recover the rent of the premises on which defendants erected a mill; these plaintiffs have no title to the buildings and the plaintiffs claim there could be no such an eviction from the premises, while defendants' buildings were left thereon, as would release defendants from payment of rent. *Bo-reel v. Lawton*, 90 N. Y. 293.

Messrs. Aldrich & Remick, for defendants:

The matter having been put in issue and determined, and such determination having been the basis of recovery, the law will not permit the same issue to be made in a case between the same parties, where the same matter and the same findings would be a defense. *Dame v. Wingate*, 12 N. H. 291; *Morgan v. Burr*, 58 N. H. 470; *Sanderson v. Peabody*, Id. 116; *Tiddets v. Shapleigh*, 59 N. H. 319; *Ashuelot R. R. v. Cheshire R. R.* Id. 409; *Eastman v. Clark*, *53 N. H. 276; *Moran v. Manson*, Id. 377.

Clark, J., delivered the opinion of the court: The former action was covenant broken.

brought by the lessees against the lessors. In that case the jury were instructed that the lessees, not having rescinded the lease and relying on their suit for damages, were liable to pay the rent, and that in assessing damages for the time the rent had not been paid, the jury might take into account the rent they were liable to pay. Hence it appears that the assessment of damages was made upon the basis of the lessees' liability for the rent. The former judgment therefore instead of being a bar to this action, is evidence of the plaintiffs' right to recover the unpaid rent up to March 13, 1882.

As to the claim for rent subsequent to March 13, 1882, the former judgment is of no effect. The lease was then treated by the defendants as a subsisting lease. The bringing an action and the recovery of damages for a breach of its covenants was a waiver of any previous notice of an intention to treat the lease as of no effect. Whether after March 13, 1882, such a condition of things existed as relieved the defendants from their covenant to pay rent does not appear.

Case discharged.

Allen, Bingham and Carpenter, JJ., did not sit; the others concurred.

Samuel E. PAINE

v.

GRAND TRUNK RAILWAY CO.

1. What constitutes negligence in a given case is a question for the jury.
2. A motion to set aside a verdict on the ground of excessive damages, raises no question of law, and its denial will not be reviewed.

(Coco—Decided March 12, 1886.)

IN review, on defendant's exceptions. *Over-ruled.*

Case for injuries received in crossing the defendant's track with a horse and wagon at a highway crossing partially obstructed by the van car of a freight train of the defendant. The obstruction was caused by the forward wheels of a car going off the rails. A case was reserved on a former trial and is reported, 58 N. H. 611.

The plaintiff claimed that the defendant was negligent in allowing its track to be in such condition as to admit of a loaded car getting off the rails; that the track was in bad condition, the sleepers insufficient and rotten; that the derailment of the car was caused by the spreading of the rails; and that the Company was also guilty of negligence in not removing the car from the crossing or stationing a man at the crossing to warn travelers that it was dangerous attempting to pass the car which obstructed the highway.

The defendant claimed that there was no sufficient evidence of negligence on the part of the defendant to enable the plaintiff to recover, and that the plaintiff was guilty of contributory negligence in approaching the crossing and attempting to pass the car.

When the plaintiff rested his case, the defendant moved for a nonsuit and the motion was denied. At the close of the evidence the motion was renewed that the court order a nonsuit or

verdict for the defendant, which was denied, subject to exception.

The jury having returned a verdict for the plaintiff, the defendant moved to set it aside:

1. Because there was no evidence of any care on the part of the plaintiff to avoid the injury.
2. Because there was no evidence of negligence on the part of the defendant.
3. Because the jury awarded excessive and unwarrantable damages.

These motions were heard and denied by the court.

The highway on which the plaintiff approached the crossing was over uneven and descending ground, and at an angle of about twenty-seven degrees with the railroad track. At the time of the accident, August 13, 1878, trees and bushes were standing by the side of the highway; and there was evidence that bushes grew on each side of the highway to the crossing. The plaintiff was familiar with the crossing.

Messrs. Drew & Jordan, for defendant:

The case should have been withdrawn from the jury. There was absolutely no evidence of the exercise of care on the part of the plaintiff. *Beaulieu v. Portland Co.* 48 Me. 291; *Paine v. R. Co.* 58 N. H. 611; 2 Thomp. Neg. 1175-1178.

Where the facts are undisputed, or where but one reasonable inference can be drawn from them, the question is one of law for the court. Where the undisputed facts show negligence on the part of the plaintiff contributing to the accident, the Judge ought to direct a nonsuit or verdict for the defendant, although in order to do so he must necessarily find an affirmative fact, namely: that there was contributory negligence. *Id.* 1179, citing *Norton v. Itner*, 56 Mo. 351; *State v. Me. Cent. R. R. Co.* 76 Me. 357.

If the plaintiff's own proof shows conclusive contributory negligence, he is liable to nonsuit. *Prideaux v. Mineral Point*, 43 Wis. 513; *S. C.* 28 Am. Rep. 558, and note 568.

In the moment of actual peril the plaintiff must not be guilty of failing to exercise such reasonable care under the circumstances as he can, to protect himself against damage. *Bigelow, Torts*, 310.

That ordinary prudence requires one who enters upon so dangerous a place as a railroad crossing to use his senses, to listen, to look or to take some precaution for the purpose of ascertaining whether he may cross in safety is an established rule both of law and experience. *Ormsbee v. Boston & P. R. R. Co.* 14 R. I. 102; *S. C.* 51 Am. Rep. 354, 355, and cases cited.

The plaintiff is bound to show affirmatively the exercise of due care; and if he fail, a nonsuit or verdict for the defendant may properly be ordered. *Bancroft v. B. & W. R. R. Co.* 97 Mass. 275; *Pittab. etc. R. Co. v. Collins*, 87 Pa. St. 405; *S. C.* 30 Am. Rep. 371; *Pa. Co. v. Sinclair*, 62 Ind. 301; *S. C.* 30 Am. Rep. 185, and note; *Fleytas v. P. R. R. Co.* 13 La. 339; *S. C.* 36 Am. Dec. 658; *Flemming v. W. P. R. R. Co.* 49 Cal. 258; *McQuilken v. C. P. R. R. Co.* 50 Id. 7; *Donaldson v. M. & St. P. R. Co.* 22 Minn. 298; *Brown v. M. & St. P. R. Co.* 22 Minn. 165; *Callahan v. Warne*, 40 Mo. 131; *N. J. Ex. Co. v. Nichols*, 32 N. J. L. 166; *S. C.* affirmed, 33 Id. 484; *Owen v. H. R. R. R. Co.* 35 N. Y. 516; *Curran v. Warren Mfg. Co.* 36 N. Y. 153; *Mackay v. N. Y. C. R. R. Co.* 27 Barb. 528; *Tolman*

v. *S. B. & N. Y. R. R. Co.* 98 N. Y. 198; *S. C.* 50 Am. Rep. 649.

When the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *R. R. Co. v. Houston*, 95 U. S. 697 (bk. 24, L. ed. 542); *Imp. Co. v. Munson*, 14 Wall. 442 (81 U. S. bk. 20, L. ed. 867); *Pleasants v. Fant*, 22 Wall. 116 (89 U. S. bk. 22, L. ed. 780); *Herbert v. Butler*, 97 U. S. 819 (bk. 24, L. ed. 958); *Bonditch v. Boston*, 101 U. S. 16 (bk. 25, L. ed. 980); *Griggs v. Houston*, 104 U. S. 553 (bk. 26, L. ed. 840); *Randall v. B. & O. R. R. Co.* 106 U. S. 478 (bk. 27, L. ed. 1008); *Anderson Co. Comrs. v. Beal*, 113 U. S. 227 (bk. 28, L. ed. 966); *Baylis v. Ins. Co.* 113 U. S. 316 (*Id.* 989).

These clearly are circumstances requiring the application of the rule, that if a traveler by looking along the road, could have seen an approaching train in time to escape, it will be presumed in case of collision that he did not look, or, looking, did not heed what he saw. *Brown v. M. & S. P. R. Co.* 22 Minn. 165; Whart. Neg. § 332.

One in the full possession of his faculties, who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be but is in fact struck by it, is *prima facie* guilty of negligence; and in the absence of a satisfactory excuse his negligence must be regarded as established. *State v. Mc. Cent. R. R. Co.* 76 Me. 857. See, *N. Pa. R. R. Co. v. Heileman*, 49 Pa. St. 60; *Pa. R. R. Co. v. Beale*, 73 Id. 504; *C. C. & C. R. R. Co. v. Crawford*, 24 Ohio St. 681; *Duscomb v. B. & S. L. R. R. Co.* 27 Barb. 221; *Wilcox v. R. W. & O. R. R. Co.* 39 N. Y. 358; *Ill. Cent. R. R. Co. v. Hall*, 72 Ill. 222; *Ill. Cent. R. R. Co. v. Hetherington*, 83 Ill. 510; *L. S. & M. S. R. R. Co. v. Hart*, 87 Ill. 529; *Mulherrin v. D. L. & W. R. R. Co.* 81 Pa. St. 366, 376; *Laicher v. N. O. etc. R. R. Co.* 28 La. Ann. 320; *R. & D. R. R. Co. v. Anderson's Admr.* 31 Gratt. 812; *Leduke v. St. etc. R. R. Co.* 4 Mo. App. 485.

Where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. *R. R. Co. v. Stout*, 17 Wall. 657 (84 U. S. bk. 21, L. ed. 745).

Messrs. Ladd & Fletcher, for plaintiff:

A person is not bound, as matter of law, to look up and down the line for moving trains. *State v. M. & L. R. R.* 52 N. H. 528.

One motion for a nonsuit in this case has been considered and overruled by the whole court. *Paine v. G. T. R. Co.* 58 N. H. 611.

Blodgett, J., delivered the opinion of the court:

1. The jury must have found by their verdict that the plaintiff was in the exercise of ordinary care at the time of the accident; and the reported facts disclose nothing sufficient to enable the court to say, as matter of law, that a nonsuit should have been ordered, or that the testimony of the witnesses, and especially when taken in connection with the inferences which the jury might have justifiably drawn from the view, was insufficient to support the verdict.

2. There plainly was competent evidence of

negligence on the part of the defendant, for reasons given in the former opinion in this case, reported in 58 N. H. 611, 614; and what constitutes negligence in a given exigency is a question for the jury and not for the court.

3. The motion to set aside the verdict on the ground of excessive damages raises no question of law and its denial by the presiding Justice will not be reconsidered.

Exceptions overruled.

Clark, J., did not sit; the others concurred.

William E. HARVEY

v.

W. F. WATSON.

Where the assignee of an insolvent debtor in another State affirms a sale and delivery of goods made by the insolvent there, shortly before the assignment, to a citizen of this State, a creditor of the insolvent, who claims that the sale was fraudulent as to creditors, may attach the goods here as the property of the insolvent; and the parties may have their rights determined in this State, the same as though there had been no assignment.

(Rockingham—Decided March 12, 1886.)

TROVER for a stock of goods. *Case discharged.*

Facts agreed. In December, 1884, one C. A. Copps, a resident of the State of New York, sold and delivered the goods in question to the plaintiff, who immediately removed them to Nottingham in this State, where he had them in his possession until February 4, 1885, when they were attached by the defendant, a deputy sheriff, on writs in favor of several Vermont, Massachusetts and Maine creditors of Copps. Prior to that time, January 14, 1885, Copps had made a valid assignment of his property and effects, under the Insolvency Laws of New York, for the benefit of his creditors, and the notes given by the plaintiff for a part of the price of the above mentioned goods were included in his schedule of assets and are now held by the assignee, but have not yet matured.

The defendant claims that the sale by Copps to the plaintiff was fraudulent as against creditors, and that the goods were therefore open to attachment as the property of Copps. The plaintiff claims that the sale was not fraudulent; and that even if it had been, the assignment passed Copps's title to the assignee as the representative of creditors, and that the assignee alone could attack the sale. The assignee has since filed a written affirmation of the sale by Copps to the plaintiff.

Messrs. Wiggin & Fuller, for plaintiff:

The validity and effect of the sale to plaintiff depend on the law of New York, where the sale took place and where the vendor resided and where the goods then were situated. *Ferguson v. Clifford*, 87 N. H. 96; *Boothby v. Plaisted*, 51 N. H. 437; *Corning v. Abbott*, 54 N. H. 470; *Stevens v. Norris*, 30 N. H. 466; *Hill v. Pine River Bank*, 45 N. H. 308.

The assignment by Copps for the benefit of his creditors being valid and effectual by the law of New York, where it was made and where he resided, is valid and effectual in every other State where the question may be litigated. *Mumper v. Rushmore*, 79 N. Y. 19. See, *Sanderson v. Bradford*, 10 N. H. 262; *Hoag v. Hunt*, 21 N. H. 106.

In this case none of the attaching creditors reside in this State, nor were the debts to them contracted here, but in New York. They have no particular claim to the benefit of our laws, if there is any conflict between them and the laws of New York; and no reason suggests itself why they should stand in any better situation than creditors of Copps who are citizens of New York. *Sanderson v. Bradford*, 10 N. H. 265.

The assignment by Copps appears upon inspection to have been duly made, acknowledged and recorded and accepted by the assignee; this is sufficient to pass to the assignee the title to the assets of Copps, in trust for his creditors. *Brennan v. Wilson*, 71 N. Y. 502.

A delivery of the property to the assignee is not necessary. *Mumper v. Rushmore*, *supra*.

Had these creditors themselves been unfortunate and made an assignment according to the laws of their domicile, the laws of New York would have given to such assignment full force, even as respects property situate in New York, as against attaching creditors there; *Kelstadt v. Reilly*, 55 How. Pr. 373; and their attempt to secure a preference and subvert the laws of New York, by attaching property here, is unwarranted.

Eddy v. Winchester, 60 N. H. 68, is an authority for saying that the assignee's rights will be recognized by this court. Indeed it seems to be well settled that this assignment, valid by the law of the debtor's domicile, is valid here against all but our own citizens. See also, *Matter of Waste*, 1 Cent. Rep. 15; *Martin v. Potter*, 11 Gray, 37; *Whipple v. Thayer*, 16 Pick. 25; *Means v. Hapgood*, 19 Pick. 105.

If the assignee is recognized here at all, he must have power to decide whether this sale shall be affirmed or disaffirmed. But if these attaching creditors of Copps hold the goods and so annul the sale, it is doubtful whether the assignee can maintain a suit on the notes given for the price. *Bailey v. Foster*, 9 Pick. 189.

Messrs. William H. Drury and Frink & Batchelder, for defendant:

The court will inquire into the intention of the assignee as regards this property, and "as the vendor owes these attaching creditors a just debt, if the assignee does not take the property for all the creditors, it is no more than just that it should be appropriated to satisfy the plaintiff's claim." *Eddy v. Winchester*, 60 N. H. 64. See also, *Young v. Kimball*, 59 N. H. 449; *Lane v. Moore*, 59 N. H. 80; *Towle v. Rowe*, 58 N. H. 394; *Ramsay v. Fellows*, 58 N. H. 609.

The fact that the assignee holds notes for the consideration does not affect the case. We contend that in fact the notes were worthless and known to be so by the vendor, and this was part of the attempted fraud; but if full consideration was paid for these goods and they were sold with a fraudulent intent, the sale must be invalid against these creditors. *Robinson v. Holt*, 39 N. H. 557.

N. H.

A mere promise to pay however is not a payment, either in this State or New York. 2 Pars. Notes & Bills, 152.

Nor would a party defrauded, if in his power, be obliged to return the note of the party defrauding him, before bringing suit. *Cook v. Gilman*, 34 N. H. 560.

Blodgett, J., delivered the opinion of the court:

The assignee having affirmed the sale from Copps to the plaintiff, the case stands, as between the latter and the defendant, as if there was no assignment. The right of the assignee to disaffirm the sale and assert his title being personal to himself, the plaintiff cannot exercise the option for him and set up his title as a bar against the assignor's attaching creditors. Chapter 814, N. Y. Laws of 1858, conferring on an assignee the right to set aside a fraudulent conveyance by the assignor, does not apparently, even in that State, preclude a creditor from bringing an action for that purpose, provided no such action has been brought by the assignee. *Leonard v. Clinton*, 26 Hun, 288; Burr. Assign. 2d ed. 352.

But however this may be, comity does not require that protection from attachment be extended to property in this jurisdiction which the assignee does not ask to have protected and which he has abandoned; and the parties to this suit will be left to determine their respective legal rights to such property as if the assignment had not been made. See generally, *Young v. Kimball*, 59 N. H. 446; *Lane v. Moore*, 59 N. H. 80, and *Eddy v. Winchester*, 60 N. H. 64. Case discharged.

Smith, J., did not sit; the others concurred.

Mary LOWD
v.

Ada L. BOWERS.

A caption of depositions may be adjourned by the magistrate to a place other than that named in the notice, when the sickness of the witness renders such a course necessary in order to obtain the deposition.

(Grafton—Decided March 12, 1886.)

ON defendant's exception. *Overruled*.

A caption of depositions by the plaintiff was notified for April 2, 1885, at the office of Burleigh & Adams. On that day the witness, who was the plaintiff herself, was unable by reason of sickness to attend at the place named, and the magistrate adjourned the caption to her residence a short distance away, and her deposition was there taken. The defendant did not appear, either at the office of Burleigh & Adams or at the plaintiff's house. The deposition was admitted at the trial, and the defendant excepted.

Messrs. Page & Story, for defendant:

The deposition should not have been admitted, because it was not taken in conformity with the requirements of the statute. G. L. chap. 229, § 8.

The right to take the deposition of a witness in a civil cause was created by statute, and the provisions of the statute conferring that right must be strictly followed. *Hayward v. Barrin*, 38 N. H. 370; *Cushman v. Wooster*, 45 N. H. 411, 412; *Cater v. McDaniel*, 21 N. H. 231, 232.

The fact that the deposition was taken in Plymouth and about forty rods from the office of Burleigh & Adams, does not aid the plaintiff any, because the notice to defendant does not state that the place of caption was the residence of plaintiff. *Rand v. Dodge*, 17 N. H. 355.

The caption must state with certainty the place where the deposition was taken, and it must correspond with the place set forth in the notice to the adverse party or the deposition is not admissible. *Rand v. Dodge*.

The fact that the defendant did not appear at that place, did not give plaintiff authority to go elsewhere without notice to the defendant. *Beach v. Workman*, 20 N. H. 379; *Kimball v. Marshall*, 44 N. H. 468.

A party notified to attend the taking of depositions at a certain place and hour is not bound to attend at the hour; and if in his absence the taking is adjourned to another place without notice to him the depositions cannot be used against his objection. *Kimball v. Marshall*, 44 N. H. 468; *Beach v. Workman*, *supra*; *Deming v. Foster*, 42 N. H. 165.

Messrs. Burleigh & Adams, for plaintiff:

We apprehend that a substantial compliance with the statutes is all that the courts exact, and that the substance of the law will not be hastily sacrificed by an insistence upon empty forms. *Fabyan v. Adams*, 15 N. H. 878.

Allen, J., delivered the opinion of the court:

The defendant was duly notified of the time and place for taking the deposition and did not attend, and was not present at the time of adjournment, nor at the caption. The inability of the witness to attend at the place named in the notice was an exigency which made an adjournment necessary to save the caption. If the defendant had appeared at the time and place notified he would have had notice of the adjournment and opportunity to attend at the place of caption.

The defendant not appearing according to the notice, and having opportunity to attend at the place to which the caption was adjourned for an unforeseen exigency, was not harmed by the admission of the deposition, and cannot now object.

Exception overruled.

Smith, J., did not sit; the others concurred.

Elizabeth A. RANDALL

v.

Town of CONWAY.

In an action against a town for injuries upon a highway, the fact that the selectmen's certificate of the laying out of the highway was not returned to the town clerk and recorded as required by G. L. chap. 61, § 14, until after the ex-

piration of thirty days will not avail the defendant to show that there was no legal highway.

(Carroll—Decided March 12, 1886.)

ON defendant's exceptions. *Overruled.*

Case, for injuries from a defective highway. The highway was laid out by the selectmen and a certificate thereof made and signed by them June 16, 1873, which was returned to the town clerk and recorded July 14, 1874. The defendant objected that there was no legal laying out of a highway because the certificate was not returned and recorded within thirty days, as required by Gen. Stats. chap. 61, § 14; G. L. chap. 67, § 18. The court ruled otherwise and the defendant excepted.

The plaintiff recovered a verdict for \$1,600, which the defendant moved to set aside as being excessive. The motion was denied and the defendant excepted.

Messrs. Worcester & Gafney, with *Messrs. T. J. Smith, J. B. Nash and G. W. M. Pitman*, for defendants:

Highways are only such as are laid out in the mode prescribed by statute, or have been used as such for twenty years. G. L. chap. 74, § 8; *Wooley v. Rochester*, 60 N. H. 468; *State v. Morse*, 50 N. H. 9-18; *Tilton v. Pittsfield*, 58 N. H. 327; *Smith v. Northumberland*, 36 N. H. 88; *Northumberland v. Atlantic & St. L. R. R.* 35 N. H. 574.

Selectmen shall within thirty days make return of every highway by them laid out, and also cause the same to be recorded by the town clerk. G. L. chap. 67, § 18.

A highway is not legally laid out until the doings of the selectmen are reduced to writing and return made to the town clerk. *Hayes v. Shackford*, 3 N. H. 10; *Greeley v. Quimby*, 22 N. H. 335-339.

Selectmen of towns are a judicial tribunal for laying out highways within their respective limits. *Haywood v. Charlestown*, 34 N. H. 23; See, *Inhab. of Windham Pet.* 32 Me. 452.

By G. L. chap. 43, § 3, it seems that the Town should have been notified, as well as the land owners, in the proceedings had.

Messrs. E. A. Hibbard and J. C. L. Wood, for plaintiff:

As to the point that the statutory provision on which the defendant relies, so far as it relates to the return being recorded within thirty days, is directory merely, see cases cited in *Morr. Dig. Statute*, § 18; *Taz and Taz Title*, §§ 78, 79; *Hughes v. Parker*, 20 N. H. 58.

As is suggested by *Parsons, C. J.*, in *Pond v. Negus*, 8 Mass. 232, the statute contains no negative words restraining the selectmen from having the return recorded afterwards.

The motion to set aside the verdict because the damages were excessive does not present a question of law. It was a question of fact to be decided at the trial term. Moreover, it appears from the report of the Judge that the motion was rightly denied. *Hovey v. Brown*, 59 N. H. 114.

Blodgett, J., delivered the opinion of the court:

In many cases, requirements that proceedings be recorded or certificates filed are regarded

as merely directory, and not as steps necessarily precedent to the validity of the Act. In *Hayes v. Hanson*, 12 N. H. 290; *Smith v. Bradley*, 20 N. H. 117; *Converse v. Porter*, 45 N. H. 385, 389; *Pond v. Negus*, 8 Mass. 230, 231; *Williams v. School Dist.* 21 Pick. 75, 82; *Jackson v. Young*, 5 Cow. 269. And the provision of Gen. Stats. chap. 61, § 14; Gen. Laws, chap. 67, § 187, requiring selectmen to make a return of every highway by them laid out within thirty days, and cause the same to be recorded by the town clerk, we think is to be so regarded. Doubtless, as against a land owner or other person entitled to appeal from its laying out, a highway cannot be considered as duly laid until the return of the selectmen is deposited with the town clerk for record, and perhaps not for any purpose. *Hayes v. Shackford*, 3 N. H. 10; *Greeley v. Quimby*, 22 N. H. 335, 339; *Commonwealth v. Merrick*, 2 Mass. 529. But in this view, the highway here became a legal one long prior to the plaintiff's injury, and the defendant being in no way prejudiced by the failure of the selectmen to make return of its laying out agreeably to the statute, it can take nothing by this objection to its legality.

The exception to the denial of the motion to set aside the verdict as excessive raises no question of law, is not properly here, and will not be considered.

Exceptions overruled.

Smith, J., did not sit; the others concurred.

Dalphon OSBORN *et al.*

v.

Benjamin W. CROSBY.

Where several mutually agree to pay money to be expended for a lawful object of common interest to the parties, the **promise of each** is considered as made in consideration of the **promise of the others**; and after expenditures have been made in advancement of the enterprise, relying upon the subscriptions, it is **no defense to an action against a delinquent subscriber** for the collection of his subscription that the expenditures were made under the direction of a corporation organized by the associates in conformity with the original plan, of which he did not choose to become a member.

(Hillsborough—Decided March 12, 1886.)

ON report. Judgment for plaintiffs.

Assumpsit to recover the amount of the defendant's subscription to a fund for the purpose of purchasing land and erecting thereon shoe factory buildings in Peterborough.

The facts, which were found by a referee, are stated in the opinion of the court.

Messrs. Frank G. Clarke and R. B. Hatch, for plaintiffs:

The point raised by the defendant, relative to the par value of shares in the corporation, is not material. P. L. 1855, chap. 1668.

The subscription paper which is the basis of this action is absolute and without condition.

The act of signing by the defendant was voluntary; the benefit was to be mutual and has been mutual. Defendant should be held to pay the amount of his subscription. *George v. Harris*, 4 N. H. 583; *Pillsbury v. Pillsbury*, 20 N. H. 90; *Ives v. Sterling*, 6 Met. 310.

Mr. Ezra M. Smith, for defendant:

The corporation or its officers could not maintain suit against this defendant, for the reason that there was no privity of contract between them. 21 N. Y. 247.

The par value of the stock is fixed at \$10 a share, while G. L. chap. 148, § 7, provides that the par value of the shares shall not be fixed below \$50.

Clark, J., delivered the opinion of the court:

For the purpose of building a shoe factory in the Town of Peterborough, the defendant and the plaintiffs signed the following agreement:

"Peterborough, N. H., June 7, 1884.

We, the undersigned, hereby promise and agree to pay the sums set against our respective names, for the purpose of purchasing land in said Peterborough and erecting thereon suitable shoe factory buildings, to be owned by us as a voluntary corporation, in proportion to the sums paid by each. Said sums to be paid to the persons designated by said corporation at such times and in such sums as the directors thereof may order.

Names.

Amount."

The amount of the defendant's subscription was \$50, for the recovery of which this action is brought.

Concurrently with the circulation and signing of the subscription paper by these parties, eight or ten others identical in terms with it were circulated and signed, principally by citizens of the town; and the sum of \$20,980 being subscribed, on the 23d day of June, 1884, articles of association were entered into in furtherance of the common object expressed in the subscription papers; and such of the subscribers as chose signed the articles and an agreement incorporated therein, to take shares in the corporation. A corporation was formally and duly organized under the name of the Peterborough Improvement Company; the capital stock fixed at \$18,000, to consist of 1800 shares of \$10 each; and 1800 shares were subscribed for. The subscribers to the stock were substantially the same as had subscribed on all the papers circulated; and all such subscribers, including the defendant, were duly notified and had an opportunity to sign and take their subscription in stock. The defendant did not sign the stock book. May 23, 1885, the capital stock was legally increased \$2,990, equalizing it with the amount of the original subscriptions. June 30, 1884, the corporation duly instructed the treasurer to collect the first assessment of 40 per cent on the subscription to the stock of the company, on or before July 15, 1884, and the second assessment of 30 per cent on or before August 20, 1884, and the balance on or before October 1, 1884. Notice of these required payments was duly given to all the subscribers on the papers and on the stock book, and payment requested. The factory was built in the summer of 1884, with the knowledge of the defendant; and the money collected

on the subscription to the amount of \$18,000 has been properly appropriated and expended; and there is an existing indebtedness of \$2,800 incurred in purchasing the land and in erecting and furnishing the factory. The defendant never revoked his subscription; but he did not take any part in organizing the corporation nor attend any of its meetings.

These facts are sufficient to maintain the action. For the purpose of securing the establishment of a shoe factory, the defendant voluntarily and without fraudulent solicitation agreed with the other subscribers to pay the amount of his subscription. Where several mutually agree to pay money to be expended for a lawful object of common benefit or interest to the parties, the promise of each is considered as made in consideration of the promise of the others to contribute to the common object. *George v. Harris*, 4 N. H. 533; *Moore v. Chesley*, 17 N. H. 151.

But in this case the consideration does not rest solely upon the mutuality of the promises. If the subscriptions in the first instance are regarded as mere offers or propositions to aid in the proposed enterprise, which could be withdrawn at any time before being accepted and acted upon, they became completed agreements binding upon the parties when, in furtherance of the common purpose and relying upon them, money was expended and liabilities incurred in the erection of the factory.

It is contended that the defendant was released from his subscription by the action of his co-subscribers in uniting with the signers of other subscription papers in entering into a new contract to which the defendant was not a party, by organizing a corporation, choosing a board of directors, fixing the amount of capital stock, receiving subscriptions and issuing certificates therefor and assuming the control of the collection and expenditure of the subscriptions in erecting and furnishing the factory. It is a sufficient answer to this objection that all the subscription papers were identical in terms; and all the acts complained of were done in conformity with the original purpose, in advancement of the common object and in the mode indicated in the contract of subscription. The defendant had due notice of all the proceedings. He was invited to participate and did not object; and he is presumed to have assented to all that was done. His associates paid in their subscriptions, made purchases and entered into contracts for the consummation of the common enterprise. All this was done with the knowledge of the defendant; and it is found as a fact that his subscription was never revoked. Under these circumstances, the fact that he did not choose to participate in the organization or proceedings of the corporation does not relieve him from liability on his subscription. *Ashuelot Boot & Shoe Co. v. Hait*, 56 N. H. 548; *Carr v. Bartlett*, 72 Me. 120.

Judgment for the plaintiffs.

Bingham, J., did not sit; the others concurred.

WINNEPESAUKEE Campmeeting ASSO. v.

Horace W. GORDON *et al.*

A stipulation in a deed of a lot of land in the grounds of the Winnepesaukee Campmeeting Association prohibiting the erection or use of buildings for stores, boarding houses, hotels or stables thereon without the consent of the Association is enforceable by injunction.

(Belknap—Decided March 12, 1886.)

BILL in equity, to enjoin the keeping of a boarding house. *Injunction granted.*

The Winnepesaukee Campmeeting Association was chartered by the Legislature in 1874. The grantees organized under the charter, purchased a lot of land near Wiers Station, and subsequently conveyed parts of it to various persons, among others to one of the defendants. The deed contains a proviso that the premises shall be held "subject to the Act of incorporation and the rules and regulations of said Campmeeting Association," and the by-laws and regulations of the Association, are printed on the same sheet of paper below the deed. One of the by-laws is as follows: "No portion of the grounds shall be used for any purpose foreign to the objects of this Association as set forth in the Act of incorporation, nor for the erection or use of buildings for stores, boarding houses, hotels or stables, without the consent of the Association."

The defendants erected a building on the lot conveyed and occupied it with their families in the summer season, during which time various religious and other associations occupy the grounds for meetings, and people sometimes come there for a day upon excursions. On these occasions the defendants entertained people at their house by accommodating them with lodging and meals, for compensation. In the early part of the season of 1885, the house was enlarged by the addition of twenty-two rooms and an extension of the dining room. The new rooms were finished and furnished for sleeping rooms. In the summer of 1885, after the completion of the enlargement, the defendants lodged as many people as applied, within the limits of their accommodations, and entertained many of them with board for pay. On one occasion, for four or five days together the house was full, and thirty or forty persons were furnished with meals; and on all occasions of the occupation of the grounds by large numbers, the defendants accommodated some people with lodging and board.

The plaintiff owns a hotel upon the grounds, and the lessee by the terms of his lease has the exclusive privilege of keeping a hotel and boarding house within the limits of the grounds.

Mr. Samuel C. Eastman, for plaintiff:

In violating the restriction, defendants went beyond their rights and should be restrained. *Linzee v. Mixer*, 101 Mass. 512; *Dorr v. Barrahan*, 101 Mass. 581; *Fuller v. Arms*, 45 Vt. 400; *Phenix Ins. Co. v. Continental Ins. Co.* 14 Abb. Pr. N. S. 266.

The acceptance of the deed binds the grantee to the covenant contained therein. *Randall v. Latham*, 36 Conn. 48; *Thornton v. Trammell*, 39 Ga. 202.

Messrs. Bingham & Mitchell, for defendants:

If the words "subject to," etc., limit the use of the estate, it must be because they constitute a covenant between the grantor and grantee. It is not a covenant. It does not impose any obligation upon the grantee, for the law does not imply an obligation when none is in terms expressed. *Lawrence v. Toole*, 59 N. H. 28; *Trotter v. Hughes*, 12 N. Y. 74; *Belmont v. Coman*, 22 N. Y. 438.

The deed should have contained words of acceptance on the part of the grantee, in order to bind him. *Binsse v. Paige*, 1 Keyes (N. Y.) 87; *Trotter v. Hughes*, 12 N. Y. 78.

The office of the *habendum* is to define and limit the estate granted in the premises, but if the estate be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any *habendum*; and if an *habendum* follow, which is repugnant to the premises, or contrary to the rules of law and incapable of construction consistent with either, the *habendum* shall be rejected and the deed stand good upon the premises. *Brown v. Manter*, 21 N. H. 528, 538.

The facts found do not show that the defendants kept a boarding house. The authorities agree that a boarding house is a house where a guest is entertained under an express contract, at a certain rate for a certain time. *Willard v. Reinhardt*, 2 E. D. Sm. 148; *Cromwell v. Stephens*, 3 Abb. Pr. R. N. S. 35; *Wintemute v. Clarke*, 5 Sandf. 247; *Seaward v. Seymour*, Anthon's L. S. 51, cited in *Cromwell v. Stephens*, *supra*; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417.

The facts found do not show that the defendants kept a hotel. To constitute a hotel it must be kept open at all times for the reception of travelers. *Bonner v. Welborn*, 7 Ga. 296, 306.

One who entertains strangers occasionally, although receiving compensation for it, is not an innkeeper. *Bonner v. Welborn*, 7 Ga. 296; *State v. Matheus*, 2 Dev. & B. (N. C.) 424; *Carpenter v. Taylor*, 1 Hilton (N. Y.) 198.

An inn and a hotel are the same in this country. *Cromwell v. Stephens*, *supra*.

Clark, J., delivered the opinion of the court:

It is stipulated in the deed of the Association to one of the defendants that the premises shall be held subject to the "Act of incorporation and the rules and regulations of said Campmeeting Association." One of the by-laws and regulations of the Association prohibits the erection or use of buildings for stores, boarding houses, hotels or stables, without the consent of the Association. Limitations of the use of real property in the form of covenants, restrictions and conditions inserted in a deed for the advantage of a grantor or the benefit of adjacent lands, when reasonable and for a lawful purpose are upheld and enforced at law and in equity. The acceptance of the deed binds the grantor to the covenant, condition or restriction contained in it. *Harriman v. Park*, 55 N. H. 471; *Emerson v. Mooney*, 50 N. H. 815; *Burbank v. Pillsbury*, 48 N. H. 475.

The stipulations in the defendant's deed are reasonable and for a lawful purpose. *Gannett v. Albree*, 103 Mass. 872.

N. H.

By accepting a title thus restricted the defendants understood they were not acquiring an absolute dominion over the lot, but a qualified and limited right of use and occupation subject to the conditions of the deed. The case shows a violation of the restriction by keeping a boarding house. The defendants furnished board and lodging for compensation to such as applied, within the limits of their accommodations, and the plaintiffs are entitled to an injunction. *Linzee v. Mixer*, 101 Mass 512; *Dorr v. Harrahan*, Ib. 581.

The object of the Association might be reasonably secured and promoted by its retaining the control of boarding-house business within its limits, as a religious society may retain a certain control of church pews which the owners cannot use for all purposes. *Jones v. Towne*, 58 N. H. 462.

The constitutional religious rights of the members of this Association are entitled to protection within as well as without the bounds of reserved territorial authority.

Commonwealth v. Bacon, 13 Bush, 210, may not be in conflict with *State v. Cate*, 58 N. H. 240; *State v. Reed*, 12 R. I. 137 and *Commonwealth v. Bearse*, 132 Mass. 542. But time may bring changes that will practically affect the limitation of the proprietary rights conveyed by the plaintiff. Its grounds may be withdrawn from ecclesiastical uses. The plaintiff may remove to some other place, or cease to exist. The defendants or their successors may have occasion to raise the question whether, under the common law of this State, the construction of the deed is that the parties intended the restriction should continue in full force if it should become useless. The decree may be made subject to a modification or dissolution of the injunction on cause shown.

Injunction granted.

Allen, J., did not sit; the others concurred.

Leonard WILCOX

v.

Reuben KENDALL.

A clause in a deed reserving the right to take from a cistern in the house on the granted premises "all the water which the grantee, his heirs or assigns shall not use" means only so much of the water as may not be used by the occupants in a reasonable enjoyment of the premises conveyed.

(Cheshire—Decided March 12, 1886.)

IN equity, on demurrer to bill. Bill dismissed. Bill in equity, praying that the right of the plaintiff to take water from a cistern in the defendant's house be defined, and for an injunction to restrain the defendant from interfering with the exercise of that right.

Facts found by a referee.

Anson Cole formerly owned the premises of both the plaintiff and the defendant, which lie adjacent. In 1859 Cole conveyed the defendant's premises, called the Kendall Place, to one Sabin, reserving "The right to take from the cistern in the house on the granted premises by

aqueduct all the water which said grantee shall not use." In 1878, Sabin conveyed the premises to the defendant, inserting in his deed a reservation in the same language "for the benefit of Anson Cole or his heirs or assigns." November 6, 1880, Cole conveyed the plaintiff's premises, called the store lot, to one Barker, and Barker on the same day conveyed them to the plaintiff. No mention is made of any water right in either of the last named deeds. The defendant's use of the water at the Kendall place has been reasonable.

Messrs. Batchelder & Faulkner, for defendant:

The plaintiff has no title to the water rights which he claims, in his bill, to own. Cole, the grantor from whom both the plaintiff and defendant derive title to their respective places, by his deed to Sabin, reserved to himself an easement in the spring and aqueduct. This reservation was to Cole alone and not to his heirs or assigns. No facts are found which tend to prove that any use of this spring and aqueduct is necessary to the reasonable use and enjoyment by the plaintiff of his store lot. *Wentworth v. Philpot*, 60 N. H. 193.

The demurrer should be sustained and the bill dismissed.

Messrs. Lane & Dole and D. H. Woodward, for plaintiff:

There is a wide difference between *Wentworth v. Philpot*, 60 N. H. 193, and the facts as they now appear in this case. That presents the simple case of conveying to a third party by deed, a privilege of going upon another's premises and getting water from a well, which privilege had been conveyed to the grantor. It was not reserved as part of the lot.

In *Dunklee v. Wilton R. R. Co.* 24 N. H. 489, the very plain and simple propositions are laid down that deeds are to be construed with reference to the actual rightful state of the property at the time of their execution, and that property conveyed passes, with all the incidents rightfully belonging to it, at the time of the conveyance; and also that property reserved in a conveyance retains all its existing incidents.

Blodgett, J., delivered the opinion of the court:

The plaintiff's title being derived from Cole, if he has the right to take water from the defendant's cistern, a point on which no opinion is expressed, it can, at most, be no greater than that reserved to Cole in his prior conveyance to Sabin, which, in legal contemplation, was only so much of the water as might not be used by the occupants of the place conveyed, in the reasonable enjoyment of the premises. Hence, the finding of fact by the referee, that the defendant's use of the water has been a reasonable one, makes it obvious that the plaintiff's alleged cause of complaint is unfounded. Furthermore, it is not found nor does it appear that the quantity of water used or appropriated by the defendant has been increased since the plaintiff's ownership of the store lot; and therefore the changes in the manner of its use are immaterial.

Bill dismissed.

Carpenter, J., did not sit; the others concurred.

Martin L. HALL et al.

Gilman H. DIMOND.

1. The right of stoppage in transitu is terminated when the goods are delivered to the buyer; or when possession, actual or constructive, is taken by him.
2. The carrier's change of character into that of an agent to keep the goods for the buyer is not inconsistent with his right to retain the goods in his custody until his lien for freight is satisfied.

(Merrimac—Decided March 12, 1880.)

ON report. Judgment for defendant.

Replevin for goods bought of the plaintiff in Boston and by them shipped to one Sawyer at Penacook, at which place they were attached by a creditor of Sawyer, while remaining in the freight house of the railroad. The plaintiffs claimed to hold them by virtue of their right of stoppage in transitu.

The facts which were found by the court are stated in the opinion.

Messrs. Albin & Martin and H. G. Sargent, for plaintiff:

The existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier and not as warehouseman; and in order to rebut this presumption there must be proof of some arrangement or agreement between the buyer and the carrier, whereby the latter, while retaining his lien, becomes the agent of the buyer to keep the goods for him. 2 *Benj. Sales*, 1,090.

The buyer cannot change the capacity in which the carrier holds possession without the latter's assent. *Jackson v. Nichol*, 5 *Bing. N. C.* 508; *Blackb. Sales*, 248; 2 *Benj. Sales*, § 1,085; *Whitehead v. Anderson*, 9 *Mees. & W.* 534; *Reynolds v. Boston & Maine R. R.* 43 *N. H.* 591.

Where goods are sold as separate items, each for its separate price, although they may be embraced in one transaction, the delivery of a part to the consignee is not a delivery of the whole, and the vendor has the right to stop the undelivered portion. *Story, Sales*, 285, ed. of 1847; *Add. Cont. Tort*, 494.

If part only be delivered, the right will survive as to the rest, *Tanner v. Scovell*, 14 *Mees. & W.* 28; *Buckley v. Furniss*, 15 *Wend.* 137; *S. C.* 17 *Id.* 504, and may be exercised immediately upon learning the insolvency of the vendee, without returning the notes or bills given for the purchase money. 1 *Sm. L. Cas. ed. of 1855*, 908.

If by the vendee's order a part of the goods are sold on the way, the remainder may be stopped. *Secomb v. Nutt*, 14 *B. Mon.* 324; 5 *Wait, Act. & Def.* 617.

This is a struggle between two creditors of an insolvent debtor mutually seeking to avoid a loss. The superior equity of the plaintiffs gives them the best standing in court. *Allen v. Mercier*, 1 *Ashm.* 103.

The rule of law is generally stated to be, that the vendor's right of stoppage in transitu continues until the goods have reached their ultimate destination and come into the actual possession of the vendee. *Mohr v. Boston & Alb. R. R. Co.* 106 *Mass.* 70, and cases cited.

The arrival of the goods at the place of destination will not defeat the vendor's right to take them. That right will only be terminated by the goods passing into the actual or constructive possession of the vendee. The carrier is authorized to hold the goods until delivered to the consignee, and if they be removed from cars or vessels to a warehouse used by the carrier for storage of goods transported, they remain in his possession. If they are held by the carrier as the agent of the consignee, the vendor's right is terminated; but if they be held without such relation existing between the carrier and the vendee, the vendor may seize them. *McFetridge v. Piper*, 40 Iowa, 627; *Alsbury v. Latta*, 80 Iowa, 442.

The right remains not only while the goods are in motion, and not only while they are in the hands of the carrier, but while they are in the hands of the warehouseman or place of deposit connected with their transmission or delivery, or in any place not actually or constructively the place of the consignee, or not so in his possession or under his control that the putting them there implies the intention of delivery. *O'Neil v. Garrett*, 6 Iowa, 480. See, *Reynolds v. Boston & Maine R. R.* 43 N. H. 580; *Inlee v. Lane*, 57 N. H. 454; *Seymour v. Newton*, 105 Mass. 272; *Grout v. Hill*, 4 Gray, 861; *Morris v. Shryock*, 50 Miss. 599; *Calahan v. Babcock*, 21 Ohio St. 281; *Allen v. Mercier*, 1 Ashm. 108.

A delivery of part of the goods does not operate as a constructive delivery of the whole, unless the parties intended it so to operate; and it rests with the party who relies on the part delivery as a constructive delivery of the whole to prove such intention. 2 Benj. Sales, §§ 1092, 1093.

In the absence of evidence to the contrary, it is to be assumed that the delivery of a part of the goods is intended to operate only as a delivery of that part and not of the whole. 2 Benj. Sales, § 1193.

Where the freight is unpaid, part delivery will not operate as a constructive delivery of the whole, unless it can be shown that the carrier assented to the buyer's taking possession of the goods without payment of freight or charges. 2 Benj. Sales, § 1,093.

And this case expressly finds that the agent of the railroad was holding the goods replevied for the freight. And their lien on the goods was not lost or waived by the failure of the road to retain possession of the goods taken by Sanborn. *New Haven etc. Co. v. Campbell*, 128 Mass. 104; *Potts v. N. Y. & New Eng. R. R. Co.* 131 Mass. 455. See, *Ex parte Cooper*, 14 R. 11 Ch. Div. 68; *Ex parte Fulk*, L. R. 14 Chan. D. 455.

The right of stoppage *in transitu* is of equitable origin, but has long been recognized in courts of law, by whom it is regarded with favor as calculated in the most effectual manner to promote substantial justice. Whittaker, *Stop. in Trans.* 152.

And by the civil law the lien prevailed even as against actual possession by the vendee. Dig. lib. 18, title I. L. 19.

The doctrine, which is applied in cases of contracts within the Statute of Frauds and some other contracts, that a part delivery of goods sold under an entire contract operates in

law as a constructive delivery of the balance, does not apply at all in cases of stoppage *in transitu*, for the exercise of the right of stoppage *in transitu* is not a rescission of the contract of sale. *Wentworth v. Outhwaite*, 10 Mees. & W. 452, and cases cited. See, 128 Mass. 104; 131 Mass. 455.

The right of stoppage *in transitu* is one highly favored in law, being based upon the plain reason of justice and equity, that one man's property should not be applied to the payment of another man's debt. 5 Wait, Act. & Def. 612; *D'Aquila v. Lambert*, 2 Eden, Ch. 77; *Gibson v. Carruthers*, 8 Mees. & W. 387; *Inlee v. Lane*, 57 N. H. 458, and cases cited.

Mr. David F. Dudley, for defendant:

The carrier had transported the goods from the vendor and deposited them where the vendee always took possession of his goods so transported. The transit was ended. Benj. Sales, §§ 805, 857; *Id.* 2d Am. ed. § 849; See, Blackb. Sales, 248; *Slubey v. Heyward*, 2 H. Bl. 504; *Jackson v. Nichol*, 5 Bing. N. C. 508; *Kendall v. Marshall*, 16 L. Rep. 511; *Moses v. Boston & Maine R. R.* 82 N. H. 523; *Reynolds v. Boston & Maine R. R.* 43 N. H. 580; *Inlee v. Lane*, 57 N. H. 454; Benj. Sales, § 851, and authorities cited.

Where the carrier by its representative has been dealing with the consignee in respect to the goods in question, after it has ceased to act as carrier, it is a simple depository holding for the consignee. *Smith v. Nashua & L. R. R.* 27 N. H. 86; *Inlee v. Lane*, *supra*; *Reynolds v. R. R. supra*; *Brown v. Grand Trunk Railway*, 54 N. H. 535; *Moses v. Boston & Maine R. R. supra*; *Bolton v. Lancashire & Y. R. Co.* L. R. I. C. P. 431. See, *Kendall v. Marshall*, 16 L. Rep. 511.

The carrier's change of character into that of agent to keep the goods for the buyer is not inconsistent with his right to retain the goods in his custody till his lien on them for carriage or other charges is satisfied. Benj. Sales, § 853; *Allan v. Gripper*, 2 Crompt. & J. 218.

The purchase of each shipment was an entire contract; and an acceptance of part would be an acceptance that would take the sale of the whole shipment out of the Statute of Frauds. *Gilman v. Hill*, 36 N. H. 811; *Mansfield v. Tripp*, 113 Mass. 350.

Actual possession is where vendee takes the whole or a part, with the intention of exercising the right of ownership over all. *Tanner v. Scovell*, 14 Mees. & W. 28; Benj. Sales, §§ 805, 857; *Jones v. Jones*, 8 Mees. & W. 431; *Foster v. Frampton*, 6 Barn. & C. 107.

And taking part in these cases determines the right of stoppage *in transitu* as to the balance remaining in the hands of the carrier *qua* carrier. Sm. Lead. Cas. 1218, *905.

The goods come to the constructive possession of the vendee when the carrier has fully performed his contract for carriage, and the vendee has actual or constructive notice of their arrival, and a reasonable time in which to remove them. After such notice and the expiration of such time, the carrier becomes a warehouseman and holds the goods as such for the vendee. *Kendall v. Marshall*, 16 L. Rep. 511; *Moses v. Boston & Maine R. R.* 82 N. H. 523; *Smith v. Nashua etc. R. R.* 27 N. H. 95; *Jewell v. Grand Trunk Railway*, 55 N. H. 91, 92; *Brown v. Same*, 54

N. H. 538; *Wentworth v. Outhwaite*, 10 Mees. & W. 436; *Sawyer v. Joslin*, 20 Vt. 172; *Dodson v. Wentworth*, 4 Mann. & Gran. 1080.

Clark, J., delivered the opinion of the court:

The right of stoppage *in transitu* exists until the goods are delivered to the buyer, or possession actual or constructive is taken by him. The goods were sold by the plaintiff to Sanborn at Boston, and sent to him at Penacook, N. H., by railroad by three different shipments, arriving there October 10th, 25th and 28th. A part of each shipment had been taken from the freight station by Sanborn before his failure November 5, when the residue was attached by the defendant on a writ against Sanborn and replevied by the plaintiffs. No part of the freight had been paid October 26. After a part of the goods had been taken, the station agent demanded the freight; and upon Sanborn neglecting to pay it the agent determined to hold the remainder of the goods for the payment of the freight, but did not inform Sanborn of his intention.

No part of the goods were formally delivered to Sanborn. The rule of the railroad known to Sanborn required the payment of freight before the goods were delivered; but prior to the reception of the goods in controversy the agent had allowed him, after goods consigned to him were deposited in the freight house, to take a part or all without any formal delivery, intending to collect the freight while goods of sufficient value to secure it remained in the possession of the railroad; but this was not always done, as he had previously paid his freight bills promptly on demand. Occasionally Sanborn left his goods in the depot a few days after he had paid the freight. The goods were together at the freight station and the agent knew when Sanborn took away a part of each of the three shipments and made no objection.

The goods had reached their ultimate destination and according to the previous and customary course of dealing were so far within the control of the consignee that he was at liberty to take away any that he chose, and he had taken away a part of each shipment. The selection of the goods removed was not determined nor controlled by any restriction upon the consignee's right of removal. The goods remaining at the freight station were left there, not because of the consignee's neglect or refusal to accept or his inability to take them, *Inlee v. Lane*, 57 N. H. 454; *Reynolds v. R. R.* 43 N. H. 580, but because he did not choose to remove them at the time. They were left voluntarily and temporarily, as a matter of convenience, to the consignee. By the previous course of dealing, the rule of the railroad requiring the payment of freight as a condition precedent to delivery had been waived and Sanborn had been allowed to use the freight station for the temporary storage of goods consigned to him, taking them away as he wanted them. A portion of the goods had been at the station nearly a month, and the last shipment arrived eight days before the attachment. The railroad allowed the goods to remain there for Sanborn's accommodation, holding them as his agent and not as carrier. Its duties and its liability as carrier and insurer had terminated, and its responsibility was that of

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warehouseman only. *Moses v. R. R.* 32 N. H. 523; *Smith v. R. R.* 27 N. H. 86.

The customary course of dealing is presumed to continue, and both the carrier and the consignee must have understood that the goods remained at the freight station as the goods of the consignee, at his risk and subject to his order and control, notwithstanding the undisclosed purpose of the agent at the time of the attachment to hold the balance of the goods until the freight was paid. "The carrier's change of character into that of an agent to keep the goods for the buyer is not at all inconsistent with his right to retain the goods in his custody till his lien upon them for carriage or other charges is satisfied. Nothing prevents an agreement by the master of a vessel or other carrier to hold the goods after arrival at destination as agent of the buyer, though he may at the same time say: 'I shall not let you take them till my freight is paid.' Benj. Sales, 4th Am. ed. § 1270.

If the existence of a carrier's lien, without other evidence, authorizes an inference that he holds the goods as carrier and not as warehouseman, such an inference is controlled and rebutted in this case by the previous course of dealing between the carrier and consignee. The capacity in which the railroad held the goods is a question of fact that might depend largely or wholly upon the understanding and intention of the railroad and Sanborn, Benj. Sales, §§ 1264, 1270, and could have been properly determined at the trial term in favor of the defendant. As to some or all of the goods, there may be a question whether there is any evidence of a right of stoppage *in transitu*, and whether a decision in favor of the plaintiffs could be sustained.

The case having been submitted for such judgment as should be ordered at the law term, there being no conflict of evidence, and it being clear that the *transitus* was at an end when the attachment was made, there seems to be no occasion for another trial.

Judgment for the defendant.

Bingham, J., did not sit; the others concurred.

John E. ROBERTSON *et al.*

v.

NORTHERN R. R. *et al.*

Under § 10, chap. 229, G. L., a party who gives notice of the taking of depositions and does not take a deposition in pursuance thereof is liable to the adverse party in the sum of twenty-five cents a mile for actual travel of himself or his attorney to attend the same, although he is not guilty of actual fault or neglect, the failure being caused by the unexpected omission of the witness to attend. (*Voght v. Ticknor*, 47 N. H. 54, affirmed and followed).

(Merrimack—Decided March 12, 1884.)

CASE, to recover costs, under § 10, chap. 229 of Gen. Laws. Discharged.
In the bill in equity pending between the

parties, on application of the defendants and against the plaintiffs' objection, one of the Justices of the Supreme Court authorized a commission to issue to a consul or vice-consul of the United States or, in the absence of both, to a notary public, to take the deposition of Henry C. Sherburne, in behalf of the defendants, at either London, England; Paris, France or Brussels, Belgium, on sixty days' notice to the plaintiffs' attorneys. June 8, 1885, the defendants notified the plaintiffs' attorneys that the deposition of said Sherburne would be taken at Fenton's Hotel, London, England, on August 10, 1885, at 11 o'clock in the forenoon. The plaintiffs' counsel attended at said time and place, and for that purpose traveled from Concord, New Hampshire, to London; but the defendants neglected to take Sherburne's deposition, because he did not attend.

The plaintiffs claim twenty-five cents a mile for the actual travel of their attorney to attend, the taking of depositions under said notices; and the defendants claim that they are entitled, if to anything, only to the actual sum they are compelled to pay out, providing it is less than twenty-five cents a mile.

The statute on the subject is set out in the opinion.

Messrs. Bingham & Mitchell, for plaintiffs:

The statute on the subject, Gen. Laws, chaps. 229, 510, has received a judicial interpretation which removes, if there ever existed, any possible doubt. *Voght v. Ticknor*, 47 N. H. 543.

The term *neglects*, as used in this statute, means to omit. It does not necessarily imply designed failure or carelessness or imprudence. *Clark v. Lisbon*, 19 N. H. 287; *Perkins v. Pitman*, 34 N. H. 261; *Deming v. Goodall*, 18 N. H. 252; *Frazier v. Merrill*, 31 N. H. 496; *Voght v. Ticknor*, *supra*; *Rosenplaenter v. Roessle*, 54 N. Y. 268; *Bendetson v. French*, 46 N. Y. 266; *Willoughby v. Willoughby*, 58 Eng. C. L. 923; *King v. Burrell*, 40 Id. 96; *Inhab. of New Marlborough v. Comrs.* 9 Met. 483.

The defendants' counsel suggests that this is a penal statute and that the twenty-five cents a mile is a penalty, unliquidated damages. This we deny. The damages are liquidated, and recoverable "by action on the case," G. L. chap. 229, § 10, and not "by action of debt," the form prescribed for the recovery of penalties. G. L. chap. 266, § 1.

Mr. William L. Foster, for defendants:

Is the term *may* in this statute to be construed as imperative, in the sense of *shall*, or does it indicate that the discretionary power of courts, with regard to the limitation of statutory costs (for there are no costs at common law), may be exercised in such a case as this? "Words and phrases shall be construed according to the common and approved usage of the language." G. L. chap. 1, § 2.

Our statute thus enforces the rule of construction and interpretation which the courts, in the absence of such a statute, have always recognized. 1 Kent, Com. 462 and *notes*.

The word *may* is sometimes a permissive and sometimes a directory word in the construction of a statute. It has frequently been held that the word is to be construed *must* or *shall* where and only where public interests and rights are concerned and where the public

or third persons have a claim *de jure* that the power should be exercised. In other cases the enactment is not imperative. *Blake v. P. & C. R. R.* 39 N. H. 435.

No general rule of construction can be laid down on this subject further than that that exposition ought to be adopted which carries into effect the true intent and object of the Legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions. *Minor v. Mech. Bank*, 1 Pet. 46, 64 (26 U. S. bk. 7, L. ed. 47); *Buffalo Plank Road Co. v. Comrs.* 10 How. Pr. 237; *State, ex rel. v. Holt Co. Ct.* 39 Mo. 521, 524; *Seiple v. Elizabeth*, 8 Dutch. 407, 410; *Williams v. People*, 24 N. Y. 405; *Proctor v. Green*, 59 N. H. 350, 352; *Potter, Dwar.* 220, n. 27.

Again; it is said that in construing statutes the word *may* will be considered as mandatory only for the purpose of sustaining or enforcing, but not for creating a right. *State, ex rel. v. Holt Co. Ct. supra*.

The usual import of the word as used in a statute is permissive. The primary, ordinary, popular and grammatical sense of the word is also the ordinary and usual legal one. The other is the exception. *Warner v. Beers*, 23 Wend. 103, 156; *Commonwealth v. Haynes*, 107 Mass. 194, 197; *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Kelly v. Morse*, 3 Neb. 224, 228; *Beasley v. People*, 39 Ill. 571, 576.

The failure to take the deposition not being by reason of any fault or neglect of the party giving the notice, the statute does not apply to this case; and the plaintiffs' sufficient remedy, on account of their expenses, is afforded by the discretionary power of the court to allow such costs in the pending suit, in which the notice of caption was given, as the court may deem just. G. L. chap. 233, § 2.

The ordinary signification of *may* will not be rejected and an unusual definition substituted. In such a statute the word *and* cannot be construed to mean *or*. *U. S. v. Ten cases of Shawls*, 2 Paine, 162.

If there is such an ambiguity as to leave reasonable doubts of the meaning of the words employed, the court will not inflict the penalty. *The Enterprise*, 1 Paine, 32.

In all cases under penal statutes, where there is a question of doubt, the party of whom the penalty is claimed is entitled to the benefit of the doubt. *Chase v. N. Y. C. R. R. Co.* 26 N. Y. 523; 1 Bl. Com. 88; *Pike v. Jenkins*, 12 N. H. 255, 261.

If a bond or other obligation be upon a condition which becomes impossible by the act of God or by inevitable casualty, the obligor is not bound to pay it. 2 Story, Eq. Jur. § 1307.

If this penalty were provided for in a recognition or other obligation or contract under seal, then by force of another statute, the plaintiffs could recover only "such amount as is equitably due." G. L. chap. 232, § 9.

If the plaintiffs get compensation for their time and expenses, they get all that in justice they are entitled to. See, 2 Story, Eq. Jur. §§ 1314, 1316.

This statute has never been judicially interpreted.

The case of *Voght v. Ticknor*, 47 N. H. 543,

was decided prior to the enactment of the present law and was governed by Rev. Stat. chap. 188, § 2. The terms of that statute were: "Such adverse party shall be entitled to recover," instead of may recover, as the law now stands.

Although the word negligence is generally used in the sense of culpable negligence, Shearm. & Redf. Neg. § 7, its existence is ordinarily a question of fact.

There is no absolute rule as to what constitutes negligence; that conduct which might be so termed in one case being in another properly considered ordinary care. It is always therefore a question of fact as to the relative degree of care or want of it, growing out of the circumstances and conduct of the parties. *Phila. & Reading R.R. Co. v. Spearen*, 47 Pa. St. 300, 305.

Negligence is sometimes defined want of ordinary care under the circumstances of the case. The standard is therefore necessarily variable; no fixed rule of duty can be formed which can apply to all cases. *Schum v. Pa. R. R. Co.* 107 Pa. St. 8, 11; *Galena & C. U. R. R. Co. v. Yarwood*, 17 Ill. 509, 519; *State v. M. & L. R. R.* 52 N. H. 528, 557; *Paine v. G. T. R.* 58 N. H. 611, 613; *Reeves v. D. L. & W. R. R. Co.* 30 Pa. St. 454, 457, 461; *Watson v. Hall*, 46 Conn. 204-207; *Story*, Bail. § 16; *Browne*, Dom. Rel. 180.

In an action to recover a statutory penalty for negligence, it devolves on the plaintiff to establish a negligent omission of duty. *West. U. Tel. Co. v. McDaniel*, 1 West. Rep. 273; *Hall v. Brown*, 54 N. H. 495; *State v. Smith*, 18 N. H. 91; *Tyler v. Flanders*, 57 N. H. 618; *State v. Daniels*, 44 N. H. 383, 386; *Cool*, Torts, 630 and n. 1.

Allen, J., delivered the opinion of the court:

"If any party, after giving notice to the adverse party, as aforesaid, neglects or refuses to take a deposition, such adverse party may recover twenty-five cents a mile for actual travel of himself or his attorney to attend the same, by action on the case, unless seasonably notified in writing, signed by the party giving such notice, that such deposition will not be taken." G. L. chap. 229, § 10.

The defendants claim that upon a fair interpretation of this statute the plaintiffs can only recover the necessary expenses, not exceeding twenty-five cents a mile, for actual travel in attending at the place notified for the caption of the deposition.

The interpretation of the statute is the ascertainment of the legislative intention; and that intention is found by the natural weight of competent evidence. Evidence of an intention that the suffering party should recover the whole sum indicated in the statute is found in the fact that language is used similar to that frequently used in other statutes for the recovery of a definite sum as liquidated damages. The money expended by one town in the support of a poor person chargeable to another town may be recovered of the town chargeable. G. L. chap. 82, § 10.

The person to whom damages are awarded for land taken for a highway "may recover the same with interest." Chap. 70 § 7.

Any person compelled to pay damages for the escape of a prisoner may recover the same, etc. Chap. 220, § 7.

"All penalties and forfeitures may be recovered by action of debt," etc. Chap. 266, § 1.

These are instances of the use of the permissive phrase "may recover" in statutes, where a sum named or one to be found by computation from given data is always the measure of the recovery.

The Act of December 3, 1828, § 7, N. H. Laws, 1880, 507, provided for the recovery of "Double the fees which are allowed by law to witnesses for their travel and attendance at court in the trial of civil causes;" and the language giving the remedy is: "Shall be entitled to have and recover, in an action on the case." Under this statute it does not appear to have been questioned that the recovery, when had, should be the double witness fees named. *Wilson v. Knoz*, 12 N. H. 347; *Gould v. Kelley*, 16 N. H. 551.

By the Revised Statutes, chap. 188, § 22, the adverse party to whom notice was given was entitled to recover of the party neglecting to take the deposition, twenty-five cents a mile for actual travel of himself or attorney to attend the caption. Under that law, the decisions have been that the aggrieved party was entitled to recover according to the rate fixed in the statute. *Powers v. Hale*, 25 N. H. 145, 154; *Voght v. Ticknor*, 47 N. H. 543.

Since the adoption of the Revised Statutes, the only change made in the law was in the enactment of the General Statutes of 1867, G. L. chap. 210, § 10, where the words "may recover," now in the statute, were substituted for the words, "shall be entitled to recover." In making this change the commissioners of revision have not indicated by sign or abbreviation upon the margin of their report that any change, verbal, material or sensible was intended. The obvious and natural meaning of the two phrases as applied to the subject of the statute is the same. The words of the one are abbreviated in the other, but the sense is not changed. "Shall be entitled to recover" is that the party, under the circumstances named, shall have the right, privilege, power to maintain an action and, in the event of success, to recover the amount named in the statute. So the words "may recover," as applied to the object of the proceeding, can only be taken as giving the right; entitling the party, if he chooses, to bring and prosecute the action and, if he proves the necessary conditions, recover twenty-five cents for every mile of actual travel as liquidated damages. Had the Legislature intended that the party complaining should be limited in his recovery to actual expenses, or what might be found equitably due, or to some less sum than that named in the statute, the intention would in some way have been expressed, as has been done in the statute providing for the recovery of any penalty or forfeiture in a recognizance in a civil action and in any obligation or contract under seal, where judgment shall be rendered for the amount found equitably due.

The defendants claim that their accidental omission to take the deposition, with no fault on their part, makes a case not within the meaning of the phrase "neglects and refuses" as used in the statute, and that there can be no recovery beyond the actual damages or

what is equitably due. In *Wilson v. Knox*, *supra*, decided in 1841, when the same words were in the statute, it is said: "The statute was designed to give an adequate and sufficient remuneration for expenses incurred, in case of an attendance agreeably to notice, on a proposed caption of depositions, where no depositions were taken." And in *Gould v. Kelley*, 16 N. H. 559, the "negligence and refusal" of the party failing to proceed with the caption is spoken of as his "default." And in *Voght v. Ticknor*, *supra*, in 1867, the full sum of twenty-five cents a mile was decided to be the true measure of damages, although the defendant was without fault and used due diligence in the attempt to take the deposition.

A uniform construction has been given to the statute in these decisions; and no distinction has been made between cases of innocent omission and willful neglect. The statute fixes the amount of compensation which the party who is notified and attends at the time and place indicated is entitled to recover of the party giving the notice and neglecting to take the deposition.

The plaintiff having attended agreeably to the notice is entitled to recover twenty-five cents a mile for the distance each way actually traveled by his attorney making the journey for the purpose. If the question were a new one, the court might and perhaps would have taken a different view and limited the recovery to such sum as might have been found to be equitably due. But upon a question of statutory construction, we feel bound by the repeated decisions heretofore made.

Case discharged.

Carpenter, J., did not sit; **Blodgett, J.**, dissented; the others concurred.

Samuel ALLARD *et al.*

v.

Ebenezer CARLETON.

For the purpose of making partition of a spring and aqueduct owned in common by several persons a sale of the whole may be ordered by a court of equity, although the right of one of the owners has become appurtenant to his other real estate.

(Coco—Decided March 12, 1883.)

IN equity. On defendant's exceptions to decree. *Overruled.*

Bill praying for partition of a spring and aqueduct leading thereto, owned in common by the plaintiffs and the defendant. Facts found by a referee.

There is no practical mode of dividing the property in question, and no mode of ascertaining when the defendant has his share of the water, but by conducting all the water to a reservoir and thence distributing it to the several owners; and that would entail an unwarranted expense. A sale of the property would be inequitable because the plaintiffs are in a condition to become purchasers and the defendant is

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not. The defendant has heretofore taken water from the aqueduct to supply his hotel premises in Whitefield, and he claimed that his interest in the spring and aqueduct had become an appurtenance to said hotel premises. The value of his interest is \$500, and the most just and equitable disposition of the controversy seems to be that the plaintiffs pay the defendant \$500 for his interest and the defendant thereupon convey the same to them. Upon the coming in of the report, an alternative decree was entered giving the defendant twenty days to elect whether he would accept \$500 for his interest in the property, and providing that in case he should not so elect the whole should be sold by a receiver appointed for that purpose and the proceeds divided among the owners according to their several interests. The defendant claimed that the court had not legal power to order a sale of such property under the circumstances shown, and excepted to the decree.

Messrs. W. & H. Heywood, for defendant.

Messrs. Ladd & Fletcher, for plaintiffs.

Blodgett, J., delivered the opinion of the court:

Whatever is capable of being divided may be the subject of partition in equity; *Allnatt, Partition*, 84; and the inconvenience or difficulty of making partition is no objection. 1 Sto. Eq. Jur. 12th ed. § 656.

Moreover, for the sake of convenience, in equity a recompense may be made by a sum of money to one of the parties, so as to prevent injustice or unavoidable inequality; *Id.* §§ 654, 656; or the court may order a sale of the subject matter and a division among the several owners according to their respective titles, as its powers are adequate to a full compensatory adjustment. *Pell v. Ball's Exrs.* 1 Rich. (S.C.) Eq. 361; *Holmes v. Holmes*, 2 Jones (N.C.) Eq. 384; *Gregory v. Gregory*, 69 N. C. 522; *McGillivray v. Evans*, 27 Cal. 92; *Royston v. Royston*, 18 Ga. 425; *Coleman v. Lane*, 26 Ga. 515; *Graham v. Graham*, 8 Bush (Ky.) 334; *Thurston v. Minke*, 32 Md. 571; *Rose v. Ramsey*, 3 Head (Tenn.) 15.

And if the defendant's right to the spring and aqueduct is to be regarded as an appurtenant to and a part of his hotel property, as he contends, an order of sale of such right in common with those of the plaintiffs might, under the circumstances, properly be ordered if the partition proceedings were at law; G. L. chap. 247, § 25; and the power of the court to make such order can certainly be no less when the proceedings are in equity.

Exceptions overruled.

Clark, J., did not sit; the others concurred.

HARDY

v.

NYE, *Appt.*

1. A declaration upon G. L. chap. 144, § 10 to recover twice the value of stray beasts found and taken up by the defendant, whereof no notice has been given, must allege that the owner was unknown.

2. **Amendments are not allowed** when the facts show that justice does not require it.

(Cheshire—Decided March 12, 1886.)

ON demurrer to declaration. *Judgment for defendant.*

Debt upon G. L. chap. 144, § 10, to recover twice the value of two sheep and two lambs of the plaintiff alleged to have been found by the defendant and taken into his possession, whereof he neglected to give notice to the town clerk of Roxbury, as required by law. Facts found by a referee upon an appeal from the judgment of a justice of the peace; the declaration contained no allegation that the owner of the animals was unknown; and the defendant, at the hearing before the referee, filed a general demurrer.

Mr. Leonard Wellington, for plaintiff.
Mr. Don H. Woodward, for defendant, appellant:

This is an action to recover a penalty. Consequently, not only the law but the report of the referee finding the facts in the case are to be construed strictly against the plaintiff.

Wood v. Adams, 35 N. H. 32, 36.

The statute forbids anyone to take up sheep as strays from April 1, to November 1, unless the same are doing damage in some inclosure. G. L. chap. 144, § 12.

The justice before whom this action was begun had jurisdiction only to recover a penalty not exceeding \$18.33. G. L. chap. 266, § 1.

The declaration does not show nor does the case that the defendant had six days in which to give notice under § 1, chap. 144, G. L. provided the defendant had taken up the sheep as strays.

Blodgett, J., delivered the opinion of the court:

Chapter 144 of the General Laws, relative to strays and lost goods, does not require the taker up or finder to give notice, in the manner there specified, if the owner is known, *Jones v. Smyth*, 18 N. H. 119, and as the plaintiff's declaration does not allege that the owner of the animals in question was not known to the defendant, it consequently states no cause of action entitling the plaintiff to the recovery of the statutory penalty for the neglect to give such notice. Nor will an amendment of the declaration in this respect be permitted, because amendments are allowed solely for the prevention of injustice; and upon the facts reported in this case, justice does not require its allowance. *Redding v. Dodge*, 59 N. H. 98; *Stebbins v. Ina Co.* 59 N. H. 143.

Exceptions sustained.

Judgment for the defendant.

Allen, J., did not sit; the others concurred.

Clinton M. GREEN

v.

Arthur L. CURRIER.

Where **land is subject to two mortgages** held by different persons, and the first mortgagee is in possession for the purpose of foreclosure, his quitclaim conveyance to a purchaser of the

equity of redemption operates as an assignment of the first mortgage, and not as a discharge of it, justice requiring the instrument to have that effect.

(Merrimac—Decided March 12, 1886.)

ON report. *Judgment for defendant.*

Writ of entry. Facts found by the court: December 14, 1870, Francis B. Berry mortgaged his farm, of which the demanded premises constitute a small part, to the Pittsfield Savings Bank to secure his note for \$4,250. June 3, 1881, he mortgaged the same farm to the plaintiff, subject to the foregoing mortgage, to secure his note for \$344.44. February 24, 1883, the Savings Bank filed a bill in equity against Berry and the plaintiff, together with others, for a foreclosure of the mortgage to the bank. The plaintiff did not appear, and the bill was taken *pro confesso* as to him. At the April Term, 1884, it was decreed that the amount due to the bank, as of September 1, 1884, was \$5,697.14, and that the right of redemption should be foreclosed in one year after the bank should be put in possession of the premises. A writ of possession was issued, and the bank put in possession under it, November 10, 1884, and the right of redemption became fully foreclosed on the 10th day of November, 1885. The value of the premises was, from the time of the filing of the bill, and is now considerably less than the amount of the mortgage to the bank. Green made no offer and did not desire to redeem.

September 13, 1883, Berry executed a warranty deed of the demanded premises to the defendant, and September 19, 1883, the bank executed a quitclaim of the same premises to the defendant. These deeds were deposited in the hands of Geo. F. Berry, to be delivered only in case the bank prevailed in the bill in equity, and upon the payment by the defendant to the bank of \$125, which was the full value of the land. The deeds were delivered to the defendant, and the defendant paid \$125 to the bank on the 30th day of December, 1884.

After September, 13, 1883, and before December 30, 1884, the defendant erected a house on the premises with the assent of Berry and the bank, and with the knowledge but without the express assent of the plaintiff. The land and buildings were at the time of the delivery of the deeds and are now of the value of \$2,000 or more.

Mr. A. F. L. Norris, for plaintiff:

If a mortgagee of real estate stand by at a sale of part of the premises by the mortgagor, acquiesce in the sale and receive the consideration of the purchase, that part of the premises is thereby freed from the mortgage. *McCormick v. Digby*, 8 Blackf. Ind. 99; *Waters v. Waters*, 20 Iowa, 363.

Currier is presumed to have paid for the right to redeem only what the land was worth over and above both mortgages. *Wade v. Howard*, 6 Pick. 492.

A deed of release or quitclaim by the mortgagee to the mortgagor or to the owner of the equity of redemption will discharge the mortgage, although the mortgagee has also acquired some other claim or title to the premises. ² *Jones*, Mort. § 972; 1 Hill. Mort. 550, § 50.

Messrs. Chase, Streeter and Shannon, for defendant:

The quitclaim deed from the Pittsfield Savings Bank to the defendant, transferred to him "all the right, title and interest" it then had in and unto the demanded premises. The bank's "right, title and interest" at that time were those of a mortgagee, having possession of the mortgaged premises for the purpose of foreclosure, by virtue of a process of this court, issued in a suit to which the plaintiff was a party, and by the results of which he is bound. By the quitclaim deed from the bank, the defendant acquired said possession and other rights, so far as the demanded premises are concerned; and the plaintiff cannot maintain this action against the defendant any more than he could have maintained a like action against the bank, if it had not transferred its possession to the defendant. *Smith v. Smith*, 15 N. H. 55, 66; *Wallace v. Goodall*, 18 N. H. 439; *Hutchins v. Carleton*, 19 N. H. 487, 514; *Hobson v. Roles*, 20 N. H. 41, 51; *Thorndike v. Norris*, 24 N. H. 454, 460; *Lamprey v. Nudd*, 29 N. H. 299; *Hinds v. Ballou*, 44 N. H. 619.

Under the circumstances of this case, the law will treat the quitclaim as an assignment of the mortgage *pro tanto*. *Bacon v. Goodnow*, 59 N. H. 415, and authorities cited.

Clark, J., delivered the opinion of the court:

The quitclaim deed of the bank to Currier conveyed to him the title of the bank in the premises, which was that of a mortgagee in possession for the purpose of foreclosure; *Hinds v. Ballou*, 44 N. H. 619; and by his continued possession under the deed, the foreclosure proceedings, to which the plaintiff was a party, were completed and Currier's mortgage title became absolute as against the plaintiff. The deed from Berry to Currier is immaterial. It was a conveyance of the equity of redemption which did not affect either of the prior mortgage titles, or the title subsequently acquired by Currier from the bank. It could operate upon the subsequently acquired mortgage title only by way of merger, and there could be no merger because of the intervening mortgage title to the plaintiff. In such a case it is to be presumed as matter of law that the parties did not intend to extinguish the mortgage. The doctrine that where the purchase of an equity of redemption takes an assignment of the mortgage it does not operate to extinguish it, if it be for the interest of the assignee to uphold it, is too well settled to require the citation of authorities. *Bacon v. Goodnow*, 59 N. H. 415; *Stantons v. Thompson*, 49 N. H. 272.

And when it will subserve the purposes of justice equity restores a mortgage released through mistake and gives it to its original priority as a lien. *Hammond v. Barker*, 61 N. H. 58.

Judgment for the defendant.

Carpenter, J., did not sit; the others concurred.

David PERHAM

v.

HAVERHILL FIBER CO. *et al.*

1. It will be ascertained at the trial term whether there are persons not made plaintiffs in a bill in equity, who will be affected by the decree, and if so, such persons may be there joined.
2. A bill in equity may be maintained by an attaching creditor to remove the cloud of a tax deed upon the title to real estate of the debtor which he has attached.

(Grafton—Decided March 12, 1886.)

IN equity. Decree for plaintiff.

Bill to remove a cloud upon the title of two parcels of land in Haverhill created by tax deeds thereof dated February 6, 1885. Facts found by the court:

April 1, 1888 the premises in question were owned by a voluntary Corporation called the Haverhill Fiber Co., which has its principal place of business in Haverhill. Having knowledge of the above facts the selectmen put the premises into the nonresident list, and they were afterwards sold and deeded by the collector to the defendant Pike for the tax of 1888 so assessed on them. The interest of the plaintiff in the premises is that of an attaching creditor of the Fiber Co. The plaintiff is described as trustee of the Haverhill Pulp Co. The defendant objected that the plaintiff's *cestuis que trust* should have been joined as plaintiff in the bill.

Messrs. Chase & Streeter, for plaintiff: If plaintiff's *cestuis que trust* should be made parties, the bill may now be amended in that respect. *Elsner v. Hughes*, 60 N. H. 469; *Stebbins v. Ins. Co.* 59 N. H. 143.

Any evidence which showed knowledge of the board that the Company was resident of Haverhill, was competent. The board, knowing the owners, must tax to them. *Thompson v. Gerrish*, 57 N. H. 87.

Whether the pulp mill was in Walcott's occupancy April 1, 1888, was a question of fact. The presiding justice has found as a fact that it was then occupied by Walcott. That finding is conclusive, unless the court now says that there was no evidence in the case competent to be submitted, tending to show that Walcott then occupied it. *Page v. Parker*, 48 N. H. 368; *Hovey v. Brown*, 59 N. H. 116.

The statute plainly provides that the premises should "be taxed as resident by the number of the lot or such other description as it is commonly known by, with the name of the occupant as such; and the estate so taxed shall be holden and liable to be sold in the same manner as the real estate of residents is holden and sold for taxes." Gen. Stat. chap. 54, § 19.

The assessment of the land as nonresident being irregular, the sale for taxes was unauthorized, and the collector's deed conveyed no title. *Perley v. Stanley*, 59 N. H. 588; *Burr. Tax* 210, and cases cited; *Barker v. Heselstine*, 27 Me. 354.

In *Wells v. Burbank*, 17 N. H. 412, the court say: "The assessment of a larger tax than was authorized, even if the excess is only nine cents,

vitiates the whole proceeding. There can be no valid sale for the collection of it. The maxim, *De minimis non curat lex*, cannot save it."

Under such circumstances as these, courts of equity will exercise jurisdiction and extend relief, on the ground that a cloud on the title exists or is imminent. See, opinions in *Brooks v. Howland*, 58 N. H. 98; *Eastman v. Thayer*, 60 N. H. 408.

Messrs. Geo. W. Chapman and Bingham, Mitchells & Batchellor, for defendant, Pike:

The trustee cannot institute these proceedings in equity relating to the property, without making the *cestuique trust* parties to the proceeding. Dan. Ch. Pl. & Pr. *267; Story, Eq. Pl. § § 207, 209.

This is a merely nominal trustee, having only a paper title. There is no exception to the rule which bars the use of this proceeding to such a party. *Fish v. Howland*, 1 Paige, *20; *Malin v. Malin*, 2 Johns. Ch. *239.

When the petitioner has property legally taxable to him, coming into court for equitable redress, it is reasonable that he himself should do equity. *Perry's Petition*, 16 N. H. 44, 48.

It is a mooted question in this State whether the attachment gives a lien that can sustain the proceedings in equity. *Person v. Monroe*, 21 N. H. 469; *Dodge v. Griswold*, 8 N. H. 428.

Allen, J., delivered the opinion of the court:

The defendants object to a decree, upon the ground that other parties interested in the merits of the proceeding have not been joined as plaintiffs. It will be ascertained at the trial term whether or not there are other persons whose interests would be affected by a decree, and if that be found, they can be joined as parties.

The estate in question being subject to execution, and the plaintiff, having obtained a specific lien upon the property by attachment in his suit at law, may maintain a bill to remove a cloud from the title, when, as in this case, the facts which entitle him to relief are not of record, and the cloud sought to be removed exists or is imminent. *Tappan v. Evans*, 11 N. H. 311; *Stone v. Anderson*, 26 N. H. 506; *Sheafe v. Sheafe*, 40 N. H. 516; *Brooks v. Howland*, 58 N. H. 98; *Eastman v. Thayer*, 60 N. H. 408.

The owners of the real estate being known to the selectmen, the tax should have been assessed against them; G. L. chap. 54, § 11; and the occupant not consenting to be taxed for the property it should have been assessed as resident. G. L. chap. 54, § 19; *Perley v. Stanley*, 59 N. H. 587, 588.

The omission to assess the tax against the owners of the land, known to the selectmen to be such, the occupant not consenting to an assessment against himself, and its assessment in the nonresident list were irregularities which render the sale of the land by the collector invalid; and against the plaintiff's attachment the defendant's title fails.

Decree for the plaintiff.

Smith, J., did not sit; the others concurred.

Sarah A. BARTON

v.

PROVIDENT MUTUAL RELIEF ASSO.

James W. BARTON *et al.*

v.

SAME.

Where the by-laws of a **mutual benefit association**, in the nature of a life insurance company, provide that upon the death of a member the benefit shall be paid to his direction, the member may **change the beneficiary** by surrendering his certificate of membership and procuring a new one made payable to the person therein named.

(Merrimack—Decided March 12, 1886.)

THE first case is covenant broken, to recover \$2,000 as a benefit payable upon the death of George C. Barton. *Judgment for defendant.*

The second is *assumpsit*, to recover the same benefit. *Judgment for plaintiffs.*

Facts agreed: August 16, 1881, George C. Barton made application to the defendants for membership. In this application was the following: "I wish this benefit to be paid to my wife, Sarah A. Barton." A certificate of membership in due form was issued to him August 17, 1881, numbered 1629, which contained the following: "In accordance with the provisions and laws governing said association, a sum not exceeding \$2,000 will be paid by the association as a benefit, upon due notice of his death, and the surrender of this certificate, to such person or persons as he may, by entry on record book of the association, or on the face of this certificate, direct said sum to be paid, provided he is in good standing when he dies." At the date of the issue of this certificate, the name of Sarah A. Barton was entered on the record book of the defendants, as the person to whom the benefit was to be paid upon his death.

February 8, 1883, the above certificate was surrendered by George C. Barton to the company and a new one bearing the same date and number, and called a "duplicate" issued in its place. This last certificate contained the following: "In accordance with the provisions and laws governing said association, a sum not exceeding \$2,000 will be paid as a benefit, upon due notice of his death and the surrender of this certificate, to his parents, James W. Barton and Betsey T. Barton, equally, provided he is in good standing when he dies."

On the right hand margin was the following: "This certificate must accompany the receipt of death benefit." On the left hand margin, "To change beneficiaries, a new certificate will be issued by surrender of this."

This certificate was signed by the president and secretary, and under seal.

George C. Barton died January 2, 1884, leaving his wife, Sarah A. Barton, and his parents, James W. Barton and Betsey T. Barton, and a minor son surviving.

Both plaintiffs claim the \$2,000. The defendant admits its liability to pay \$2,000;

and it is agreed that the deposit of that sum to meet the judgment in this suit, in some savings bank in Concord, shall relieve the defendant from further claim for costs or interest.

Judgment to be rendered in favor of the party entitled to the same. The charter and by-laws of the defendant are made part of the case.

Messrs. Chase & Streeter and Nathaniel E. Martin, for Sarah A. Barton.

Mr. Samuel C. Eastman, for J. W. and Betsey T. Barton:

Life insurance is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life. May, Ins. § 8.

By chap. 171, Gen. Laws, all insurance companies were obliged to make certain reports to the insurance commissioner, but it was not until 1883 that the Legislature subjected this Association, chartered in 1878, to any supervision, or required any report from it. Laws of 1883, chap. 52; Reports of the Ins. Com. prior to 1884.

As the Association is not an insurance company, the certificate is not a policy, and chap. 175 of the Gen. Laws does not apply.

If the designation of the beneficiary is not in accordance with the terms of membership or the contract, no benefit would be paid by the association. *Eastman v. Prov. Mut. Relief Assn. Merrimack Co.* 1888.

There was no vested interest in the original beneficiary. She paid nothing, and was not entitled to claim the fund on contract. *Greeno v. Greeno*, 23 Hun, 478; *Swift v. Railway Pass. Assn.* 96 Ill. 309; *Splawn v. Chew*, 60 Tex. 532; *Richmond v. Johnson*, 28 Minn. 447; *Worley v. N. W. Masonic Assn.* U. S. C. C. Iowa, 11 Ins. L. J. 141.

Messrs. Barnard & Barnard, for defendant:

As to whether this contract is one of life insurance, see, *Durian v. Central Verein*, 7 Daly, 168.

The promise in the original certificate was only to pay a sum not exceeding \$2,000 to such person or persons as he, the said Barton, may direct by entry on the face of the certificate or on the record book of the association. If no beneficiary was named then nothing would be due. *Gigar v. Prov. Mut. R. Assn. Merrimack Co.* August, 1888.

We apprehend the true construction of the contract on this point to be that so long as the member holding the certificate retained the custody and control of the document, and the right to change the beneficiaries, no other person has any vested right in or to it; and this, we think, is in accordance with the adjudicated cases on this subject. *Splawn v. Chew*, 60 Tex. 532.

The person procuring the policy for the benefit of another may reserve the right to change this designation, in whole or in part, and the law will respect any change he may make in the beneficiaries named in the policy in pursuance of such right. Bliss, Life Ins. § 318; *Hutchings v. Miner*, 46 N. Y. 456. See, *Ricker v. Charter Oak Life Ins. Co.* 27 Minn. 193; *Swift v. Ry. Pass. & F. Cond. Mut. Aid & Ben. Assn.* 96 Ill. 309; *Richmond v. Johnson*, 28 Minn. 447; *Greeno v. Greeno*, 23 Hun, 478.

N. H.

Allen, J., delivered the opinion of the court:

The mutual contract between the husband of the plaintiff, Sarah A. Barton, and the defendant Association, provided for a consideration to be paid as a condition of membership and further sums to be paid annually and at other times as assessments, by one party, and a sum not exceeding \$2,000 to be ascertained by rules certain, to be paid by the other party, on the death of the member, to any person designated by him, and is in form and substance a contract of life insurance. 1 May, Ins.; *Commonwealth v. Wetherbee*, 105 Mass. 149.

The contract, though one of life insurance, must be interpreted according to its terms, in view of the laws of the defendant Association and of the evident understanding of the parties. The by-laws provide, that "When a member dies, the Association shall pay within sixty days, to his direction, as entered upon his certificate of membership, the sum of two thousand dollars," if the death assessments amount to that sum. The certificate of membership provides that "In accordance with the provisions and laws governing said Association, a sum not exceeding \$2,000 will be paid by the association as a benefit, upon due notice of his death and the surrender of the certificate, to such person or persons as he may, by entry on the record book of the association, or on the face of this certificate, direct said sum to be paid, provided he is in good standing when he dies." The power of direction as to the object of the benefit is given to the member, both in the by-law and in the certificate of membership, and there is nothing in either tending to show that the power is to be exercised at the time of becoming a member, or that when exercised, the power is exhausted and another beneficiary cannot be substituted. The power of selection is unlimited as to persons and is limited in time only by the death of the member. The certificate remains in the possession and control of the member until death, and the provision for paying the benefit to the person named in the certificate at the death of the member, as then appears, leaves the power to appoint the beneficiary continuous until that event. The power of appointment is the one thing in the contract which is given to the member, and over that power no other person has any control. The right of its free exercise requires its continuance until death. The appointment by Barton of the plaintiff, his wife, to the benefit, at the time he became a member, was no bar to his right to appoint another or others by a subsequent change. She was no party to the contract and acquired no vested right in the benefit. The contract was between Barton, her husband, and the defendant, which on the performance of the conditions of membership, agreed to pay the benefit to any person whose name might appear by his entry on the record book or the face of the certificate at his death. The power of appointment being free and continuous, no right to the benefit could vest in the plaintiff until it became certain that her name remained in the certificate as beneficiary at her husband's death. If by the entry of her name as beneficiary, the plaintiff acquired any interest whatever in the benefit, it was only a contingent interest, which her husband had the

power to defeat, and which he has defeated, by exercising the power of substitution in the appointment of other beneficiaries.

Chapter 175, G. L., which gives the benefits of life insurance to the beneficiaries named in the contract to the exclusion of the creditors and personal representatives of the assured, does not attempt to control or interpret contracts of insurance, but protects beneficiaries, whoever they may be found to be, and has no application here. The plaintiffs, James W. and Betsey T. Barton, are entitled to the fund.

There must be judgment for the defendant in the suit of Sarah A. Barton, and for the plaintiffs in the suit of James A. and Betsey T. Barton.

Smith, J., did not sit; the others concurred.

Jane M. VANDEWALKER *et al.*

v.

William H. ROLLINS *et al.*

1. A by his will gave \$10,000 to B in trust for C, the income to be paid to C for life, with remainder to the children of C, if she had any, and if she had none then to D. C had no children. D died in the lifetime of C, leaving one child. **Held**, that the remainder became vested in D immediately on the death of the testator subject to be devested by the birth of a child to C; and that on the death of C without children the fund passed to the heir at law of D.
2. B by his will gave \$12,000 to E and F in trust to pay the income to C for life, remainder to her children, if she had any, and if she had none, to such person or persons as she might appoint, and made E and F general residuary legatees. C died leaving no child and without making any appointment of the fund. E and F both died before C. **Held**, that upon the death of B the remainder became vested in E and F, subject to be devested by the birth of a child to C; and that upon the death of C without children the fund passed to the legal representatives of E & F.
3. The quality of property for purposes of transmission by will or inheritance is not changed from that in which the testator or intestate left it, unless there is some clear act or intention by which he has impressed upon it a definite character either as money or land. And when for the security of the fund money is converted into land by a judicial decree, the land is substituted for the fund and goes to the person who would have taken the fund had it remained specifically personal estate.

(Rockingham—Decided March 12, 1886.)

IN equity. *Decree for plaintiffs.*

Bill brought by Jane M. Vandewalker, guardian of Charles March Stephens, minor, and John S. H. Frink, administrator of the estate of Susan S. March St. Clair, against William H. Rollins, trustee, and the heirs of

Frances Freeman; asking for an accounting by said trustee, and payment and delivery of the sums of money and securities and the transfer of the estate in his hands to the plaintiffs. Facts found by the court:

The claims of the plaintiffs arise under the wills of Charles W. March and of John Howard March respectively. Charles W. March by his will, gave to Clement March in trust for his sister, Susan S. March St. Clair, the sum of \$10,000, the income to be paid her for her life, with remainder to her children, if she had any, and, if she had none, then to his niece, Susan Sparhawk Stephens.

In the lifetime of Susan S. March St. Clair, Clement March, the trustee, became embarrassed; and such proceedings were had that a portion of said fund was secured by liens on his property, and, by order of the court, was placed in the hands of the defendant Rollins, as trustee, to hold according to the terms of Charles March's will.

Susan Sparhawk Stephens died in the lifetime of Susan S. March St. Clair, leaving one child, Charles March Stephens, the claimant; and neither Mrs. Stephens or Mrs. St. Clair left any husband.

Charles W. March made Clement March his residuary legatee. Clement March died in West Virginia, unmarried, childless, and without will, and by the laws of that State, Susan S. March St. Clair and Charles March Stephens were his heirs at law.

Susan S. March St. Clair died in the District of Columbia, intestate, as to this estate, and by the laws of the District, Charles March Stephens was her heir at law.

By the laws of the State of New Hampshire her aunt, Frances Freeman, who was living at the death of Mrs. St. Clair, would have been her next of kin and heir at law. The claim arising under the will of John Howard March presents the following facts: John Howard March was the uncle of Charles W. March, Clement March, Susan S. March St. Clair, and of one Frank March, who died many years ago leaving a daughter, Susan Sparhawk Stephens, who died, after John Howard and Charles W., but before Clement and Susan St. Clair, leaving no husband, and an only child, Charles March Stephens, the claimant.

Frances Freeman was not related by blood to John Howard March, but was an aunt of Charles W., Clement and Susan St. Clair, being a sister of their mother. She survived all of them and died, leaving the defendants, except Rollins, as her heirs at law.

John Howard March by will gave to Charles W., and Clement March, his nephew, in trust, the sum of \$12,000, to pay the income to Susan S. March St. Clair for life, and in case she left children, to divide the same among them, and, in case she left no husband or child, the bequest was to go to such person or persons as she might appoint.

She died in the District of Columbia, having no husband or child, and making no appointment and disposition of this fund.

John Howard March made no other disposition of this fund, but made Charles W. March and Clement March his residuary legatees.

Clement March died in West Virginia, July 25, 1878, leaving no will. Under the laws of West

Virginia, his sister, Susan S. March St. Clair and Charles March Stephens were his heirs at law.

Susan S. March St. Clair, died July 3, 1883, in the District of Columbia, and by the laws of that District, Charles March Stephens was her heir at law.

By the laws of New Hampshire, Frances Freeman was her heir at law.

John Howard March died in 1864. At his death said fund was personal estate, and remained so until August 15, 1872. After the death of Charles W. March, Clement March, the surviving trustee, being embarrassed, such legal proceedings were had, that it was adjudged by the court that there was due from Clement March \$12,000 on account of the fund; and the Temple in Portsmouth, valued at \$4,500, four houses on Cabot Street, valued at \$7,500, and \$500 in money of Clement March's property was assigned to Mr. Rollins, trustee, to hold in trust, in fee, with power to sell the realty, to hold the same in trust, and apply the income according to the provisions of said legacy.

When Susan S. March St. Clair died in 1883, it had all been changed into personalty excepting two houses on Cabot Street.

When Clement March died in 1878, there were four houses in Cabot Street not sold, the temple having been previously burned, and the insurance being invested in personalty.

As to the fund left by Charles W. March to Mrs. St. Clair for life, and to her children if she had any, and if she had none, to Mrs. Stephens, the mother of the claimant Charles March Stephens, absolutely there can be no controversy.

Messrs. Frink & Batchelder, for plaintiffs:

We say the second fund, from John Howard March, passed to Charles and Clement, or their representatives, upon Susan's death, by virtue of the residuary clause in the will of John Howard March. "A residuary gift of personal estate carries not only everything not in terms disposed of, but everything in the event that turns out not to be well disposed of." 2 Jarm. Wills, 365; *Thayer v. Wellington*, 9 Allen, 295; *Bigelow v. Gillett*, 123 Mass. 107.

The court did not intend to convert any portion of the fund from one species of property to another, but simply intended to make the fund safe and secure. Like the case of an infant's estate, when his personal property is used to pay off incumbrances on his real estate, the personal property so employed is still regarded as personalty, notwithstanding its incorporation into real estate. 2 Perry, Trusts, § 611.

The court never converts or changes a fund from one species of property to another, unless the testator's intention to create an equitable conversion is manifest, so as to change the character of the inheritance. *Boydton v. P. & S. R. R. Co.* 4 Cush. 467.

Mr. J. W. Emery, for defendant, Rollins.

Messrs. Marston & Eastman, for other defendants.

Allen, J., delivered the opinion of the court: Charles W. March by his will gave to Clement March \$10,000 for the use of his sister, Susan S. March St. Clair for life, remainder to her children, if any, and if none, then to his niece, Susan Sparhawk Stephens. Mrs. Ste-

phens died in the lifetime of Mrs. St. Clair, leaving no husband and one child, her heir, Charles March Stephens, the plaintiff. Mrs. St. Clair died leaving no husband nor child.

It was evidently the intention of the testator that his niece, Sarah Sparhawk Stephens, should take the fund in trust for the use of Mrs. St. Clair, in the event of her death without a child. Having no child at the death of the testator, the estate vested immediately on his death in Mrs. Stephens, subject to be divested on the birth of a child to Mrs. St. Clair. Mrs. Stephens, at any time after the death of the testator, on the termination of the life interest of Mrs. St. Clair without children, would have taken the fund. The fund vesting in Mrs. Stephens and never having been divested by the birth of a child to Mrs. St. Clair, on her death, the plaintiff, heir to Mrs. Stephens, became entitled to the fund.

Under the will of John Howard March \$12,000 was given to Charles and Clement March in trust to pay the income to Mrs. St. Clair for life, remainder to her children, if any, and if not to such person or persons as she might appoint. Charles and Clement were made general residuary legatees in the same will. Mrs. St. Clair died leaving no child and made no appointment of the fund. On her death, therefore, when the trust ceased, the fund fell to the representatives of Charles and Clement March, residuary legatees under the will by which the trust was created, and both of whom died before Mrs. St. Clair. For the general residuary bequest carried with it everything not in terms disposed of, or in the event not well disposed of, and every lapsed legacy. *Mathes v. Smart*, 51 N. H. 433, 443; *Tappan's App.* 55 N. H. 317, 324; *Brigham v. Shattuck*, 10 Pick. 306, 309; *Clapp v. Stoughton*, 10 Pick. 463; *Thayer v. Wellington*, 9 Allen, 295; *Bigelow v. Gillett*, 123 Mass. 107; 2 Jarm. Wills, 365; 2 Redf. Wills, 442; *Helms v. Franciscus*, 2 Bland, Ch. (Md.) 544; Wms. Exrs. 1453, and notes; *James v. James*, 4 Paige, 115; *Van Kleeck v. Reformed Dutch Ch.* 6 Paige, 600; *Gore v. Stevens*, 1 Dana, 201, 206; *Bolles v. Smith*, 39 Conn. 217.

Charles March made Clement March his residuary legatee, to whom by the same principle, his interest passed; and from Clement, who died intestate, the whole interest, subject to the contingency of the birth of a child to Mrs. St. Clair, and to her exercising the power of appointment, passed to his heirs, which by the laws of his domicile were Mrs. St. Clair and the plaintiff Stephens. At her death, she leaving no child, and not having designated anyone to take the estate, the plaintiff was entitled to the immediate possession of one half the estate, and as heirs of Mrs. St. Clair by the law of her last domicile, of the other half, if for the purposes of distribution the fund retained its original character of personalty. By the law of New Hampshire Frances Freeman was heir of Mrs. St. Clair, and if, at her death, any part of the fund, for purposes of descent or distribution, was real property, then the defendants, representatives of Frances Freeman, are entitled to Mrs. St. Clair's share of the estate.

The quality of property for purposes of transmission by will or inheritance is not changed from the character in which the testator or intestate has left it, unless there is some clear act

or intention by which he has impressed upon it a definite character either as money or land. Story, Eq. 1214.

A bequest of money in trust to be converted into land to be held to the use of one for life, with remainder over, is a devise of the land which takes effect on the death of the testator, though the money has not then been converted; and a devise of law with power of sale and direction to pay the proceeds to particular persons for particular purposes, is a bequest of the money as a legacy to the persons and for the purposes named. The property passes as land or money according to the quality impressed upon it by the testator. If no intention appears in the will to convert money into land, or if the conversion be made by the direction of the testator, by judicial decree or by operation of law, for the mere purpose of investment, or for the greater security of the fund, the land is substituted for the fund, and shall go to the same persons and upon the same contingencies, which would have affected the fund had it remained specifically personal estate. *Holland v. Cruft*, 3 Gray, 162; *Holland v. Adams*, Id. 188; *Oestlager v. Fisher*, 2 Pa. St. 467; *Craig v. Leslie*, 3 Wheat. 577; *Wms. Exrs.* 658; 1 Jarm. Wills, *584; *Perry, Trusts*, 453.

The testator gave the fund as a sum of money

to be held in trust for investment and to pay the income to Mrs. St. Clair for life. No intention can be found in the will that this money should be converted into land and the land at the end of the life estate pass to the persons designated then to take it. On the contrary, the intention is plain that the fund should retain the character of personal estate throughout, and that the trustees should then "Pay, apply, and dispose of said sum of \$12,000 to such person or persons and in such way or manner, as the life tenant by will might appoint." She having failed to appoint, the persons upon whom by law the fund devolved as personalty were entitled to take it, although at the time for purposes of security, it had been partly converted into land. The decree by which the present trustee holds the property was made for the protection of the fund, and neither changed the purposes of the trust nor the character or quality of the fund, nor its ultimate destination. For purposes of transmission, on the termination of the trust by the death of the life tenant, it retained the character given it by the testator, and it must pass to the persons who by law would be entitled to take it were it personal estate.

Decree for the plaintiffs.

Clark, J., did not sit; the others concurred

NOTE. Nothing is better established than this principle: that money directed to be employed in the purchase of land, and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted. *Craig v. Leslie*, 3 Wheat. 578 (16 U.S. bk. 4, L. ed. 460,) citing *Fletcher v. Ashburner*, 1 Brown, Ch. 497; *Doughty v. Bull*, 2 P. Wms. 320; *Yates v. Compton*, Id. 308; *Trelawney v. Booth*, 2 Atk. 307.

The principle upon which this doctrine is founded is that a court of equity, regarding the substance and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done as having been actually performed, where nothing has intervened to prevent performance. *Craig v. Leslie*, 3 Wheat. 577 (16 U. S. bk. 4, L. ed. 463.)

When the ancestor directs land to be sold by absolute direction and not in the discretion of the executor, the land is considered money from the date of the ancestor's death. *Compton v. McMahon*, 2 West. Rep. 186. It is no objection to this doctrine, that the period of sale is remote and that conversion cannot be made until the time arrives. *McClure's App.* 72 Pa. St. 414; *Hocker v. Gentry*, 3 Met. (Ky.) 463. See however, *Arnold v. Gilbert*, 5 Barb. 190.

But if the time of sale is discretionary in the executor, conversion does not take place till sale by

the executor. *Compton v. McMahon*, 2 West. Rep. 188.

Such is the law in Kentucky. *Haggard v. Rout's Heirs*, 6 B. Mon. 249.

And in New Jersey. *Den v. Snowhill*, 3 Zab. 447; *Herbert v. Smith*, Saxt. 141; *Fluke v. Fluke*, 1 C. E. Green, 478.

And in New York. *Jackson v. Burr*, 9 Johns. 104; *Jackson v. Schaubert*, 7 Cow. 167; *Moncrief v. Ross*, 50 N. Y. 431.

In the latter case, i. e. when the time of sale is discretionary in the executor, the land descends to the heir the title being subject, of course, to the execution of the power. *Compton v. McMahon*, 2 West. Rep. 188; See, *Kirkman v. Miles*, 13 Ves. Jr. 338; *Edwards v. Countess Warwick*, 2 P. Wms. 171.

Hence a purchaser at execution sale of the interest of the heir in the land, before the executor's sale, no election having been made by the beneficiary, acquires only a title to the land extinguishable by the exercise of the power of sale. *Compton v. McMahon*, 2 West. Rep. 188.

The purchaser will not be entitled to the personal interest of the legatee, although he be at the same time the heir; *Allison v. Wilson's Exrs.* 13 Serg. & R. 330; under the legal maxim that where two rights unite in the same person they are to be viewed as if they existed in different persons.

SUPREME COURT OF RHODE ISLAND.

Albert BURDICK,

v.

Reuben BURDICK *et ux.*

When the **general issue and special pleas** are pleaded and a verdict is found for the plaintiff on the general issue, which clearly could not have been so found if any of the special pleas had been supported, the verdict is in effect a **verdict for the plaintiff on all the pleas.** (*Carroll v. Graham*, 8 R. I. 242, followed.)

(Washington—October. 24, 1885.)

MOTION in arrest of judgment. *Overruled.*
The case is stated in the opinion.

Messrs. Thomas H. Peabody and Charles Perrin, for defendants:

In the action of ejectment as conducted at common law, the plea must be in general issue; and the defendant will not be permitted to plead specially, in bar to this action, matters which in most actions would be required to be set up specially; and consequently all such matters may be given to evidence under the plea of the general issue. *Tyler, Eject.* 464-5. And see, § 7 of chap. 212, Pub. Stat.; *Slocumb v. Powers*, 10 R. I. 256, 257.

By section 2 of chapter 175, Pub. Stat., it is provided that said chapter 175, being pleaded in bar and being duly proved, shall be allowed to be good, valid and effectual in law for barring such action. See also, *Moury v. Providence*, 10 R. I. 58; *Union Sav. Bk. v. Taber*, 18 R. I. 694, 695.

The title, by possession, is as perfect against all the world as it would have been under the Statute 4 Henry VII. The defendant may plead it, as he might plead a title acquired by any mode of common assurance. *Clarke v. Cross*, 2 R. I. 442, 8.

It is not necessary that a verdict should follow the precise language of the issue; but it must be responsive to it and so expressed as to render it certain that the jury decided the question or questions submitted to them; and any uncertainty on this point is fatal. *Coffin v. Jones*, 11 Pick. 47. And see, *Hamilton v. Colt*, 14 R. I. 209; *Boynton v. Page*, 13 Wend. 425; *Fenwick v. Logan*, 1 Mo. 401; *Anderson v. Anderson*, 4 Hayw. (Tenn.) 255; *Powell v. Harter*, 5 Ham. (Ohio) 259; *Carr v. Stevenson*, 5 Humph. 559; *Vines v. Brownrigg*, 2 Dev. 537; *Kirkpatrick v. S. W. Railroad Bk.* 6 Humph. 45; *Chevell v. Chapman*, 42 N. H. 47; *Lovell v. North*, 4 Minn. 82; *Tybs v. Brown*, 2 Grant, Cas. 89; *Dominick v. State*, 40 Ala. 680; *Kegwin v. Campbell*, 1 Root, 288; *Bemus v. Beekman*, 8 Wend. 687; *Kilbourn v. Waterous*, Kirby, 424; *Grice v. Ferguson*, 1 Stew. (Ala.) 36.

Mr. Albert B. Crafts, for plaintiff:

As to pleas of title, see, *Carroll v. Graham*, 8 R. I. 242; *Porter v. Rummery*, 10 Mass. 64; *French v. Hanchett*, 12 Pick. 15; *Sutton v. Dana*, 1 Met. 888.

The dictum in *Hamilton v. Colt*, 14 R. I. 209, cited for defendant, does not apply, as there is a marked difference between the issue raised by R. I.

non cepit in replevin and the general issue in ejectment. See, 2 Greenl. Ev. 13th ed. pt. 4, §§ 804, 562; *Tripp v. Ide*, 3 R. I. 51, 56.

In Massachusetts and Connecticut and many other States, title in the defendants by adverse possession may be shown under the general issue, *Overseers v. Sears*, 22 Pick. 122, 124; and probably it could be done under our practice.

A verdict on the general issue often covers defenses that must be raised by special pleas. See, *Tripp v. Ide*, *supra*.

The jury could not have returned such a verdict, unless they had found in favor of the plaintiff and against the defendants on every plea of title, by adverse possession or otherwise; and therefore the verdict should so far be sustained on the authority of *Carroll v. Graham*, *supra*.

Durfee, Ch. J., delivered the opinion of the court:

This is a motion in arrest of judgment for insufficiency in the verdict. The action is trespass and ejectment. The defendants pleaded: first, freehold; second, the Statute of Possessions; third, an easement; and fourth, not guilty.

The case was tried on all the issues, and the jury returned a verdict that the defendants were "guilty in manner and form," etc., and assessed damages for the plaintiff in the sum of ten cents. We think it must be held on the authority of *Carroll v. Graham*, 8 R. I. 242, that the verdict was in effect a verdict for the plaintiff on all the issues.

The defendants argue that the verdict is insufficient, because at least some of the defenses specially pleaded were not available under the general issue. The argument rests on the assumption that a verdict for the plaintiff, which is in form a verdict on the general issue, is insufficient, unless the defenses set up by the special pleas could have been set up without them under the general issue.

The doctrine of *Carroll v. Graham* is broader than that. The doctrine is that the courts in construing a verdict look rather to the substance than the form, and that a verdict for the plaintiff, which could not have been properly found for him without finding all the issues in his favor, will be regarded as a verdict for him on all the issues and judgment will be entered for him accordingly.

Carroll v. Graham was an action of *assumpsit*, to which the defendant pleaded the general issue and the Statute of Limitations. The verdict was in form a verdict on the plea of the general issue; *i. e.* that the defendant did not promise, etc., with damages for the plaintiff. The court nevertheless held that it was virtually a verdict for the plaintiff on both of the issues. It did so, not because the defense specially pleaded would have been set up under the general issue, for it would not have been, but because the jury could not have found such a verdict unless they had found the issue under the plea of the statute against the defendant.

The rule is well stated in *Browning v. Skillman*, 24 N. J. Law, 851, 855, as follows, to wit: "Whenever the general issue and a special plea are pleaded, and a verdict is found for the plaintiff on the general issue, if it is apparent that the verdict could not have been so found if the special plea had been supported, the omis-

sion is matter of form only." See also, *Martin v. Williams*, 7 Humph. 220.

The verdict in the case at bar not only finds that the defendants are guilty but also assesses damages for the plaintiff. This assessment removes all doubt, if otherwise any there were, in regard to the meaning of the verdict, and shows that the jury must have found all the issues for the plaintiff; for if they were rightly instructed, as we must presume they were, they must have known that the defendants were not liable to even nominal damages for doing anything which they showed they had a right to do or were justified in doing.
Motion overruled.

PETITION OF Nelson E. CHURCH and J. Erastus Lester for an Opinion of the Court.

Public Statute R. I. chap. 209, § 4, clause 2, **exempting from attachment** the necessary working tools of a debtor, not exceeding in value \$200, covers only tools used in manual labor and does **not cover a lawyer's law books.**

(Providence—Decided January 30, 1886.)

CASE stated for an opinion of the court, under Pub. Stat. R. I., cap. 192, § 28.

Mr. Nelson E. Church, *pro. per.* for petitioners.

Per Curiam:

The court is of opinion that the provision of the statute exempting from attachment the working tools of a debtor necessary in his or her usual occupation not exceeding in value the sum of \$200, Pub. Stat. R. I., cap. 209, § 4, clause 2, covers only such utensils or implements as the debtor is accustomed to use in manual work or labor in his or her usual occupation, and does not extend to a library of law books belonging to a lawyer when such lawyer is the debtor.

Decree accordingly.

Re LIQUORS OF George W. HOXSIE & Co.

1. Pub. Stat. R. I., chap. 87, § 39, provides: "All **intoxicating liquors** and the vessels containing the same, seized under this chapter, which were kept for sale in violation of law, shall be **forfeited** to the State and the officer making such seizure shall forthwith proceed to prosecute for the forfeiture thereof in the manner provided by law." **Held**, that the words "the officer * * * shall forthwith proceed" were directory, and that **delay** on the part of the officer did **not relieve the liquors from forfeiture.**
2. An **information for the seizure of intoxicating liquors** under the statute, charged that the liquors were kept "for sale within the State in violation of law." **Held**, that the information was **sufficient** without the addition of

"with force and arms," "against the statute," "with intent to sell," and without negative averments.

(Washington—Decided January 30, 1886.)

ON claimants' exceptions to the Court of Common Pleas, in proceedings for forfeiture under Pub. Stat. R. I. chap. 87. *Overruled.*

Messrs. Crafts & Tillinghast, for claimants.

Mr. Charles C. Mumford, *Asst. Atty-Gen.*, for State.

Stiness, J., delivered the opinion of the court:

The only exceptions presented at the hearing relate to the sufficiency of the information. Pub. Stat. R. I. chap. 87, § 39, provides that the officer making a seizure of liquors "shall forthwith proceed to prosecute for the forfeiture thereof in the manner provided by law." In this case a little over three months elapsed between the seizure and the filing of the information. The defendants therefore claim that the officer in failing to make complaint forthwith, lost his right to complain at all and became a trespasser *ab initio*. We think the provision in the statute is directory. It is intended to bring the question of forfeiture to a speedy trial and to impose responsibility upon an officer for unnecessary delay.

But, having said that all liquors seized under this chapter shall be forfeited if the cause of forfeiture be proved, it cannot be supposed that the Legislature intended that the neglect of an officer to prosecute speedily should exempt liquors from forfeiture which are kept for sale in violation of law. The forfeiture depends upon the breach of the law and not upon the diligence of the officer. Several cases are mentioned in the statutes in which an officer may arrest persons without a warrant and detain them a certain number of hours for prosecution; *e. g.*, for disturbing meetings; fighting birds and animals; cruelty to animals; stealing oysters from beds; stealing growing fruit and vegetables, and refusal to leave disorderly houses.

Suppose an officer should detain a person, charged with one of these offenses, longer than the specified time; could anyone claim that the offender was thereby exculpated? The officer may become liable for illegal detention, but the prisoner will still be held to answer for his offence, if proved. So if an officer neglects to prosecute for the forfeiture of goods seized, as in *Kent v. Willey*, 11 Gray, 368, he may be treated as a trespasser *ab initio*, for, in such a case, no justification of the seizure is shown. The cases cited by the defendants do not touch the point. They are cases relating to the civil liability of an officer, when he does not show a justification under the law.

The next objection is that the information is informal and insufficient, because it does not charge an offense, "with force and arms," against the statute; that it does not contain negative averments setting out a lack of authority to keep liquors for sale, and does not charge that they were kept with intent to sell.

An information is in the nature of a criminal prosecution and must set out fully the charge upon which the forfeiture is to be based. Gen-

erally, however, if a charge conforms to a statute, in setting out an offense, it is sufficient.

Public Statute R. I. chap. 87, § 29, provides that "No negative allegations of any kind need be averred or proved in any complaint under this chapter."

Also section 61 provides that proof of a violation of any of the provisions of the chapter, the substance of which is briefly set forth in the complaint or information, shall be sufficient.

Further; section 28 provides that the form there given, "If substantially followed, shall be sufficient in law to fully and plainly, substantially and formally describe the offenses set forth" in sections 25, 26, the latter of which is for keeping liquors for sale unlawfully.

The charge in this information is that the liquors described were kept by the defendants "For sale within this State, in violation of law, upon said date." Comparing this with the provisions above referred to, we think that the form given in section 28 is substantially followed. The addition of the words "with force and arms," or the use of the phrase "against the statute," instead of "in violation of law," would give to the defendants no more definite information of the charge than is given in the form used.

Reference is made in the information to chapter 87, under which the liquors were seized, and the words "kept for sale" are quite as explicit as the words "kept with intent to sell." The language of section 26 is "kept for the purposes of sale."

All the essential elements of the charge are contained in the information. Upon this point, see, *Commonwealth v. Sprague*, 128 Mass. 75, and *State v. Mohr*, 53 Iowa, 261.

The other exceptions are not pressed nor do they, in our opinion, require attention.

Exceptions overruled.

James REYNOLDS

John B. HENNESSY *et al.*

1. A mortgage in the usual form gave to the mortgagee power of sale, making the mortgagee, his executors, administrators and assigns, the mortgagor's "attorneys irrevocable, with full power of substitution and revocation," authorizing them to sell in case of default and after notice, and to pay the expenses of sale and the debt secured, accounting to the mortgagor, his heirs and assigns, for the surplus. Held, that mortgagee did not hold an express or technical trust; that any surplus resulting from a sale under the powers of the mortgage was the equity of redemption converted into money; that this surplus was recoverable at law; and that the right of action to recover this surplus accrued soon after the sale and without previous demand.

2. A mortgagee sold under the powers of the mortgage in 1872. In November, 1881, the successor in title of the mortgagor filed a bill in equity against the

mortgagee for an account. The answer set up as a plea the Statute of Limitations. Held, that the plea should be sustained.

3. The mortgage was executed in 1870. The mortgagor died in 1872, having conveyed his equity of redemption by a deed which was afterwards, in 1879, set aside as procured by the grantee's fraud. Held, that the pendency of equitable proceedings to set aside this deed did not suspend the operation of the Statute of Limitations. The deed, void by fraud, could have been attacked at law by suing for the surplus of the mortgagee's sale, as well as in equity.

(Providence—Filed January 23, 1886.)

BILL in equity for an account. On plea of the Statute of Limitations. *Bill dismissed.*

The case is further stated in the opinion.

Messrs. Charles Bradley, Albert R. Greene and George B. Barrows, for complainant:

As between trustee and *cestui que trust* in the case of an express, subsisting and technical trust, which comes within the proper, peculiar and exclusive jurisdiction of courts of equity, the Statute of Limitations does not apply, and no lapse of time is a bar. 2 Perry, Trusts, § 863; Angell, Lim. § 166; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Pratt v. Northam*, 5 Mason, 95, 112.

That there is, in this case, a trust such as equity takes cognizance of is clear. 4 Kent, Com. *146, 147; *Chaffee v. Franklin*, 11 R. I. 578; *Howard v. Ames*, 3 Met. 308; *Korns v. Shaffer*, 27 Md. 83.

That there is an express trust is no less clear because it was created by the express and intentional act of Bartley Reynolds when he made the mortgage with a power of sale, which alone created the right to sell, prescribed the mode and defined the purposes of the sale, and directed the disposition to be made of the proceeds. 1 Perry, Trusts, §§ 24, 73; 1 Story Eq. Jur. § 980; 1 Spence Eq. Jur. [*495.]

The essential elements of a trust are legal ownership of property in one, and some beneficial or equitable interest therein in another. 1 Perry, Trusts, § 2; 2 Story Eq. Jur. § 964; *Seymour v. Freer*, 8 Wall. 202 (75 U. S. bk. 19, L. ed. 306).

In executing a power of sale, the mortgagee is the trustee of the debtor and must act *bona fide* and adopt all reasonable modes of proceeding to render the sale most beneficial to the debtor. *Howard v. Ames*, 3 Met. 308; 2 Perry, Trusts, § 602, l.

The mortgagee himself under such a power becomes a trustee for the surplus. 4 Kent, Com. *146, 147.

The union of two separate and distinct characters or offices in one and the same person at one and the same time respecting one and the same thing is not unknown, and equity will separate and distinguish the act and duties of the one from those of the other. *Phillipo v. Munnings*, 2 Mylne & C. 309.

Trust mortgages and mortgages with power of sale are identical as trusts. Perry, Trusts, §§ 602 d, 602 l; Hill, Trustees, *386; 2 Spence,

Eq. Jur. *633, 634; *Judge Dillon's* article in Am. Law Reg. N. S. September and October, 1863; *Sayles v. Tibbitts*, 5 R. I. 79.

The mortgagor has no legal title to the money or any part of it produced by the sale. He could not sue the purchaser for it. His legal title to any part of it arises only when the trusts have been performed or are admitted to have been performed, and the surplus ascertained and stated or admitted; and then and not until then an implied *assumpsit* arises to pay such sum. *Case v. Roberts*, Holt, 500; *Edwards v. Lowndes*, 1 El. & B. 81; *Bartlett v. Diamond*, 14 Mees. & W. 49; *Bond v. Nurse*, 10 Ad. & E. N. S. 244; *Pardoe v. Price*, 16 Mees. & W. 451; *Roper v. Holland*, 3 Ad. & E. 99; *Edwards v. Bates*, 7 M. & G. 590; *Howard v. Brownhill*, 23 L. J. Q. B. 23; *Johnson v. Johnson*, 120 Mass. 465; *Dias v. Brunell*, 24 Wend. 9.

In Massachusetts the courts had equity powers conferred upon them to a very limited extent from time to time until 1877, when jurisdiction was granted to them in all cases where there is not a plain, adequate, and complete remedy at law. The common-law courts, therefore, from necessity and to prevent a failure of justice, were forced for many years to take cognizance of matters and apply common-law remedies in a manner unknown to the common law; and later, when sitting with full equity powers, the courts have declined to take jurisdiction of a case if there is a remedy at law under their peculiar system, although cases are excluded thereby which are of equitable cognizance according to the principles of general jurisprudence. *Newhall v. Wheeler*, 7 Mass. 189; *Arms v. Ashley*, 4 Pick. 71; *Pratt v. Pond*, 5 Allen, 59; *Jones v. Newhall*, 115 Mass. 244, 1 Pom. Eq. Jur. §§ 286, 311-318.

So in Pennsylvania, except that the equity power of the court is not limited. 1 Pom. Eq. Jur. §§ 286, 339-341.

In the case at bar there was an open account, because Hennessy had never rendered an account. The term "open account" is used in opposition to a stated account, wherein the account is closed by an assent to its correctness by the party charged. *Whittlesey v. Spofford*, 47 Tex. 13; *Wedderburn v. Wedderburn*, 4 Mylne & C. 41.

Even in those cases of express trusts which are cognizable at law, the Statute of Limitations does not begin to run until there has been a denial of the title of the *cestui que trust* by the trustee, brought home to the former's knowledge. *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Goodrich v. Pendleton*, 3 Johns. Ch. 884; *Cook v. Williams*, 1 Green, Ch. (N. J.) 209; *Jones v. McDermott*, 114 Mass. 400; *Seymour v. Freer*, 8 Wall. 202 (75 U. S. bk. 19, L. ed. 306).

On the same principle where one deposits money in the bank, subject to check at convenience, the Statute does not begin to run until demand and refusal, or some adverse claim be made. *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92; *Adams v. Orange Co. Bank*, 17 Wend. 514.

Courts of equity in cases within their exclusive jurisdiction follow the Statute or not, as justice may require in a particular case. 1 Story, Eq. Jur. § 529; 2 *Id.* §§ 1520, 1521; *Life Association, etc. v. Siddal*, 3 DeG. F. & J. 58.

There was no express contract. If any action was ever maintainable against Hennessy for the surplus it was on an implied contract or promise only, and such contract or promise is one where, in view of the circumstances and acts of the parties, the law presumes or creates such terms as reason and justice dictate in the particular case. Chit. Cont. 17.

The parties are supposed to have made those stipulations which, as honest, fair and just men they ought to have made. *Ogden v. Saunders*, 12 Wheat. 841, (25 U. S. bk. 6, L. ed.) Addison, Cont. 30, 31 and 1399.

Hennessy was not a party to the suit between James Reynolds and Patrick Reynolds. That suit was decided and James Reynolds' title established in 1879, and no implied promise to pay ought to have been raised before that time. *Siggins v. Heard*, 31 Miss. 426.

Messrs. Wm. H. Greene and P. J. McCarthy, for defendant, J. B. Hennessy.

The sale under the mortgage being made after the death of the mortgagor, for default of payment of the semi-annual interest, the surplus proceeds, if any, would go to the mortgagor's heir or his assigns, under the mortgage contract; and such surplus is recoverable at law in an action for money had and received. 2 Jones, Mortgages 3d ed. §§ 1927, 1934; *Fussell v. Hennessy*, 14 R. I. 550, citing *Jackson v. Stephens*, 108 Mass. 94; *Cook v. Basley*, 123 Mass. 396; *Buttrick v. King*, 7 Met. 20, *Cope v. Wheeler*, 41 N. Y. 303; *Hiestler v. Maderia*, 3 W. & Serg. 884.

The concurrent jurisdiction of equity extends to all cases of legal rights where, under the circumstances, there is not a plain, adequate and complete remedy at law. Snell, Principles of Equity, 357, *et seq.*; 1 Story, Eq. Jur. § 76; 1 Pom. Eq. Jur. §§ 176, 178.

It is well settled that the only cases of trust not to be reached or affected in equity by the Statute of Limitations, are those technical and continuing trusts, which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity; they must be direct trusts belonging exclusively to the jurisdiction of a court of equity, and the questions must arise between the trustee and *cestui que trust*. But even in such case, the Statute will begin to run from the time that the knowledge is brought home to the *cestui que trust*, that the trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own not subject to any trust. 1 Perry, Trusts, 2d ed. §§ 125 and note 26, 152, 865; *Lyon v. Marclay*, 1 Watts, 271; *Finney v. Cochran*, 1 Watts & Serg. 112; *White v. White*, 1 Johns. (Md.) Ch. Dec 56; *Hancock v. Harper*, 86 Ill. 445, 450; *Mauvy v. Mason*, 8 Porter, (Ala.) 311; *Fussell v. Hennessy*, 14 R. I. 550; 2 Perry, Trusts, 2d ed. §§ 855, 857, 862-865, and notes thereto.

The Statute of Limitations, applicable to actions of *assumpsit*, applies to an action for an excess of proceeds of a sale of such land above the mortgage debt. A suit to recover the land or to redeem would not be barred by a lapse of time shorter than that which would bar an ejectment at law. But a claim to the proceeds of a sale is not a claim to real property, but only for the recovery of money. The Statute of Limitations applies to proceedings in equity

only by analogy; and the analogous case at law is an action of *assumpsit* or an action of account, and not an action of ejectment. 1 Jones, Mortgages, 3d ed. § 341; Wood, Limitations, § 58 and notes; *Vandusen v. Worrell*, 5 Ab. Pr. N. S. 286; *Arms v. Ashley*, 4 Pick. 71; *Hancock v. Harper*, 86 Ill. 445; *Amory v. Lawrence*, 3 Cliff. 523. And see, 2 Jones, Mortgages, § 1940; *Bellinger v. Bourland*, 87 Ill. 513; *Stoeer v. Stoeer*, 9 Serg. & R. 434; *Crane v. Buchanan*, 29 Ind. 570.

If on the death of Bartley Reynolds the real estate descended to his father, the complainant, as his sole heir at law, he thereupon became the owner of the equity of redemption, and on conversion of the estate by mortgage sale, became entitled to any surplus proceeds with the right to sue therefor in an action for money had and received, he being called upon only at the trial to show by proper evidence that he was such heir to the estate which had been so converted. 2 Jones, Mortgages, 3d ed. §§ 1931, 1935, 1940 and notes thereto; *Fussell v. Hennessy*, 14 R. I. 554, and cases before cited. See also, *Furlong v. Stone*, 12 R. I. 437; *Miller v. Adams*, 16 Mass. 456; 3 Johns. 524; *Mathewson v. Sprague*, 1 Curtis, 457.

Durfee, Ch. J., delivered the opinion of the court :

The case stated in the bill is this : the complainant formerly had a son, Bartley or Bartholomew by name, who died February 4, 1872. Some time before his death he was the owner of certain real estate, situate in the City of Providence, subject to a mortgage for \$1,600, with interest, in favor of the defendant Hennessy, bearing date February 17, 1870. During the illness which preceded said Bartley's death, the defendant Patrick Reynolds procured from him by fraud a conveyance of said estate and entered into possession thereof.

Immediately after the death of Bartley the complainant, who was his sole heir at law, instituted a suit in equity against Patrick Reynolds for the annulment of said conveyance, and in February, 1879, obtained a decree annulling it. While this suit was pending, to wit: May 7, 1872, said Hennessy, by virtue of a power of sale in his mortgage deed, sold the estate at auction and conveyed it to said Patrick Reynolds, who bid therefor the sum of \$4,950, being much more than the amount needed to pay the mortgage debt with interest and the expenses of sale. The bill charges that Hennessy has refused to account to the complainant for the surplus and prays that he may be decreed to account and pay over what may be found due. The bill was filed in November, 1881. Hennessy has answered, setting up in his answer a plea of the Statute of Limitations. The case has been heard chiefly on the sufficiency of that plea.

The complainant contends that the plea is bad because Hennessy, by selling the estate by virtue of the power, submitted himself to the obligations of the power, which amounts to an express or technical trust in favor of the complainant, and against such a trust the Statute does not run. The power is in the usual form. It appoints Hennessy "his executors, administrators and assigns," the mortgagor's "attorneys irrevocable, with full power of substitution

and revocation," and empowers them to sell and convey the estate in case of default, after giving the notice prescribed; to receive the purchase money, and out of it to pay the expenses of sale and the mortgage debt, accounting to the mortgagor, his heirs and assigns for the surplus. It is these express directions in regard to the execution of the power which, the complainant argues, makes the power an express trust. It will be observed, however, that the power is expressed, not in terms of trust but in terms of agency or attorneyship. The word trust or trustee nowhere occurs in it.

It is doubtless true that a trust may exist without the use of the word, courts looking through words to things. But nevertheless the absence of the word is significant where the claim is that the language creates an express trust. The complainant cites text books and cases in which a mortgagee exercising the power is called a trustee and treated as such. He does not cite any case which holds that the trust is express or technical. Chancery, where it asserts its jurisdiction over persons having charge of property for the benefit of others, generally speaks of and treats them as trustees, taking advantage of an analogy to subject them to the rules which apply to trusts. It proceeds thus in regard to executors, administrators, agents and partners. Such persons are in chancery *quasi* or constructive trustees.

In the case at bar the power of sale does not convey an estate, which is the usual mode of creating a technical trust; it delegates an authority. It appoints the mortgagee an attorney and empowers him to sell, receive the proceeds of the sale, pay the mortgage debt and expenses out of the proceeds, accounting for the surplus, if any there be, to the mortgagor. The mortgagee may exercise the power or not, as he chooses; but if he chooses to exercise it, he virtually promises to fulfill the conditions under which the power is granted. Such a promise may be implied at law as well as in equity, and we cannot see why an action at law will not lie for a breach of it. Indeed, the mortgagee by the terms of the power receives the purchase money for himself only to the extent of the debt and his expenses, being accountable for the rest of it to the mortgagor, his heirs and assigns. The surplus is in fact the equity of redemption converted into money. Why then cannot the mortgagor recover it in an action for money had and received?

The case closely resembles the case of a factor who receives goods for sale on which he makes advances. He thereby acquires a lien which he is entitled to satisfy out of the sales. But the consignor can recover his balance after the lien is satisfied at law as well as in equity, notwithstanding that in equity the factor may be treated as if he were a trustee. *Scott v. Surman*, Willes, 400, 405; *Story*, Eq. Jur. §§ 463, 464.

The complainant contends that the trust is express and technical because the mortgagee has the legal title. He has the legal title, not as donee of the power but as mortgagee. His title as mortgagee is peculiar, the mortgagor in possession being regarded as owner, subject to the mortgage as well at law as in equity. The power does not belong to the mortgagee as such, but it is collateral to the mortgage, and the purchaser at a sale under the power takes,

not as grantee of the mortgagee but as grantee of the mortgagor, even when the deed is in the name of the mortgagee. *Hall v. Bliss*, 118 Mass. 554.

A sale, professedly under the power but not pursuant to its terms, operates at most only as an assignment of the mortgage. All this goes to show that the mortgagee in exercising the power is not considered to have the same sort of legal title as a trustee under a technical trust.

In *Robertson v. Norris*, 1 Giffard, 421, the Vice Chancellor, commenting on the saying of Lord Eldon in *Dowdes v. Grazebrook*, 3 Meriv. 200, that a mortgagee when he sells under a power cannot be considered otherwise than as a trustee, remarks: "That expression is to be understood in this sense, that the power being given to enable him to recover the mortgage money, the court requires that he shall exercise the power of sale in a provident way, with a due regard to the rights and interests of the mortgagor in the surplus money to be produced by the sale." The remark is a recognition of the fact that a mortgagee in exercising the power is a *quasi* not a technical trustee. Technically he is the attorney of the mortgagor. *Watson v. Saul*, 1 Giffard, 188, 198; *Dickenson v. Teasdale*, 1 DeG. J. & S. 52, 60.

It is admitted that the Statute applies, if the remedies are concurrent at law and in equity; or, in other words, if the trust is not technical so as to be exclusively cognizable in equity. Wood, Limitations, § 200.

The cases are numerous in which the surplus has been sued for and recovered in actions at law. *Cook v. Basley*, 123 Mass. 396, and cases there cited; *Stoever v. Stoever*, 9 Serg. & R. 484; *Davenport v. McChesney*, 86 N. Y. 242; *Flanders v. Thomas*, 12 Wis. 410; *Vick v. Smith*, 83 N. C. 80; *Bailey v. Merritt*, 7 Minn. 159; *Webster v. Singley*, 58 Ala. 208. And see also, *Cope v. Wheeler*, 41 N. Y. 303; *Ballinger v. Bourland*, 87 Ill. 518.

We do not find that any of these cases refer the jurisdiction to any peculiar local law. In *Stoever v. Stoever*, *supra*, the court expressly declares: "If there was a court of chancery, *indebitatus assumpsit* for money had and received would lie." 9 Serg. & R. 454.

Nor do we find that the courts make any distinction in this respect between the mortgagor and persons holding under him; the duty imposed by the terms of the power being deemed sufficient to raise a promise to pay the surplus to the owner of the equity of redemption, if the mortgagee sells under the power, since the surplus is what the equity sells for and belongs to the owner. We also think that the right to sue for the surplus accrued forthwith or very shortly after the sale, without any previous demand, it being the duty of the mortgagee receiving the proceeds to ascertain the surplus immediately and pay it over. *Bailey v. Merritt*, 7 Minn. 159; *Fussell v. Hennessey*, 14 R. I. 550.

Nor do we see how the pendency of the former suit against Patrick Reynolds to set aside the deed from Bartley to him for fraud could stay the running of the Statute. If the deed from Bartley was procured by fraud, it was avoidable at law as well as in equity, and the complainant might have disaffirmed it by suing

for the surplus as well as by prosecuting his suit in equity.

The bill as framed is simply a bill for an account. As such, we think it is barred by the Statute of Limitations. It makes Patrick Reynolds a defendant with Hennessey, but states no case for relief against him. Hennessey in his sworn answer alleges that he received from Patrick Reynolds only the amount necessary to pay the mortgage debt and expenses, because, being ignorant of the complainant's claim, he believed Patrick Reynolds to be entitled to the surplus. No testimony is adduced in support of the allegation, and in the absence of such testimony, we think the acknowledgment of the receipt of the purchase money, made in Hennessey's deed to Patrick Reynolds, is *prima facie* proof that it was received. The question whether the power of sale would have been so fully executed as to cut off the right to redeem, if only the mortgage debt and expenses were paid, does not arise on the pleadings and proof as they stand.

Plea sustained and bill dismissed without costs.

George A. BURROUGH

v.

George H. HILL.

1. The year mentioned in Public Statutes, R. I. chap. 221, § 2, **within which a petition for a new trial may be filed** in the Supreme Court, begins to run on the entry of final judgment; and in the case of exceptions or appeal, from the entry of judgment of affirmance.
2. Thus, when exceptions were taken to the Court of Common Pleas and sustained and the case was remitted for a new trial and by error of counsel was not reentered and the former judgment was affirmed on petition; held, that the year ran from the date of the affirmance.
3. When counsel obtained a new trial on exceptions and failed to reenter the case in the court below, alleging that, deceived by the similarity of the name of another case on the docket of the court below, he supposed the reentry had been made, the court with some hesitation granted a new trial on the ground of accident and mistake.

(Providence—Decided December 10, 188.)

PLAINTIFF'S petition for a new trial
Granted.

The facts appear in the opinion.

Mr. D. L. D. Granger, for petitioner.

The authorities cited are: *Townley v. Jones*, 8 C. B. N. S. 289; *Neave v. Milne*, 29 Eng. Law & Eq. 806; *Riley v. Emerson*, 5 N. H. 311; *Winn v. Young*, 1 J. J. Marsh. 51; *Fourdriner v. Bradbury*, 3 Barn. & Ald. 328; *Hill New Trials*, 553, and cases cited.

Mr. Joseph C. Ely, for George H. Hill.

It must be a suit tried or decided "within one year previous to such application." *Adams*

Express Co. v. Gregg, 23 Kan. 376; *Schweizer v. Raymond*, 6 Abb. N. C. 378; *Gray v. Coan*, 48 Iowa, 424; *Pugh v. Reat*, 107 Ill. 440; *Clark v. Crane*, 57 Cal. 629.

Negligence of attorney is not good ground for a new trial. *Babcock v. Brown*, 60 Am. Dec. 290; *Shields v. Burns*, 81 Ala. 535; *Mulholland v. Heyneman*, 19 Cal. 605; *Yates v. Monroe*, 13 Ill. 212; *Steigers v. Darby*, 8 Mo. 679; *Handy v. Davis*, 38 N. H. 411; *Freeman v. Neyland*, 23 Tex. 529; *Green v. Bulkley*, 23 Kan. 130; *Landrum v. Farmer*, 7 Bush (Ky.), 46; *Meyer v. Smith*, 7 Phil. (Pa.) 105; *Hartford F. Ins. Co. v. Vanduzor*, 49 Ill. 489.

Misapprehension of law by a party is no ground. *Howard v. Capron*, 3 R. I. 182.

This is substantially a second motion for a new trial and will not be favored. *Hayes v. Kenyon*, 7 R. I. 531.

Durfee, C. J., delivered the opinion of the court:

This is a petition by the plaintiff for a new trial on the ground of accident or mistake. The case was begun in the court of common pleas at the June Term, 1882. At the next December Term judgment was rendered for the defendant for his costs and the case was taken to this court on exceptions. The exceptions were sustained and the case was remitted for new trial July 7, 1883. It should have been reentered by the plaintiff in the court of common pleas on or before the second day of the December Term, 1883. The reentry was omitted. On the eighteenth day of the December Term, 1884, the judgment for the defendant was affirmed with additional costs after hearing. The omission to reenter was owing to the following alleged accident or mistake on the part of the plaintiff's counsel the counsel brought, besides this action, another action in the court of common pleas against the same defendant at the June Term, 1882, to wit: the action of *George R. Bennett v. George H. Hill*, the counsel in both cases being the same.

In *Bennett v. Hill*, judgment was rendered for the plaintiff at the June Term, 1883, and the case was carried by the defendant on exceptions to this court. Thereupon the case should have been dropped from the common pleas docket, but by an oversight of the clerk it was retained.

The counsel who, according to custom, had delayed to reenter this case until the commencement of the December Term, looking at the docket then, saw the case of *Bennett v. Hill* there, and, misled by the similarity of the names and by the travel of the two cases, took it for *Burrough v. Hill*, and supposed that the latter case had been reentered.

The plaintiff contends that but for the oversight of the clerk and the consequent mistake of the counsel the omission to reenter would not have occurred, and that he is therefore entitled by reason of the accident or mistake to a new trial. We think there was, to say the least, a considerable admixture of negligence or inattention on the part of the counsel. We have however come to the conclusion, though not without a good deal of hesitation, that there was enough of accident or mistake to entitle the plaintiff to a new trial on terms, if the petition was seasonably preferred.

This is a petition under Pub. Stat. R. I. chap. 221, § 2, under which this court is empowered to grant a new trial for the causes mentioned in any suit tried or decided in this court or in the court of common pleas within one year previous to the application. The petition was filed in this court July 10, 1885, being more than a year after the judgment was originally rendered in the court of common pleas but less than a year after it was affirmed.

The defendant contends that the petition is too late, because the judgment is in law a judgment of the date when it was originally entered. It is difficult to accept this view because the judgment as affirmed is not the judgment originally entered, the costs being increased. But, however that may be, the time for the petition is not limited to a year after the judgment, but to a year after the case has been tried or decided. Therefore, the question is: when was this case decided? Evidently it was not decided when the judgment was originally entered, for the case was afterwards before the supreme court on exceptions which were sustained. The plaintiff might have reentered the case, and if he had reentered it, the original judgment would beyond question have been utterly annulled. Evidently, therefore, the case was not decided until after the time for reentry had gone by. But if it was not decided before then, when afterwards it is decided before the affirmation? We are unable to find any previous time. The original judgment ceased to be a judgment when the case was taken to the supreme court on exceptions. It did not become a judgment again until it was affirmed. Our opinion is that the case was decided, within the meaning of the statute, when the judgment was, to use the language of the statute, affirmed with additional costs, and that the petition having been reentered in less than a year afterwards was in time.

New trial granted, the plaintiff to pay the defendant's costs and to recover no costs up to the present time.

1. Sec. 2. Whenever it shall be made to appear, to the satisfaction of the Supreme Court, by any party or garnishee in a suit which shall have been tried or decided therein or which shall have been tried or decided in the Court of Common Pleas within one year previous to such application, that by reason of accident, mistake or any unforeseen cause, judgment has been rendered in such suit on discontinuance, nonsuit, default or report of referees, or that such party or garnishee had not a full, fair and impartial trial in such suit, or in case a trial has been had in such case, that a new trial therein should be had, such court may grant such trial or new trial upon such terms and conditions as they shall prescribe.

Edward W. HOWLAND

2.

SCHOOL DISTRICT No. 3 of Little Compton.

1. Under Gen. Stat. R. I. chap. 53, § 5, Pub. Stat. R. I. cap. 56, § 5; the **school committee**, after the school district has voted to erect a schoolhouse, may **appoint appraisers of the land** fixed upon by the committee for the location of the **schoolhouse**, but cannot appoint appraisers before the district has so voted.
2. A **vote by the district** to locate is not a vote to erect.

3. The district has no power to locate; this must be done by the committee.
4. A delegated power of condemning property must be exercised strictly in accordance with the terms of its delegation.

(Newport—Decided December 10, 1885.)

TRESPASS and ejectment.

Heard by the court, jury trial being waived.

The facts are stated in the opinion.

Mr. E. L. Barney, with **Mr. Charles Action Ives**, for plaintiff:

Cites Peckham v. School District No. 7, North Providence, 7 R. I. (1868) 545.

Mr. Ziba O. Slocum, for defendant.

Durfee, Ch. J., delivered the opinion of the court:

This is trespass and ejectment for a lot of land in Little Compton, which it is admitted belongs to the plaintiff unless the defendant has acquired title by taking it for a schoolhouse lot, under Gen. Stat. R. I. chap. 53, § 5,* being the same as Pub. Stat. R. I. chap. 56, § 5.

We think that section 5, though not quite clear in all respects, is clear in this respect, namely: that where a town has a district organization, the school committee is authorized to appoint appraisers to decide upon the value of land, fixed upon by the committee as the site of a schoolhouse in any district, after the district has voted to erect a schoolhouse, no authority to make the appointment being given until after such vote. It follows that in such a case an appointment before the vote is unauthorized and void; and, consequently, that any valuation of the land by the appraisers so appointed and any tender to the owner in pursuance thereof are ineffectual to divest the title of such owner and vest it in the district. We think the proceeding under which the defendant claims is defective in this particular. The records of the defendant District and of the school committee, copies of which were put in evidence at the trial, show that the proceeding was as follows, to wit:

A meeting of the District was held April 14, 1875, for the purpose, among other things, of considering the expediency of building or repairing the schoolhouse in said District. At the meeting it was voted to repair the schoolhouse and that "Charles Staples hire money for the present use if needed for the repairs of the said schoolhouse."

Subsequently a special meeting was notified

*As follows:

In case the school committee shall fix upon a location for a schoolhouse in any district, or shall determine that the schoolhouse lot shall be enlarged, and the district shall have passed a vote to erect a schoolhouse, or to enlarge the schoolhouse lot, or in case there is no district organization, and the committee shall fix upon a location for a schoolhouse and the proprietor of the land shall refuse to convey the same, or cannot agree with the district for the price thereof, the school committee of their own motion, or on application of the district, shall be authorized to appoint three disinterested persons, who shall notify the parties and decide upon the valuation of the land; and upon the tender or payment of the sum so fixed on, to the proprietor, the title to the land so fixed on by the school committee, not exceeding one acre, shall vest in the district for the purpose of maintaining thereon a schoolhouse and the necessary appendages thereof.

for May 22, 1875, "For the purpose of taking such measures as may be deemed necessary for the location of a district schoolhouse." At the meeting held pursuant to this notice it was voted "That we locate the district schoolhouse on the ground of the old schoolhouse," and "that the trustee petition the school committee to lay out a lot of a suitable size for a district schoolhouse." Under the latter vote the trustee petitioned the school committee, which was in session the same day, to locate a site for a district schoolhouse for District No. 3. The school committee, acting on this petition, fixed upon the old schoolhouse lot, being the lot in suit, and defined its bounds. An attempt was then made to agree with the plaintiff as owner, which failed. Thereupon, on application of the trustee, the school committee appointed appraisers who valued the land at \$45. Upon their report the District voted to tender the \$45 to the plaintiff as owner, which was done June 10, 1875.

The recital shows no vote of the District to erect a schoolhouse. There is no proof of any such vote prior to the appointment of the appraisers. Possibly it may be thought that the vote to locate implies a vote to erect and is therefore equivalent to it. We do not think so. The vote to locate was in point of law a mere nullity, the power to locate being in the school committee. The vote was merely an expression of preference. The statute contemplates that the selection of the site shall precede the vote to build.

Moreover, it does not appear that the District ever supposed or claimed that the vote to locate was equivalent to a vote to erect. On the contrary, the record shows that at a special meeting of the District, August 27, 1875, held pursuant to notice for the purpose of considering the question of building or repairing district schoolhouse, it was voted to recede from repairing the old schoolhouse, and to build a new schoolhouse.

The inference is that the District then considered the vote to repair as still in force and that the vote to build still remained to be adopted. It is hardly necessary to say that if the appraisal was unauthorized and consequently void, when made, for want of a precedent vote to build, this subsequent vote was without effect, as against the plaintiff at least, to ratify or confirm it.

The power to take property *in invitum* is a sovereign power, and, when delegated, must be exercised in strict uniformity with the terms of its delegation, or otherwise the exercise will be invalid. Cooley, Const. Lim. *528-530.

H. Frank PAYTON *et ux.*

v.

James SHERBURNE *et ux.*

1. The refusal of a motion to nonsuit is ordinarily no ground for exception.
2. Under Pub. Stat. R. I. chap. 232, § 1, tenants at will or by sufferance must quit on the day named in the notice given them to quit by the owner or lessor.
3. Query, if the notice is not reasonable in time, whether the tenant does not have the right of ingress and egress to

remove his effects and emblements, after the tenancy has terminated, without being liable as a trespasser.

4. When in a declaration before a Special Court of Common Pleas against A and his wife, the only counts showing a letting, hence the only counts setting out a case within the jurisdiction of the court, **charged the defendants as tenants by hiring and as tenants at will**, and no evidence supported the count against them as tenants by hiring and the only evidence to support the count against them as tenants at will was their admissions in the answer to a bill in equity against them, previously filed by the plaintiff, and these admissions showed them to have been tenants at will of a deceased owner, predecessor in title of the plaintiff; **held, that the tenancy at will under the deceased owner terminated with his death, and being a personal relation did not fail to the plaintiff by either descent or devise.**
5. There were counts against the defendants as tenants by sufferance, but these counts contained no averment of a previous letting. **Held, that a letting could not be presumed, as a tenancy by sufferance does not imply a previous letting and may exist without one.**

(Providence—Decided Jan. 8, 1886.)

ON defendants' exceptions to a Special Court of Common Pleas. *Overruled in part; sustained in part.*

Action to dispossess tenants.

The questions presented are stated in the opinion.

Mr. James Tillingham, for defendants:

The court below had no jurisdiction. The case as made by the plaintiffs, so far from disclosing, expressly negated, any letting whatever. It showed merely a detainer by the defendants against their own deed made under the decree of the court in the equity case, a detainer resting evidently upon the reserved right referred to in that deed and was therefore strictly within *Champlin v. Horton*, 12 R. I. 123.

The defendants were clearly tenants, either at will or at sufferance, and in either case were entitled to reasonable notice to quit, under the Statute P. S. p. 648, § 1, which has most materially modified the common-law doctrine in such cases; and the notice here was unreasonably short and therefore insufficient. *Ellis v. Paige*, 1 Pick. 43; *Prescott v. Elm*, 7 Cush. 846; *Kinsley v. Ames*, 2 Met. 29; *Brock v. Berry*, 31 Me. 298; *Young v. Young*, 36 Me. 133. And see, *Semmes v. U. S.* 14 Ct. of Claims, 493; *Livingston v. Tanner*, 12 Barb. 481; *Leavitt v. Leavitt*, 47 N. H. 329; *Williams v. Hodges*, 41 Mich. 695.

Messrs. Francis W. Miner and William G. Roelker, for plaintiff.

Durfee, Ch. J., delivered the opinion of the court:

The first exception is for the refusal of the court below to dismiss the action for want of jurisdiction. The motion to dismiss was submitted by the defendants after the plaintiffs had introduced their testimony and was based, not

on any defect apparent on the record, but on a claim that there was no evidence that the tenements sued for were tenements let. The motion, though in form a motion to dismiss, was in effect a motion for a nonsuit. A motion for a nonsuit is addressed to the discretion of the court and is not ordinarily matter for exception.

The second and third exceptions are for the refusal of the court below to nonsuit the plaintiffs or to direct a verdict for the defendants because the notices to quit were unreasonably short and therefore void. The tenancy, if any existed, was admittedly either a tenancy at will or by sufferance. The notices were notices to quit August 17, 1885, and were given August 14, 1885. Our statute, Pub. Stat. R. I. chap. 232, § 1, provides: "Tenants of land or tenements at will or by sufferance shall quit upon notice in writing from the lessor or owner at the day named therein." The natural construction of this section is that the tenant receiving notice shall quit on the day named; and that all that he can require is that the notice shall give him a day. If this view be correct, the notices were good.

The defendants contend that the construction is too strict and that "notice" means "reasonable notice." We should be inclined to construe the section so, if the language were that the tenants "shall quit upon notice in writing from the lessor or owner," without more; but the section adds "at the day named therein," which, it seems to us, clearly indicates an intention to leave the length of the notice to the discretion of the lessor or owner giving it. To hold that "notice" means "reasonable notice," is to open the door to contention such as it was the intention of chapter 232 to avert. The objection is that if the length of the notice be left to the discretion of the lessor or owner, he may use his discretion oppressively. The objection is not decisive. We think section 1 applies only to strict tenancies at will or sufferance, such as were terminable at common law on demand and which are not very common here. *Jackson v. Bradt*, 2 Caines, 169; *Post v. Post*, 14 Barb. 253; *Humphries v. Humphries*, 3 Ired. 362; *Kinsley v. Ames*, 2 Met. 29; *Hollis v. Post*, 3 Met. 350; *Johnson v. Johnson*, 18 R. I. 487.

Tenancies from year to year or for any recurring term less than a year, though sometimes denominated tenancies at will, fall under chap. 232, §§ 2, 3, which prescribe definitely what notices shall be given to terminate them. In this view the force of the objection is much mitigated and we are not satisfied that any departure from the obvious and natural construction is justified. On the contrary, we think it better to construe section 1 as it would be ordinarily understood, leaving the General Assembly to make their meaning plainer, if we have mistaken it. We will add that in thus deciding we do not mean to decide that the tenant may not be entitled, after the tenancy is terminated, if the notice is unreasonably short, to ingress and egress for the purpose of removing household effects or taking emblements without making himself liable as a trespasser.

The last exception is because the court below directed a verdict for the plaintiffs against both defendants. We think this was error. The only counts in the declaration which in our opinion fully state a cause of action within the

jurisdiction of a special court are the counts against the defendants as tenants by hiring and as tenants at will of the plaintiffs, for they are the only counts which show even by implication that the tenements sued for are tenements let. It is not claimed that there was any evidence to support the counts against the defendants as tenants by hiring; and the only evidence brought to our attention to support the counts against the defendants as tenants at will of the plaintiffs is the admissions of the defendants in their answer to the plaintiffs' bill in equity. These admissions, however, are only evidence of a tenancy at will between the defendants and Bowen, the former owner; and that tenancy, if it ever existed, came to an end when Bowen died. Being a tenancy at will, it was purely personal and the plaintiffs could not succeed to it by devise or inheritance. It may be thought, on the authority of *Kenney v. Sweeney*, 14 R. I. 581, that the plaintiffs are entitled to recover on the counts against the defendants as tenants by sufferance. A tenancy by sufferance may exist without any previous letting, and therefore a count against the defendants as such does not show even by implication that the tenements sued for are tenements let. The counts contain no express averment to that effect.

First three exceptions overruled; the last exception sustained; case remitted for new trial.

STATE of Rhode Island

v.

Charles M. BURDICK *et al.*

A statute allowed the **commissioners of shell fisheries** to lease tide-flowed land, "not leasing more than one acre in one lot or parcel to any one person or firm." The commissioners gave to A a single lease of "a certain piece of land in * * * covered with tide water, containing about ten acres * * * being lots numbered * * *," said lots were leased separately, but are included in one lease for convenience. **Held**, that the lease was **ultra vires and void**.

(Washington—Decided January 11, 1886.)

ON defendants' exceptions to the Court of Common Pleas. *Sustained*.

The case is stated in the opinion.

Messrs. Thomas H. Peabody and Charles Perrin, for defendants:

If this pond is not an arm of the sea, the right of fishery therein, as well as the land covered by the waters thereof, belongs to the riparian proprietors. Article 1, § 16, Constitution of this State, provides that private property shall not be taken without just compensation. This property was not taken in that way. Consequently the leases are void, and these defendants have not committed the offense with which they are charged. Gould, Wat. § 149.

If it is an arm of the sea, then the defendants, under the evidence, had as much right to these oysters as had Ward or any other person. § 15 chap. 145; Pub. Stat. and chap. 368, Pub. Laws.

The commissioners had no right to lease

a natural and common oyster bed in this pond, as against these defendants. Art. 1, § 17, Constitution, R. I.

It is well settled that the public right of fishing includes shell fish as well as floating or swimming fish. *Commonwealth v. Bailey*, 13 Allen, 542, and cases cited.

The lease to Ward merely gives him the use of the land, "for the planting and producing of oysters." Clearly it does not mean oysters already grown. The words, "planted and propagated in private beds," as used in *N. E. Oyster Co. v. McGarvey*, 12 R. I. 391, throw some light upon this question and indicate in some degree, the object sought to be accomplished by these leases. That larceny cannot be maintained where oysters are taken from a natural oyster bed, see, *State v. Casselari*, S. C. La.

By § 18 of chap. 146, Public Statutes, it is made the duty of the commissioners to erect bounds, stakes, etc., but even they have no authority to do so if it interferes with navigation. In this case, the defendants offered to prove that it did so interfere; and further, that Ward had placed other obstructions than those named in the statute, upon said oyster bed. Whether that was material or not, we contend that said bed and the oysters thereon belonged, either to the citizens of this State, of whom the defendants were two, or to the owners of the adjoining land. In either event, the defendants could not be convicted. Besides, if it could not be occupied without interfering with navigation, it could not be leased. Gould, Wat. § 21; *Fleet v. Hegeman*, 14 Wend. 42.

One who claims a franchise or exclusive privilege, in derogation of the common rights of the public, must prove his title thereto by a grant clearly and definitely expressed, and cannot enlarge it, by equivocal or doubtful provisions, or mere probable inferences. In all grants, made by the government to individuals of rights, privileges and franchises, the words are to be taken most strongly against the grantee, contrary to the rule applicable to a grant from one individual to another. *Cleveland v. Norton*, 6 Cush. 384, 385.

Public grants, whether made by the Crown, or by Congress, or by a State, are construed strictly. Gould, Wat. § 36.

"No alienation will be presumed beyond what is clearly and indisputably expressed." *Id.* § 23.

Parties may contract in reference to laws of future enactment; may agree to be bound and affected by them, as they would be bound and affected if such laws were existing. *Knights v. Ainsworth*, 17 Rep. 140.

Formerly, by § 14, chap. 134, Gen. Stat. 1872, the offense of taking oysters, under certain circumstances, was made larceny. But this section has been omitted, and the whole law with reference to this subject has been merged into the offense of wrongfully taking and carrying them away; and instead of two offenses, as remarked by the court, in *State v. Tayler*, 13 R. I. 541, there is now but one. And see, *State v. Luther*, 8 R. I. 151.

Ignorance or mistake of fact is, in all cases of supposed offense, a sufficient excuse. 1 Bish. Cr. L. 7th ed. § 801. "On questions of mere private right, that is, in civil causes, this rule is not universal." *Id.* "In criminal cases, the

intent required is, not to break the law, but to do the wrong. And any ignorance of the law which prevents one from intending to do a wrong will excuse him." *Id.* §§ 297, 298, 300, 304. See, also, *Id.* § 303, *a*, and note 4, by the learned author, in which he denies that the courts of R. I. stand side by side with those of Mass. upon this question. No reason appears why ignorance of fact produced by ignorance of law, may not, under proper circumstances, constitute an excuse for an act otherwise criminal. *Id.* § 311.

The flowing and reflowing of the waters of a lake or river, being caused by the occasional swell and subsidence thereof, and not by the ebb and flow of regular tides do not constitute such lake or river tidal. Above the ebbing and flowing of the tide, the fishery belongs exclusively to the adjoining proprietors. *Adams v. Pease*, 2 Conn. 481; 20 Johns. (N. Y.) 98; 17 *Id.* 195; Woolrych, Wat. chap. 2; Angell, Tide Wat. chap. 3.

Mr. Chas. C. Mumford, Assistant Atty-Gen., for plaintiff :

Durfee, Ch. J., delivered the opinion of the court:

This case comes up from the Court of Common Pleas on exceptions for errors in ruling at the trial in said court. The case is in an indictment against the defendants for taking and carrying away oysters from the private oyster beds of George H. Ward in Powaget or Charlestown Pond in the Town of Charlestown. The statute, Pub. Stat. of R. I. chap. 146, § 3, provides that the commissioners of shell fisheries may lease by public auction or otherwise to any suitable person being an inhabitant of the State "any piece of land in Powaget or Charlestown pond covered by tide water, * * * not leasing more than one acre in one lot or parcel to any one person or firm." Under this section the commissioners, on September 18, 1882, executed a writing purporting to be a lease to George H. Ward, the granting part of which is in the words following, to wit: "The State doth hereby lease, demise and let unto the said George H. Ward a certain piece of land in Charlestown Pond lying and being covered with tide water, containing about ten acres and bounded and described as follows, to wit: being lots numbered 24, 25, 26, 27, 28, 22, 21, 20, 16 and 17 on a plat of oyster ground in one acre lots, Charlestown Pond, R. I., surveyed by John L. Kenyon, September 18, 1882; said plat being on file in the office of the commissioners of shell fisheries; said lots were leased separately, but are included in one lease for convenience." At the trial the State introduced evidence to show that oysters were taken by the defendants from lot 26, October 1, 1883, Ward then being still lessee under the lease, if it be valid. Two of the exceptions reserved by the defendants were for the refusal of the court below to instruct the jury in compliance with the request of the defendants, as follows, to wit :

First. "The lease in this case is inoperative and void for the reason that by it there is an attempt made to lease more than one acre in one lot or parcel to the said George H. Ward, to wit: ten acres."

Second. "The following language contained in said lease, viz.: 'Said lots were leased separately,

but are included in one lease for convenience,' are ineffectual and cannot operate to take this case out of the inhibition of the statute, which provided that not more than one acre in one lot or parcel shall be leased to any one person or firm, and said language is used merely for the purpose of evading the statute."

The statute is clear that no more than one acre shall be leased in any one lot or parcel to any one person or firm. It is not disputed that the meaning is that no single letting can include more than one acre in any one lot or parcel. The lease describes the premises let as "a certain piece of land," words which *prima facie* signify a single parcel or lot, and the rest of the description is to the same effect. There is no dispute but that the ten acres lie together in a single parcel. The lease is therefore ineffectual, unless effect can be given to it by virtue of the phrase, "said lots were leased separately, but are included in one lease for convenience." It is not stated how the lots were leased separately, whether orally or in writing. The statute, chap. 146, § 12, requires by necessary implication that they shall be in writing with certain covenants and reservations in favor of the State. Now if the letting was by written leases as required by § 12, then those leases passed to George H. Ward his title, and were the leases which should have been put in evidence to prove it, the paper adduced being inoperative as a lease, whatever value it might have as a memorandum of the terms on which the actual leases were given. There is no pretense, however, that such leases were given, a lease including all the lots being given to avoid the necessity of the several leases. Undoubtedly, the so-called separate letting was oral, and being oral it was null and void, because it did not meet the requirements of the statute. The exceptions to the two refusals must therefore be sustained.

Exceptions sustained.

NEWPORT HOSPITAL

v.

Daniel CARTER.

1. The freemen of the town of M. voted to sell a beach belonging to the town in case the purchaser "will allow all such privileges as shall be thought necessary for the service of the town by a committee." A committee was appointed to sell and "to reserve the privileges by bond, * * * the town clerk to give the deed." The town clerk gave a deed in his own name and the purchaser gave to the town treasurer a bond conditioned on the purchaser, his heirs and assigns, allowing the inhabitants of the town forever full liberty of going to the beach and taking sand, seaweed, shells and certain drift stuff therefrom. This took place in 1746. In 1885 the successor in title of the purchaser brought trespass *quare clausum* against an inhabitant of M. for asporting sand and seaweed from the beach. The defendant as a statutory equitable defense pleaded in justification the bond and its provisions, to which plea the plaintiff de-

murred. **Held**, that the plea was bad and that the demurrer should be sustained.

2. Public Statutes R. I. chap. 204, § 33, allows a defendant to **avail himself at law of such defenses** only as without the statute he could have availed himself of by suit in equity.

(Newport—Decided Feb. 20, 1886.)

TRESPASS *quare clausum*. On demurrer to the plea. *Demurrer sustained*.

The facts are stated in the head note.

Messrs. Wm. P. Sheffield and Francis B. Peckham, for plaintiff:

The bond of May 19, 1746, made by Jonathan Easton, is inadmissible in evidence, because it conveys no title to any interest either corporeal or incorporeal in the *locus in quo*.

The inhabitants of the Town of Middletown, otherwise than in their corporate capacity, cannot take any interest in another's land, either by grant or prescription. See, Coke, Litt. 3 a; Com. Dig. *Capacity*, B. 1; 8 Jurist. 543-545; *Jackson v. Cory*, 8 Johns. 385.

They cannot take by way of reservation. *Hornbeck v. Westbrook*, 9 Johns. 73; *Hornbeck v. Sleight*, 12 Id. 199; *Shelton v. Montague*, Hobart, 118.

None but parties to deeds, and those in privity with the parties, can acquire any rights under the deeds. See, Shep. Touch. 78; *Hornbeck v. Westbrook*, *supra*; *Craig v. Wells*, 11 N. Y. 323; *Moore v. Plymouth*, 3 Barn. & Ald. 66.

The inhabitants of a municipal corporation, as inhabitants, are neither parties nor privies to a deed within the meaning of these authorities. See, *Hornbeck v. Sleight*, *supra*; *Worcester v. Green*, 2 Pick. 429.

It is a settled rule of the common law that a community not incorporated cannot take and purchase in succession. See, Coke, Litt. 3 a; 10 Co. 28 b.

So held in reference to the people of a county. See, *Jackson v. Cory*, 8 Johns. 385.

Messrs. Arnold Green and Samuel R. Honey, for defendant.

Durfee, Ch. J., delivered the opinion of the court:

The defendant contends that the bond amounts to a perpetual license to the inhabitants of the Town of Middletown to do the acts complained of in the declaration. He contends that it is in effect a covenant for such license and that as such it is specifically enforceable in equity against the plaintiff as owner, under the covenantor, of the estate to which it relates. Admitting, without deciding, that the bond is such a covenant, does it follow that the defendant can plead it in bar of the action? The general rule is that only parties to a contract or their successors in law or fact, or, at the most, those who are interested in the subject matter, can maintain a suit to enforce it. Wat. Spec. Perf. § 50; *Beardsley Scythe Co. v. Foster*, 36 N. Y. 561; *Moss v. Bainbridge*, 18 Beav. 478, 482; also in 6 DeG. M. & G. 292; *Peele, ex parte*, 6 Ves. Jr. 602; *Colyear v. Mulgrave*, 2 Keen, 81; *Denbo v. Tipton*, 2 Ind. 20.

The defendant is neither party nor privy to the contract nor assignee. He has no interest in the subject matter; for a mere license does not amount to an interest even in equity until

the licensee has incurred expense or labor in consequence of it. He does not come within the recognized exceptions to the given rule.

The exceptions extend only to marriage settlements or to contracts for the benefit of some person nearly related to the promisee or of some person who in consequence of the contract has altered his *status* or condition. Fry, Spec. Perf. §§ 102, 105; Wat. Spec. Perf. § 51.

The defendant could only bring himself within the last if either exception, and he does not do it by his plea. He argues that the obligee of the bond became a trustee for the inhabitants, and that as one of the inhabitants he is entitled to an enforcement of the trust. We do not think the bond can be held to have created a trust in favor of the inhabitants. The obligee, by taking the bond in his name, may become a trustee for the town, supposing the town authorized such taking, because the consideration proceeded from the town. No consideration proceeded from the inhabitants. The bond is merely an executory contract, and it is well settled that an executory contract will not be enforced as a trust in equity at the suit of a mere volunteer. If upon suit the penalty were recovered, the money would go to the town, not to the inhabitants. The town, for anything we can see, could in equity discharge the bond for good consideration. It could not do so if the inhabitants were *cestuis que trustent* and entitled as such to the benefits of the condition. It follows that the defendant has no right under the bond which would entitle him to equitable relief independently of the statute, and we do not think the statute does more than enable a defendant to avail himself at law of such defense, as without it he could have availed himself of by suit in equity.

The bond, construed as the defendant seeks to have it construed, resembles a condition in a grant. The estate might have been granted on condition that the grantee, his heirs or assigns, should allow to the inhabitants the privileges mentioned in the bond, in which case if the grantee had disallowed those privileges, the inhabitants could not have enforced the condition, but only the grantor; or, if the grantor were a natural person, his heirs.

In *Parsons v. Miller*, 15 Wend. 561, 564, the defendant, who was sued in trespass for carrying away seaweed from the plaintiff's beach, justified under such a condition; but the court held, as we understand the decision, that even if the condition extended to the taking and carting away of seaweed, it was no defense because the defendant was a stranger to the deed. See also, *Hornbeck v. Westbrook*, 9 Johns. 73.

The defendant cites *Driscoll v. Marshall*, 15 Gray, 62. There the defendant bought standing wood with the right to enter, cut and remove it. The owner subsequently sold and conveyed the land where the wood stood to purchasers who sold and conveyed it to the plaintiff. The plaintiff had notice of the sale of the wood to the defendant and assented to the reservation of it for him, though the assent was not put in the deed. The court held that the assent was equivalent to a license, under which the defendant could justify. There was no evidence of any revocation of the license and it was not claimed that the license was irrevocable. The defense was legal, not equitable.

The case does not much resemble the case at bar. The defendant here sets up, not simply a license given by the plaintiff but a so-called license given by Jonathan Easton, under his hand and seal, a hundred and forty years ago, which the defendant contends operates in equity like a covenant running with the land, binding it forever. To sustain the plea, therefore, giving it the effect which he claims for it, is not merely to give effect to a personal license, but to saddle the estate with a perpetual charge or servitude. If this can be done, we think it for the obligee of the bond to do it, or possibly for the town as the obligee in equity, and not for the defendant.

The bond cannot operate as a grant, for an unincorporated community, "a mere flux body," united only by local habitation, cannot take in succession, either collectively or individually, and therefore a grant to the inhabitants of Middletown, giving it the most favorable construction, would be simply a grant to the inhabitants living at the time of the grant. *Thomas v. Inhab. of Marshfield*, 10 Pick. 364, 368; *Rogers v. Brenton*, 10 Q. B. 26, 60; *Jackson v. Cory*, 8 Johns. 801; *Hornbeck v. Sleight*, 12 Johns. 199.

Demurrer sustained.

CENTRAL LAND CO., *Appt.*,

v.
City of PROVIDENCE.

George W. BUTTS, *Appt.*

v.
SAME.

1. Land of A was taken for a highway. Pending the proceedings of condemnation, A sold the land to B who claimed damages from the town for the taking. From the decree of the town council awarding compensation both A and B appealed to the Court of Common Pleas. **Held**, that A's appeal was improper and should have been dismissed at the request of the appellee.
2. The two appeals were consolidated by the Court of Common Pleas. **Held**, error.
3. A judgment was then entered by the Court of Common Pleas on A's appeal, but the record showed no judgment of any kind on B's appeal. **Held**, that the judgment was erroneously entered, and that the case must be remanded to the Court of Common Pleas to dispose of B's appeal.
4. The front line of lots platted for partition was drawn parallel with and twenty feet from W. Street, and each deed of partition contained the statement: "The strip of land situated in front of lot No. —, as designated on said plat, which is intended to be used at some future time to widen W. Street, is included in the above conveyance and may be improved by the grantee until it shall be laid out for a street, but no building can be erected thereon." **Held**, that the plat and deeds were not an offer to dedicate

the strip to highway purposes; affirming *Aldrich v. Billings*, 14 R. I. 283, that the deeds conveyed the strips "subject to the easement of the other owners on the street to have the strip unencumbered by buildings, and ready at any time to be laid out for a street;" that the strip could not be taken for a street without compensation to the owners, and that the measure of compensation was the loss sustained by taking the land for a street, regard being had to the restrictions on the use of the land, and to the benefit accruing from widening the street.

(Providence—Decided February 6, 1886.)

EXCEPTIONS by appellee to ruling in the Court of Common Pleas. *Sustained.*

The case is stated in the opinion.

Mr. Nicholas VanSlyck, for appellee.

Messrs. Charles H. Parkhurst and Thomas C. Greene, for appellants:

The right to present his claim for damages is given by statute. P. S. chap. 64, § 11.

See, as to question of title to this strip of land, *Aldrich v. Billings*, 14 R. I. 283.

The claim of the City that the proceedings in question were an acceptance, is not well founded. The board of aldermen is not the agent of the public, and cannot accept an offer of dedication to the public. *Remington v. Millerd*, 1 R. I. 93.

Durfee, Ch. J., delivered the opinion of the court:

The object of the appellants is to recover compensatory damages for a piece of land taken for the purpose of widening Worcester Street in this City. At the commencement of the proceeding the land belonged to George W. Butts, but before the decree was entered establishing the lay-out by which the land was taken, he had conveyed it to the Central Land Company. The record shows that the Company appeared before the board of aldermen and made claim for damages before the decree was entered. Appeals from the decree were taken by both Butts and the Company. We think that under Pub. Stat. R. I. chap. 64, § 11,¹ the proper party to take the appeal was the Company. Butts was not aggrieved by the decree, having parted with the land before it was entered, and therefore was not entitled to appeal. The appeal taken by him ought to have been dismissed by the Court of Common Pleas on motion of the appellee. The exceptions for its non-dismissal must be sustained and the appeal be dismissed here. The two appeals were consolidated by the Court of Common Pleas and heard together. This was clearly an error, since both appeals were not maintainable. The court, however, though it heard the two appeals together, entered judgment in only one

1. Sec. 11. If any person, through whose land a highway or driftway is laid, shall be aggrieved by the doings of the committee or town council, he, his heir or devisee may appeal to the next court of common pleas to be holden for the county in which such highway or driftway is located, giving bond to the town to prosecute his appeal, and producing an attested copy of the whole proceedings to such court, and filing his reasons of appeal with the clerk of the court, ten days before the sitting thereof.

of them, to wit: in the appeal of George W. Butts, which we have said must be dismissed as wrongly taken. No judgment was entered either for or against the Company; therefore, for anything we can see, the Company's appeal must be regarded as still pending in the court below. There is no judgment here which we can either affirm or disaffirm.

We might stop at this point, but the case has been argued on other points and therefore we deem it not improper to give our opinion on them, since our opinion given now may make it unnecessary to bring the case before us again.

The other exceptions go to the merits. Worcester Street was formerly only twenty feet wide. The land on its southern side, including the piece in question, belonged to James Aborn, who died October 4, 1845, leaving four heirs at law. After his death the land was platted into lots, the front line of the lots facing toward Worcester Street being drawn parallel with and twenty feet distant from it. The lots were assigned in partition by mutual conveyances to the different heirs in severalty. The lots facing Worcester Street were described in the conveyances by their numbers on the plat which was referred to and also as bounded northerly by Worcester Street. Each of the deeds contained the statement following, to wit: "The strip of land, situate in front of lot No. —, as designated on said plat, which is intended to be used at some future time to widen Worcester Street, is included in the above conveyance and may be improved by the grantee until it shall be laid out for a street; but no building can be erected thereon." Some of the late deeds under which the appellants claim, describe the lots conveyed simply by the number on the plat. It is not claimed that this alters the construction. We assume, therefore, for present purposes, that the omission makes no difference. The contention for the City is that by virtue of the plats, deeds and partition as aforesaid, the City became entitled to take the land in question, in pursuance of the statement, without compensation, whenever it might see fit to lay out Worcester Street over it, to the width of forty feet. The grounds of this contention are: first, that the grantees took under their deeds only a qualified right to use the front strips, which right was to cease when the City took the strip to widen Worcester Street; and second, that the plat and deeds together amounted to an offer of dedication which was accepted by or for the public when the decree establishing the layout was entered.

We do not think the plat and deeds can be held to have amounted to an offer of dedication. The only way in which an offer of dedication can be effectually made at common law is by opening the land intended to be dedicated to the public use, though where land has been platted into lots with intersecting streets and conveyed by lot as delineated to different grantees, the conveyances may create an estoppel which, for all practical purposes, will be equivalent to an irrevocable offer of dedication. In such cases, however, the estoppel arises from an implied contract or covenant between the parties that the land platted as streets shall remain open as streets. In the case at bar such a contract could not be implied because the deeds contained a

statement which was inconsistent therewith. Under these deeds the grantees of the Worcester Street lots were, according to the statement, to be entitled to use the strips in front as their own to the utter exclusion of the public and even of other lot owners, until there should be a layout by the City, the only restriction being that they should not build thereon. For anything that appears the strip has been so used. It cannot be said, therefore, that there was any offer of dedication in the usual sense of the words; and if it be claimed that there was an offer *sub modo* or in some unusual sense of the word, the claim can be better considered or will be virtually considered under the other head.

The claim is that the qualified right to improve the strip came to an end by the terms of the deed when it was taken by the City, and therefore the City cannot be required to pay for it. The claim rests on the statement before recited. It may be remarked, however, that the statement conveys nothing either to the City or to the grantee, but at the most merely affords a rule for the construction of the grant in regard to its extents and implications. The right of the City, if it has any, accrues to it not directly but indirectly as the result of an estoppel originating in an implied contract among the owners. If the deeds by which the Worcester Street lots were conveyed in partition had not contained the statement, undoubtedly the grantees would have taken the lots subject to an implied contract to have the strip open for use as a part of Worcester Street. The statement, however ineffectual it may be as a conveyance, is at least effectual in so far as it rebuts the implication. The question is therefore: what did the parties intend by it? Did they intend to negative the implication only until the strip should be taken for a street, or did they intend to negative it altogether and only to impose a restriction which by preventing expensive improvements would keep the strip more readily and cheaply available for a street? The latter would evidently be the meaning but for the words "until it shall be laid out for a street." Were those words used for any other purpose than to express what would follow without them, namely: that the qualified right of the grantee to improve the strip was to continue only until it should be laid out for a street? When land is laid out for a street, the right of the owner to improve it, except as an abutter, terminates, whether it is paid for or not. Can we say that the words impart a right in the City to have the land *gratis*? It seems to us that the preceding words which declare that the strip "is included in the above conveyance," throw much light upon the question, for they import that the strip was intended to pass by as full a title as the rest of the land, subject only to the restriction subsequently imposed.

In *Aldrich v. Billings*, 14 R. I. 233, 238, this court, construing these deeds with this statement, held that their effect was to convey to the several grantees the strip in front of their respective lots, "subject, however, to the easement of other owners, at least on the street, to have the strip unincumbered by buildings and ready at any time to be laid out for a street." We think that this is the fair and full effect, and that, regarding the statement as a whole in

seeking for its meaning, it is neither necessary nor warrantable to hold further that the City is entitled to take the strip for a street without making any or, if any, only a nominal compensation.

Exception is taken to the decision of the court below on the question of damages, the contention being that, if damages are allowable, the amount allowed is excessive. The question of damages is a question of fact and therefore any error of the court below in awarding the amount of them is not revisable here as a bill of exceptions. Of course the Central Land Company, according to the view which we have taken, is not entitled to full damages, because it held the strip under a restriction not to build upon it. The true measure of damages is the loss which the Company has sustained by the taking of the land, considering the restriction upon the use thereof, less the benefit received by having the street widened.

The exceptions for refusal to dismiss the appeal of George W. Butts are sustained.

The said appeal is dismissed and the cause or matter is remitted to the court below for further action. Order accordingly.

Patrick TIERNEY *et al.*

v.

Henry A. CLAFLIN *et al.*

1. Under Public Statutes R. I. chap. 192, § 9, which gives to either party in equity proceedings the right to a jury trial of questions of fact raised by the pleadings, and provides that the verdict shall be conclusive unless set aside for cause, the verdict given must stand unless palpably wrong. That the court might have drawn a different conclusion from the evidence, is immaterial.
2. Public Statutes R. I. chap. 173, § 1, of fraudulent conveyances, is a substantial reenactment of the English statutes on the same subject, 13 and 27 Elizabeth; and although it omits the proviso in favor of *bona fide* purchasers for value in the English statutes, must be construed like the English statutes and as if the proviso had not been omitted.
3. The evidence at a jury trial of issues in equity under Public Statutes R. I. chap. 192, § 9, was reported to the court on a petition for a new trial. Held, that this evidence was before the court only in support of the petition for a new trial; and that for the purposes of the equity suit the court could only consider the pleadings and the verdict of the jury.

(Providence—Decided January 23, 1886.)

BILL in equity to set aside a conveyance of realty. On complainants' request for a new trial of issues of fact. *Refused.*

The case is stated in the opinion.

Mr. James Tillinghast, for complainants:

The verdict was against the law and the evidence. What constitutes constructive notice is a question of law. Wait, Fraud. Conv. §§

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373, 374, 376, 379-382, 385, and cases cited; Bump, Fraud. Conv. 232, 238; Kerr, Fraud & M. 236, 239; *Kennedy v. Green*, 3 Mylne & K. 719; *Carr v. Hilton*, 1 Curt. 390; *Wood v. Carpenter*, 101 U. S. 141 (bk. 25, L. ed. 809); *Whitbread v. Jordan*, 1 Younge & C. Exch. 308; *Atwood v. Impeon*, 20 N. J. Eq. 156.

Actual knowledge of the fraudulent intent is not necessary. A knowledge of facts sufficient to excite the suspicions of a prudent man or woman and to put him or her on inquiry amounts to notice and is equivalent to actual knowledge in contemplation of law. "It has even been held that the means of knowledge by this use of ordinary diligence amounts to notice." *Wilson v. Prevett*, 3 Wood, 641. See also, *Williamson v. Brown*, 15 N. Y., 354; *Herrlich v. Brennan*, 11 Hun, 194; *McDonald v. Gaunt*, 30 Kan. 693.

We have a combination of "badges of fraud," each of which cast the burden of explanation upon the purchaser; and entirely unexplained as they all were, was in itself enough to avoid his purchase, viz.: it was entirely out of the usual course; unseemly haste; no inquiry as to title, running for luck, as Clafin himself admits; Bump, Fraud. Conv. 93; Kerr, Fraud. & M. 208-257;

For an inadequate price; Bump, Fraud. Conv. 86, 233;

And on unusual credit, purchaser's own unsecured note; *Id.* Con. 89, 238; Kerr, Fraud. & M. 196.

Notice before actual payment of the purchase money is enough to avoid purchase. Kerr, Fraud. & M. 201, 315, 318, 319; Bump, Fraud. Conv. 233, 277, 568; *Clements v. Moore*, 6 Wall. 299 (73 U. S. bk. 18, L. ed. 786).

But even if the verdict stands, the complainants are entitled to a decree. Our statute declares all conveyances made in fraud of creditors to be absolutely void as to them, without exceptions or reservations, omitting the proviso of the Statute of Elizabeth, protecting *bona fide* purchasers. This omission could not have been accidental. It was plainly intentional. For on comparison it will be seen that the statute, first enacted in its present language in 1798, is copied in large part *verbatim* from section 2, and the preamble of 13 Eliz. chap. 5; the clause also avoiding deeds made to defraud purchasers being taken plainly from 27 Eliz. § 2, and preamble. Compare Act of 1728, reenacted Dig. 1767, p. 65, and original Act of first General Assembly 1647, 1 Col. Rec. 177, and English statutes declared in force here. Laws 1749, p. 71; Dig. 1767, pp. 55, 56.

This statute is the only law of the State. If the statutes of Elizabeth were ever in force here they have long since been expressly repealed. Dig. 1857, 632, § 3; 1872, 630, § 3; 1882, 771, § 3; p. 633, § 1; p. 636, § 1; p. 772, § 1.

This is more clearly shown as at the same time common law crimes are expressly excepted from the repealing statutes. Dig. 1857, p. 650, § 1; 1872, p. 559; 1882, p. 649.

The statute being express and being unambiguous repeals, supersedes, the common law. *Grisham v. State*, 2 Yerg. 589. Compare *Preston v. Crofut*, 1 Conn. 527, note; *Garland v. Rines*, 4 Rand. 282; *Hildreth v. Sands*, 2 Johns. Ch. 35; *Beckford v. Wade*, 17 Ves. 87; *Warfield v. Fox*, 53 Pa. St. 382; *Roberts v. Ander-*

son, 8 Johns. Ch. 371; *Bean v. Smith*, 2 Mason, 252.

The province and duty of the court is to declare the law as it is, not to make it. 3 Bl. Com. 431.

The rules for the interpretation and construction of statutes and contracts and other writings are the same. Where the words embody a definite meaning, involving no obscurity, "There is no room for construction. That which the words declare is the meaning of the instrument; and neither courts nor Legislatures have the right to add to or take away from that meaning." *Newell v. People*, 7 N. Y. 97.

Courts cannot correct supposed errors, omissions or defects in legislation, or vary by construction the contracts of parties. The office of interpretation is to bring a sense out of the words used, not to bring sense into them. *McCluskey v. Cromwell*, 11 N. Y. 601, 602; *Enckling v. Simmons*, 28 Wis. 276.

And it is the settled doctrine that "a *casus omissus* can in no case be supplied by a court of law; for that would be to make laws. Judges are bound to take the Act of Parliament as the Legislatures have made it. *Potter, Dwar. Stat.* 215. And see, *Sedg. Stat. & Const. L.* 360-363; *Beckford v. Wade*, 17 Ves. 88; *Eberett v. Wells*, 2 Scott N. R., 525; *Lamond v. Eaffe*, 3 Ad. & El. 910; *Demarest v. Wynkoop*, 8 Johns. Ch. 142; *Collins v. Garman*, 5 Md. 505; *Ellis v. Paige*, 1 Pick. 43.

Neither has the argument *ad inconvenienti* any proper place here. *Hall v. Franklin*, 8 Mees. & W. 259;

Nor an argument drawn from the supposed intent of the law makers; much less what may be supposed would have been their intent had the particular case in question been presented to them. *King v. Barham*, 8 Barn. & C. 104.

As Dr. Lieber says in *Hermeneutics*, 118, 119: "In many cases it is difficult to discover the motives which may have prompted those who drew up the text; but it is also dangerous to construe upon supposed motives; that is, such as are not ascertainable from the interpretation of the text. Everyone is apt to substitute what his motives would have been, or, unconsciously perhaps, to fashion the supposed motives according to his own interests and views of the case." See also, *Sussex Peerage*, 11 Clark & F. 86; *Fordyce v. Bridges*, 1 H. L. Cas. 1; *Minet v. Leman*, 20 Beav. 269; *Dunbar v. Roxburghe*, 3 Clark & F. 335; *Warfield v. Fox*, 58 Pa. St. 382; *Tynan v. Walker*, 35 Cal. 634; *Harrington v. Smith*, 28 Wis. 43; *Beckford v. Wade*, 17 Ves. 87; *Gardiner v. Collins*, 2 Pet. 93 (27 U. S. bk. 7, L. ed. 359).

At all events, under the circumstances disclosed, Clafin can only hold the estate as security for what he has actually paid for it; and the plaintiffs are entitled to a decree ordering him to release it to them on repayment. *Kerr, Fraud. & M.* 319; *Bump, Fraud. Conv.* 303, 564, 574; *Wait, Fraud. Conv.* §192, *et seq.*; *Youst v. Martin*, 3 Serg. & R. 428; *Servis v. Beatty*, 32 Miss. 52; *Farlin v. Cook*, 30 Kan. 401; 46 Am. Rep. 100; *Clements v. Moore*, 6 Wall. 299.

The plaintiffs are also entitled to a peremptory order against Young, for the payment to them of the purchase money received by him with interest, and that he stand committed as for contempt until it is paid; the bill being also

a bill by the plaintiffs as judgment creditors, after return of execution against him *nulla bona*. *Williamson v. Williams*, 11 Lea (Tenn.), 355.

Mr. Ziba O. Slocum, for respondent, Clafin:

The verdict was against the complainants, upon whom the burden of proof lay, and will not be set aside, unless there is a strong preponderance of the evidence against it, and the Judge who tried the cause be dissatisfied with it. 5 R. I. 24.

The verdict of a jury will not be set aside when the question of fact is not free from doubt or when more than one conclusion can be drawn from the facts by reasonable men; and it is quite immaterial that the court might have come to a different conclusion from that drawn by the jury, or that another jury might, on the same evidence, find a different verdict. *Boss v. Prov. & W. R. R. Co.* 1 New Eng. Rep. 39.

Messrs. Joseph E. Spink and Page & Owen, for the other respondents.

Durfee, Ch. J., delivered the opinion of the court:

This is a suit in equity to set aside a conveyance of real estate, on the ground that it was made with intent to hinder, delay or defraud creditors. The defendant, Henry A. Clafin, is grantee of the estate, and the defendant, George A. Young, the grantor. A jury, to which the questions of fact in the case were submitted, found that Young did convey the estate with the fraudulent intent, but that Clafin was a *bona fide* purchaser for value without notice, actual or constructive, of the fraud. The complainant complains of the latter finding as against the evidence and asks for a new trial on that account. Our statute, Pub. Stat. R. I. chap. 192 § 9, gives either party to a suit in equity by bill the right to have questions of fact raised by the pleadings tried by a jury, timely demand being made. It provides that the verdict thereon shall be conclusive, unless set aside for cause and a new trial granted. The questions were tried under this provision, and under it we think the verdict must stand unless it is palpably wrong. It is not enough that we do not agree with the jury, for we have no right to make our opinion the test. Nothing shows that the jury, who it is admitted were fully and correctly instructed by the court, were improperly influenced by either sympathy or prejudice. There was no direct testimony that Clafin had any actual knowledge of the fraud. He denies that he had any, or that he knew that Young, with whom he was not intimate, was involved in debt.

The question, therefore, was whether the circumstances were such as to put him on inquiry and to affect him with imputed or constructive knowledge. The circumstances were suspicious, but Clafin testifies that Young came to him in affliction from the death of his son, and stated that he was anxious to sell the estate, even at some sacrifice, because he was in immediate want of money to meet needs consequent upon the death. The alleged reason for wishing to sell was one which, if believed, was calculated to divert suspicion and quiet inquiry. We cannot say there was not a fair arguable question for the jury. If the jury had given a verdict against

Claffin, we should doubtless have accepted it; but still we are not convinced that a verdict for him is so clearly erroneous that we ought to set it aside.

The complainants contend that the verdict ought to be set aside because, after the conveyance but before the purchase money was paid, Claffin had notice of a fact that ought to have put him on inquiry, namely: the levy of the execution under which the complainants claim title. The levy, though made before the purchase money was actually paid, was made after Claffin had given his check for half of it, and his negotiable promissory note for the other half. Moreover, the question for the jury was whether Claffin "in taking the deed" was a *bona fide* purchaser for value without notice. We do not see how a fact which occurred after the deed was taken could much avail to show notice before it was taken. At best it could only throw back an equivocal light. If the question for the jury had been whether or not the purchase money was paid over in bad faith, the fact might have been more important.

The complainants contend that they are entitled to a decree setting the conveyance aside under the verdict, under our statute of fraudulent conveyances, even if Claffin was a *bona fide* purchaser for value without notice. Our statute, Pub. Stat. R. I. chap. 173, § 1, is in substance a reenactment of the English statutes of fraudulent conveyances, 13 and 27 Elizabeth, with the omission of the penal clauses and of the proviso or saving in favor of *bona fide* purchasers for value without notice. The complainants ground their contention on the omission of the proviso.

We have no reported decision on this point, and we are unable to name any unreported case in which the point has been adjudicated; but nevertheless we are very confident that both bench and bar have always understood that our statute was to be construed like the statutes of Elizabeth in this respect, notwithstanding the omissions and that the court has repeatedly ruled so at *nisi prius*.

One of the purposes of the statute is to protect *bona fide* purchasers, and it would certainly be very singular for the statute to require the sacrifice of such a purchaser merely because he happens to be the grantee under the fraudulent deed. The statutes of several other States omit the proviso, and yet the complainants can adduce no decision which supports the construction for which they contend. We find cases which opugn the construction.

The Statute of Ohio against fraudulent conveyances contains no words confining its operation to creditors and no proviso in favor of *bona fide* purchasers for value, but provides that such conveyances "shall be deemed utterly void and of no effect;" but it has been held by the supreme court of that State that the operation of the statute is to be confined to the mischiefs in view, and that it must receive the same construction as though it had contained the restriction and proviso. *Burgett v. Burgett*, 1 Ohio, 469; *Bancroft v. Blizzard*, 18 Ohio, 80.

The statutes of Alabama, Illinois, Kansas and Vermont omit the proviso, but nevertheless it has been held by the courts of last resort in those States that conveyances to innocent grantees for value are valid, notwithstanding they may have

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been made by the grantor with intent to hinder delay or defraud creditors. *Stover v. Herrington*, 7 Ala. 142, 151; *Governor v. Campbell*, 17 Ala. 566; *Ewing v. Runkle*, 20 Ill. 448; *Gridley v. Bingham*, 51 Ill. 153; *Farlin v. Sook*, 30 Kansas, 401; *Leach v. Francis*, 41 Vt. 670. We think our statute must be similarly construed.

The complainants contend that Claffin is only entitled under the circumstances to hold the estate as security for what he paid for it. Doubtless relief in that form may properly be administered under some circumstances. The complainants seem to suppose that the testimony reported in support of the petition for a new trial is before us for all purposes. We do not take that view. We think we have nothing to do with it except for the purposes of the petition, and that for all other purposes we know only what is alleged in the bill and admitted or not denied in the answer and what has been found by the jury on the issues submitted to them. We think we ought to know more before granting relief in the special form suggested.

DUNNELL MFG. CO.

v.

George W. NEWELL, Treasurer of the Town of Pawtucket.

1. Under Public Statutes R. I., chap. 42, §§ 10, 11; chap. 43, §§ 11, 22, **business corporations having capital owned in shares are taxable only for real estate and such personalty as is described in Pub. Statutes. R. I. chap. 42, § 11.**
2. When **power to assess for taxation is limited to certain kinds of personalty**, the assessment roll must show that the assessment is made only on such kinds.
3. If an **assessment is entire and any part of it is void**, the whole is void.
4. An **assessment roll against a manufacturing corporation** specified several distinct tracts of realty and continued: "personal valuation, \$170,000; personal tax, \$2,266.66." **Held**, that the assessment on personalty was void.
5. An **action will not lie to recover the amount of taxes illegally assessed and voluntarily paid.**
6. A **tax is not paid under compulsion** merely because the collector holds a warrant to collect it by levy or distress.
7. A **paid under protest a tax illegally assessed. Held**, that he could recover it.

(Providence—Decided January 30, 1886.)

ASSUMPSIT. Heard by the court on an agreed statement of facts. *Judgment for plaintiff.*

The agreed statement of facts was as follows:

1. That the plaintiff is a manufacturing Corporation whose capital stock is held in shares.
2. That the voters of Pawtucket authorized the levy of a tax in the years 1881, 1882, 1883 and 1884.
3. That in execution of this authority the assessors assessed against the plaintiff the taxes

in dispute in the way set out in the copies presented to the court. These copies show an assessment upon real estate, of which no complaint is made, and also each year upon "personal" property \$170,000. The word in the list is "personal" alone, which, no doubt, means "personal property."

It is agreed that the assessments were made in accordance with the votes of the town, signed by the assessors, dated, and deposited with the town clerk; and that the town clerk made copies of these assessments and delivered them to the town treasurer.

4. That the town treasurer, on receiving them, affixed to them his warrant to the collectors and delivered them to the collectors for collection.

A copy of the certificate of the assessors, of the town clerk, and of the treasurer's warrant to the collector is submitted to the court. The warrant authorized a levy by the collector, as provided by law, upon any property of the plaintiff to satisfy the tax.

5. The collector notified the plaintiff that the taxes were committed to him for collection.

6. The plaintiff then paid the taxes. The receipts are submitted herewith to the court.

7. The plaintiff before paying the taxes in 1884 made protest against the personal tax, but not in 1881-1883.

8. The taxes were paid by the collectors into the treasury.

9. The plaintiff made demand on the town council for the repayment of the taxes.

10. The plaintiff in none of the years named made any return of its taxable property to the assessors.

The plaintiff claims, on the foregoing facts, that the tax on personal property each year was illegal, was made by compulsion and not voluntarily.

Mr. Claudius B. Farnsworth, for plaintiff:

Taxes can only be levied by virtue of some statute. The authority here was P. S. chap. 42, §§ 1, 8, 11.

If there is any other property belonging to the company rendering the stock more valuable, the law orders it to be assessed to the owner of the stock where he is taxable for personal property. P. S. chap. 42, §§ 9, 10; P. S. chap. 43, §§ 11, 12.

Our law is similar to that which formerly existed in Massachusetts. See, *Salem Iron Factory Co. v. Danvers*, 10 Mass. 514; *Amesbury Mfg. Co. v. Amesbury*, 17 Mass. 461.

Taxes against corporations should be assessed on the companies' real estate and machinery specifically. See, *Boston & S. Glass Co. v. Boston*, 4 Met. 184.

The assessors perform judicial functions of a limited sort; and it should appear on the face of the proceedings that they have done what the law authorized them to do. *Cooley*, Tax. 550-552; *Boston Water Power Co. v. Boston*, 9 Met. 199; *Adam v. Litchfield*, 10 Conn. 127; *Whitelsey v. Clinton*, 14 Conn. 72. See also, *Henry v. Chester*, 15 Vt. 460; *Allen v. Burlington*, 45 Vt. 207; *Thurston v. Little*, 3 Mass. 429.

It has never been supposed that a lump tax on "real estate," where no specific real estate was named would be a valid tax. *Young v. Joslin*, 118

13 R. I. 875; *Hopkins v. Young*, R. I. Index W. 47.

An action lies for the recovery of this tax on personal property, and assumpsit is the proper remedy; because personal property is a distinct subject of taxation from that which was lawfully taxed to the Company, that is, the real estate, and an unlawful tax upon it may be recovered. *Preston v. Boston*, 12 Pick. 7; *Lee v. Templeton*, 6 Gray, 579; *Boston & S. Glass Co. v. Boston*, 4 Met. 181, 185, 186; *Amesbury W. & C. Mfg. Co. v. Amesbury*, 17 Mass. 461; *Dunnell Mfg. Co. v. Pawtucket*, 7 Gray, 277; *Preston v. Boston*, 12 Pick. 7; *Huckins v. Boston*, 4 Cush. 543; *Lee v. Templeton*, 6 Gray, 579; *St. Mary's Ch. v. Tripp*, 14 R. I. 307; *Lincaln v. Worcester*, 8 Cush. 55.

The tax was paid to an officer having a warrant to levy on the Company's property forthwith if it was not paid. Hence, it was paid under compulsion and not voluntarily; and as it was an unlawful tax, it may be recovered. P. L. chap. 43, § 20; *Bradford v. Chicago*, 25 Ill. 411; *Howard v. Augusta*, 74 Me. 79; *Boston & S. Glass Co. v. Boston*, *supra*; *Dunnell Mfg. Co. v. Pawtucket*, *supra*; *Louisville v. Anderson*, 79 Ky. 384; *S. C.* 42 Am. Rep. 220; *Henry v. Chester*, 15 Vt. 460; *Allen v. Burlington*, 45 Vt. 207, 407; 4 Wait, Act. & Def. 506; *Atwell v. Zeluff*, 26 Mich. 118, where no protest was made; *Cooley*, Tax. 569, n. 3.

Durfee, Ch. J., delivered the opinion of the court:

The first question is whether the assessments on the personal estate of the plaintiff Corporation, mentioned in the agreed statement, were valid. The Corporation contends that the assessments were invalid because it was not taxable for personal estate generally but only for machinery. Our statutes relating to taxation do not in terms limit the taxation of the personal estate of manufacturing corporations to machinery; but they provide for the taxation of corporate shares to the owners unless the corporation is taxed for an amount equal to the full value of its property. Pub. Stat. R. I. chap. 42, § 10.

They also authorize assessors to call upon any corporation in the State for the amount and par value of the stock of any stockholder assessable by them; require the corporation to respond to the calls, giving the par and cash market value of the shares and "the proportionate amount per share at which its real estate and machinery, if any, were last assessed," and direct that stockholders shall be taxed "Only for the difference in the cash market value of each share by them held and the proportionate amount per share at which its real estate and machinery were last assessed." Pub. Stat. R. I. chap. 43, §§ 11 and 12.

It is argued that the implication from these provisions is that manufacturing corporations are taxable only for real estate and machinery; for if they were taxable generally for both real and personal estate the result would be that the excess over real estate and machinery would be subject to a double taxation; and statutes are not to be construed as calling for a double taxation unless the construction is unavoidable. We think the argument is valid as applied to business corporations having capital owned in

shares, unless they happen to have personal estate, besides machinery, which is locally taxable under chapter 42, § 11. It may be objected that it is evidently contemplated in chapter 42, § 10, that such corporations may be taxed for an amount equal to the value of their entire property. The answer is that they may be taxed on their real estate and personal estate of the kinds specified in chapter 42, § 11, for an amount equal to their entire property, or that they may have no personal property except such as is specified in chapter 42, § 11. The answer is not quite satisfactory; but the supposition that it was intended that the assessors should be at liberty to tax corporations for their entire property or not, according to their own option, regardless of any rule or system, is still less satisfactory and yet that is the alternative. We have come to the conclusion that the plaintiff Corporation was taxable in its corporate capacity only for its real estate and for its personal estate of the kinds specified in chapter 42, § 11. And see, *American Bank v. Mumford*, 4 R. I. 478; *Boston & S. Glass Co. v. Boston*, 4 Met. 181.

The assessments complained of here extend in terms to both real and personal estate generally. For anything that appears, the assessors may have assessed the plaintiff Corporation for its entire personal estate of every kind. We must assume that they did so assess it, and consequently that they exceeded their authority. Even if the Corporation had no personal estate besides the kinds specified in chapter 42, § 11, we could not know that the assessors did not suppose it had other kinds and assess it accordingly. We think that where the authority to assess is limited to particular kinds of personal estate, the assessment roll ought to show that the assessment was made only on those kinds, the taxpayer being entitled to know that the assessors keep within their jurisdiction. And this is the more plainly so in the case of corporations, because, as we have seen, our statute makes it the duty of a corporation, when asked by assessors, to report "the proportionate amount per share at which its real estate and machinery, if any, were last assessed;" something which it would have no means of knowing if the machinery be not assessed specifically as such. *Whittlesey v. Clinton*, 14 Conn. 72; *Goddard v. Seymour*, 30 Conn. 394; *Monroe v. New Canaan*, 43 Conn. 309; *Dubois v. Webster*, 7 Hun, 371, 374.

If any part of an assessment is void, the whole is void where the assessment is entire. *Johnson v. Colburn*, 36 Vt. 693; *Gerry v. Inhab. Stoneham*, 1 Allen, 319.

The second question is: can the plaintiff recover back the taxes paid under the invalid assessment? It is settled that if a taxpayer voluntarily pays taxes he cannot recover them back, even if he afterwards discovers an invalidating defect in the assessment. *Sarton v. Pepper*, 28 Hun, 31; 2 Desty, Tax. 791.

This is not unreasonable. A taxpayer may be illegally assessed and yet may not be more onerously assessed than he would be if legally assessed; and therefore if he pays the tax without objection it may be properly taken for granted that he intends to waive the objection, the presumption being that he knows the law. In the case at bar, if the stockholders in the plaintiff Corporation all reside in Pawtucket,

the result to them is the same, whether the personal estate of the Corporation be taxed wholly to the Corporation or only partly to the Corporation and the rest to them as stockholders. It is therefore no more than fair that a taxpayer, if he intends to take advantage of a defect, should at least object to or protest against the tax when he pays it, so that the assessors may have notice and correct the defect for the future. In the case at bar, the taxes for 1881, 1882 and 1883 were paid without objection and without protest. There is nothing to show that they were not paid as voluntarily as any taxes were paid by any taxpayers in the Town of Pawtucket during those years. The plaintiff contends that they were paid by compulsion because they were paid to a collector having a warrant to collect them by levy or distress. But they were paid before any step was taken or threat made to enforce them by levy or distress. The collector, if the taxes had not been paid, might have proceeded against the Corporation by an action at law, in which the Corporation would have had full opportunity to contest the validity of the taxes, instead of proceeding by levy or distress. To hold that the payments were compulsory simply because the collector had his warrant, would be practically to hold that all payments are compulsory, for the collector has no authority to collect without warrant. We think, therefore, that the taxes paid in 1881, 1882 and 1883 must be taken to have been voluntarily paid, and that they cannot be recovered back. *Cooley, Tax. 567, 568; Taylor v. Board of Health*, 81 Pa. St. 73.

The tax of 1884 was paid under protest. Having been so paid, we think it may be recovered back, though even a payment under protest may, under some circumstances, be regarded as voluntary. 2 Desty, Tax. 797; *Parcher v. Marathon Co.* 52 Wis. 388; *Erskine v. Van Arsdale*, 15 Wall. 75 [82 U. S. bk. 21, l. ed. 63]; *Baker v. Cincinnati*, 11 Ohio St. 534.

We give the plaintiff judgment for the amount of tax on personal estate for 1884, with interest from payment.

Alfred POND *et al.*,

v.

John ALLEN *et al.*

1. A testatrix, by the third item of her will, gave all her estate to her husband for life; by the fourth, she directed that "the following bequests" be paid one year after the death of the husband. Held, that the bequests were present gifts and vested, notwithstanding the postponement of payment.
2. The residuary devisees were, by the will, entitled only to the surplus after payment of the specific legacies. Held, that the legacies were a charge on the realty of the estate; that the legatees, in the absence of laches, were entitled to the rents of the realty, if needed to pay their legacies; and further, that the death of a legatee did not discharge the realty.
3. A court of equity may sequester the rents of realty charged with the payment of debts or legacies if the rents are

needed to prevent a deficiency. (*Draper v. Barnes*, 12 R. I. 156; *Allen v. Allen*, 12 R. I. 301, explained).

4. By the eleventh item of her will the testatrix gave certain realty to a devisee and his heirs. **Held**, that the devisee took a fee in remainder and was entitled to the rents from the husband's death.
5. By the eighteenth item of her will the testatrix requested the court of probate after the death of her husband, who was named as executor, to appoint some suitable person to make "a final settlement" of the estate. **Held**, that the final "settlement" to be made by the person so appointed administrator related only to bequests of personal property.
6. A bequest given by the codicil, in place of one given by the will, stands on the same footing in regard to payment as the bequests of the will.
7. A clause in the codicil to the will enumerated certain legacies in the will, changed some of them, affirmed others, and proceeded: "I also give and bequeath to S." **Held**, from the general tenor of the will that this gift to S. made S. a legatee under the will, just as were the other legatees named in this clause of the codicil.

(Providence—Decided Nov. 9, 1886.)

BILL in equity for the administration of a testate estate. *Will construed.*

Mrs. Elmira Helme, wife of James Helme, of Woonsocket, died August 17, 1876, possessed of a large estate, real and personal, and leaving a will and codicil, by which she gave all of her estate to her husband during his life, and made him executor.

He administered and took charge of all of the estate, taking the rents and income for his own use, during his life, and died December 22, 1888, and on January 18, 1884, the defendant, F. G. Jillson, was appointed administrator *d. b. n. c. t. a.* by the Court of Probate of Woonsocket, and by general consent has since taken charge of all the estate, real as well as personal.

The will makes the following dispositions of the estate after the death of the husband, viz.:

"Item 4. Now then, after the death of my said husband, James Helme, I do hereby make the following bequests to the following named persons, to them and to their heirs and assigns forever, to be paid to each of them one year after the death of my said husband, James Helme, viz.":

Then follow general money legacies amounting, including those in the codicil, to \$80,000, and in item 11 a specific devise to the defendant, Francis Metcalf, of a lot of land and buildings in Blackstone, Mass.; followed in item 17, as changed by the codicil, by a general residuary gift of "All the rest and residue of my estate, both real, personal and mixed that may be left at the death of my said husband, and after the payment of all the foregoing bequests contained in my last will and testament not revoked or changed, and all the bequests contained in the codicil, in full, and the payment

of all the indebtedness of the final settlement of my estate," to the defendants, John Allen, James H. Rickard and George S. Rickard, and to Asa Allen, who died January 1, 1885, and who is now represented by the defendant, Delia A. Allen, his widow, executrix and devisee and legatee, in equal fourth parts each.

And all followed by this additional direction in the will:

"Item 18. I direct the foregoing bequests to be paid and delivered to the aforementioned devisees one year after the death of said husband, James Helme, except the bequests of my wearing apparel, and that I direct to be delivered to said devisees as soon as may be after the probate of my will; and after the death of my said husband I desire the Court of Probate of the Town of Woonsocket to appoint some suitable person to make a final settlement of my estate according to the tenor of this my last will and testament."

The bill is filed by certain of the general legatees against the administrator, the specific devisee, the residuary devisees and legatees, and the other general legatees, or their representatives averring that the estate is insufficient to pay the general legacies, and claiming that they all are charged upon the real estate and praying accounts, sale of the real estate, payment of the legacies, etc.

At the last term, an interlocutory decree was entered declaring the legacies charged upon the real estate, except the Blackstone estate devised in item 11 to the defendant, Francis Metcalf, that all the real estate so charged would be required to pay the legacies, and appointing Mr. Jillson receiver to hold the rents, and also master to sell the real estate, and also directing him to convert into money all the personal estate and hold the funds till further order, rendering separate accounts.

This he has done, and returned accounts, showing balances in his hands for distribution.

The bill and answers present the following questions:

1. As to the rent of the Blackstone estate in Mr. Jillson's hands which accrued during the year after Mr. Helme's death. This is claimed on the one hand by the devisee, Francis Metcalf, for himself; and on the other hand by the legatees as falling into the estate.

2. As to the rents of the other real estate in Mr. Jillson's hands. These are claimed on the one hand by the residuary devisees for themselves; and on the other hand by the legatees as falling into the estate and as charged with the legacies.

3. As to the legacy of \$1,000 given by item 6 of the will to Mrs. Laura Pond, who died before the testatrix. This is claimed by the complainants, Alfred Pond, Mrs. Cox and Mrs. Leland, the children of Mrs. Pond; but their claim to it is denied by the residuary legatees on the ground, presumably, for the answer does not disclose, that it lapsed and fell into the residue.

4. As to the legacies to those legatees who survived the testatrix but died in the lifetime of her husband, James Helme, and now claimed by their respective representatives.

5. As to the legacy given by the codicil to the defendant, Sarah H. Rickard; and the same applies to that given to Lucinda Hazleton. Mrs.

Rickard claims that it was a present gift, payable one year after the death of the testatrix; and that it therefore carries interest accordingly; and also that it is preferred to all the other legacies; while the other legatees claim that it stands upon the same footing as all of the others.

Mr. James Tillinghast, for legatees:

1. As to the rents of the Blackstone estate accruing during the year next after the death of the husband and life tenant, James Helme:

It is submitted in behalf of the devisee, Franklin Metcalf, that these rents belong to him. The devise to him, item 11, was immediate upon the death of James Helme, and free from any charge for the legacies. The possession is not postponed by either item 4 or 17 of the will, for these plainly are applicable only to the pecuniary legacies, the payment of which is postponed for the convenience of the estate.

There is no intermediate gift of these rents, and it is impossible to find in the will any intention to throw them into the residue, much less to leave them to descend as intestate. See, 1 Jarm. Wills, ed. 1881, 652.

2. As to the rents of the other real estate in Mr. Jillson's hands:

It is submitted in behalf of the general legatees that these rents, being needed, the estates otherwise real and personal being confessedly insufficient, are charged with and should be applied to the payment of the legacies. The charge upon the real estates out of which these issued was created by the testatrix, not by operation of law; and was immediate upon the death of the life tenant, James Helme; and then became an equitable lien upon the estates so far as needed, and was equally upon the incident as upon the principal; upon the rents as upon the estates themselves. The rents are but a part of the estates; and having been seized and being now actually in the possession of the court, through the receivership, can be at once applied under the decree.

Seizure through a receiver to effectuate such a charge is a well settled exercise of equity jurisdiction. 2 Story, Eq. Jur. §§ 1216, 1244-1246; *Jones v. Pugh*, 8 Ves. 71; *Davis v. Marlborough*, 1 Swanst. 74; *Walker v. Bell*, 2 Madd. 21; *Schomburg v. Humfrey*, 1 Dru. & War. 411; *Stratford v. Ritson*, 10 Beav. 25; *Chalk v. Raine*, 13 Jur. 981; 18 L. J. N. S. 472; *Smith v. Butler*, 28 Gratt. 144; *Johnson v. Tucker*, 2 Tenn. Ch. 398; *Grantham v. Lucas*, 15 W. Va. 425; *Smith v. Kelley*, 31 Hun, 887; *Pepper v. Shepherd* 1 Cent. Rep. (D. C.), 87.

3. As to the legacy of \$1,000 to Mrs. Pond in the 6th item of the will:

It is submitted in behalf of her children, the complainants, Alfred Pond, Mrs. Cox and Mrs. Leland, that they are entitled to it. They clearly are, by force of the statute, chap. 182, p. 472, § 14, if their mother would have been had she survived the testatrix. *Moore v. Dimond*, 5 R. I. 121.

4. Did these legacies vest at the death of the testatrix or were they contingent upon the legatees surviving the life tenant, James Helme? It is submitted in behalf of the legatees, that they vested immediately, the payment only being postponed so as not to interfere with the husband's life estate, as it was for a year longer for the further convenience of the estate. The evident intent of the testatrix was to give to her husband the use and enjoyment of her

sole estate during his life, and at his decease for the whole to be divided among the legatees and devisees in the proportions named. *Ives v. Harris*, 7 R. I. 424, 425.

Then, as used in this 4th item, is not an adverb of time; although if it were it would make no difference. "Adverbs of time, in a devise of a remainder, are construed to relate merely to the time of enjoyment of the estate, and not to the time of vesting." *Poor v. Considine*, 6 Wall. 475 (73 U. S. bk. 18, L. ed. 874). And see, 1 Jar. Wills, Big. ed. 1881, 894, 895, 842, 843; 1 Rep. Leg., Phil. ed. 1848, chap. 10, § 3, p. 584 et seq.; *Benyon v. Maddison*, 2 Bro. Ch. 75; *Scurfield v. Howes*, 3 Bro. Ch. 90; *Taylor v. Langford*, 3 Ves. 119; *Harrison v. Foreman*, 5 Ves. 207, 209; *Cohen v. Waley*, 10 Jur. 787; *Cousins v. Schroder*, 4 Sim. 23; *Watson v. Watson*, 11 Sim. 73; *Peters v. Dipple*, 12 Sim. 101; *Locker v. Bradley*, 5 Beav. 593; *McLachlan v. Taith*, 28 Beav. 407; affirmed in 2 DeG. F. & J. 449; *Re Bright's Trust*, 21 Beav. 67; *Pike v. Stephenson*, 99 Mass. 188; *Bunch v. Hurst*, 3 Desaus. 275; *Perry v. Rhodes*, 2 Mur. (N. C.) 140; *Re Mahan*, 32 Hun, 73; *Flickinger v. Saum*, 40 Ohio St. 591; *Thornton v. Roberts*, 80 N. J. Eq. 473; *Sweet v. Chase*, 2 N. Y. 73; *McClure's App.* 72 Pa. St. 414.

5. As to the legacies given by the codicil, of \$3,000, to the defendant Sarah W. Rickard, and of \$2,000 to Lucinda Hazelton who survived the testatrix and died in the lifetime of the life tenant, James Helme:

These legacies were not payable until a year after the death of James Helme. All the legacies of the codicil are plainly only substitutional for those in the will, and are to be read, therefore, as if inserted in the several items of the will to which they are referred.

It is impossible to suppose that it was the intention to put these two legacies on any different footing from the others and to give them precedence over the husband's life estate. The same language of present gift, but stronger: "I now give," is used for the increased gifts, but there can, we conceive, be no doubt that these are upon the terms of the original will. 1 Jarm. Wills, ed. 1881, 185; *Snow v. Foley*, 119 Mass. 102.

Mr. Thomas C. Greene, for Jillson, administrator.

Messrs. Colwell & Barney, for other respondents.

Durfee, Ch. J., delivered the opinion of the court:

The decision of the court on the questions submitted is as follows, to wit:

First. The devise of the Blackstone estate to Francis Metcalf is an out and out devise to him of the fee in remainder and entitled him to the rents thereof immediately after the death of James Helme, the life tenant. The direction in item 18 is in our opinion a direction to the administrator to be appointed "to make a final settlement of the estate," and as such relates only to the pecuniary bequests and bequests of personalty.

Second. It is competent for a court of chancery to sequester the rents of real estate which is charged by will with the payment of debts or legacies, if there will be a deficiency without them.

The cases of *Draper v. Barnes*, 12 R. I. 156, and *Allen v. Allen*, 12 R. I. 301, are cases relating to the statutory charge for the payment of debts and not, as here, to a testamentary charge for the payment of legacies or debts and legacies. The statute provides in effect that the statutory charge shall not extend to rents accruing before sale. Pub. Stat. R. I. chap. 185, § 5; chap. 187, § 10. Under the will here the residuary devisees are entitled to nothing except what is left after the specific legacies are paid out; and therefore the specific legatees are as much entitled to the rents or income of the residuary real estate as to the real estate itself, if the rents are needed for the payment of the legacies and the legatees duly assert their title to them. *Grantham v. Lucas*, 15 W. Va. 425; *Schomberg v. Humfrey*, 1 Dr. & War. 411; *Chalk v. Raine*, 18 Jur. 981; *Bloodgood v. Clark*, 4 Paige, 574; *Bank of Ogdensburg v. Arnold*, 5 Paige, 88; 2 Story Eq. Jur. §§ 1244, 1246.

Third. The several pecuniary legacies are present gifts to the legatees named, though they are not to be paid until one year after the death of James Helme, who is to have the income of the estate during his life. The payment of the legacies is postponed during the life of James Helme for his benefit, in order that he may have the income; and for one year longer for the settlement of the estate. Such a postponement does not prevent the vesting of the legacies. It follows that the personal representatives of the legatees who died after the testatrix are entitled in their places. *Rogers v. Rogers*, 11 R. I. 38, 73-76; *Packham v. Gregory*, 4 Hare, 396; *Doe v. Considine*, 6 Wall. 458 [73 U. S. bk. 18, L. ed. 869]; *Herbert's Exrs. v. Post*, 26 N. J. Eq. 278; *Post v. Herbert's Exrs.* 27 N. J. Eq. 540; *Loder v. Hatfield*, 71 N. Y. 92; *Eldridge v. Eldridge*, 9 Cush. 519. Nor is the real estate exonerated. The doctrine of the English cases cited (*Poulet v. Poulet*, 1 Vern. 204, also 2 Ventr. 366; *Gawler v. Standerwick*, 2 Cox, 15; *Smith v. Smith*, 2 Vern. 92; *Jennings v. Looks*, 2 P. Wms. 276; *Duke of Chandos v. Talbot*, Id. 601, 610; *Prosser v. Abington*, 1 Atk. 482, 485; *Parker v. Hodgson*, 1 Drew. & Sm. 568), that where a legacy payable in *future* is charged upon real estate, the real estate is relieved if the legatee dies before the time of payment arrives, even though the legacy may be vested and hold as against the personal assets, is not a very satisfactory doctrine. It rests rather upon the English prejudice in favor of the heir, or of the devisee who is, it is said, *factus hæres*, than upon any sound principle, and we are not aware that it has the approval of any American decision. But, however that may be, the doctrine, according to the modern statement of it, applies only where the payment is postponed for reasons personal to the legatee; as, for instance, where the legacy is to a minor to be paid when he reaches his majority; and does not apply where, as in the case at bar, the postponement is for the benefit of some person other than the legatee, who is meanwhile entitled to the use or income of the estate which is charged, or where it is merely for the convenience of the estate in settlement. 2 Jarm. Wills, 5th Am. ed. by Rand & Talcott, 450, and note; *Evans v. Scott*, 1 H. L. Cas. 43, 57; *Birdsall, Admr. v. Hewlett*, 1 Paige, 32; *Harris v. Fly*, 7 Paige, 421.

Fourth. The children of the legatee who died

before the testatrix are entitled to take in her place under the statute, Pub. Stat. R. I. chap. 182, § 14*. *Moore v. Diamond*, 5 R. I. 121.

Fifth. The bequest by codicil, of \$4,000 to Leonard Hazelton, instead of the \$2,000 bequeathed by will, takes the place of the latter bequest in the will, and should abate and be paid on the same footing with the other legacies. *Rop. Leg.* 873.

Sixth. The bequest, by codicil, of \$3,000 to Sarah H. Rickard, wife of George Rickard, is also to be treated as if it were originally in the will. The bequest is contained in a clause which alters the will in respect of bequests of \$2,000 each to James H. Rickard and George S. Rickard, by substituting bequests of \$7,000 to each of them, and which confirms the will in respect of bequests of \$2,000 each to Sarah Rickard and Lizzie Rickard. The bequest to Sarah H. Rickard, wife of George, immediately follows the confirmation in the words, "and I also give and bequeath to Sarah H. Rickard, wife of the said George Rickard, the sum of \$3,000 to her, her heirs and assigns forever." Of course the bequest, being a part of the clause, must be interpreted as such, and so interpreted it seems to us that the intention was to put Sarah H. Rickard, wife of George, together with the other legatees there named, and to make her, together with them, in legal effect, a legatee under the will. This construction, though not free from doubt, is the construction which best accords with the general design of the will to keep the property intact for the use of James Helme, the husband of the testatrix, during his life. Moreover, considering how careful the testatrix was to fix the time for the payment of the legacies given by the will, it is reasonable to suppose that she would have named a time for the payment of this bequest, if she had not intended it to be paid as if a bequest under the will. The legacy to Lucinda Hazelton is of the same character and must be construed in the same way.

*As follows:

SECT. 14. Whenever any child, grandchild or other person having a devise or bequest of real or personal estate shall die before the testator, leaving a lineal descendant, such descendant shall take the estate, real or personal, as devisee or legatee, in the same way and manner as such devisee or legatee would have done in case he had survived the testator.

Mary A. HAZARD *et al.*

v.

Attmore ROBINSON *et al.* (No. 105.)

Mary A. HAZARD *et al.*

v.

Attmore ROBINSON *et al.* (No. 106.)

John G. CLARKE, Administrator of Jonathan H. Hazard, *et al.*

v.

Attmore ROBINSON. (No. 113.)

1. In Rhode Island when, on a bill to redeem, a decree is entered that the complainant may redeem by paying the amount found due on the mortgage, and the decree fixes the time for such pay-

ment and provides that in default of payment within the time fixed, the bill from thenceforth stand dismissed out of court with costs, such a decree is a **final decree**.

2. In case payment is not made within the time fixed, neither affidavit of non-payment nor a formal decree of dismissal is needed. The decree already entered acts as a decree of foreclosure.

3. Foreclosure without sale is a satisfaction of the debt secured only to the amount of the value of the property taken in foreclosure.

4. When after foreclosure without sale the mortgagee brought suit and obtained judgment, not for a deficiency, but for the whole amount of the debt; held, that obtaining the judgment was presumptively a waiver or disclaimer of the foreclosure and presumptively left the mortgage subject to redemption in equity.

5. A mortgaged certain shares of corporate stock which, although personality, were by the charter of the corporation transferable by deed; and then by deed assigned his property for the benefit of his creditors to B. B conveyed this property to C, by deed setting forth the same trusts as those under which B had received it from A. C died. Held, on a bill to redeem brought by the administrator of A, that the legal title to the shares of stock passed to C, and that the personal representative of C was a necessary party to the suit.

(Washington—Decided January 23, 1886.)

BILLS in equity to redeem a mortgage, and for an account. On demurrer and pleas o the bills.

The cases are stated in the opinion.

Messrs. Amasa M. Eaton and Edwin Metcalf, with *Messrs. Josiah Porter and Joseph C. Ely*, for complainants:

1. "In general, where a bill is ordered to be dismissed upon a contingent event, the established rule is, that such orders are not conclusive unless the words 'without further order' are annexed to the order; and that where such words are omitted, the defendant must apply for and obtain an absolute order of dismissal." 2 Dan. Ch. Pr. *995, 5th Am. ed. 879.

2. "The most ordinary case in which a further order is necessary to complete the decree is that of a decree for a foreclosure." After stating the usual form of such decree, Daniell proceeds: "He must however, in order to complete his title, procure a final order confirming it; otherwise the degree of foreclosure will not be pleadable." See, Seaton, Forms of Decrees, Decree for Foreclosure, *189, No. 1, *140 (4) Foreclosure and Final Order for Foreclosure, *143, No. 111; also the recent case, *Smith v. Angell*, Prov. Co.

3. In the case also of a suit for the redemption of a mortgage, a final order is necessary. 2 Dan. Ch. Pr. *998; and for forms see, 3 *Id.* *2221 a), *2225 (m); also, Seaton, *144, No. IV. and

4, "Dismissal." "Upon default, a further order is necessary for dismissing the bill;" and *147, No. V. "Final order for dismissal of bill for redemption," and note "Final order"—or, in the edition of Little, Brown & Co., 1884, at page 544, § V, 1, and 516, "Dismissal of redemption action." *Roscarrrick v. Barton*, 1 Ch. Cas. 217; *Hartpole v. Walsh*, 5 Brown, Par. 369; *Cholmley v. Countess Dowager of Oxford*, 2 Atk. 267; *Senhouse v. Earl*, 2 Ves. Sr. 450; *Stuart v. Worrall*, 1 Bro. C. C. 581; *Perine v. Dunn*, 4 Johns. Ch. 140, Kent, Chancellor; *Ex parte Paine*, 3 De Gex, J. & S. 458.

4. There is no question that a suit brought to recover the whole debt opens the foreclosure, upon proper proceeding being brought in equity. 2 Hillard, Mort. 292.

5. A mortgagee may sue for and recover the debt or the balance of it, but a recovery is good ground for opening the decree of foreclosure. 2 Jones, Mort. § 950.

"If after foreclosure the mortgagee in any other way treats the debt as still due, the account will be opened." "The reason is, he treats the debt as still due, and therefore his title is not absolute." *Bissell v. Bozman*, 2 Dev. Eq. (N. Car.) 154, 166. And see, *McEwen v. Welles*, 1 Root, 202; *Strong v. Strong*, 2 Aikens (Vt.) 373.

A pursuit to collect after a decree of foreclosure lays a foundation for opening the decree, if the mortgagor so elect; but such pursuit is not prevented by the decree. *Smith v. Lamb*, 1 Vt. 395; and see, *Andrews v. Scotton*, 2 Bland, 629, 665.

6. If the mortgagee receive rents, etc., before the day fixed for payment, the final order will not be granted, but another day will be set. *Garlick v. Jackson*, 4 Beav. 154; *Prees v. Coke*, L. R. 6 Ch. Ap. 645.

It has been held in Massachusetts that if the mortgagee enters before breach of condition and continues in receipt of the profits, etc., after breach, the time limited by the statute for redeeming will not begin to run until after due notice to the mortgagor, after breach, that he, the mortgagee, will thereafter hold possession for the purpose of foreclosing. *Pomeroy v. Winship*, 12 Mass. 514; *Scott v. McFarland*, 18 Mass. 809, 815; *Mann v. Richardson*, 21 Pick. 355, 357.

If a mortgagee has been in possession twenty years, without any impediment in the mortgagor to assert his title, such as imprisonment, infancy, coverture or being beyond sea, it is a bar to redemption. 1 Madd. Ch. Pr. 519 and cases cited in note (a); 1 Sim. & Stu. 632, 347; 2 Sim. & Stu. 408.

"But if sixty days after default had expired at the time of the attachment, so that the right of redemption at law was gone (Gen. Stat. R. I., chap. 165, § 12), was it still open in equity? We think it was. This right, however, might be cut off by the mortgagee foreclosing in equity, or by a bona fide sale of the property at auction, after due notice, or by a sale by agreement." *Arnold v. Chapman*, 18 R. I. 586. See also, Story, Eq. Jur. § 1031.

Mr. Charles H. Parkhurst, for respondents, in No. 105 and in No. 113.

Messrs. Charles H. Parkhurst, Elisha C. Clarke and B. W. Case, for respondents, in No. 106.

Stinness, J., delivered the opinion of the court:

Upon pleas and demurrers to these three bills in equity, common questions arise:

Bill 105 is brought by the administrator, assignee and heirs at law of Jonathan N. Hazard, deceased, claiming the right to redeem a mortgage given by him upon shares of stock in the Narraganset Pier Company. Hazard brought a bill to redeem in his lifetime, and under a rule of court the matters of difference between the parties were submitted to a referee, who reported the sum due from Hazard to the defendant, Attmore Robinson, including the amount due on the mortgage notes. A decree was entered in the suit to redeem, requiring that amount to be paid on or before April 4, 1864; or, upon default, that the bill be dismissed; and this bill alleges that said Hazard paid said notes in full and satisfied the executions issued under the petitions for rule. The answer sets up by way of demurrer that there is no allegation in the bill that such payment was made within the time limited in the decree to redeem; and, denying such payment, sets up the default by way of plea, averring that the judgments are still outstanding and that at the November Term, A. D. 1884, of the Court of Common Pleas in Washington County, in a suit brought upon the judgment entered upon the award of the referee, against the administrator of Jonathan N. Hazard, judgment was recovered for the amount of said former judgment and interest.

In bill 106, the complainants claim to be the owners of stock in the Narraganset Pier Company, derived from Jonathan N. Hazard, and pray for an account and payment of a certain judgment recovered by said company against said Attmore Robinson. The answer denies that the complainants are stockholders in the company, setting up by way of plea that, under the decree above referred to, the mortgage of Jonathan N. Hazard upon his stock had been foreclosed.

Bill 118 is by the administrator and assignee of Jonathan N. Hazard, reciting the proceedings in his bill to redeem, and claiming the right to redeem the mortgage upon the grounds set forth in bill 105; also claiming the right to redeem by reason of the suit brought by the respondent, Attmore Robinson, in the court of common pleas, for the full amount of the award, referred to in the answer to that bill. The answer sets up, by way of plea, that neither Jonathan N. Hazard nor anyone for him paid the amount required to be paid by the decree, within the time named therein, whereby redemption is barred.

The first question which arises, applicable to each of the three bills, is: upon this record has the mortgage been foreclosed, so that the mortgagor and those claiming under him are barred of their right of redemption? When a bill to redeem a mortgage is dismissed, for failure to pay the amount due within the time required by the decree, such dismissal operates as a foreclosure. 2 Jones, Mortgages, § 1108, and cases cited.

But the complainant contends that, after such failure, a formal decree dismissing the bill must be entered in order to complete the foreclosure. This has been the practice in

England. 2 Daniell, Ch. Pl. & Pr. *308; Seton's Forms, *147 V. and *note*.

The reason for the practice, evidently, is to show by the record that the mortgagor has failed to redeem, and that his right to redeem has become barred by a final and absolute dismissal of his bill, operating as a foreclosure. But we do not see that the reason requires the rule. Possession by the mortgagee, after the time for redemption has gone by, would show that the mortgagor had failed to redeem. Or if the mortgagor in possession should refuse to surrender to the mortgagee, a judgment in ejectment would be evidence of equal value with the decree.

Without doubt an affidavit of non-payment, with the consequent dismissal of the bill, is a convenient way of showing a complete foreclosure; but we are not prepared to say that there cannot be a foreclosure without this. The entry of a final order of dismissal is purely formal; it will be done as of course; and to hold that a bill to redeem is kept open by the non-observance of a mere form, after the mortgagor's own default, is not in accordance with the more liberal practice of modern days. Moreover, we do not think that such has been the practice in this country.

The only case to which we have been referred, where the strict English rule was followed, is *Bolles v. Duff*, 43 N. Y. 460. In that case, however, the court says that the suit to which the rule should apply was not merely a suit to redeem, and that the court, in making the decree, "did not, probably, have their attention directed to its effect, in case the plaintiff should be unable to pay within the specified time." The rule seems to have been seized upon by the court to protect the equities of the parties in the case before them.

In *Stevens v. Minar*, 110 Mass. 57, it was held that no decree dismissing the bill is necessary in that State. In many cases it is not clear, from the language used, whether reference is made to a special order or to the alternative order of dismissal contained in the decree to redeem.

Our statute, Pub. Stat. chap. 176, § 18, relating to the redemption of mortgages, first appears in the digest of 1798, where, p. 274, it provides that the court shall, "According to the usages in chancery and on the principles of equity, proceed to render judgment on such bill, which shall be final." So far as we are able to learn, it has not been the practice, under this statute, to enter a formal order of dismissal in bills to redeem. The decree that upon default of the mortgagor to make payment, within the time required, his bill "do from thenceforth stand dismissed out of this court with costs," has been treated as a final decree. We think therefore that the omission of a final order to dismiss the bill of Jonathan N. Hazard does not operate to keep the redemption open.

The next question is, whether the mortgage is still redeemable by reason of the suit and judgment for the whole of the mortgage debt. Strict foreclosures have not been considered with favor, and within the last century they have almost entirely given way to foreclosures by sale. A strict foreclosure has been thought to leave no certain measure of relation between

the amount of the debt and the value of the property. It is evident, however, that a mortgagee ought not to have both the debt and the estate.

It was formerly held that a mortgagee who took the property took it in satisfaction of the debt, and that any action upon the debt opened the foreclosure and let in the right to redeem. Kent says: "The better opinion is that after a foreclosure, with or without a subsequent sale, the mortgagee may sue at law for the deficiency, to be ascertained in the one case by the proceeds of the sale and in the other by an estimate and proof of the real value of the pledge at the time of the foreclosure. Whether the action at law will open the foreclosure and let in the equity of redemption is an unsettled question." 4 Kent, Com. 12th ed. *182, and cases cited.

See also, Hilliard, Mortgages, chap. 36. In case of a sale under a foreclosure, there is no question that a mortgagee may sue for a deficiency. The point of doubt seems to be whether such a suit, where there has been no sale, opens the state to redemption. We do not see why it should have that effect. With or without a sale, the foreclosure is not, in fact, a satisfaction of the debt, to any greater extent than the value of the property. That value may be as well shown in a suit for a deficiency, without a sale, as it is in other suits where the value of property has to be proved. The mortgagor is no more likely to be injured by inadequate proof of the value of the property than he is by an inadequate price at a sale.

If it be conceded that the property itself is only payment *pro tanto*, we see no reason why a mortgagor should not be liable for a deficiency when there has been no sale, as well as when there has been one. It is no longer a question of right, but of evidence. If, therefore, the judgment in this case had been for a deficiency only, we should hesitate to say that he bringing of a suit for such deficiency reopened the foreclosure. But however this may be, there can be no question that a mortgagee cannot have the whole estate and the whole debt, a double satisfaction. The recovery of judgment for the whole mortgage debt is inconsistent with its satisfaction, in whole or in part, by foreclosure. It is, presumptively, at least, a waiver or disclaimer of foreclosure, which leaves the mortgage redeemable in equity, nothing being set up in rebuttal or explanation of a presumption of waiver, if the presumption can be rebutted; a question which we do not decide.

The next question is: what parties are entitled to redeem? Generally, those who have an interest in the property and who would be losers by the foreclosure. 2 Jones, Mortgages, § 1055.

The shares of stock, in this case, are personal property. They would not therefore pass to the widow or heirs at law of Jonathan N. Hazard, an administrator having been appointed. The shares are made, by the charter, transferable by deed, in the same manner as real estate. In 1864, Hazard made an assignment to John C. Hazard, in trust for the benefit of his creditors. The latter, a few weeks after, conveyed to Elisha R. Potter upon the same trusts. These deeds undoubtedly

carried the legal title to the shares, according to the terms of the charter. John C. Hazard is already a party; also the administrator of Jonathan N. Hazard, who, aside from any question about the mortgage, would hold an equitable interest in the stock. But the legal title conveyed to Elisha R. Potter is not represented. "If this were the hearing of the cause, the defendant might insist that there was a want of parties; that the suit could not proceed" without the holder of the legal title. But this legal title is set up in bar of all interest in the complainants. As we cannot say that they have no interest, the plea must be overruled. *Winterbottom v. Tayloe*, 2 Drewry, 279.

As a result of these conclusions, the demurrer to bill 105, and the plea to bill 106 must be sustained, and the plea to bill 118 overruled.

Decree accordingly.

Samuel T. DOUGLAS, Admr.,

v.

John B. HENNESSY.

1. A executed a bond to B, "her executors, administrators, and assigns," conditioned on the **transfer** by A of certain **realty**, in certain contingencies, **to B or her assigns**. Held, that the **administrator of B was her "assign"** within the meaning of the word assigns in the condition, and that a transfer to the administrator of B would satisfy the condition of the bond.
2. Hence, the **death of B did not render the performance of the condition impossible**, although no assignment of the bond had been made by her.

(Providence—Filed February 20, 1886.)

COVENANT. On demurrer to the declaration. *Overruled.*

The case is stated in the opinion.

Messrs. Wm. H. Greene and Patrick J. McCarthy, for defendant:

The point involves the construction and exposition of the specialty counted on, the same, on oyer, in its entirety, *in hæc verba*, constituting a part of the count.

All the court can do is to ascertain the meaning of the words actually used; and in construing the deed, it will adopt the established rules of construction. Broom, *Legal Max.* 5th Am. ed. *482, 483, 485, 491, 494-497, 499, 520, 552, 553, 580, 583; 14 Mees. & W. 706, 707; 5 Foster, 426; 31 Mich. 49, 53; 1 Doug. (Mich.) 255.

An assignee is a person to whom some right or property is assigned, transferred or made over by another; or, according to the old definition, "he to whom a thing is appointed or assigned to be used, paid or done." Assignees are either by deed or in law.

Assigns is a word nearly or quite synonymous with assignees, and formerly sometimes so written. Its use is now confined to conveyancing. Where a party in a deed covenants for himself, his executors, administrators and assigns, the word assigns means any person to whom the property or interest described in the

deed may happen at any future time to be assigned, either by deed or by operation of law. 1 Burrill, Law Dic. 145, 146, citing Dyer, 6; Hob, 9 *b*; Co. Litt. 884 *b*; Plow. 287, 288; 5 Co. 16, 17 *b*; 2 Show. 39, 57; Godbolt, 161; 3 Leon. 212; 1 P. Wms. 78.

In deeds and other legal instruments it is usual to transfer personal estate absolutely, by the use of the words, "executors, administrators and assigns." As real estate is conveyed to a man, his heirs and assigns, so personal property is assigned to him, his executors, administrators and assigns. The executor or administrator is the person who becomes legally entitled to a man's personal estate after his decease, in the same manner that a man's heir or his assign becomes entitled to his real property. But the analogy extends no further. There is no necessity for the use of these terms as there is for the employment of the word "heirs." Williams, Pers. Prop. 3d Am. ed. *248. And see, 1 Bac. Abr. *642, *661, *663-5; Dyer, 180, 181; 5 Co. 96; 1 Roll. Abr. 421; 3 Bulst. 168; Bridg. 39, 40; Hob. 9, 10; Cro. Eliz. 377; Eq. Abr. 18; Co. Litt. 208, 208 *b*, 209 *a*, 210, 218 *a*, § 387.

If the condition of an obligation be to do a local act to the obligee, to which the concurrence of the obligor and obligee is necessary, as to make a feoffment, etc., no time being limited, the obligor hath time during his life to perform it, if not hastened by request. Where no time is limited, the act ought to be performed in convenient time. 1 Bac. Abr. *665; Co. Litt. 208, 208 *b*; 6 Co. 30 *b*, 31; 1 Roll. Abr. 430. And see, 1 Bac. Abr. *650; Co. Litt. 208 *a*.

If a condition be to do a collateral thing, the feoffee or obligee cannot accept money or another thing in satisfaction; for a contract in writing for a collateral thing shall not be altered by an accord without writing. As, if a condition be to deliver a horse, etc., if the obligee accepts money or other thing in satisfaction, it is not sufficient. 5 Vin. Abr. *112, 118, 235, 237, 246, 247; 3 Com. Dig. *104, 105, 118, 120, 123, 124, 125; 5 Dane, Abr. 177; Shep. Touch. *382, 398; 6 Co. 78 *b*; 2 Bl. Com. *340.

And with reference to covenant, it may be said to run with the land, when either the liability to perform it or the right to take advantage of it passes to the assignee of that land. But in order to make a covenant run with the land, it is not sufficient that it be concerning land; there must also be a privity of estate between the contracting parties. Such covenant real being annexed to the estate shall descend to the heir of the covenantee, and he alone shall take advantage of it. 1 Smith, Lead. Cas. *120; 2 Bac. Abr. *70, 73; 5 Co. 16 *a*, note A.

A covenant is not a duty nor cause of action until it be broken, so that it is not discharged by a release of all actions; and when it is broken, the action is not founded merely upon the specialty, as if it were a duty, but savors of trespass and sounds in damages; and therefore an accord is a good plea to it. Shep. Touch. *160, 161, citing Aleyn, 39.

The condition of an obligation, when it is doubtful, is always taken most favorably for the obligor, in whose advantage it is made, and most against the obligee. Shep. Touch. *376, citing Dyer, 14, 51.

A personal thing being once suspended is perpetually extinguished. 1 Roll. Abr. 412, 740.

As to assignment of bond, see, 1 Bac. Abr. *249; 5 Dane's Abr. 174; 4 Pick. 1; 10 Cush. 108.

The case is not materially different from *Newton v. Newton*, 11 R. I. 391, except that here no time was limited, and there seven years was the limited time.

We do not find any case in which the precise point here raised has been decided; but there are English cases which hold that an heir or devisee is entitled to have a contract for the purchase of real estate specifically performed by the administrator or executor in case the intestate or testator could have been held to perform it, if he were alive; but is not entitled to have the contract so performed, if in consequence of any defect of title, the intestate or testator being alive, would not be bound by it; nor to have the amount of the stipulated consideration laid out in other lands or paid to him *in specie*. *Buckmaster v. Harrop*, 7 Ves. 341; *Broome v. Monck*, 10 Ves. 597; *Savage v. Carroll*, 1 Ball. & B. 265, 281; *Collier v. Jenkins*, Younge, 295.

And that a mere option to purchase is probably not assignable, see, *Meynell v. Surtees*, 3 Sm. & G. 101, 117.

Messrs. Wm. W. Douglas and Chas. E. Gorman, for plaintiff:

The recital and condition of the bond is a covenant by H. to do what is there set forth either literally or according to its substantial legal import.

1. A bond for money, to be void upon the doing of a certain thing, is in legal effect a contract to do that thing. *Waynick v. Richmond*, 11 Kan. 488; *Ensign v. Kellogg*, 4 Pick. 1; *Dooley v. Watson*, 1 Gray, 414; *Prunkett v. M. E. Society*, 8 Cush. 561.

Covenant lies on a bond, for it proves an agreement. 1 Chit. Pl. 130.*

"Words of recital in a deed will constitute an agreement between the parties on which an action of covenant may be maintained; and the recital in a deed of a previous agreement is equivalent to a confirmation and renewal of the agreement; and words of proviso and condition will be construed into words of covenant when such is the apparent intention and meaning of the parties." 2 Pars. Cont. 511 and note *f*.

So covenant lies if an agreement appear in an obligation. 8 Com. Dig. p. 252 (top) citing, *Hill v. Carr*, 1 Ch. Cas. 294*; *Severn and Clerk's Case*, 1 Leon. 122; *Stevenson's Case*, 1 Leon. 324; *Seddon v. Senate*, 13 East, 63; *Saltoun v. Houstoun*, 1 Bing. 433; opinions, pp. 443, 444; *Sampson v. Easterby*, 9 Barn. & Cress. 512; 6 Vin. Abr. 38; Com. *Obligation E. v. 196*, citing *Lord Mansfield* in 4 Burr. 2228.

There is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election; he may either bring debt for the penalty and recover when he cannot afterwards resort to covenant, or he may proceed upon the covenants and recover more or less than the penalty *toties quoties*. 2 Mod. Entries *Covenant*, No. 13, p. 94; *Barfoot & Pickard*, 3 Keb. 465.

Bond given by grantee in a deed; breach of condition of bond is breach of covenant. Deed set aside by the court. *Leach v. Leach*, 4 Ind. 638; *Randel v. Ches. & Del. Canal Co.* 1 Harr. (Del.)

166, 172; *Holles v. Carr*, 8 Swanst. 648*; *S. U. 2* Mod. R. 87.

It makes no difference to the effect of the condition of a bond where it is written. It forms part of the obligation, though written on the back. 1 Rol. 413, b. 1-10. "*Un condition d'un obligation est bon si soit escry (ecrit) sur le dorse*" (*dos*). 3 Comyn, 89, *Condition*, A. 9; 5 Com. 194, *Obligation*, E; Shep. Touch. 367.

2. A covenant, like a parol agreement, may be implied as well as expressed; and will be inferred from the substance of the language employed, when the words do not fully express the intention of the parties. *Courtney v. Taylor*, 7 Scott, N. R. 749, p. 765. And see cases cited in plaintiff's argument in that case, which fully support the proposition; *e. g.*, *Pordage v. Cole*, 1 Saund. 320; *S. C. 1* Lev. 274, and 1 Sid. 423; *Duke of St. Albans v. Ellis*, 8 East, N. E. 469, p. 471; 16 East, 352, pp. 469, 471, 2d Am. ed.; *Sampson v. Easterby*, 9 Barn. & Cress. 505, p. 512; *S. C.* on appeal, 6 Bing. 644, p. 650; *Earl of Shrewsbury v. Gould*, 2 B. & Ald. 487; *Potter v. Bacon*, 2 Wend. 585; 1 Chit. Pl. 185.

The rule that if a thing becomes physically impossible to be done by the act of God, performance may be excused, does not avail when the essential purpose of the contract may be accomplished. If the intention of the parties can be substantially, although not literally, executed, performance is not excused. *White v. Mann*, 26 Me. 361; *School Dist. v. Davuchy*, 25 Conn. 530.

"If there be any reasonable certainty in the contract, it is good enough." Shep. Touch. *Obligation*, 370.

If H. had no option to sell the whole land, then his sale was a breach of the condition; if he had such option, then it is a necessary implication that he should pay over the surplus. *Markey v. Langley*, 92 U. S. 153 (bk. 23, L. ed. 705).

The word assigns is a contracted form of the word assignees, and the two are homonymous. Assigns or assignees are of two kinds: assignees in fact or assignees in law. Bouv. Law Dic. title, *Assignee*: "Assignee in law is one in whom the law vests the right as an executor or administrator." Jacob, Law Dic. title *Assignee (assignatus)*: "Assignee in law is he whom the law so makes without any appointment of the person: as an executor is assignee in law to the testator" (quoting Dyer, 6 b, No. 5, where the same is said of an administrator). And see, Bac. Abr. *Conditions*, 663; 3 Com. Dig. p. 256 (bottom); *Allen v. Wedgewood*, 3 Bulst. 168, 169.

The obligee named is preferred to his assigns, as in *Smith v. Sharp*, 5 Mod. 133.

By common law an executor or administrator, although he was not named, might have an action of covenant because he was privy. *Leber v. Kauffelt*, 5 Watts & Serg. (Pa.) 440.

And so if the wrong word be used. "And if it be made thus: *solvendum* to the obligee *et successoribus suis*, and not *executoribus*, etc., this is a good obligation, and the executors and administrators, and not the successors, except it be in the case of a corporation, shall take advantage of it." Dyer, 13; Brooke, Abr. *Obligations*, 15, 68; 2 Shep. Touch. p. 369.

The law disposes of the covenant according to the nature of the case, and not according to

the words of the instrument. 4 Dane, Abr. p. 35, § 1, art. 1, chap. CV.

Where the condition was to make the obligee a lease for life by such a day or pay him £100, it was held that, although the obligee die before the day, his executor should have the £100. Salk. 170, pl. 2.

Where the covenant is a real one, it descends to the heir although executors only are named. 2 Mod. Entries, 102. And see, *Wotton v. Cook*, Anderson, 53.

The insertion of the word assigns in the condition, and the words executors, administrators or assigns in the obligation, are conclusive that the right was to run beyond E. F. to her representatives. *Lougher v. Williams*, 2 Lev. 92.

8. The rule of *Laughter's Case*, 5 Co. 21, b, that where a condition is in the alternative giving the obligor the choice of two actions and one of them becomes impossible without his fault, the obligor having lost his choice, is excused from performing either, has no application here, for H. has exercised already the options given him; and it was for E. F., not for him, to say whether payment should be made to her or her assigns in fact or in law. Her death has deprived him of no choice. And the rule of *Laughter's Case* has not been universally accepted. 3 Co. Rep. Thomas & Frazer's ed. 42, note a.; *Barkworth v. Young*, 3 Jur. N. S. 84.

4. E. F. died and her husband was appointed her administrator in Massachusetts before the sale by H., and has been so ever since, and payment of the surplus to the Massachusetts administrator would have been good. *Mackay v. St. Mary's Church*, 1 New Eng. Rep. 141.

Durfee, Ch. J., delivered the opinion of the court:

This is a suit on a bond given by the defendant to the plaintiff's intestate, the late Euphemia Fussell, wife of John Fussell, of Roxbury, Mass. The bond is dated April 4, 1866. The condition recites that William Duff of Providence is indebted to the defendant in divers sums of money; that said John Fussell is indebted to Duff in divers sums of money; that Duff has conveyed by deed, of even date with the bond, certain parcels of land in Massachusetts to the defendant, and that the defendant has agreed, upon payment of the indebtedness of Duff to him and of Fussell to Duff, etc., to convey said lands to said Euphemia "or her assigns," and provides that, upon his conveying the lands as agreed to Euphemia "or her assigns," the bond shall be void.

The declaration contains three counts. The second count alleges that Euphemia died December 12, 1866, and that administration on her estate was granted in Massachusetts to John Fussell, January 5, 1867. It alleges that the defendant sold the lands March 7, 1877, and that on September 28, 1877, after all debts and expenses paid, the defendant had the sum of \$15,575.65 of the proceeds of the lands. It alleges that the plaintiff was appointed administrator on the estate of Euphemia in this State September 15, 1884. It alleges a breach of the bond in that the defendant had never conveyed to Euphemia during her life, nor to her heirs or administrators since her decease, any portion of the lands or of the proceeds thereof. The defendant demurred to the entire declaration.

At a former term we expressed the opinion that the second count is good unless the death of Euphemia, without assignment before the debts were paid, rendered it impossible for the defendant to perform the condition of the bond, and consequently released him. Since then, counsel have presented elaborate briefs on that question which we have considered.

The defendant contends that it was impossible for him to perform the conditions because the obligee died before the debts were paid and left no assigns. He contends that the word "assigns" can only mean some person nominated by the obligee to receive a conveyance in her stead, because it is only in that way that she could assign the lands, having no title to them. Is it true that the word "assigns" means assignees of the lands? The word is used in the obligatory part of the bond as well as in the condition; and, as used in the obligatory part, it manifestly means not assignees of the lands, but assignees of the bond itself. It seems clear to us that it has that meaning, too, in the condition; for the obligee had nothing but the bond or her right under it, which is the same thing, to assign. Certainly a conveyance to an assignee of the bond would satisfy the condition as completely as a conveyance to any person nominated to receive it, for there is no better way in which a person could be nominated to receive it than by an assignment of the bond.

But if the meaning of the word "assigns" is assignees of the bond or of the obligee's right under it, why would not a grant of administration operate as an assignment, making the administrator the assign to whom conveyance could have been made to satisfy the condition? The authorities, which have been referred to, show that the word "assigns" may be construed to extend to executors and administrators, the executor or administrator of an obligee or covenantor being his assign or assignee by operation of law. *Jac. Law Dic.* title, *Assignee*; 1 *Bac. Abr.* *668; 8 *Com. Dig.* 256; *Dyer*, 18; 2 *Shep. Touch.* 369.

In *Baily v. DeCrespigny*, 10 B. & S. 1, 12, decided by the Court of Queen's Bench in 1869, *Hannen, J.*, delivering the opinion remarks: "The word 'assigns' is a term of well known signification, comprehending all those who take, either immediately or remotely from or under the assignor, whether by conveyance, devise, descent or act of law."

We think the word "assigns" in the condition of the bond may be construed to include an administrator as assignee by act of law, if such a construction comports with the character and intent of the instrument.

The defendant contends that the only purpose of the bond was to confer a privilege on the obligee, which was intended to be purely personal to her, to wit: the privilege of having the lands conveyed to her in payment of the debts; and that accordingly on her death, before they were paid, the bond ceased to be obligatory. But in our view, the bond was not intended to be purely personal, since it was intended to be assignable; and by its terms the penal sum is to be paid to the obligee, "her executors, administrators or assigns," if the condition is not performed. Moreover, the obligee's right to have the lands conveyed to her does not depend on her paying the debts,

but becomes effectual when they are paid, whoever pays them.

Another argument is that an administrator, as assignee by act of law, is merely an assignee of personality, and that therefore it could not have been contemplated that the lands might be conveyed to him in satisfaction of the condition. The administrator, as assignee by act of law, takes only the bond; it is by the act or agreement of the parties, if at all, that he becomes the person, *persona designata*, to whom the lands may be conveyed in satisfaction of the condition.

The bond was a chose in action, and if not discharged by the death of the obligee, passed to the administrator as a part of her personal assets. The administrator became, by operation of law, the obligee in her stead, and might, therefore, not unnaturally be the person designated to receive satisfaction of the condition, since he was the only person who could sue the bond if the conditions were not satisfied. Undoubtedly if the lands had been conveyed to him he would have been required in equity to hold them in trust for the estate.

We ought to construe the bond so that it shall survive rather than become extinct, *Ut res magis valeat quam pereat*, unless there is good reason for construing it otherwise. Perhaps it may be thought that the omission of the words "her executors, administrators" in the condition is such a reason, seeing that the words are contained in the obligatory part. We think the use of the words in the obligatory part is too purely formal for that. We find no other contrary indication, either in the bond or in the declaration, which on demurrer is our only other source of light.

Our conclusion is, that the condition might have been satisfied by conveying the lands, or the portion of them not required for the payment of debts and expenses, to the administrator, and consequently that the demurrer must be overruled.

Demurrer overruled.

STATE of Rhode Island

v.

Benjamin WILSON.

1. In Public Statutes of R. I. chap. 80, § 3: "It shall not be necessary to prove an actual sale of intoxicating liquors in any building, place or tenement in order to establish the character of such premises as a common nuisance, but the notorious character of any such premises * * * shall be evidence that such premises are nuisances within the meaning of * * * this chapter," the word character is used as a synonym for reputation.
2. Thus construed the section is constitutional, as it allows reputation to be given in evidence, leaving the jury free to acquit or convict upon the whole evidence. (*State v. Kartz*, 13 R. I. 528; *State v. Bewick*, 13 R. I. 211, distinguished.)

(Washington—Decided November 9, 1885.)

EXCEPTIONS to the Court of Common Pleas. Overruled.

Mr. Elisha C. Clarke, for defendant.

If the construction, that "notorious character" means the same thing as reputation, be adopted, then the statute, or so much of it as makes this evidence sufficient to warrant a conviction, is clearly unconstitutional for the reasons stated in *State v. Kartz*, 13 R. I. 528.

If however the other construction, viz.: that the words "notorious character" have a distinct, separate and different meaning from reputation, be given, then clearly the evidence to which exception was taken in the case at bar is inadmissible.

Mr. Samuel P. Colt, Atty-Gen., for plaintiff.

Durfee, Ch. J., delivered the opinion of the court:

This is an indictment under Pub. Stat. R. I. chap. 80, §§ 1, 2, for nuisance in keeping a grog shop, etc., in North Kingstown. The case comes up from the Court of Common Pleas by bill of exceptions which sets forth that upon the trial five witnesses for the State against the defendant's objection, "testified of and concerning the reputation of said defendant's premises and the speech of the people concerning said premises as a place where intoxicating liquors were sold and kept for sale." The testimony was admitted under chapter 80, § 3, which provides that "it shall not be necessary to prove an actual sale of intoxicating liquors in any building, place or tenement in order to establish the character of such premises as a common nuisance, but the notorious character of any such premises shall be evidence * * * that such premises are nuisances * * *." The defendant contends that the witnesses ought not to have been permitted to testify, because their testimony was not as to the "notorious character," but as to the reputation of the premises complained of.

Doubtless there is a distinction, observed by careful writers, between character and reputation; "character," where the distinction is observed, signifying the reality and "reputation" merely what is reported or understood from report to be the reality, about a person or thing. The word "character," however, is often used as synonymous with and in the sense of "reputation." We think it is clearly so used in § 3. The word is used twice in § 3: first in its more proper sense and secondly as synonymous with reputation. To hold that the word has the same sense in both instances would be to hold that the General Assembly has enacted the self-evident proposition that "the notorious character of the premises" shall be evidence of their character. To interpret the word as used in § 3 the second time as synonymous with reputation does not render § 3 unconstitutional within either *State v. Kartz*, 13 R. I. 528, or *State v. Bewick*, 13 R. I. 211. The fault of the provision condemned in *State v. Kartz*, was that it made mere reputation criminal and so exposed a man to punishment as a criminal for what other people said about him. The fault of the provision condemned in *State v. Bewick* was that it made reputation *prima facie* evidence and thus made it the duty of the jury to convict on such evidence, if unrebutted, whether testified by it of the guilt of the accused or not. Section 3, as we interpret it, simply makes the

reputation of a place evidence of its character, but it leaves the jury free to find the accused guilty or not according as they are satisfied of his guilt or not by the evidence. We see no reason to think that such an enactment is unconstitutional.

Exceptions overruled.

PEARCE, Larkin & Co.

v.

Joseph CURRAN *et al.*

When a bond is given for the liberty of the jail yard, of which there are two breaches at different times, the Statute of Limitations begins to run at the time of the first breach, the amount recoverable for the first being the same as for both breaches. The fraud or concealment of the debtor does not prevent the running of the Statute.

(Providence—Decided March 31, 1886.)

EXCEPTIONS by plaintiffs to the Court of Common Pleas. *Overruled.*

Action of debt on bond.

The case is stated in the opinion.

Mr. Edwin D. McGuinness, for plaintiffs.

Mr. John P. Gregory, for defendants.

Per Curiam:

This is an action for debt upon a bond given for the liberty of the jail yard. The defendants pleaded in bar the special Statute of Limitation, Pub. Stat. R. I. chap. 225, § 9, which provides that no action shall be maintained for the breach of any such bond unless brought within one year after the breach shall have been committed, alleging in their plea that the debtor committed an escape in not making an assignment, or rendering himself to the jailer, within thirty days after the date of the bond, and that the action was not commenced within a year after the escape.

The plaintiffs replied that they did not know of the escape alleged, and that they founded their action on another escape committed by the debtor by going off the limits into the State of Massachusetts, which latter escape was committed within one year before the commencement of the action.

The defendants demurred to the replication. The question is whether the Statute began to run so as to bar the action when the first escape was committed.

We are of opinion that it did. The case of *Brown v. Houldette*, 10 Me. 399, is precisely in point. It was there held that when a bond is given for the liberty of the jail yard, of which there are two breaches at different times, the Statute begins to run at the time of the first breach, the amount recoverable for the first being the same as for both breaches. We do not see how there can be any question about the correctness of this decision. We do not see how the mere fact that the plaintiffs did not know of the first breach can prevent the running of the Statute, inasmuch as they could readily have known it by inquiry at the jail. The case does

not fall within the class of cases in which the running of the statute is avoided by the fraud or concealment of the debtor.

Exceptions overruled.

Susan J. PARKER

v.

Daniel H. REMINGTON, Admr.

An acknowledgment of a debt made to a stranger is ineffectual to remove the bar of the Statute of Limitations, unless intended to be communicated to the creditor.

(Providence—Decided April 8, 1886.)

ON defendant's petition for a new trial.
Granted nisi.

Messrs. Simon S. Lapham and Louis L. Angell, for defendant:

The testimony clearly shows the plaintiff assuming the same relation to the deceased's affairs and family as if actually married to his son; she is therefore within the rule as to "near relatives." 29 Pa. St. 465; 30 Pa. St. 478; 34 Vt., 429; 27 Vt., 717; 47 N. H., 234; 44 N. H., 297; 3 Ind., 156; 5 Harr. (Del.) 428; 38 Vt., 139.

Messrs. Charles H. Page and Franklin P. Owen, for plaintiff.

Per Curiam:

This is an action of assumpsit for compensation for services rendered by the plaintiff to the defendant's intestate. The services were rendered during a period of more than twenty years, extending down to a short time prior to the death of the intestate.

The defense was the general issue and also the Statute of Limitations, to which the plaintiff set up in reply a new promise. The jury returned a verdict for the plaintiff for \$2,000. The damages were clearly excessive unless there was evidence of a new promise to lift the bar of the Statute; for there was no testimony to show that the services were worth more than \$3 per week.

The only testimony of a new promise was given by Esek King, a nurse, who took care of the intestate during his last illness. He testified that the deceased told him that he wanted the plaintiff to be well paid for her work. This remark is very general, but perhaps might warrant the finding of a new promise if it had been addressed to the plaintiff herself, or to any person who represented her. It was addressed to a mere stranger.

The older cases, both English and American, hold that an acknowledgment of a debt to a stranger is as effectual to remove the bar of the Statute as one made to the creditor, but the later cases, both English and American, strongly maintain that an acknowledgment to a mere stranger is ineffectual to remove the bar, unless it was intended to be communicated to the creditor; the reason being that otherwise no privity is established between the parties in respect to the new promise. Wood, Limitations, § 79, p. 193, note; 1 Smith, Lead. Cas. 726; Bloomfield v. Bloomfield, 7 Ill. App. 261; Parker v. Shuford, 76 N. C. 219; Backman v. Roller, 9 Baxter (Tenn.), 409; 40 Am. Rep. 97; Edwards v. Culley, 4 H. & N. 377; Fuller v. Redman, 26 Beav. 614.

We find nothing in the testimony from which the jury could infer that the intestate intended that his remark should be communicated to the plaintiff. We have no reported decision upon this point in this State. We think the later cases rest upon the better reason, and are therefore, of the opinion that the defendant is entitled to a new trial, unless the plaintiff will remit one half of the verdict; one half of the verdict being the most she would be entitled to claim, if the defense of the Statute be allowed.

KENTISH ARTILLERY

v.

GEORGE M. GARDINER.

Where the justice of the peace was a member of a military company his membership disqualified him from acting as justice in an action of trover for the conversion of a uniform of such company.

(Decided March 30, 1886.)

EXCEPTIONS by plaintiff, to the Court of Common Pleas. *Overruled.*

Trover for the recovery of a uniform converted by defendant.

The case is sufficiently stated in the opinion.

Mr. Albert R. Greene, for plaintiff:

The interest referred to in chapter 196, § 18, chap. 206, § 23, and chap. 218, § 1, of the Public Statutes, is an interest in the common-law meaning of the term.

A member of such a corporation is not thereby disqualified at common law, on account of interest, from being a witness. 1 Greenl. Ev. §§ 832, 333.

Mr. Samuel W. K. Allen, for defendant.

Per Curiam:

This is an action of trover for the conversion of a uniform, belonging to the plaintiff Corporation, a military Company. The action was begun in the justice court of Warwick. The defendant pleaded in abatement to the jurisdiction, on the ground that the justice was a member of the company and, as such, interested in the event of the suit.

The question raised by the exceptions is, whether the plea is good. We think it is. The uniform, if recovered, will become serviceable to the Company. It cannot be serviceable to the Company without being serviceable to the members of the Company. Each member, therefore, has an interest in its recovery. The fact that the interest is only for the time of membership and is only usufructuary, if the word may be used, and exceedingly minute, makes the interest none the less an interest, and none the less such an interest as will disqualify the justice.

Exceptions overruled and judgment for defendant on said plea in abatement, without costs.

SUPREME COURT OF MAINE.

Thomas J. HOWE

v.

WISCASSET Brick and Pottery Company.

1. If one has a lien by special contract, upon bricks, for labor and fuel furnished in manufacturing and burning, he has no lien therefor under the statute.
2. Such a lien is not affected by the insolvency of the debtor.

(Lincoln—Decided April 7, 1886.)

ON plaintiff's exceptions. *Overruled.*

An action to enforce a lien under R. S. chap. 91, § 28.

The presiding Justice instructed the jury that the plaintiff had no statute lien on the bricks attached, and to this instruction the plaintiff alleged exceptions.

The insolvency of the defendant Company was shown, and Seth Patterson, assignee, appeared and claimed the property attached.

Mr. George B. Sawyer, for plaintiff:

The lien sought to be enforced by this suit is based on R. S. chap. 91, § 28: "Whoever performs labor, or furnishes labor or wood for manufacturing or burning bricks, has a lien on such bricks for such labor and wood." etc.; and the same and subsequent sections prescribe the time, manner and proceedings for the enforcement of such lien, all of which have been complied with.

The statute is not one which can be restricted or diminished in its operation by strict rules of construction. It is in the interest of common right and in accordance with the common law. Chit. Cont. 10th Am. ed. 594; *Sawyer v. Fisher*, 32 Me. 28.

The vocabulary does not afford a more comprehensive term than the word whoever, by which the application of the statute is determined. As defined by Webster, it is synonymous with "whosoever," and means "anyone, without exception;" "any person whatever."

Proceedings in insolvency do not defeat a lien nor deprive the claimant of the ordinary and appropriate means for its enforcement. "The assignee takes the property subject to all existing liens and incumbrances." *Hutchinson v. Murchie*, 74 Me. 187.

The plaintiff's employment as general manager made him an agent of the corporation. Bouv. Law Dic. title, *Manager*.

An agent may maintain a lien as against his principal. *Newhall v. Dunlap*, 14 Me. 180.

Under the contract the bricks were, and were expected to remain the property of the Company until sold; whether by the plaintiff as general manager, or by the treasurer, is immaterial. This contract was supplemental to his general employment. It embraced all the elements of the particular lien at common law, except that the property was to go out of his possession before he would receive his pay. *Oakes v. Moore*, 24 Me. 214; *Newhall v. Dunlap*, *supra*. It was not a mortgage. *Sawyer v. Fisher*, *supra*.

Whatever other rights it conferred upon the plaintiff, he might lawfully waive them, and rely upon the statute lien, for which it laid a complete foundation.

The defendant Corporation is subject to the ME.

laws; bound by its contracts, express and implied; answerable to suits at law, whether brought by its members, officers or agents, or by strangers, as a natural person is. *Potter, Corp. § 84; Bank of U. S. v. Dandridge*, 12 Wheat. 64. (25 U. S. bk. 6, L. ed. 552); *Bank of Columbia v. Patterson*, 7 Cranch, 299 (11 U. S. bk. 3, L. ed. 351); 2 Kent, Com. 289, 290; *Coffin v. Rich*, 45 Me. 507, 509.

The assignee can only hold or claim to hold the property in privity with the title of the insolvent debtor, whom he represents; and can make no defense to a suit on an executed contract, respecting the property which it, the insolvent, could not make. *Hutchinson v. Murchie*, *supra*; 1 Greenl. Ev. §§ 189, 190; *Kip v. Bank of N. Y.* 10 Johns, 68.

A verbal contract by a majority of the directors of a corporation is binding. *Cram v. Bangor House Proprietor*, 12 Me. 354; *Bank of Columbia v. Patterson*, *supra*; *Potter, Corp. § 80*.

In the case of *Severance v. Hammett*, 28 Me. 511, the majority of the court held that a lien claim was not protected by the law, against the insolvency of the estate of a deceased debtor.

The dissenting opinion by Wells, J., expresses his view, and we think the better view, of the policy of the law, as it then was, and the probable intention of the Legislature. The Legislature, by the Acts of 1850 and 1851, adopted and emphasized that view; and it has ever since been the law in respect to every statute lien. The insolvent law is a creation of later times. It found an established and well defined policy respecting the protection of liens, and must be construed as having been made in subjection to that policy. *Winslow v. Kimball*, 25 Me. 493; *Ingalls v. Cole*, 47 Me. 590, 540.

"Statutes cannot be repealed by implication, if the implication does not necessarily follow from the language used." *Pratt v. At. & St. L. R. Co.* 42 Me. 579.

It is easy for a dishonest debtor to avail himself of the insolvent laws; *vide* opinion by Barrows, J., in *Collins Granite Co. v. Devereux*, 72 Me. 422.

In a qualified sense the lienor is a partner or part owner with the general owner, and that interest, estate or part in the thing never having become the property of the latter, cannot pass to his assignee or vendee. *Deering v. Cobb*, 74 Me. 332; *Briggs v. Parkman*, 2 Met. 258; *Clarke v. Minot*, 4 Met. 346.

The two cases cited by defendant, *Cunningham v. Hall*, 69 Me. 353, and *Storer v. Haynes*, 18 Bank. Reg. 354, relate only to the lien created by the attachment of a general creditor, and demands no further consideration.

In *Fuller v. Nickerson*, 69 Me. 228, in which the lien claimed was on a vessel, the specification being required by statute to be verified by oath, the court says: "If an item of debt had been honestly claimed for which no lien existed * * * such an error would have no effect upon the sufficiency of the specification, whether voluntarily corrected by the plaintiff, under leave of court, or by a verdict of the jury * * * It is simply an error in the amount claimed, which has no effect upon the specification as it was originally made, as a valid foundation for an attachment and judgment."

So, in *Spofford v. True*, 33 Me. 297, and in *Deering v. Lord*, 45 Me. 293, it is held that

"these items can be stricken from the writ, which would be amended accordingly, at any time before judgment."

And in *Sands v. Sands*, 74 Me. 239: "But there is no objection to amending a writ before judgment, by striking out a non-lien claim and taking judgment for the other and thus preserve the lien."

An amendment diminishing the extent of the plaintiff's claim is admissible after verdict. *Plummer v. Walker*, 24 Me. 14.

Amendments generally may be allowed at the discretion of the court after verdict. *Holmes v. Robinson Mfg. Co.* 60 Me. 201, citing *Hayward v. French*, 12 Gray, 453; *McLellan v. Crofton*, 6 Me. 307.

Such amendments may be allowed by the law court, although no motion to amend was made at nisi prius. *Dyer v. Brackett*, 61 Me. 587.

Mr. Henry Ingalls, for assignee and defendant:

The Lien Law, chap. 91, § 28, makes provision for the prosecution of a suit on a lien claim against the insolvent estate of a deceased debtor; but no such provision is made for a case like the one under consideration, which by implication shows that no such attachment can be sustained.

In *Hutchinson v. Murchie*, 74 Me. 187, there was no attachment. The claim was to recover the value of property mortgaged. If the plaintiff had taken a mortgage of the bricks, that case would be applicable, but it is not so as this case now stands.

The provision of the statute for a dissolution of attachments by insolvency proceedings, would not apply to a lien at common law to be enforced without attachment. "An attachment is a lien which the law cannot release, except by such means as may be provided for the purpose in the bankrupt law itself," to wit: an assignment. *Cunningham v. Hall*, 69 Me. 353; *Storer v. Haynes*, 67 Me. 420.

It is well settled that unless the whole claim for which judgment is rendered is a lien, no lien can be maintained, although some of the items in the account sued might constitute a lien. *Lambard v. Pike*, 88 Me. 141; *Bicknell v. Trickley*, 34 Me. 273; *Pearsons v. Tincker*, 86 Me. 384; *Johnson v. Pike*, 35 Me. 291; *Perkins v. Pike*, 48 Me. 141; *First Nat. Bank v. Redman*, 57 Me. 405; *Baker v. Fessenden*, 71 Me. 292.

The plaintiff before verdict might have amended his writ by striking out such claims as were not a lien; but not having done so, no lien can be maintained unless the whole amount included in the verdict is a lien. The judgment must be upon the verdict. *Deering v. Lord*, 45 Me. 293.

Libbey, J., delivered the opinion of the court:

After the evidence was out, the presiding Judge directed the jury to return a verdict for the plaintiff for the amount claimed, and that he had no statute lien on the bricks attached therefor. To this direction the plaintiff excepted.

If there was evidence which, if true, would authorize the jury to find that the plaintiff had such a lien, the direction was wrong.

The evidence relied on to support his lien comes wholly from the plaintiff. The defend-

ant Corporation was engaged in manufacturing bricks in Wiscasset. The plaintiff was its general agent in carrying on that business. He testified, in substance, that, in the spring of 1864 the Corporation was without means to prosecute its business, and he made a contract with its directors to go to Wiscasset, contribute his personal labor, advance his money to hire laborers and buy wood, manufacture the bricks, get them into market, sell and convert them into money, reimburse himself and pay the balance, if any, into the treasury of the Corporation; and that under this contract he burnt two kilns of brick, when the Corporation was put into insolvency.

By this special contract he had a lien upon the brick which he manufactured. The terms of the contract were inconsistent with the statute lien. The plaintiff was to put them into the market, convert them into money, satisfy his own claims, and pay the balance, if any, to the corporation. Proceedings to enforce a lien under the statute would prevent the performance of his contract. He could not put them into market and sell, but they must be attached and remain till judgment might be rendered for the lien, and then the sale is a judicial sale, at the place of manufacture. This process might be much more prejudicial to the defendant than the enforcement of the lien under the contract. The two liens could not exist together, and it must be presumed that the parties intended to substitute the lien by special contract for the statute lien. *Barrows v. Baughman*, 9 Mich. 213.

The plaintiff's lien under his contract was in no way affected by the insolvency. The assignee took only what interest in the property the debtor had. *Hutchinson v. Murchie*, 74 Me. 187; *Merry v. Lynch*, 68 Me. 94.

Exceptions overruled.

Peters, Ch. J., Walton, Danforth, Emery and Foster, JJ., concurred.

William M. BEAN

v.

George A. BACHELDER.

When a deed describes the premises conveyed as a certain lot according to a plan, the plan referred to will be controlled by the actual survey and monuments on the face of the earth.

(Penobscot—Decided March 22, 1886.)

ON defendant's exception. *Overruled.*

Trespass *quare clausum*. The plaintiff was the owner of lot number four and the defendant of lot number five, range three, in Greenfield. The question in controversy was the location of the line between those two lots.

The verdict was for the plaintiff and the defendant excepted.

Mr. A. W. Paine, for defendant:

The prior deed prevails. *Williams v. Spaulding*, 29 Me. 112.

The plan not only makes a part of the deed, but a controlling part, and is as if incorporated into it. See, *Bartlett v. Bangor*, 67 Me. 400; *Farnsworth v. Taylor*, 9 Gray, 162; *Boston*

Water Power Co. v. Boston, 127 Mass. 374; *Lincoln v. Wilder*, 29 Me. 169-179; *Davis v. Rainsford*, 17 Mass. 207, 211; *Erskine v. Moulton*, 66 Me. 276; *Chealey v. Holmes*, 40 Me. 546; *Murdock v. Chapman*, 9 Gray, 158; *Morgan v. Moore*, 8 Gray, 821; *Dodd v. Burchell*, 1 Hurl. & C. 113; *Dold v. Vodicka*, 49 Mo. 100; *Augustine v. Britt*, 15 Hun, 395; *Noonan v. Lee*, 2 Black. 499; *McIver's Lessee v. Walker*, 4 Wheat. 444 (17 U. S. bk. 4, L. ed. 611); *Loring v. Norton*, 8 Me. 61; *Eaton v. Knapp*, 29 Me. 120; *Proprietors Ken. Purchase v. Tiffany*, 1 Greenl. 219; *Walker v. Boynton*, 120 Mass. 349; *Barter v. Arnold*, 114 Mass. 577; *Magoun v. Lapham*, 21 Pick. 135.

In *Allen v. Allen*, 14 Me. 887, the plan was regarded as so important that the court overruled the force of the description of the premises as his "homestead," by giving effect to the calls of the plan.

Messrs. Davis & Bailey, for plaintiff:

Where a plan is made intending to delineate a previous survey and there proves to be a variance between the survey and the plan, and a conveyance is made containing a reference to the plan, the grantee will hold to the survey. *Williams v. Spaulding*, 29 Me. 112; *Heaton v. Hodges*, 14 Me. 66; *Thomas v. Patten*, 13 Me. 329; *Esmond v. Tarbox*, 7 Me. 61; *Pike v. Dyke*, 3 Me. 218.

The description by plan limits the deed to the lot on the plan, although more extensive premises are described. The plan is regarded as the most certain and reliable. *Stewart v. Davis*, 68 Me. 589.

The clear and unambiguous calls of a deed cannot be set aside and different ones substituted by parol in their place. *Ames v. Hilton*, 70 Me. 36.

The rule of interpretation of a deed is the intention of the parties as expressed in the deed, without the aid of extraneous testimony, except in the single instance of latent ambiguity. *Knowles v. Toothaker*, 58 Me. 172.

In *Murdock v. Chapman*, 9 Gray, 158, the court says: (the lot being described as lot No. 5 by plan) "This is a case where the usual rule that monuments are to govern must give way," a case directly in point. *Morgan v. Moore*, 8 Gray, 821.

Emery, J., delivered the opinion of the court:

The defendant claimed under the earlier deed, which contained the description lot number five, in the third range in Greenfield, according to Herrick's plan. Herrick had surveyed the south half of the town into lots and ranges, the north half having been previously surveyed into lots and ranges by another surveyor. Herrick then made a plan of the surveyings of the whole town, which plan was in the case. The defendant's lot was in the south half, that had been surveyed by Herrick.

The jury were instructed in effect that the lines run by Herrick upon the surface of the earth, as and for the boundaries of lot five, would still be the boundaries of that lot, if their locality could be found; that the question for them to decide was the locality upon the surface of the earth, of the lines actually run by Herrick in making the survey of that lot.

The instruction was correct. *Esmond v. Tar-*

box, 7 Me. 61, is express authority for it. See, also, *Pike v. Dyke*, 2 Me. 218; *Williams v. Spaulding*, 29 Me. 112.

The plan was merely a picture. The survey was the substance. The plan was not made to show where the lots were to be hereafter located, or how they were to be hereafter bounded. It was made as evidence of where they had been before located and bounded. The lot actually surveyed, bounded by the lines actually run, was the lot intended to be conveyed. The plan was named in the deed, rather as a picture, indicating the location and lines of the lot. Still, the actual boundaries, rather than the pictured boundaries, were to be sought for. The picture might not be wholly accurate.

The defendant's counsel urges that the words of the deeds in the cases cited are merely of "reference to the plan" which he claims simply indicate the relative location of the lots without attempting to define the boundaries. He claims that the language of his deed being "according to the plan" does undertake to define the boundaries and to limit them to the plan. In *Esmond v. Tarbox*, *supra*, it does not appear that the language was of reference merely. Such language, however, has full as much force. There is no difference in the effect. *Lincoln v. Wilder*, 29 Me. 179; *Erskine v. Moulton*, 66 Me. 276.

Exceptions overruled.

Peters, Ch. J., Danforth, Virgin, Foster and Haskell, JJ., concurred.

Ezekiel LEVASSEUR

v.

Luther K. CARY.

1. Whether and when the title to an article is to pass from vendor to vendee is always a question of intention. The title will pass when the parties so agree, whatever the circumstances.
2. Circumstances stated showing an intention to pass title to a quantity of wheat and oats purchased and left in the premises of vendor.

(Aroostook—Decided March 22, 1886.)

ON report. *Judgment for plaintiff.*

The facts are stated in the opinion.

Mr. L. R. King, for plaintiff.

Mr. N. Fessenden, for defendant.

Per Curiam:

Whether and when the title to an article is to pass from vendor to vendee is always a question of intention.

The title will pass when the parties so agree, whatever the circumstances. The circumstances are merely evidence of the intention. They do not control it. They guide the court and jury. They do not compel them. Every case must therefore be decided upon its own peculiar evidence and cannot be a controlling precedent for any other case. *Benj. Sales*, chap. 2, § 111.

In this case the question is whether the par-

ties intended that the property in the wheat, the seed oats and the feed oats or either of them, should pass either at the time of the trade or at the time of the payment.

The wheat was all in the store, and apart by itself, at the time of the trade. The price was fixed. The identity was fixed. All the wheat was to be taken. The purchaser was to send bags, and the seller was to keep the identical wheat for him until the bags were sent. The purchaser afterward paid the money, before sending bags. We think it was understood that the wheat became the vendee's wheat and was to be kept for him. Its destruction was the vendee's loss. *Phillips v. Moor*, 71 Me. 78.

There were some 500 bushels of seed oats in a bin in the store at the time. The purchaser agreed to take 100 bushels at fifty cents a bushel. The oats were not to be measured out, till he should send bags for them, which he was to do at his pleasure. The \$150 paid by purchaser was to cover the seed oats. We think it was understood that the purchaser was to own the 100 bushels as his own property, and that the risk was on him. *Waldron v. Chase*, 87 Me. 414.

The feed oats, however, were not specifically bought. Enough was to be put in to fill the bags when they were sent. Any feed oats would do. No property in any specific oats passed. A jury might have drawn different inferences. We state our own.

The seed oats came to \$50. The wheat was about sixty bushels in quantity, averaging the guesses of the witnesses. This would make \$110 worth of specific property bought. The balance of the \$150, paid by plaintiff, was for feed oats to be supplied. He is entitled to recover back this balance.

Judgment for plaintiff for \$40, with interest from date of writ.

Susan J. GRAY

John H. GRAY.

A motion for a new trial will not be granted, when a careful examination of the evidence reported does not satisfy the court that the verdict is wrong.

(Kennebec—Decided April 7, 1886.)

MOTION for new trial by defendant. *Overruled.*

The case appears in the opinion.

Messrs. Clay & Clay, for defendant.

Messrs. Lancaster & Potter, for plaintiff.

Walton, J., delivered the opinion of the court:

This is a real action. The contention is in relation to the ownership of a farm said to be worth about \$150. The action has been tried and a verdict returned for the plaintiff. The defendant moves for a new trial on the ground that the verdict is clearly wrong. We have read the evidence with care and we are not satisfied that the verdict is wrong. Certainly it is not so clearly wrong as to require us to set it aside and send the case back for another trial.

Motion overruled. Judgment on the verdict.

Peters, Ch. J., Danforth, Libbey, Emery and Foster, JJ., concurred.

Betsey MERRILL

v.

Andrew N. STOWE.

An action of trespass cannot be maintained, where the only question is the title to the property, when it appears that the question of title had been determined adversely to the plaintiff in a real action between the same parties. The question of title in such case is *res judicata*.

(Oxford—Decided April 7, 1886.)

On exceptions by plaintiff. *Overruled.*

Mr. S. F. Gibson, for plaintiff.

Mr. R. A. Frye, for defendant.

Per Curiam:

This is an action in which Betsey Merrill claims to recover damages for an alleged trespass by Andrew N. Stowe upon lands set out to her as dower. The court instructed the jury to return a verdict for the defendant. The instruction was correct. The question of title between these same parties has been tried in a real action, in which Mrs. Merrill's title was sought to be sustained by the same evidence by which it is sought to be sustained in this action, and the court held that her title was not valid. The question of title therefore, as between these parties, is *res judicata*, and need not be discussed further. See, *Stowe v. Merrill*, 77 Me. 550; *S. C. 1 New Eng. Rep.* 291 [*ante*].

Exceptions overruled.

Charles W. HOWARD

MAINE INDUSTRIAL SCHOOL for Girls.

1. A bid in answer to an advertisement for proposals for a building does not constitute a contract. It must be accepted without condition to have that effect, or if condition is imposed, that must be first complied with.
2. Where one party is a corporation, acting through a building committee, a majority of the committee must concur, to make or alter a contract.

(Kennebec—Decided April 16, 1886.)

ASSUMPSIT for breach of contract. *Nonsuit.*

The facts are stated in the opinion.

Messrs. Beane & Beane, for plaintiff:

By the defendant's pleading, the Statute of Frauds is supposed to be set up. If so, we say that this contract was for the erection of a building and this statute does not apply. *Hight v. Ripley*, 19 Me. 137; *Abbott v. Gilchrist*, 38 Me. 260; *Crockett v. Scribner*, 64 Me. 447; *Towers v. Osborne*, 1 Strange, 506; *Crookshank v. Burrell*, 18 Johns. 58; *Mizer v. Howarth*, 21 Pick. 205.

Mr. H. M. Heath, for defendant:

A bid in response to the advertisement does not constitute a contract. There could be no contract until plaintiff's bid, or offer, was accepted by the defendant without modification or conditions. 53 Me. 20; 53 Me. 511; 63 Me. 187.

Plaintiff, under his declaration, cannot rely on contract of Hall, Howard and Church, because Hall and Church are not parties to this action. The nonjoinder of plaintiffs is fatal and open as a defense under the plea filed: the general issue. *Marshall v. Jones*, 11 Me. 54.

It is well settled, that if the managers or directors of a corporation appoint a committee to transact any business, a majority of such committee, at least, must join in any act to make the same binding on the corporation. 59 Me. 483; 36 Me. 516; 43 Me. 180; 16 Me. 215; *Stoughton v. Baker*, 4 Mass. 522; *Kupfer v. So. Parish*, 12 Mass. 185; *Boylston Market Assn. v. Boston*, 113 Mass. 528.

This job was not up at auction. The offer was to come from other parties to defendants. The committee was to receive the offer. Without any reservation, the lowest offer might have been rejected, and any other accepted. *Topping v. Swords*, 1 E. D. Smith, 609.

Emery, J., delivered the opinion of the court:

The plaintiff's declaration briefly stated is, that he made a valid contract with the defendant Corporation, to furnish the mason work and material on a new school building for \$2,400, and that the defendant prevented his going on under the contract after he had incurred expense on account thereof. From the report of the evidence we gather the following facts:

The board of managers of the defendant Corporation, at a meeting held June 19, 1884, voted to proceed to build a new school building, and appointed a committee of five to advertise for proposals, and to take the necessary measures for such erection. This committee, all five acting, advertised for proposals for furnishing the labor and materials required according to plans, specifications, etc. In answer to said advertisement the following written proposal was sent in to the committee. The Howard named in the proposal was the plaintiff.

"Hallowell, Sept. 20, 1884.

To the Building Committee of Industrial School:

We propose to put up the superstructure of said building, as per plans and specifications or instructions of your architect, E. E. Lewis, of Gardiner, Maine, for the sum of \$4,550.

John Hall, carpenter,
Howard & Church, masons."

On the same day, Sept. 20, the building committee had a meeting with three members present. They opened the bids and found the above bid to be the lowest. The record of the meeting then proceeds as follows:

"And the contract was awarded to Hall, Howard and Church for \$4,525.

Voted, that the committee require a bond from the contractors to the amount of contract, for fulfillment: also forfeiture for delay in completing the work."

The same evening the plaintiff met Mr. Rowell, one of the building committee, and asked him

"Who got the job," and was answered "Hall, Howard and Church."

It is evident that up to this point there was no such contract between plaintiff and defendant as is stated in the declaration. The committee's advertising for bids was not an offer. They merely asked for offers. They did not agree to accept any. The first offer in the case, was a joint one by Hall, Howard and Church. Even this was not accepted unconditionally. The committee required a bond, which was never tendered by the proposers. There was as yet no mutual assent. *Jenness v. Mount Hope Iron Co.* 53 Me. 20; *Maynard v. Tabor*, 53 Me. 511; *Cumberland Bone Co. v. Atwood Lead Co.* 63 Me. 187.

It is also evident that the negotiations thus far were not with the plaintiff alone, but with Hall, Howard and Church. It was the joint offer of the three which the committee proposed to accept if a bond was furnished. *Non constat* that they would ever have accepted the plaintiff's single offer for mason work, and material alone.

So far then, the proof does not sustain the declaration. But the plaintiff urges that subsequent oral negotiations took place, in which it was agreed that he should alone furnish the mason work and materials for \$2,400. His own testimony, however, shows that he never had any talk with three of the committee, and that a fourth member, Mr. Nash referred to negotiate with him alone, but demanded a contract, which should include church at least, and also insisted on a bond.

The only member of the committee who had any subsequent talk with the plaintiff was Mr. Rowell, and the evidence is conflicting as to what was said by him. We do not find, however, from the evidence, that any other member ever assented to any change in the committee vote of September 20. We do not find any previous authority for, nor any subsequent ratification of the parol arrangements claimed by plaintiff to have been made with Rowell. The concurrence of a majority of the committee was essential for making a contract binding on the defendant. *Adams v. Hill*, 16 Me. 215; *Hanson v. Dexter*, 36 Me. 516; *Female Orphan Asylum v. Johnson*, 43 Me. 180; *Curtis v. Portland*, 59 Me. 483.

The evidence does not show any such concurrence.

Plaintiff nonsuit.

Peters, Ch. J. and Walton, Danforth, Libbey and Foster, JJ., concurred.

Inhabitants of PERU

v.

Eliza A. POLAND.

An action may be maintained under R. S. chap. 24, § 45, against a married woman who has been deserted by her husband, for reimbursement for pauper supplies furnished her upon her own application.

(Oxford—Decided April 7, 1886.)

ON report. *Judgment for plaintiffs.*
The facts are stated in the opinion.

Mr. A. E. Herrick, for plaintiffs:

The plaintiff Town had been properly notified and was under a legal obligation to pay Oxford and Auburn for the supplies furnished by those towns. Those towns were not required to ascertain whether the defendant had property any further than it affected the question of the necessity for immediate relief being furnished. *Brewer v. East Machias*, 27 Me. 495.

Peru paid the claims of Oxford and Auburn, while legally bound so to do, and can recover the amount paid of the pauper. *Cutler v. Maker*, 41 Me. 594; R. S. chap. 24, § 45.

Chapter 24, § 45, R. S. covers expenses incurred for a pauper whether he has a settlement in that town or not.

The common law treated supplies furnished to a pauper as a gratuity for the payment of which no promise was implied. *Deer Isle v. Eaton*, 12 Mass. 328.

The statute was enacted to cure a supposed defect and to create the implied promise. *Kennebunkport v. Smith*, 22 Me. 449.

The counts in the writ are sufficiently comprehensive to include not only the statute but also the common law remedy; and the plaintiffs could recover for money paid for the benefit of the defendant. *Alna v. Plummer*, 4 Greenl. 262.

Supplies cannot be considered as furnished to a man as a pauper, unless furnished to himself personally or to one of his family; and that those only can be considered as his family who continue under his care and protection. *Green v. Buckfield*, 3 Greenl. 136; *Dixmont v. Biddeford*, 3 Greenl. 205; *Raymond v. Harrison*, 11 Me. 190; *Augusta v. Kingfield*, 36 Me. 289; *Berkeley v. Taunton*, 19 Pick. 480.

There is no difference in the effect of such supplies on the question of the man's being a pauper, whether they be furnished to an abandoned wife or to abandoned children. *Lewiston v. Harrison*, 69 Me. 504.

Married women are liable for debts contracted by themselves in their name for any lawful purpose. R. S. chap. 61, § 4.

The right of a town to recover of a married woman who has been abandoned by her husband is necessary, to give full effect to the statute. See, *Brewer v. East Machias*, 27 Me. 495.

No statute was needed to render a husband, having means, liable for necessities furnished to his wife even when provided by the town; that right existed at common law. *Hanover v. Turner*, 14 Mass. 227; *New Bedford v. Chace*, 5 Gray, 28.

The statute was plainly intended to give the right to recover of the person actually receiving the supplies. It gives the right to recover of the "pauper." See, R. S. chap. 24, § 45.

The defendant was a pauper within the meaning of the Act. *New Bedford v. Chace*, *supra*.

Mr. John P. Swasey, for defendant:

In the absence of any statute provision there is no liability except by express contract. *Deer Isle v. Eaton*, 12 Mass. 328; *Kennebunkport v. Smith*, 22 Me. 445, and cases cited.

The remedy relied upon by these plaintiffs against the defendant existed long prior to the enactments of the statute creating any liability

upon the part of a married woman, and while marriage was a complete defense to all suits upon her contracts, express or implied. See, *Stow v. Sawyer*, 3 Allen, 515; *Groveland v. Medford*, 1 Allen, 23.

The provision for the support of the poor is a charitable provision. To consider it in any other light detracts much from the benevolence of the law. *Stow v. Sawyer*, 3 Allen, 517.

Prior to the enactment of the statute relating to rights of married women, chap. 61, R. S. a married woman could neither sue nor be sued, and coverture was a perfect defense. 41 Me. 245; *Howe v. Wildes*, 34 Me. 566.

Emery, J., delivered the opinion of the court:

From the evidence and admissions we gather the following facts:

The defendant was a married woman, but had been deserted by her husband, who had left the State. Her pauper settlement was in the plaintiff Town solely by virtue of her husband's pauper settlement being in that Town. In 1879 and 1880, after the husband's desertion, the plaintiff Town incurred expense for the support of the defendant, she having called for and received pauper supplies.

The action is under R. S. 1871, chap. 24, § 84, now R. S. 1883, chap. 24, § 45. The only question is whether her coverture is a bar. We do not think it is.

At the time and under the circumstances, she could have made express or implied contracts for her support, which would be binding on her as if sole. Any person furnishing her with needful supplies, at her request, could have maintained an action therefor against her despite her coverture. We think the statute gives the Town as much right. Its language is explicit: "A town which has incurred expense for the support of a pauper * * * may recover of him," etc. "The statute is remedial, not penal. It gives to the inhabitants of a town the right to be reimbursed for an expenditure incurred by authority of law, against the recipient of the benefit. It merely creates an implied promise on his or, her part to make the reimbursement." *Whitman, Ch. J.*, in *Kennebunkport v. Smith*, 22 Me. 449.

There is no exception in favor of married women.

Judgment for plaintiffs, for \$67.19 and interest from date of the writ.

Peters, Ch. J., Walton, Virgin, and Haskell, JJ., concurred.

Benjamin LANDERS

v.

Dexter SMITH.

The Statute of Maine, giving an action against a party for damages occasioned by the perjury of a witness introduced by him at the trial of an action between the parties, requires that such new action should be brought within three years after final judgment in the former case, unless proceedings for review were brought within said three years; then the new action may

be brought within three years after final judgment in the proceedings for review.

(Kennebec—Decided April 5, 1886.)

ON report. *Plaintiff nonuit.*

Action on the case for damages, under R. S. chap. 82, § 187, for the alleged perjury of witnesses introduced by the defendant at the trial of an action between the parties.

Mr. Winfield S. Choate, for plaintiff.

Messrs. J. W. Spaulding and F. J. Baker, for defendant:

This action does not exist at common law. *Soverance v. Judkins*, 78 Me. 379; *Garing v. Fraser*, 76 Me. 41.

Statutes are to receive such a construction as must evidently have been intended by the Legislature; and to ascertain this the court may look to the object in view, the remedy intended to be afforded and the mischief intended to be remedied. *Winslow v. Kimball*, 25 Me. 498.

In *Holmes v. Paris*, 75 Me. 561, the court says, in an opinion by Peters, *Ch. J.*: "It has been repeatedly asserted, in both ancient and modern cases, that judges may in some cases decide upon a statute, even in direct contravention of its terms; that they may depart from the letter in order to reach the spirit and intent of the Act; and a thing within the letter is not within the statute, if contrary to the intention of it."

In Bacon's Abr. title, *Statute, Rules of Construction*, the rule is expressed in these terms: "A statute ought sometimes to have such an equitable construction as is contrary to the letter." The illustrations there given of the rule are pertinent to the present discussion. See, *Allen v. Young*, 76 Me. 80.

The statute in question reads as follows: "When a judgment has been obtained against a party by the perjury of a witness introduced at the trial by the adverse party, the injured party may bring an action on the case within three years after such judgment or after final judgment in any proceedings for a review thereof, against such adverse party, or any perjured witness, or confederate in the perjury, to recover the damages sustained by him, by reason of such perjury; and the judgment in the former action is no bar thereto."

Judgment in the former action was rendered April 21, 1877. At the March Term, 1883, the plaintiff filed a petition for review, which was dismissed at the October Term, 1883. This action was commenced March 13, 1884.

Emery, J., delivered the opinion of the court:

Courts will always endeavor to ascertain the real meaning and purpose of the Legislature in enacting a new statute. In such endeavor, they are not confined to the words of the particular statute in question. The general policy of previous legislation and the general principles of law and equity are to be considered, for there is a presumption, overcomeable of course by sufficient words, that the Legislature did not intend any marked departure from such policy and principles. The results of any particular construction are to be anticipated; and if such results will be anomalous, unjust or even inconvenient, it is a legitimate and strong

argument against the construction contended for. It will be presumed the Legislature did not intend any such results. The language of a statute would need to be very strong and clear to cause a belief that such was the intent.

The real meaning of a statute is to be ascertained and declared, even although it seem to conflict with the words of the statute. See, language of *Chief Justice Peters* in *Holmes v. Paris*, 75 Me. 561.

The cause of action created by Revised Statutes, chap. 82, § 187, is the obtaining of a judgment against another, by perjury of a witness. Before that statute was passed, the only remedy of the injured party was by review. Under the second specification of section 1, chap. 89, Revised Statutes, he was entitled to a review of the action if he could show to the court that the testimony was false and that he was surprised by it at the trial; or by showing that the witness had been convicted of perjury therefor. The limitation of this remedy, however, was three years. The general limitation for all remedies, there being of course a few exceptions, was six years or less. It was the policy of the law and legislation to fix short limitation for special remedies.

This statute gave a new and additional remedy. The injured party may now bring his action directly against the witness; or he may apply for a review on discovering the perjury. He must, however, do one or the other within three years from the judgment. He should bestir himself within that time. If he remain wholly idle he will be wholly barred. Such we think was the intent of the Legislature. *Ut finis.*

The plaintiff concedes, that the application for review should be made within the time limited for such applications, but urges, by the seventh specification of grounds for review, he has six years in which to make application. But under that specification, the court has full discretion. It may not grant a review, even though all the required allegations be proved. If the cause alleged be one that falls within any of the prior specifications, the review ought not to be granted, at least after the time allowed by such prior specification.

This construction contended for by the plaintiff would make the statute anomalous in regard to limitations. It would cause hardship, as may be easily seen. It would enable an unsuccessful litigant to wholly ignore the three years' limitation named in the statute. He could delay all action for nearly six years, and then apply perfunctorily for a review, perhaps for the sole purpose of reviving his right of action under the statute, and without any purpose or desire for a review. He might even then delay action on his petition and thus extend the time for bringing the statute action. When finally driven out of court on his petition, he could delay still three years longer, by which time all means of defense would have been lost.

We cannot think the Legislature so intended. We think it intended that the action or petition should be within three years. If the petition is begun within three years, the time for the action may be extended; otherwise it ends with the three years.

Plaintiff nonuit.

Peters, Ch. J., Walton, Danforth, Libbey, and Foster, JJ., concurred.

STATE of Maine

v.

Seth W. FIFE.

The costs before the grand jury in an indictment for being a common seller of intoxicating liquors form a part of the costs of prosecution.

(Oxford—Decided April 2, 1886.)

INDICTMENT for being a common seller of intoxicating liquor. *Sentence affirmed.*

Mr. James S. Wright, County Atty., for the State.

Messrs. S. C. Strout and A. E. Herrick, for defendant:

The statutes of this State provide that where a fine is imposed under section 85, chap. 27, the costs of prosecution shall be taxed. R. S. 1888, chap. 185, § 1.

Costs depend entirely upon statutory provision. Where no authority is given, costs are not taxable. 1 Douglass, 41.

Prosecution begins when indictment is found. Such being the law, all costs made before indictment is found are not costs to be taxed to defendant under the statute, because they are not costs of prosecution. 5 Mass. 176; 7 Blackf. 148; 1 Chit. Cr. L. 184; *Rez v. Brown*, 1 Salk. 376; 2 Bouv. L. Dic. 382; Whart. L. Dic. 885.

Per Curiam:

A prosecution against one for being a common seller of intoxicating liquors must be commenced before the grand jury; and the costs incurred before the grand jury are as clearly a part of the costs of the prosecution as the costs subsequently incurred, and may be legally included in the costs which the defendant, if convicted, is required to pay. R. S. chap. 27, § 51; chap. 185, § 1; chap. 27, § 85.

The costs incurred before the grand jury were properly included in the costs which the defendant in this case was required to pay.

Sentence affirmed.

Herbert ERSKINE

v.

John S. GLIDDEN.

1. The fact that a promissory note was made and delivered on Sunday is no defense in Maine, unless the defendant shows that he has offered to restore the consideration.
2. A discharge in insolvency does not affect a promissory note given by the insolvent before the law on Sunday contracts was enacted, if the note was not proved against the insolvent estate.

(Kennebec—Decided April 12, 1886.)

EXCEPTIONS by the defendant. *Over-ruled.*

The case is stated in the opinion.

Mr. H. Bliss, Jr., for defendant.

Mr. John H. Potter, for plaintiff.

Per Curiam:

This is an action upon a promissory note given for money loaned. The defense set up is twofold: first, the note was executed and delivered on Sunday; and second, a discharge under the insolvent law.

The note bears date previous to the passage of the Statute of 1880, entitled, "An Act in Relation to Defenses in Actions Involving Contracts Made on Sunday;" but this action was commenced subsequent to that Act; and the case finds that there has been no offer to restore the consideration received for the note. The first ground of defense therefore fails, the same question having been decided in *Berry v. Clary*, 77 Me. 482.

It further appears that the note was an executed contract before the passage of the insolvent law, and was not proved against the defendant's estate. Therefore, the defendant's discharge cannot avail him.

Exceptions overruled.

Laura F. PLUMMER *et al.*

v.

Benjamin F. HILTON.

A testator, after describing certain real estate, devised it in these words: "I devise, give and bequeath to him, the said Isaac, Junior, in trust for his heirs so long as he shall live; and after his death to his heirs, their heirs and assigns, to have and to hold forever." Held, that the effect of this devise, under R. S. chap. 78, § 6, was to vest a life estate in Isaac, Junior, with a fee simple in his heirs.

(Lincoln—Decided April 7, 1886.)

REAL action. *Defendant defaulted.*

The facts are stated in the opinion.

Messrs. A. P. Gould and J. E. Moore, for plaintiffs.

Mr. Rufus K. Sewall, for defendant:

Defendant claims that the premises in question, as to title in fee, were vested in testator's estate independently of all grants by levy, or otherwise. The acquiescence of the trustee for nearly forty years, and the administration in subordination thereto for so long a period, in law and equity, is equivalent to an open, notorious, adverse holding, in the right of the testator. *Blanchard v. Moulton*, 63 Maine, 484; *Crooker v. Pendleton*, 28 Me. 339; *Farrar v. Merrill*, 1 Me. 17; *Hill v. Lord*, 48 Me. 83.

Therefore defendant holds that the claim of demandants is barred by R. S. chap. 105, § 15, as to any supposed title accruing under their alleged judgment and levy of execution.

Walton, J., delivered the opinion of the court:

This is a real action. The plaintiffs derive their title as follows: Isaac Hilton, Senior, devised the demanded premises to his son, Isaac Hilton, Junior, "In trust for his heirs so

long as he should live; and after his death, to his heirs, their heirs and assigns, to have and to hold forever." The effect of this devise, under our statute, R. S. chap. 78, § 6, was to vest an estate for life in Isaac Hilton, Junior, and a fee simple in his heirs. Isaac Hilton, Junior, conveyed to his son, Benjamin F. Hilton, the other children of Isaac joining in the conveyance to their brother. The effect of this conveyance was to vest the whole title in Benjamin F. Hilton. The title then passed from Benjamin F. Hilton to Nancy C. Ames, by the levy of an execution upon the land. Nancy C. Ames died and the title passed by descent to the plaintiffs as her heirs at law.

It is thus seen that the plaintiffs have apparently a valid title to the demanded premises, and are entitled to a judgment in their favor. And the defendant's counsel admits that this is so, if the effect of the devise from Isaac Hilton, Senior, to Isaac Hilton, Junior, was to vest a life estate in the latter, and a fee simple in his heirs. But he claims that such was not its effect. He claims that the first taker and his heirs held the estate in trust for the great-grandchildren of the deviser; and that, until it reached the latter, it could not be legally levied upon.

We are unable to sustain this proposition. We think the effect of the devise was, under our statute already cited, to vest a life estate in the first taker and a fee simple in his heirs, and that the estate was legally levied upon, and that the title is now vested in the plaintiffs.

As agreed in the report, the entry must be: *Defendant defaulted.*

Peters, Ch. J., Virgin, Libbey, Foster and Haskell, JJ., concurred.

Allen F. DAWES

v.

Trueman BERRY.

1. The fact that the defendant in an action of trover caused the property to be attached and delivered to him by the attaching officer, on a writ which was not entered in court, was held, to be evidence of conversion.

2. It is no defense to such an action that the defendant claimed the property under a mortgage, the mortgage having been paid prior to the conversion.

3. The consideration named in a deed is *prima facie* evidence that it is for the property therein described, alone.

(Somerset—Decided April 16, 1886.)

ON exceptions by defendant. *Overruled.*

The case appears in the opinion.

Mr. S. S. Brown, for defendant.

Messrs. A. H. Ware and Merrill & Coffin, for plaintiff.

Per Curiam:

The action was trover for various articles, hay, bean fodder, birch timber and wood. The title to the articles was the only issue, the

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defendant claiming that they were included in a certain sale of real estate to him by plaintiff.

1. The defendant, for the purpose of obtaining possession of the articles, sued out a writ against the plaintiff, upon which the officer made a return of an attachment of some of the articles. The officer and also the present defendant testified that the attachment was in fact made, and that the defendant took the property into his possession. That writ was never entered in court.

The jury were instructed that the above evidence, if believed, was evidence of the conversion of the property attached. The instruction was correct.

2. The defendant also claimed title to some of the articles under various mortgages. There was evidence that all the mortgages were paid and discharged, three days prior to the alleged conversion.

The jury were instructed that if the evidence was believed and the mortgages were discharged, the defendant had no title; no right to interfere with any of the property, by virtue of the mortgages. This instruction was correct.

3. In the aforesaid writ, the declaration by the then plaintiff but now defendant, was on sale of the articles to him by this plaintiff. He declared for hay, and bean fodder sold to him, but did not declare for any birch timber or wood. The writ was made soon after the transaction.

The jury were instructed that the omission in that writ, to claim the wood and timber, was evidence tending against the claim now made for him. This instruction was correct.

4. In the deed of the real estate from plaintiff to defendant, the consideration was stated at \$1,500. The defendant claimed that the \$1,500 included the personal property, while plaintiff claimed it was for the land alone. No personal property was named in the deed. The jury were instructed that *prima facie* the \$1,500 consideration was for land alone; that the recital was *prima facie* evidence for the plaintiff but that it might be overcome; that it was not conclusive. This instruction was correct.

5. The jury were told that if the personal property had been named in the deed of real estate, as intended to be also conveyed, it would have settled the controversy. We think it would. The omission of all mention of personal property in the deed was some evidence that none was intended to be conveyed.

6. The plaintiff claimed that part of the \$1,500 consideration was paid by a \$900 note from defendant. The defendant denied giving any such note.

The jury were told that their verdict, whichever way it was, would not decide whether the note was genuine; that the genuineness of the note was not the issue. This was correct. The character of the note could only affect the credibility of one or the other of the parties.

Exceptions overruled.

Nicholas HANSON

v.

Henry M. BREWER, *Err.*, et al.

A testator in his will said: "I authorize my said executors, or their successors, to make such conveyances and disposition of my estate, not hereinbefore specifically devised, as shall in their opinion be necessary to carry into effect the provisions of this will." Held, that the executors were authorized to sell the estate not specifically devised, limited only by their own judgment of what was necessary to carry into effect the provisions of the will; and that by necessary implication the legal title was in the executors.

(Cumberland—Decided April 7, 1886.)

BILL in equity. *Dismissed.*

That portion of the will of Jonathan Smith material to this case, is as follows: "And I do hereby authorize my said executors and enjoin it upon them, in case that in their opinion the best interests of any one of my children would not be promoted by his or her coming into immediate or actual possession of his or her share of my estate, that my executors should hold the same or convey the same in trust and upon such trusts as in their opinion will best secure the permanent interest of either or all of my children. And for the purposes aforesaid, I authorize my said executors or their successors to make such conveyances and disposition of my estate, not hereinbefore specifically devised, as shall in their opinion be necessary to carry into effect the provisions of this will."

The facts are further stated in the opinion: *Messrs. S. C. Strout, H. W. Gage and F. S. Strout*, for plaintiff:

Under the provisions in the will, this estate vested in fee in the devisees, as tenants in common, subject only to be divested if the power of sale should be exercised under circumstances justifying it. The courts incline to treat the estate as vesting in the heirs or devisees, who are identical in this case, where there is no direct devise to trustees, unless the duties imposed upon the trustees, in this case the executors, are such as require them to be seised of the legal estate in order to execute their trust. *Deering v. Adams*, 37 Me. 265; *Perry, Trusts*, § 511, a.

In this case the executor has a naked power, not coupled with an interest; and until he legally should exercise that power, he had nothing to do with the land, and the fee was in the devisees, who were entitled to the possession and the income therefrom. A devise to an executor to sell gives a power coupled with an interest; but a devise directing executors to sell confers a power, without interest, and the fee vests in the devisees. *Fay v. Fay*, 1 Cush. 105; *Shelton v. Homer*, 5 Met. 462; *Larned v. Bridge*, 17 Pick. 339; *Sug. Pow.* 106-111; 2 Burr. 1027; *Bergen v. Bennett*, 1 Caines' Cas. 16; *Hill, Trust*. 236-471; *Perry, Trusts*, §§ 250, 251, 765.

A direction to divide would not imply a

power of sale. *Id.* §§ 765, 766; *Taylor v. Benham*, 5 How. 269 (46 U. S. bk. 12, L. ed. 147).

Unless the power given in this will is legally executed, the title to the land was in the devisees, Smith's children. *Hill, Trust*. 472; *Perry, Trusts*, § 765.

As the executor was not charged with any duty in managing the real estate, even if the legal estate had been in him, it would have been a *dry trust*, which under the Statute of Uses would be executed in the *cestuis que use*, and the title would be in them, subject to the power. *Id.* §§ 520, 521; *Hill, Trust*. 231, note 2.

When land descends to the heir or is devised, and a naked power of sale is given to an executor, as in this case, the heir or devisee is entitled to the profits and possession until the sale. *Seymour v. Bull*, 3 Day, 389; *Perry, Trusts*, § 769.

There is no general power of sale; it is only for the purpose of holding or conveying in trust. If the executors decided to hold it in trust, it might be necessary to sell the child's share; or possibly, if not practicable to divide, to sell the shares of all in a particular piece of real estate. It was only for these purposes that they have any power of sale at all.

A power must be strictly executed or the conveyance fails. *Perry, Trusts*, §§ 511 a, 511 b, 763, 765, 769.

A purchaser from one selling under a power must at his peril see that the power is legally executed. *Id.* §§ 789, 790.

A power to sell for a certain purpose or in a certain contingency will not authorize a sale for any other purpose or in any other contingency; and the purchaser is bound to know whether the sale is for such purpose or in such contingency. If it is not, his title fails. He must at his peril ascertain whether the facts justify the execution of the power. *Id.* §§ 224, 769.

Whether the recital in this deed "it being necessary, in my opinion, to carry into effect the provisions of said will, to make this conveyance, and for the purposes therein expressed," is sufficient or not, it does not conclude. The grantee of the executor claiming against the devisees or their grantee the plaintiff, must show that the existing facts were such as to authorize the executor to sell, and brought the case within the terms of the power. *Stevens v. Winship*, 1 Pick. 325; *Minot v. Prescott*, 14 Mass. 496; *Larned v. Bridge*, 17 Pick. 339; *Perry, Trusts*, §§ 224, 769; *Sug. Pow.* 267; *Hill, Trust*. 478, note 2.

A widow had power under a will to mortgage for her support. It was held that she could not mortgage for \$1,500, unless the whole amount was needed for her support. *Paine v. Barnes*, 100 Mass. 471.

Where power to sell is on contingency, sale cannot be made unless contingency happens. And that is a question of fact for the jury. If contingency has not happened, a deed reciting the power is invalid. *Stevens v. Winship*; *Minot v. Prescott*; and *Larned v. Bridge*, *supra*; *Rathbun v. Colton*, 15 Pick. 486; *Johnson v. Battelle*, 125 Mass. 453.

In *Penniman v. Sanderson*, 18 Allen, 193, the sale was sustained, but the power authorized a sale if deemed expedient to raise money for any purposes of the will.

The contingency on which sale may be made is a condition precedent, and must exist before a sale can be made. *Sug. Pow.* 267; *Hill, Trust*, 478, *note* 2.

If the power is to sell to invest in a particular way, the purchaser is bound to see to the application of the purchase money. *Sugd. Pow.* 268; *Doe v. Martin*, 4 Term R. 39.

It follows that no condition of things existed, when Brewer made his deed, which authorized a sale under the power, and the deed to Cobb and Jacobs is absolutely void.

The title of complainant to $\frac{1}{8}$ of the land under his deed from the devisees, is complete in him, and the deed of Brewer to Cobb and Jacobs, being invalid, is a cloud upon complainant's title and should be removed. The invalidity of the deed is not apparent on its face, hence equity has jurisdiction. *Briggs v. Johnson*, 71 Me. 235; 3 Dan. Ch. 1961, *note*; 1 Story, Eq. §§ 700, 711; *Hubbell v. Currier*, 10 Allen, 333; *Knight v. Mayberry*, 48 Me. 158; *Crooker v. Crooker*, 46 Me. 250; *Chafee v. Bank*, 71 Me. 529.

The acts and agreements on the part of Brewer, followed by Hanson's purchase of the several shares of the devisees and paying his money therefor, amounted to an assurance and undertaking by Brewer that he had no occasion and would not execute the power of sale in the will, and authorized Hanson to purchase of the devisees directly. It was then a fraud in Brewer, after Hanson had made these purchases in good faith, relying upon Brewer's assurance that if Hanson could obtain the share of Edwin he should have the others, for Brewer to attempt, as he did, to exercise the power in the will on February 19. He was estopped to do this. *Sug. Pow.* 411.

This state of facts as between Brewer and Hanson, amounted to an agreement to execute the power in favor of Hanson, if any circumstances should exist to authorize its execution; and although resting in parol, there was such part execution as would operate a fraud on Hanson, unless performed, and in such case equity will compel performance. The bill is drawn to cover this condition of things. *Hill, Trust*, 477; *Mortlock v. Buller*, 10 Ves. 315; *Pulsifer v. Waterman*, 78 Me. 234.

Besides, the record of Hanson's deeds on February 16 and 18 was notice to Cobb and Jacobs. Although not deeds from Brewer, they were deeds from the heirs, and Cobb and Jacobs both knew that the title was in the heirs and not in Brewer; and they personally knew all the heirs. It certainly gave them sufficient knowledge to put them on inquiry, before they took a deed from Brewer under his power, and that is good notice. *Pingree v. Coffin*, 12 Gray, 307; *Sug. Pow.* 351; *Perry, Trusts*, § 223, 224; *Hill, Trust*, pp. 510, 511, 512, *note* 4.

Knowledge of the existence and terms of an agreement for sale of land is, in equity, sufficient to prevent one who has it from acquiring rights in fraud of that agreement. It puts him on inquiry and it is his own fault if he fails to inform himself of the validity and force of the agreement, before undertaking to acquire title. *Connihan v. Thompson*, 111 Mass. 271; *Sug. Pow.* 411; *Clark v. Flint*, 22 Pick. 240.

Brewer had no binding agreement with Cobb and Jacobs. It was all dependent on obtaining ME.

deeds from Edwin, as the case abundantly shows. If this condition did not exist, it was a mere parol agreement, nothing done by either party which equity would regard as such part performance that it should be enforced to prevent a fraud. *Potter v. Jacobs*, 111 Mass. 32; *Pulsifer v. Waterman*, 78 Me. 234.

The conveyance to Cobb and Jacobs was in fraud of Hanson, and should be canceled; or they should be treated as holding it in trust for Hanson, and compelled to convey to him, to accomplish the agreement between Brewer and Hanson, if Brewer had power to convey. *Fuller v. Percival*, 126 Mass. 332.

In suit against an administrator it is not necessary to make the heir a party. *Story, Eq.* §§ 140, 141.

It is not always necessary that all parties interested in the subject matter should be parties. Here they are represented by the executor. *Id.* §§ 142, 144.

Messrs. Frank & Larrabee, for defendants:

The strict rule is that all persons materially interested in the subject of the suit, however numerous, ought to be parties, that there may be a complete decree between all parties having material interests. *Story, Eq. Pl.* § 76 c (n. 4).

"A court of equity will be careful to have all the parties, who apparently have an interest in the subject matter of the suit which may be affected by the decree, before them; giving all an opportunity to be heard; so that such decree may be made as will effectually bind all and settle the rights of all thus interested." *Brown v. Johnson*, 53 Me. 248; *Pierce v. Faunce*, 47 Me. 507; *Morse v. Machias Water Power Co.* 42 Me. 119.

When it is manifest upon the face of bill that the alleged agreement or promise was a mere matter of conversation and not an agreement in writing, then a demurrer will lie. *Walker v. Locke*, 5 Cushing, 90; *Ahrend v. Odiorne*, 118 Mass. 263.

Under the provisions of the will, the executor, Henry M. Brewer, had full power and authority to make the conveyance to the respondents, Cobb and Jacobs, which is here complained of. *Wms. Exrs.*, 549; 2 Redf. Wills. 122, 123, 124; *Perry, Trusts*, § 501; 2 Spence, 366, 367; *Going v. Emery*, 16 Pick. 107.

"Executors can deal with real estate only as they are empowered to do so by the will of testators. Purchasers must then look to the will for the power of the executor. If they purchase in good faith, from an executor with full power to sell, they will take a good title." *Perry, Trusts*, §§ 224, 218, 219.

Whatever the executor may have done to affect his right to exercise the power conferred upon him, or whatever agreement he may have made with others, relative to the property or a conveyance of it, could not affect them unless they had actual knowledge of it. The same principle applies as in cases of sale of real or personal property, acquired by fraud of vendor, to an innocent vendee for valuable consideration. *Somes v. Brewer*, 2 Pick. 184; *Green v. Tanner*, 8 Met. 411; *Robbins v. Bates*, 4 Cush. 104; *Hoffman v. Noble*, 6 Met. 68; *Wyman v. Hooper*, 2 Gray, 141.

The record cannot be regarded as giving notice of any facts not stated in it. *Roberts v. Bourne*, 23 Me. 169.

"Record of deed is only notice of what it contains and not of any contemporaneous agreement." 36 Am. Dec. 186.

"A recorded deed is constructive notice only to those who claim under the same grantor." *Spofford v. Weston*, 29 Me. 140; *Roberts v. Bourne*, 23 Me. 165, 169; *Bates v. Norcross*, 14 Pick. 224, 231; *Tilton v. Hunter*, 24 Me. 29.

Walton, J., delivered the opinion of the court:

This is a suit in equity. The contention is in relation to the title to real estate. One party claims title by a deed from the executor of Jonathan Smith. The other party claims title to thirteen twentieths of the estate by deeds from four of Jonathan Smith's heirs. The defendants are Henry M. Brewer, the executor of Jonathan Smith, and George W. Cobb and Elias M. Jacobs, the purchasers from the executor. The plaintiff is the purchaser from the heirs. He contends that the heirs had authority to convey. And he contends further, that if the legal title was in the executor and he alone had authority to convey, still, the equitable and beneficial interest was in the heirs, and that he purchased from them with the knowledge and consent of the executor, and with a promise from him that the title should be made good. And he avers that at the time of the conveyance from the executor to Cobb and Jacobs, they knew of his purchase from the heirs and of the agreement of the executor to be bound by it. And he claims that under these circumstances the purchase of Cobb and Jacobs from the executor was fraudulent and collusive; and he asks that the deed to them may be canceled and his title made good.

We think the relief prayed for cannot be granted. The evidence shows clearly that Cobb and Jacobs were the first to bargain for the land, and that the plaintiff's efforts to obtain the title were made with a full knowledge of this fact. Their purchase was not an interference with his. His was an attempted interference with theirs.

There is no doubt that the legal title and the authority to convey were vested in the executor. It is well settled that an authority to sell, vested in an executor by the testator's will, vests in him the legal title also. *Richardson v. Woodbury*, 48 Me. 206; *Deering v. Adams*, 37 Me. 265.

Jonathan Smith's will authorized the executor to make such conveyances and disposition of his estate as should, in the opinion of the executor, be necessary to carry into effect the provisions of the will. Such a power vests in the executor an authority to sell, limited only by his own judgment of what is necessary to carry into effect the provisions of the will; and by necessary implication, as the cases cited will show, also vests in him the legal title. Having the legal title and authority to sell, the executor, by his deed to Cobb and Jacobs, conveyed to them a perfect title; and under the circumstances disclosed by the evidence, there is no rule of law or equity which will justify the court in disturbing it. As already stated, Cobb and Jacobs were the first to bargain for the property. Their contract for the purchase of it was as complete as a contract for the purchase of real estate can be which is not

reduced to writing and a deed for the conveyance of it not yet executed. The plaintiff's attempt to obtain a title through the heirs was an effort, knowingly and intentionally made with a view and with the intention, if possible, to thereby discourage and prevent Cobb and Jacobs from completing their purchase from the executor. This court, sitting as a court of equity, cannot lend its aid to render such an effort successful.

Bill dismissed, with one bill of costs for the defendants.

Peters, Ch. J., Virgin, Libbey, Foster and Haskell, JJ., concurred.

Aaron S. COBB

v.

Moses CORBITT.

To entitle the plaintiff to recover in an action under the statute for "**double the value and expenses**" of building the portion of the **division fence**, between the lands of the parties, assigned by fence viewers to the defendant to build, it must appear that the plaintiff has built the whole of the portion thus assigned.

(Oxford—Decided April 23, 1886.)

ON exceptions by defendant, to a ruling that the fact that the plaintiff had neither completed the portion of the division fence assigned by fence viewers to him to build, nor all of the defendant's portion, constituted no defense. *Sustained.*

Mr. J. P. Swasey, for defendant:

Under the statute, R. S. chap. 22, § 5, we assume that the plaintiff is not entitled to claim double the amount expended in building any part of the fence assigned to the defendant, until he has completed the whole. The statute being penal as well as remedial, this court has held it should be strictly construed. *Abbott v. Wood*, 22 Me. 546.

The law does not make either party the judge of what he should do in the premises, or what he shall leave undone; but when the complainant has completed such fence and, after due notice given, it has been adjudged sufficient, etc., he has his remedy as provided in R. S. chap. 22, § 4.

Messrs. Bisbee and Hersey, for plaintiff.

Foster, J., delivered the opinion of the court:

The plaintiff and defendant are occupants and owners of adjacent lands. Having disagreed respecting their obligation to maintain a partition fence between them, on application of the plaintiff, the fence viewers of the town, after due proceedings, in relation to which no question is raised, assigned to the parties their respective shares in such partition fence. By this assignment the plaintiff was to build a certain specified portion of the fence in the center, and the defendant was to build the residue at each end. The time having elapsed in which each was to build his part of the fence, the

plaintiff having built a part only of the fence thus assigned to him, proceeded and built that portion of the fence assigned to the defendant at one end of the line, the remaining portion assigned to the defendant and a part of that assigned to the plaintiff never having been built.

This action is brought under §§ 5 and 6, chap. 22, R. S., to recover double the value of so much of that part of the division fence as was assigned to the defendant and built by the plaintiff.

The defendant makes no objection to the regularity of the proceedings of the fence viewers in matter of form, but contends that the plaintiff is not entitled to recover in this action upon other grounds. His position is that the plaintiff, having built only a portion of that part of the fence assigned to the defendant, is not entitled to recover double the amount expended in building only such portion, the remainder never having been completed.

And such is the opinion of the court. The remedy being one afforded by statute, the plaintiff, to entitle himself to a recovery, must show a compliance with its provisions. He is not entitled to enforce the statute penalty against the defendant, for his own benefit, until he has performed what the law requires at his hands. Such remedy is penal as well as remedial and will not be extended by implication to cases not clearly embraced within the provisions of the statute which the plaintiff invokes in his own behalf. *Abbott v. Wood*, 22 Me., 541; *Wood v. Adams*, 35 N. H. 36.

That part of the statute under consideration, section 6, provides that, "If any party refuses or neglects to build and maintain the part thus assigned him, it may be done by the aggrieved party, who is entitled to double the value and expenses, to be ascertained and recovered as provided in section 4." It is "the part thus assigned" which the aggrieved party is authorized to build, upon refusal or neglect of the other party, and not any fraction of such part.

And when we examine section 4, to which reference is made for the manner of ascertaining and recovering the amount to which the aggrieved party may be entitled under sections 5 and 6, it will be seen that one of the prerequisites to a recovery there is that the party complaining has "completed" such fence. No other conclusion can be reasonably arrived at than that the plaintiff, before he can be entitled to recover in this case, must show that he has complied with the statute and built, of the fence in question, "the part thus assigned" to the defendant. The building of a moiety of such part is not the building of the part contemplated by the statute; and a multiplicity of suits is not to be favored where one is all that was intended to be given.

Exceptions sustained.

Peters, Ch. J., Walton, Virgin, Libbey and Haskell, JJ., concurred.

STATE of Maine

v.

James M. BUCK.

An indictment for maintaining a liquor nuisance is good, which contains an ME.

averment that the defendant, at a time and place stated, used a building for the illegal keeping and sale of intoxicating liquors; although it contains a further allegation that he thereby rendered himself guilty of keeping a nuisance, with the blank space of the time left unfilled.

(Kennebec—Decided April 7, 1886.)

EXCEPTIONS to the ruling of the Superior Court in overruling the defendant's motion in arrest of judgment. *Overruled.*

Mr. H. M. Heath, for defendant:

The motion in arrest of judgment presents the point involved. "Said indictment is bad, for uncertainty in the following particular: that it contains therein no definite allegation of the time when said respondent was guilty of the offense charged."

If an allegation has reference to the day of the finding of the indictment and not to the time of the offense, the indictment is insufficient. *State v. Thurstin*, 35 Me. 206.

In *State v. Baker*, 84 Me. 52, the allegation of time was "on or about" a specified day. Held, fatally defective.

In *State v. Thurstin*, *supra*, the precise point now involved was settled.

In *State v. Jackson*, 89 Me. 291, two different dates were alleged in the indictment and all subsequent averments as to time were introduced by the use of the words "then and there." Such pleading was held insufficient, as it would be uncertain to which time the word "then" would refer. *Jane v. State*, 8 Mo. 61.

In *State v. Hurley*, 71 Me. 854, the court says: "Where more times than one have been mentioned in the indictment it is not sufficient to use the words 'then and there' because it is uncertain to which of the times previously named they refer. 1 Bish. Cr. Pro. 2d ed. § 414; *State v. Hill*, 55 Me. 365."

The same reasoning would apply when the words "said day" have been used following allegations of more times than one.

In *State v. Day*, 74 Me. 220, 224, the foregoing cases are cited and approved. In that case four dates were referred to in the body of the indictment followed by the averment "then and there." Held, insufficient because not alleged with precision and certainty. It is there held to be a "fixed rule of criminal pleading that no indictment whatsoever can be good without precisely showing a certain year and day of the material facts alleged in it."

Mr. W. T. Haines, County Attorney, for State:

This is a statutory nuisance; the keeping of the place is the gist of the offense; several independent causes may be set out as constituting it. Proof of either of them proves the nuisance. Proof of all proves no more. *State v. Lang*, 68 Me. 215.

If a fact be stated as to time, with repugnancy or uncertainty, the indictment will be bad. All unnecessary words may, on trial or arrest of judgment, be rejected as surplusage, if the indictment would be good on striking them out. Whart. Cr. L. § 622.

The indictment is so plain that he who runs may read. The defendant had full knowledge

or information by the indictment, of the offense with which he was charged and called upon to plead to. Exceptions must be overruled. See, *Commonwealth v. McKenney*, 14 Gray, 1.

Walton, J., delivered the opinion of the court:

The defendant has been tried on an indictment charging him with keeping a liquor nuisance, and found guilty by the verdict of a jury. He moves in arrest of judgment, on the ground that the indictment contains no definite allegation of the time when the offense was committed.

An examination of the indictment discloses the fact that one of the blanks intended for a date is left unfilled. But this blank is in that portion of the indictment which characterizes the defendant's act, and declares that it rendered him guilty of keeping a nuisance. The fact that he used a building for the illegal keeping and sale of intoxicating liquors is averred, with time and place, in the usual manner. But the allegation that he thereby rendered himself guilty of keeping a nuisance is made, with the blank space for the time left unfilled.

It is the opinion of the court that the whole averment is immaterial and might have been left out without impairing the indictment. It has no other effect than to advise the court of the legal consequences of the act already stated; and of this the court would take judicial notice without the averment. It does not state a traversable fact. And being wholly immaterial, the omission to affix to it a date is unimportant. Besides, the date is certain without being stated. It is the illegal use of the building that constitutes the nuisance; and when the time of the former is stated, the time of the latter is made certain; for they are in point of time necessarily contemporaneous.

It is therefore the opinion of the court that the indictment does contain a legal and sufficient statement of the time when the offense was committed.

Exceptions overruled.

Peters, Ch. J., Danforth, Libbey, Emery and Foster JJ., concurred.

Charles MERRILL, Admr.,

v.

Inhabitants of NORTH YARMOUTH.

1. It is settled law in Maine that, in an action against a town to recover damages for the death of a person, alleged to have been caused by the negligence of the town in not keeping one of its ways in repair, the burden of proof is upon the plaintiff to show due care on the part of the deceased.
2. Facts stated which were held by the court to constitute contributory negligence.

(Cumberland—Decided April 7, 1886.)

ON exceptions by the plaintiff to the instructions of the presiding Justice, directing the jury to return a verdict for the defendants. *Overruled.*

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This is an action brought by the administrator of the estate of Oliver B. Corlies for damages for the loss of the life of his intestate by reason of a defective way in the defendant Town. The action is brought under the provisions of Rev. Stat. chap. 18, § 80.

Messrs. Woodman & Thompson, for plaintiff:

The facts are stated in the opinion.

The defendants rely upon two grounds to sustain the direction: 1. The lack of twenty-four hours' notice to the Town, of the defective condition of the way. 2. The contributory negligence of plaintiff's intestate in driving into the overflow and attempting to cross the interval.

The question whether or not the way was defective in and of itself, in its construction, was a question of fact upon which the plaintiff should have been permitted to go to the jury.

It is difficult to determine what would be and what would not be a defect that would render a town responsible in damages for injury received upon a highway. It may be a question of law or of fact, or of law and fact combined, according to circumstances. If the evidence is clear and undoubted it may be so palpable a case that the law can settle it one way or the other. The doubtful cases belong usually to the jury for decision. *Nichols v. Athens*, 66 Me. 404.

What obstructions or inconveniences will render a highway defective, so as to make the town liable if an injury is thereby occasioned, is, to a considerable extent, a matter of opinion or judgment. The same is true as to what constitutes due care. The court must not, therefore, assume that the jury have acted dishonestly or perversely, simply because they may have come to a conclusion different from that to which the court would have come upon the same evidence. *Weeks v. Parsonsfield*, 65 Me. 286.

Each case must depend somewhat upon its peculiar facts. Of course, whether a road is or not out of repair is generally for the jury to decide. *Card v. Ellsworth*, 65 Me. 558.

It was for the jury to decide whether on the evidence, the defendants had used ordinary care and also whether the sidewalk was reasonably safe. *Hull v. Lowell*, 10 Cush. 261.

But what is a defect and whether any defect however slight exists is to be submitted to the jury. The law has not prescribed what imperfections in a road would constitute the defect referred to in the statute. It was a fact for the jury to settle what condition would render it safe or otherwise. *Lawrence v. Mt. Vernon*, 85 Me. 104.

If there had been nothing more than a single stout railing on the westerly side of the road along this dangerous part, the overflowing water would have been powerless for evil, as the deepest water in the roadway was only three feet two inches deep. The current might have swept decedent up against the railing but it could not have swept him to his death, so that in this respect, regarding the overflowing water as a defect of which the Town had not had twenty-four hours' notice, and the absence of a railing as a separate or independent defect, the case travels on all fours with that of *Spaulding v. Winslow*, 74 Me. 528, in which case the

plaintiff's horse shied at a hole in a culvert, and, there being no railing by the side of the way, plaintiff was upset in the ditch. The hole in the culvert had been in existence but a few hours. The defect alleged was the lack of railing.

If it once be granted that there is ground for any difference of opinion among ordinary men, the conclusion follows irresistibly that the question was one which should have been left to the jury. See, *Weeks v. Parsonsfield*, *supra*; also, *Lawless v. Conn. R. R. Co.* 136 Mass. 8; *Crumpton v. Solon*, 11 Me. 387.

In *Mayo v. Boston & Maine R. R. Co.* 104 Mass. 142, the court says: "However indicative of carelessness the circumstances may seem to the court, if there be any evidence upon which it is competent for the jury to find that reasonable care was in fact exercised, it is proper to submit it to them."

Lest the rule in *Merrill v. Hampden*, 26 Me. 239, to the effect that it is the duty of the plaintiff to prove affirmatively that he was in the use of ordinary care, be invoked against us, we wish to call attention to the modification of this rule which seems to be well established in cases where, as in the present case, it is impossible to adduce direct evidence of care.

In *Foster v. Dixfield*, 18 Me. 380, which is an early case brought before the modification of the rules of evidence allowing parties to testify, Chief Justice Weston says: "It is contended that the plaintiff is bound affirmatively to prove due care on his part. It may well be doubted whether this should be required in all cases. If direct and positive proof to this effect is essential, a party who sustains an injury by reason of a defect in the highway, when alone or when the transaction was witnessed by no other eye, would be without remedy. * * * The want of railing on the bridge could not fail to admonish the plaintiff that care was necessary for his own safety. * * * In the absence of all opposing proof it may not be too much to infer care from common experience, when essential to personal security."

The rule thus laid down is commented upon in *Merrill v. Hampden* and is there admitted to be the rule governing cases where direct and positive proof of due care is, in the nature of the case, impossible. See too, 61 Pa. St. 361.

Mr. Corliss was not bound to look ahead from the top of the hill before he came down into the interval to take note of the extent of the overflow and the force of the current at the further side of the interval, and it is no evidence of lack of ordinary care that he did not do so. *Hill v. Seekonk*, 119 Mass. 85-89; *Thompson v. Bridgewater*, 7 Pick. 189.

The case of *Horton v. Ipswich*, 12 Cush. 488 is strong in the plaintiff's favor, on the point that the mere entering upon this overflow is not in itself conclusive evidence of negligence on the part of Mr. Corliss. See also, *Mahoney v. Met. R. R. Co.* 104 Mass. 78.

Messrs. Symonds & Libby, for the defendants:

This is not a case like that cited by the plaintiff, *Thompson v. Bridgewater*, 7 Pick. 189, where the overflowed causeway was hidden from the view until the person had reached the bridge which adjoined it and had gone too far to avoid the danger, being unable to turn around on the

narrow bridge. No such difficulty existed here.

The court in that case, lays down the rule that "If from foolhardiness one should plunge his horse into water, which by a flood had covered a causeway, he knowing it to be so, or if he should enter upon a bridge which he saw was weakened by a storm, he ought not to be indemnified for his carelessness."

The same court in *Horton v. Ipswich*, 12 Cush. 492, says: "The real point is not whether the plaintiff was chargeable with negligence in making his way over the road, after he had entered upon it, or before he had reached any dangerous place. If so, he could not in the exercise of ordinary care proceed and take his chance, and if he should actually sustain damage look to the town for indemnity."

The case of *Foster v. Dixfield*, 18 Me. 380, is not the law of this State, where it expresses a doubt as to "whether the plaintiff is bound to prove affirmatively due care on his part in all cases;" nor does the case of *Merrill v. Hampden*, 26 Me. 240, recognize this case as establishing the correct rule in cases where direct and positive proof of due care is, in the nature of the case, impossible. The court in *Merrill v. Hampden*, says that the court, in *Foster v. Dixfield*, "only expresses a doubt whether direct and positive proof is essential."

We are not disposed to contend that circumstantial proof or due care is not sufficient, but the circumstances must prove it. See, *Gleason v. Bremen*, 50 Maine, 224. In this case they not only fail to do that, but all point in the opposite direction.

The rule is also well settled in this State since the statute of 1877, chap. 206, that a town must have notice of the actual defect producing the injury; not notice of another defect nor of the existence of a cause likely to produce the defect; but, to adopt the language of the court in *Smith v. Bangor*, 72 Me. 252, "The notice must be of the identical defect which caused the injury."

In the case of roads which are not overflowed it is well settled that towns are not obliged to maintain railings to prevent travelers from straying from the highway. *Willey v. Ellsworth*, 64 Me. 62.

This is a case where the primary cause is one for which the Town is not responsible; and whatever other proximate cause may have united with it, the Town is not liable, according to the doctrine of *Moulton v. Sanford*, 51 Maine, 127; at the most it could only be claimed that the Town had notice of the existence of a cause which at some time or other might be likely to produce a defect, which this court, in *Smyth v. Bangor*, 72 Me. 252, held to be insufficient.

It is more like the case of the culvert, in *Ryerson v. Abington*, 102 Mass. 532, which by its narrowness caused the water to overflow; or the defective trench in *Monies v. Lynn*, 121 Mass. 442; *S. C.* 124 Mass. 165, neither of which was held a defect for which the town was liable.

Walton, J., delivered the opinion of the court:

This is an action to recover damages for the death of a person, caused, as is claimed, by the negligence of the defendant Town in not keeping one of its highways in repair. At the trial,

the presiding Judge directed the jury to return a verdict for the defendants. The question is whether this direction was correct. We think it was. It is now the settled law of this State that in such an action the burden of proof is upon the plaintiff to show due care on the part of the deceased. *State v. R. R. Co.* 76 Me. 357; *Lesan v. R. R. Co.* 77 Me. 87.

It is the opinion of the court that in the present case this burden is not sustained; that, on the contrary, the evidence establishes a clear case of contributory negligence.

The deceased lost his life by drowning. No one witnessed the accident; but the evidence is such as to leave no doubt that he undertook to drive, with a horse and pung, over a road across which was flowing at the time a stream of water thirty or forty rods wide and in some places not less than three feet deep, with a current moving at the rate of five miles an hour, and carrying upon its surface cakes of ice some of which were twenty-five or thirty feet in diameter; and that, at some stage of his journey, and in some way, he and his horse got out of the road and were precipitated into the deeper channel of the river below, and drowned.

Surely, one who knowingly and unnecessarily exposes himself to such perils cannot be regarded as in the exercise of due care. We say knowingly, for this accident happened in broad daylight, about the middle of the forenoon, when the deceased could see not only the extent of the overflow but the proximity of the river and the want of a railing or other means of protection, to enable him to keep the road and to prevent his being washed away by the current. And there was nothing in the nature of a trap. The deceased was familiar with the road. He had passed over it twice the day before. Although seventy-eight years of age, he appears to have been in the full possession of his mental faculties and blessed with good eyesight. All the dangers of the situation must therefore have been known to him. And he seems to have braved them unnecessarily. A mother who rushes in front of an approaching engine to save the life of her child has an excuse for her rash act. One who, in great peril, jumps from a carriage may be excused for so doing. One who rushes into a torrent of water to rescue one who is drowning may be said to act under a moral necessity. But no such mitigating circumstance appears in this case. The deceased was going from his home, not toward it; so that the ordinary anxiety one feels when

away from home, to return to it, could not have influenced him. And, so far as appears, his only business was to market a few eggs; and no necessity for haste in the performance of that duty is shown. He was not therefore impelled to go forward by any overwhelming necessity. The act seems to have been voluntary and wholly unnecessary and with a full knowledge of the dangers to be encountered. Surely, a verdict finding due care on his part could not be allowed to stand. The direction to the jury to return a verdict for the defendants was therefore correct. *Heath v. Jaquith*, 68 Me. 433, and cases there cited.

This conclusion renders it unnecessary for the court to express an opinion as to whether the Town was or was not guilty of negligence in not raising the road so as to render an overflow impossible; or whether, as the plaintiff's counsel contends, it was remiss in not providing a railing to prevent travelers who should attempt to use the road when overflowed, "from being swept to their death." It is sufficient to say that the road was in the same condition in which it had been "from time whereof the memory of man runneth not to the contrary;" and that no accident had ever before happened, and that this one would not have occurred if the deceased had used that degree of caution which his neighbors used; for those who approached the place that morning turned back and did not attempt to go through, and no one of the witnesses pretends that he would have attempted to drive through when the deceased did; or that he ever knew a person to drive through when the water was as high as it was then; and however careless it may have been for the Town to leave the road in a condition in which it was liable to be overflowed, and without a railing to catch travelers who might be washed out of it, still its condition was as well known to the deceased as to any other inhabitant of the Town. He had passed over the road twice the day before. And if it was careless in the Town to allow it to remain in that condition, it must have been equally careless in him, knowing its condition, voluntarily and unnecessarily to attempt to use it; so that the two negligences combined to produce the accident; in which case it is well settled that a recovery cannot be had. *Lesan v. R. R. Co.* 77 Me. 87, and cases cited.

Exceptions overruled.

Peters, Ch. J., Virgin, Libbey, Foster and Haskell, Jr., concurred.

NOTE.—In actions for damages for injuries caused by the alleged negligence of a railroad company, the burden is on the plaintiff to show that he was exercising due care at the time, and that defendant was negligent. 101 Mass. 455; 38 Ind. 538; *Pittsburg, etc., R. R. Co. v. McClurg*, 56 Pa. St. 294; *Pennsylvania R. R. Co. v. Righter*, 42 N. J. L. 180.

It is absolutely necessary for plaintiff to allege: "That the injury was caused by or resulted from the negligence of the defendant." *Pennsylvania R. R. Co. v. Gallentine*, 77 Ind. 324.

It must be shown by direct averment that plaintiff was without fault and was not guilty of contributory negligence. *Wilson v. Trafalgar & B. Gravel R. Co.* 83 Ind. 326.

Although a party may be doing an unlawful act at the time he is injured through the negligence of

another, this will not prevent a recovery, unless the act is of such a character as would naturally tend to produce the injury. *Sutton v. Wauwatosa*, 29 Wis. 22; *Whart. Neg.* 2d ed. § 905.

Plaintiff must prove affirmatively that he used every reasonable precaution to avoid being injured. *Adams v. Carlisle*, 21 Pick. 146; *Parker v. Adams*, 12 Met. 415; *Lucas v. New B. & T. R. R. Co.* 6 Gray, 64; *Robinson v. Fitchburg & W. R. R. Co.* 7 Gray, 92; *Caraley v. White*, 21 Pick. 254; *Gaynor v. Old Col. & N. R. Co.* 100 Mass. 208; *Allyn v. Boston & Alb. R. R. Co.* 105 Mass. 77; *Butterfield v. Western R. R. Corp.* 10 Allen 532; *L. N. A. & C. R. Co. v. Boland*, 53 Ind. 308; *T. W. & W. R. Co. v. Brannagan*, 75 Ind. 490; *Louisville & N. R. Co. v. Orr*, 84 Ind. 52; *Cordell v. N. Y. Cent. R. R. Co.* 75 N. Y. 320; *Warner v. N. Y. C. R. R. Co.* 44 N. Y. 455; *Cooley, Torts*, 673.

SUPREME COURT OF MASSACHUSETTS.

George M. BARNARD.

v.

John L. COFFIN *et al.*

1. **Requests for rulings** are properly refused where the **facts were not found to be as assumed** in the requests.
2. If an **agent employs a subagent** for his principal and by his authority, express or implied, then the **subagent is the agent of the principal** and is directly responsible to the principal for his conduct, and the **agent himself is responsible only for a want of due care in selecting the subagent**; but if the **agent employs a subagent on his own account**, to assist him in his undertaking, **such subagent is responsible to the agent for his conduct**; and the **agent is responsible to the principal for the manner in which the business has been conducted by himself or the subagent**.

(Suffolk—Decided January 11, 1886.)

ON defendants' exceptions. *Overruled.*

Reported for decision on the findings of facts by the Superior Court. The facts found were as follows:

In March, 1882, the defendants, for a compensation to be paid by a commission, undertook to aid the plaintiff in selling 160 acres of land in Rock Island County, Ill., by obtaining, if possible, offers for it and communicating them to him for his acceptance or rejection, together with such information as they could readily obtain to assist him in determining his action upon these offers, and by consummating a sale in case such an offer was accepted. Nothing was said about the employment of any subagent and the plaintiff gave no consent, express or implied, to the employment of any subagent, and no custom or usage to delegate authority to a subagent in such case was shown; and it did not appear that the plaintiff knew that, in doing other similar business for him, the defendants had ever acted otherwise than in person or by clerks or agents who were under their control and employed and paid by them on their own account.

The defendant Henry lived and kept one of the defendants' business offices at Davenport, Iowa, and the land in question was about fifteen miles from that office. One Louis A. Ochs also lived there; and the defendants' firm, and the defendant Coffin, before the existence of the firm, had been accustomed for more than twenty years to employ him to assist them in selling lands, and from time to time but not always to pay him for such services.

Immediately after their employment by the plaintiff to sell this land, the defendants employed Ochs to get for them a customer for it if he could; and he undertook the business in the expectation of receiving compensation for his services, as he had done before in similar cases. On or about June 10, 1882, Ochs received from one Peter Haupt an offer of \$22.50 per acre for the land, and went to the defendant Henry and told him he had an offer of \$10 an acre for it.

The defendants reported to the plaintiff that they had received the offer of \$10 an acre, and advised him that in their opinion it was a fair price; and he, believing it, authorized the defendants to accept it.

This fact was communicated to Ochs, who then negotiated further with Haupt and sold the land to him for \$22.75 per acre, and executed a contract of sale in his own name as agent, and received an installment of the purchase money, and caused a deed to be prepared from the plaintiff to one Isaac Fleishman, which the plaintiff subsequently executed and transmitted through the defendants.

A deed was then made from Fleishman to Haupt; the balance of the purchase money of \$22.75 per acre was paid by Haupt to Ochs, and Ochs returned \$1,600 of it to the defendants, who transmitted it, less their commissions, to the plaintiff. The defendants at the time had no knowledge of Ochs' fraud, but believed he had had an offer of \$10 per acre, as he represented, and supposed from his statements that the property was worth no more than that. The Judge found that Ochs was the agent of the defendants in the business of obtaining and transmitting offers; and assessed damages for the plaintiff in the sum of \$2,865.72.

The defendants alleged exceptions.

Messrs. B. R. Curtis and S. G. Croswell for defendants:

In this action the plaintiff seeks to fix upon the defendants a liability for negligence, as agents of the plaintiff. They were special or particular agents. Story, Ag. §§ 17-22.

Where a principal expressly reserves to himself the right to accept or reject any provisional negotiation entered into in his behalf by special agents, he cannot afterwards maintain an action against said agents to hold them liable, in the absence of fraud or gross negligence, for the result of a transaction which was deliberately authorized by said principal himself; and to enable a principal to recover, under such circumstances, the agents must have been personally guilty of fraud or gross negligence; and the degree of negligence required to bind them is a question of law for the court. *Bigelow v. L. Cas.* on Torts, 589-596.

The Judge at the first trial of this case found for the plaintiff, and the defendants' exceptions were sustained, on the ground that no liability was shown.

In *Barnard v. Coffin*, 188 Mass. 42, the court considers the points of alleged negligence in the personal acts of the defendants in regard to the sale of the land, as found by the Judge of the Superior Court at the first trial, and decides that there is no negligence.

Negligence is a fact. *Williams v. Grealy*, 112 Mass. 82; *Aigen v. B. & M. R. R.* 132 Mass. 426.

If the plaintiff merely employed the defendants to get offers and report them to him, and he on his own judgment accepted an offer they reported, it is difficult to see how the defendants can be held responsible for the fraudulent conduct of Ochs, unless they participated in it. *Barnard v. Coffin*, 188 Mass. 42.

If an agent is authorized, expressly or impliedly, to employ a subagent, he will not be responsible for his negligence or misconduct if he used due care in the selection of the subagent.

Darling v. Stanwood, 14 Allen, 504; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Dorchester Bank v. New Eng. Bank*, 1 Cush. 177; *Story*, Ag. § 201; *Fabens v. Bank*, 23 Pick. 330; *Tiernan v. Bank*, 7 How. (Miss.) 648; *Etna Ins. Co. v. Bank*, 25 Ill. 243.

The appropriate remedy of the principal in such cases, for the misconduct or negligence of the subagent, is directly against the latter, since a privity will, under such circumstances, exist between them. *Story*, Ag. § 217a; *De Russche v. Alt*, L. R. 8 Ch. Div. 286; *Miller v. Farmers Bank*, 30 Md. 392; *Wilson v. Smith*, 3 How. 763; *Whitlock v. Hicks*, 75 Ill. 460.

In a business which requires or justifies the delegation of an agent's authority to a subagent, who is not his own servant, the original agent is not liable for the errors and misconduct of the subagent, if he has used due care in his selection. *Darling v. Stanwood*, 14 Allen, 507; *Dorchester Bank v. New Eng. Bank*, *supra*; *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189; *Warren Bank v. Suffolk Bank*, 10 Cush. 582.

It is a well recognized rule that if it was understood by the principal that the business would or might be done through a subagent, then the agent may employ a subagent. *Story*, Ag. §§ 14, 201.

If an agent has improperly substituted another agent under him, the ratification by the principal of the acts of the subagent will, to all intents and purposes, bind him in the same manner as if he had originally given to his agent the power of substitution. *Story*, Ag. § 249; *Coles v. Trecothick*, 9 Ves. 236; *Hamilton v. Phoenix Ins. Co.* 106 Mass. 398.

If an agency exists, a ratification of the mode of conducting the agency will be presumed from slight circumstances. *Harrod v. McDaniels*, 126 Mass. 418.

If in the findings of facts by a superior court judge before whom a case is tried without a jury, there is no finding upon a material question of fact, as to which evidence has been introduced, the decision is fatally defective, and there should be a new trial. *Miller v. Robinson*, 2 Allen, 610; *Brooks v. Prescott*, 114 Mass. 392.

Messrs. Shattuck & Monroe, for plaintiff.

Field, J., delivered the opinion of the court:

Of the rulings requested by the defendants, the second and third were refused because the facts were not found to be as they were assumed to be in the requests, and this is a sufficient reason for the refusal.

The remaining exception is to the refusal to rule that on the whole evidence the plaintiff could not maintain the action. The Judge found that no consent was given by the plaintiff to the defendants to delegate their authority to a subagent; and that no custom or usage to delegate authority in similar cases was shown; and that the nature of the employment of the defendants by the plaintiff was that they undertook, for a compensation to be paid them, to aid the plaintiff in selling the land, by obtaining, if possible, offers for it and communicating them to him for his acceptance or rejection, together with such information as they could readily obtain to assist him in determin-

ing his action upon these offers; and by consummating a sale in case such an offer was accepted.

The judge also found that Ochs was the agent of the defendants in the business of obtaining and transmitting offers. The evidence warranted these findings. The only question of law is whether, with these findings, the plaintiff can, on the other facts found and on the evidence, maintain his action.

If Ochs was employed by the defendants, without the express or implied consent of the plaintiff, and if there was no usage in the business to employ subagents, and there was no necessity, from the nature of the business, that subagents should be employed, there is no privity between the plaintiff and Ochs; and Ochs is only liable to his employers, who were the defendants; and the defendants are liable to the plaintiff for the acts of Ochs, in the same manner as if these acts were their own. *Warren Bank v. Suffolk Bank*, 10 Cush. 58; *Pownall v. Bair*, 78 Pa. St. 403; *Darling v. Stanwood*, 14 Allen, 504; *Stephens v. Babcock*, 3 Barn. & Ad. 354.

It is argued that as the plaintiff knew before he signed the deed that "the sale was made by Ochs," the plaintiffs by confirming the sale and signing the deed ratified the employment of Ochs. If the plaintiff understood that Ochs was employed by the defendants as his agent, then these acts of the plaintiff might be held to be a ratification of his employment, and equivalent to an authority to the defendants to employ Ochs as the agent of the plaintiff. But if the plaintiff understood that the defendants employed Ochs as their agent to assist them in transacting the business which they had undertaken, then these acts of the plaintiff might only show that the plaintiff was willing that the defendants should transact the business by means of their servants or agents, for whom they should be responsible; and it was competent for the court, on the evidence, to find that this was the understanding and intention of the plaintiff, and the court has in effect so found.

The principle which runs through the cases is that if an agent employs a subagent for his principal and by his authority, express or implied, then the subagent is the agent of the principal and is directly responsible to the principal for his conduct, and, so far as damage results from the conduct of the subagent, the agent is only responsible for a want of due care in selecting the subagent; but if the agent, having undertaken to do the business of his principal, employs a servant or agent on his own account to assist him in what he has undertaken, such subagent is an agent of the agent, and is responsible to the agent for his conduct; and the agent is responsible to the principal for the manner in which the business has been done, whether by himself or his servant or agent.

The decision in this case as reported in *Barnard v. Coffin*, 138 Mass. 37, is that the finding that "The defendants were bound to see to it that the offer transmitted was a genuine offer and not the offer of a subagent," was a ruling of law which could not be supported if the defendants were only liable on the ground of neg-

ligence, and not on the ground that Ochs was their agent for whose acts they were responsible.

Exceptions overruled.

Maria A. MORELAND

v.

BOSTON & PROVIDENCE R. R. CORP.

1. The degree of care required of railroad companies as carriers of passengers is not fixed solely by the relation of carriers and passengers; it is measured by the consequence which may follow the want of care. They are held to the highest degree of care in respect to the condition and management of the engines and cars, because negligence in that respect involves extreme peril to passengers against which they cannot protect themselves.
2. In its approaches to its trains, and at its station grounds, a railroad company is held to the exercise of reasonable care for the safety of its passengers, but not the utmost which human care and foresight can furnish, in providing egress from its premises.

(Suffolk—Decided January 12, 1886.)

ON defendant's exceptions. *Sustained.*

Action of tort to recover damages for personal injuries sustained by a passenger, passing from defendant's train over the platform and station grounds of defendant, to the highway.

Messrs. Russell & Putnam, for defendant.

Messrs. J. E. Cotter and C. F. Jenney, for plaintiff.

Plaintiff continued to be entitled to the rights of a passenger of the defendant Corporation until after her injury. *Warren v. Fitchburg Railroad*, 8 Allen, 227; *Snow v. Same*, 136 Mass. 552.

The instructions given by the court to the jury, as to the duty of the defendant towards its passengers, were correct. *Warren v. Fitchburg Railroad and Snow v. Same*, *supra*; *Simmons v. Steamboat Co.* 97 Mass. 361; *McElroy v. N. & L. R. Co.* 4 Cush. 400; *McDonald v. C. & N. W. B. Co.* 26 Iowa, 184; *Knight v. P. S. & P. R. Co.* 56 Me. 234.

The jury found as a fact, under instructions sufficiently favorable to the defendant, that the plaintiff was in the exercise of due and ordinary care; and that the defendant was negligent in the discharge of its duty towards the plaintiff. Due care on the part of the plaintiff and negligence on the part of the defendant were peculiarly, in this case, questions for the consideration of the jury. *Tyler v. N. Y. & N. E. R. Co.* 187 Mass. 238; *Fleck v. Union R. Co.* 134 Mass. 480; *Woods v. Boston*, 121 Mass. 337; *Chaffee v. B. & L. R. Co.* 104 Mass. 108; *Wheelock v. B. & A. R. Co.* 105 Mass. 203; *Elkins v. B. & A. R. Co.* 115 Mass. 191; *French v. Taunton B. R. Co.* 116 Mass. 537; *Craig v. N. Y. N. H. & H. R.* 118; *Mass. 431*; *Copley v. N. H. & N. R. Co.* 136 Mass. 6; *Baxter v. Troy R. Co.* 41 N. Y. 502; *Dyer v. Erie R. Co.* 71 N.

Y. 228; *Brooks v. Buffalo & N. F. R. Co.* 25 Barb. 600.

This case falls within the general rule stated in *Gaynor v. Old Colony & Newport Railway*, 100 Mass. 208-212.

W. Allen, J., delivered the opinion of the court:

The plaintiff, while passing from the train on which she was a passenger on the defendant's railroad to the highway, over the platform and station grounds, stepped upon some loose shingles which had been left on the ground by the defendant while shingling its station house, and fell and was hurt.

The plaintiff contended and the defendant denied that the defendant was negligent in permitting the shingles to remain there; and both parties asked instructions as to the degree of care which the defendant was bound to exercise in the matter.

The plaintiff asked instructions to the effect that the defendant was bound, as a common carrier of passengers, to exercise the utmost care and diligence in providing egress from its premises; that it was liable if the plaintiff was injured through the existence of an obstruction on the premises, which might have been guarded against by the utmost care and foresight on the part of the defendant; and that it was the duty of the defendant to provide for its passengers a reasonable and safe opportunity to pass from its premises; and to take any means to prevent injury to them while so passing which human care and foresight could guard against.

The defendant requested instructions to the effect that the duty of the defendant was to see that the approaches to the station were reasonably safe and convenient; that its duty in that respect to its passengers did not differ from its duty to persons other than passengers having business at its station, nor from the duty of other owners of buildings towards persons having business therein.

The presiding Justice read these requests to the jury, and in answer to them gave the instruction that in case the plaintiff has the rights of a passenger, "She is entitled to all the care which human foresight can furnish her;" and at the close of his charge, as a summary and repetition of the law and instructions upon the matters of the prayers, told the jury that if the plaintiff had been a passenger on the defendant's railroad, and was passing from the train to the highway over the platform and grounds, "The defendant was bound to be in the exercise towards her of such care and diligence as could reasonably be exercised to protect her from such injuries as human foresight could anticipate and prevent."

Taking the instructions given, in connection with the requests for instructions by the parties, the jury may well have understood that the defendant was bound to take every possible precaution against the plaintiff's injury, and was liable if human foresight could have anticipated and prevented it. The former instructions expressly referred to the degree of care; the latter taken by itself would refer to the objects rather than the degree of care, as does so much of it as is taken from *Ingalls v. Bills*, 9 Met. 1.

But the context forbids that meaning and, if taken by the jury as an attempt to define

what degree of care was due and reasonable in the matter, it would probably confirm, in no view could it control, the former instruction.

The former instruction is clearly erroneous. The latter, if its meaning is that the defendant was bound to use reasonable care to prevent injuries that could be prevented, was immaterial, as it gave no rule of reasonable care; if its meaning is that the defendant was bound to use such care as would prevent injuries which could be prevented, it was in substance the same as the other and equally erroneous.

If the language could be construed to intend only the rule of care required of passenger carriers in the carriage of passengers, as laid down in *Ingalls v. Bills*, *supra*; *Warren v. Fitchburg Railroad*, 18 Allen 227, and *White v. Fitchburg Railroad*, 136 Mass. 321, it would be erroneous.

The degree of care is not fixed solely by the relation of carriers and passengers; it is measured by the consequence which may follow the want of care. A railroad company is held to the highest degree of care in respect to the condition and management of its engines and cars, because negligence in that respect involves extreme peril to passengers, against which they cannot protect themselves. It would not act reasonably if it did not exercise greater care in equipping and running its trains than in regard to the condition of its station grounds.

Exceptions sustained.

David R. WEBSTER

v.

REAL ESTATE IMPROVEMENT COMPANY.

One who merely draws sand or lumber to the premises to be used by the contractor in the erection of a structure thereon does not perform such work and labor as will be effectual in laying the foundation of a mechanic's lien, within the terms of the statute.

(Essex—Filed January 9, 1886.)

ON petitioner's exceptions taken, at a trial in the Essex Superior Court. *Overruled.*

Petition to enforce a mechanic's lien.

The facts are sufficiently stated in the opinion.

Mr. W. H. Moody, for petitioner.

Messrs. E. T. Burley and N. C. Bartlett, for respondent.

Gardner, J., delivered the opinion of the court:

The petitioner seeks to enforce a mechanic's lien under the Public Statutes, chap. 191, § 1, for labor performed and furnished in the erection of a building. His account consists of a large number of items of charge for hauling lumber and sand to the premises upon which a building was in process of erection. One Killam and the petitioner, under a contract with him, carted the lumber and sand charged in his account.

Under certain circumstances a lien may be established for work done away from the premises in the construction of a building. In cases where the inside finish of the house has been

got out at the carpenter's shop or where the lumber has been sawed and planed at the mill, or the iron work done at the blacksmith's shop in the repair of a vessel, it has been held that a lien may be established for work thus done away from the premises or vessel, in preparing material which is intended for use, and is actually used in the construction or repair. *Dewing v. Cong. Society*, 13 Gray, 414; *Bennett v. Shackford*, 11 Allen, 444; *Jones v. Keen*, 115 Mass. 170; *Wilson v. Sleeper*, 181 Mass. 177.

In the last case, although the labor was not performed upon the premises, it was done on the material "which was designated and intended for use in the building on the premises, and was in fact so used."

Such labor was, therefore, to all intents and purposes, performed in the erection, alteration or repair of a building under the terms of the statute. Where, for the sake of convenience or from necessity, the material is shaped, the lumber sawed, planed and fitted for its proper place in the structure, where the stairs are built or the doors are made for the building away from the premises, but in reality as parts of the labor of construction or repair, intended to be used, and actually so used, becoming parts of the structure, this work and labor are as effectual in laying the foundation for a lien as if performed upon the land on which the house is erected. These cases furnish no precedent for the case at bar.

The petitioner does not allege that he performed any labor upon material which became part of the structure, so as to change its shape or character in order to adapt it to the building. He did nothing with the sand to make it fit and proper to enter into the construction of any part of the house, nor did he perform any labor by which the lumber was fitted and adapted to any section of the structure. What he did was to draw the sand to these premises so that the contractor, if he saw fit, with other material, could make it into mortar and use it in the construction of the building; so with the lumber; when delivered, the contractor could do with it as he pleased. He could sell it, as his assignee in insolvency afterwards did as to a part of it, or he could use the sand in making mortar, and then sell it, as was done by his assignee as to a portion thereof, or he could employ them in the erection of the house.

We think this labor of the petitioner does not come within the terms of the statute; that it was not connected with the building of the structure; and that it was too remote to enable him to establish a mechanic's lien therefor. It is difficult to distinguish the claim of the petitioner for lien from that of the railroad for transporting the lumber; or from that of the teamster who carted it to the railroad; or from the claim of the wood cutters who felled the trees; provided they stood in other respects toward the respondent as does this petitioner.

The petitioner argues that if this petition is not sustained, all the class of workmen known as helpers, such as hod carriers and those who convey material from one part of the building to another, would be prevented from maintaining a lien for their services.

The distinction between the two classes is apparent. The one class is employed and labors actually upon the premises in the construction

and erection of the building, while the petitioner simply brought the raw material to the premises.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

Anson P. ROWE.

Where the **complaint** substantially follows the **language** of section 7 of chapter 8, of the revised **standing regulations** of the board of aldermen of the city, under which it was brought, the **obvious meaning** of which is that **no vehicle shall make a continuous stop** for more than twenty minutes, it is **sufficient on motion to quash.**

(Suffolk—Decided January 30, 1886.)

ON defendant's exceptions. *Overruled.*

Complaint to the Municipal Court of Boston, alleging that the defendant on August 21, 1886, at Boston, was the person then and there having the care and ordering of a certain vehicle, to wit: a cab, and did then and there, without any license, authority or appointment according to law so to do, suffer said vehicle to stop in a public street situate within said city and district, and called Causeway Street, for a longer time than twenty minutes.

In the Superior Court, the defendant filed a motion to quash the complaint for the following reasons: 1. That said complaint contains only one count, and there is not an offense set forth in said count known to the laws of the land. 2. It is not alleged and does not appear in said count what place or locality in said street said vehicle was suffered to stop by the defendant. 3. It is not alleged in said count that said defendant suffered said vehicle or cab to stand or stop in one particular place or locality in said street at any one time for a longer space of time than twenty minutes. 4. It is not alleged in said complaint at what period of time on said twenty-first day of August that said defendant suffered said vehicle or cab to stop on said street.

The court overruled this motion. The jury returned a verdict of guilty, and the defendant alleged exceptions.

Mr. C. R. Morse, for defendant:

An imperative rule of pleading is thus tersely expressed: "An indictment ought to be certain to every intent, and without any intentment to the contrary." *Long's Case*, Cro. Eliz. 490.

Looseness and carelessness in instituting criminal proceedings are not to be encouraged. *Commonwealth v. Barlight*, 9 Gray, 114.

Nothing material in an indictment can be taken by way of intentment or implication. *King v. Cheere*, 4 Barn. & Cress. 905.

The difficulty is that the precision and certainty required in criminal pleading, for the security of the accused, will not admit anything to be taken by intentment. *Moore v. Commonwealth*, 6 Met. 244.

Whatever it is necessary to set forth in an indictment must be distinctly averred by a proper affirmative allegation, and not by way of infer-

ence or argument merely. *Commonwealth v. Lannan*, 1 Allen, 591.

The want of a direct allegation of anything material in the description of the substance, nature or manner of the offense cannot be supplied by any intentment or implication whatsoever. *Commonwealth v. Shaw*, 7 Met. 57.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth:

The motions to quash were properly overruled. The complaint substantially follows the language of section 7 of chapter 8, Revised Standing Regulations of the Board of Aldermen of the City of Boston, under which it was made, and hence is clearly sufficient. *Commonwealth v. Barrett*, 108 Mass. 308, and cases cited; *Same v. Fenton*, 189 Mass. 197; *Same v. Keenan*, 189 Mass. 195.

By the Court:

The motion to quash was rightly overruled. The regulation of the board of alderman, under which the complaint is brought, provides that no person "having the care or ordering of a vehicle shall suffer the same to stop in a street for more than twenty minutes." The obvious meaning of the regulation is that no vehicle shall be allowed to make a continuous stop for more than twenty minutes. The complaint substantially follows the regulation and, by its natural and obvious construction, charges a continuous stopping for a longer time than twenty minutes, and is sufficient. *Commonwealth v. Barrett*, 108 Mass. 302; *Same v. Fenton*, 189 Mass. 197.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

Thomas FERDEN.

1. A **complaint** for maintaining a common liquor nuisance held **good.**
2. **Neglect to keep a door** at the rear of a saloon, opening upon a driveway from the street **closed, is a violation of a license** requiring that all entrances other than those from the public street be permanently closed.

(Middlesex—Filed January 11, 1886.)

ON defendant's exceptions. *Overruled.*

This was a complaint alleging that the defendant on June 6, 1884, and on divers other days and times, between that day and the date of the complaint, August 9, 1884, at Watertown, "Knowingly, willfully and without having any legal appointment or authority therefor, did keep and maintain a certain common nuisance, to wit: a tenement in said Watertown, then and on said other days and times there used for the illegal sale and illegal keeping for sale of intoxicating liquors, to the great injury," etc. The warrant issued upon the complaint described it as "for maintaining a common liquor nuisance at Watertown;" the presiding Judge overruled a motion to quash, the jury returned a verdict of guilty and the defendant alleged exceptions. Sufficient facts appear in the opinion.

Mr. I. W. Richardson, for defendant.

Mr. Edgar J. Sherman, Atty-Gen., for Commonwealth:

One holding a license must, at his peril, keep within the terms of it. The defendant violated one of the conditions of his license, and therefore the court properly ruled "that upon the conceded facts the defendant was guilty." *Commonwealth v. Barnes*, 188 Mass. 511; *Commonwealth v. Rogers*, 185 Mass. 536.

Morton, Ch. J., delivered the opinion of the court:

The defendant's motion to quash was rightly overruled. The complaint is in the usual and approved form and is sufficient. If any objection to the form of the warrant could furnish ground for quashing a good complaint, we are of opinion that, in this case, the warrant sufficiently recites the substance of the accusation. The principal question is whether, upon the facts proved and admitted, the court rightly ruled that the defendant was guilty of the offense charged.

By the defendant's license, he was "required to close permanently all entrances to the licensed premises other than those from the public street or streets upon which such premises are located." This requirement follows the words of the Public Statutes, chap. 100, § 12.

The licensed premises of the defendant were a saloon thirty feet deep, with a door on the street front opening into the saloon. There was another door at the rear of the saloon, opening upon a driveway from the street to the rear, which was not kept closed. By neglecting to keep this rear door closed, the defendant violated his license.

The purpose of the Legislature, manifested in this and other provisions of the statute, was that the premises licensed and the entrances to them should be open and exposed to view from the public streets. The plain intent of the statute is to prohibit back entrances and to permit the use of such entrances only as are directly upon the street. The rear door of the defendant was an entrance from the driveway, and not an entrance from the public street, within the meaning of the statute and the license. The court, therefore, rightly ruled that upon the conceded facts the defendant was guilty. *Commonwealth v. Barnes*, 188 Mass. 511.

The question whether the defendant had a right to go to the jury upon the facts conceded is not raised by the bill of exceptions. He expected only to the ruling of the court and not to the act of the court in directing *pro forma* a verdict of guilty.

Exceptions overruled.

Frank BLOOD

Epaminondas WILSON.

Where plaintiff has in good faith done what he believed to be in compliance with the contract, he may recover the value of his services, not exceeding the contract price, after deducting the damages sustained by defendant by the breach of its stipulations.

(Suffolk—Decided January 11, 1892.)

ON defendant's exceptions. *Overruled.*

This was an action of contract, upon an account annexed, for labor and materials.

At the trial in the Superior Court, the plaintiff offered evidence tending to show that the agreement between the parties was that he should paint the outside of the defendant's house with two coats of paint, in a good and workmanlike manner, giving as good a job as could be done with two coats for \$140; and the plaintiff offered evidence tending to show that he performed his contract, and also did the extra work charged in the declaration.

The defendant offered evidence tending to show that the agreement between the parties was, that the plaintiff should paint the house so as to make a first class job of it: putting on two coats, if two were sufficient, if not, more; that the price was to be \$140; that the plaintiff did not perform his contract; and that, insisting that the contract had not been fulfilled, defendant requested of the plaintiff its performance; but the plaintiff claimed that he had fully performed it.

The plaintiff offered evidence tending to show that he performed his work in good faith; that what he did was beneficial to the defendant, and that, if his work varied from his contract at all, it was substantially like it.

The defendant offered evidence tending to show that the work was not done in good faith, and was of no benefit, but an injury to him; and that it was entirely at variance with the contract.

The Judge instructed the jury, in respect to the contract for the painting, that there was no evidence of a waiver of its provisions or an acceptance by the defendant to be considered by them; that the contract was entire, whether it was as claimed by the plaintiff or as claimed by the defendant; that the jury must decide: first what the contract was; and second, whether the contract as it existed was performed; that if the plaintiff performed his contract, he was entitled to recover the amount remaining due under it; that if the plaintiff had endeavored in good faith to perform the contract between the parties, and had substantially done so, and thereby had conferred on the defendant a substantial benefit, although he had failed in some particulars to perform the contract, he might recover in this action what his work and the materials furnished by him were fairly worth, having regard to the contract price; that the defendant was entitled to the benefit of his contract; and, in the case above supposed, the jury should deduct from the contract price such a sum as would enable the defendant, with the amount thus deducted, to make good what he had suffered by the failure of the plaintiff to fulfill his contract in all particulars; and that the plaintiff should recover only the balance of the contract price due after making this deduction.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

Messrs. Powers & Powers, for defendant:

Under an entire contract for repairs, *assumpsit* will not lie for the value of a partial repair, although such repair was beneficial to the defendant. *Sinclair v. Bowles*, 4 M. & R. 1.

To entitle the plaintiff to recover upon an en-

tire contract he must prove a completion of his work in accordance with the terms of that contract. *Cutler v. Pinell*, 6 T. R. 320; *Cooper v. Langdon*, 9 M. & W. 60.

If one who has contracted to perform a certain undertaking voluntarily leaves it unfinished, he can have no action against his employer for the part performed. *Fazon v. Mansfield*, 2 Mass. 147; *Stark v. Parker*, 2 Pick. 267; *Taft v. Montague*, 14 Mass. 282.

Ignorance of law or want of the ordinary skill pertaining to one's calling is no excuse. The jury should have been instructed not that honest endeavor, good faith, and any benefit conferred upon the defendant, but a fulfillment of the contract save in "some comparatively slight deviations as to some particulars provided for," was the ground upon which the plaintiff could recover. *Hayward v. Leonard*, 7 Pick. 180, 181.

Messrs. Blackmar & Sheldon, for plaintiff.

Morton, Ch. J., delivered the opinion of the court:

It is well settled in the Commonwealth, that when a special contract has not been fully performed, but the plaintiff has, in good faith, done what he believed to be a compliance with the contract and has thus rendered a benefit to the defendant, he can recover the value of his services, not exceeding the contract price, after deducting the damages which the defendant has sustained by the breach of the stipulation of the contract. *Hayward v. Leonard*, 7 Pick. 181; *Reed v. Scituate*, 7 Allen, 141; *Atkins v. Barnstable*, 97 Mass. 428; *Denham v. Bryant*, 139 Mass. 110.

The instructions at the trial, to which the defendant excepted, were in compliance with this rule and were correct.

Exceptions overruled.

William H. GOVE, Assignee.

v.

Addison P. LEAROYD.

A trust does not result to the grantor in a deed simply because he received no consideration therefor in fact, where there was no fraud and the deed recites a consideration, declares the uses, and contains the covenants usual in a quit-claim deed.

(Reex—Decided January 9, 1886.)

ON demandant's exceptions. *Overruled.*

This was a writ of entry, in which the demandant counted upon his own seisin, claiming title as assignee in bankruptcy of Frederick Perley.

Plea, general issue, *nul disseisin*, with no specification of defense, except as hereinafter set forth under an amendment allowed by the court. Trial before the court without a jury.

There was no conflict of testimony, but question was made as to the legal consequences of certain facts proved.

Frederick Perley was shown to be seised of the demanded premises, and in peaceable possession of the same, under a deed from John B. Pierce *et al.*, dated April 1, 1859, and recorded April 2, 1859, which peaceable possession continued until the commencement of proceedings in bankruptcy, *in re* Frederick Perley, in the United States District Court for the Massachusetts District. The proceedings in bankruptcy were continued in course and are still pending, and Horace L. Hadley was appointed assignee. The important dates in the bankruptcy proceedings were as follows, viz.: Petition filed, December 23, 1868. Adjudged bankrupt, January 21, 1869. Memorandum of choice of H. L. Hadley, assignee, February 10, 1869. Assignment same date. Assignment recorded with Essex Deeds Southern District, September 2, 1869. Assignee's account filed July 30, 1869. Bankrupt discharged March 6, 1875. Assignee removed in creditor's petition March 20, 1880. W. H. Gove appointed same day.

It did not appear upon the records nor in any way that said Horace L. Hadley or the bankrupt ever disclosed the interest of said insolvent in the demanded premises to the court, or applied for leave to dispose of the same at private or public sale.

It did appear that on March 1, 1870, for the consideration of \$200, actually paid by the tenant, Addison P. Learoyd, to Frederick Perley to his own use, the said Perley executed a deed purporting to convey the demanded premises to said Learoyd, which deed was recorded July 15, 1870; and that said Learoyd immediately entered upon the same, claiming title, and is still in possession thereof.

It further appeared that on March 10, 1871, by deed executed on that day, which was recorded August 31, 1871, in the aforesaid registry, the said Horace L. Hadley as assignee of said Perley conveyed the demanded premises to the tenant for a consideration nominal upon its face; but in fact not even a nominal consideration was paid, nor has any money received from Learoyd ever been paid to any assignee of Perley, or accounted for as part of his insolvent estate.

On January 24, 1880, Horace L. Hadley was removed by the court, and William H. Gove was appointed in his place. On June 12, 1882, the present suit was commenced.

At the opening of the defense and after the plaintiff had put in his case, the aforementioned amendment to the tenant's plea was filed and allowed.

Under this state of facts the court held as matter of law:

1. That the deed of Hadley, assignee as aforesaid, was sufficient in law to pass a title which cannot be questioned in this court.

2. That the limitation in the United States Revised Statutes, § 5057, having been duly pleaded, was a bar to this suit.

The court having predicated its determination upon these positions, and having thereupon found for the tenant, the demandant excepts to the same as incorrect in law.

Messrs. S. H. Phillips, W. H. Gove and John W. Porter, for demandant:

Upon the facts, a resulting trust is disclosed in favor of the demandant, which is sufficient

in chancery to avoid the deed under which the tenant claims. 2 Bl. Com. 330; 2 Story, Eq. Jur. § 1197; Com. Dig. Ch. 4 W. 3; *Livermore v. Aldrich*, 5 Cush. 431; *McGowan v. McGowan*, 14 Gray, 121; 2 Washb. Real Prop. 183.

It is to be premised that mere alteration of possession does not in equity give a right, but it shall be for the use of the donor, etc., unless the use is expressed, or there is a valuable consideration. Bacon, Abr. *Uses and Trusts*; Gilbert, *Uses & Trusts*, Sugden's ed., 118.

By recent statute, in this Commonwealth, the plaintiff, in real actions styled the demandant, shall be entitled to avail himself, in answer to any defense alleged by the defendant, of any facts that would avoid such defense in equity, or would entitle the plaintiff to be absolutely and unconditionally relieved in equity against such defense. Stat. 1883, chap. 223.

The limitation in the United States Bankrupt Act applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt which come to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before the assignment. *Re Conant*, 5 Blatch. C. C. 54; *Stevens v. Hauser*, 39 N. Y. 302; *Re Krogman*, 5 B. R. 116.

This construction was practically adopted by the court in *French v. Merrill*, 132 Mass. 526; and generally, although it may be too late to bring an action, a party may avail himself, in equity at least, by way of defense or reply, of a state of facts which would otherwise be the foundation of a right of action. Stat. 1883, chap. 223.

Mr. H. F. Bidwell, for tenant.

Holmes, J., delivered the opinion of the court:

The only argument addressed to us for the demandant is that there was a resulting trust because the assignee received no consideration in fact. But it is admitted that there was no fraud, and the deed of the assignee recited a consideration, declared the uses, and contained the covenants usual in a quitclaim deed. It is settled that in such cases there is no resulting trust. *Gould v. Lynde*, 114 Mass. 366, and cases cited.

It is therefore unnecessary to consider whether the Statute of 1883, chap. 223, § 14, was intended to allow a writ of entry to be converted into a bill in equity by replication when the answer is simply the general issue, as here the special plea raised a distinct defense.

Exceptions overruled.

John B. BAYLIES, Exr.,

v.

Charlotte M. A. C. SPAULDING *et al.*, Appts.

1. To authorize the submission to the jury, of the issue whether an alleged will was procured to be made through undue influence, there must be evidence upon which they may reasonably and properly infer undue influence.
2. Where it was shown that testator was eighty years old when he married his second wife, was a spiritualist, and

submitted to her influence over him as a medium between him and the spirit of his first wife, there was evidence from which the jury might reasonably infer that the alleged will was procured to be made through her undue influence and fraud.

(Bristol—Filed March 31, 1886.)

APPEAL from the probate of the will of Edward Stetson of New Bedford.

The testator was a dentist living in New Bedford. He married Eliza C. Blake, Oct. 7, 1880. His will was executed September 5, 1881. It was admitted by the contestants that he was a man of strong, clear mind and strong will; but they claimed that he was a believer in spiritualism, and that he was influenced by his wife to make the will by means of control which they claimed she had acquired by her false pretenses; that she had, as a medium, communications from his first wife, who died in 1836, which they claimed his second wife pretended to communicate to him.

His second wife had been his housekeeper for 12 to 16 years before they intermarried. She was 66 at the time of the marriage, and he was 80. The appellant, Charlotte, was testator's daughter, now aged 54, and the other appellant, her daughter Mary, aged 27. Testator had no other child.

Mrs. Spaulding procured a divorce from her husband in 1876, lived with her father until his second marriage, and moved into the south tenement, adjoining the one occupied by him, just before he married. Mrs. Spaulding's testimony tended to show that she, with her father, had frequently consulted with Mrs. Blake as a medium before she came to be the testator's housekeeper, and that the testator would go to sittings thinking that he had communications with his first wife; that Mrs. Blake had said she would never marry witness' father, but after coming to live with him as housekeeper she obtained great influence over him, and witness finally left her father's house because of trouble with Mrs. Blake; that the day of testator's marriage he sat down and cried, and said he did not want to be married. The evidence of other witnesses tended to show that Mrs. Blake had great influence over the testator.

Mrs. Blake testified that she had held the faith of the spiritualists, but could not discuss the question of spiritual agency because she did not know enough about it to understand or define it. She denied having influence over the testator and denied having talked with him about his will.

The jury found: 1, that the testator was of sound and disposing mind and memory at the date of the alleged will; and 2, that the alleged will was procured to be made through undue influence and fraud by Eliza C. Stetson.

Messrs. Hosea M. Knowlton and Daniel T. Devoll, for appellants:

Whether any given case of influence is on one or the other side of the line between the lawful and innocent inducements and persuasions which may be used toward a testator by a would-be beneficiary on the one hand, and the unlawful and undue influence, with or without fraud, by which the testator's mind is dominated and controlled, on the other hand, is a pure

question of fact. As in questions of due care, of ordinary diligence, of insanity, of fixtures, of proof beyond reasonable doubt, of prescription, the court formulates the rule for coming to a conclusion, but the truth itself is entirely in the domain of facts. *Gaynor v. Old Colony R. R. Co.* 100 Mass. 208; *Chaffee v. Boston & Lowell R. R. Co.* 104 Mass. 108.

It is not claimed that there was direct evidence that the domination she acquired was exercised in the making of the will, further than appears from the will itself; but there is no such requirement of proof. "On demurrer to the evidence, its amount and weight are not in issue. It is only sufficient if there be such an amount of the evidence that the court would not set aside any number of verdicts rendered upon it *toties quoties*." *Denny v. Williams*, 5 Allen, 1, 5.

Mere strength of will and character generally, even though admitted, as here, does not meet the charge of undue influence. "All that is secular in temperament or modes of thought, the idiosyncrasies of the man, so far as susceptibility is thereby shown, present proper considerations for the jury." *Shailer v. Bumstead*, 99 Mass. 112-121.

Messrs. T. M. Stetson, O. Prescott and L. Le B. Holmes, for appellee:

The burden of proof of undue influence is on the appellants. *McKeone v. Barnes*, 108 Mass. 346.

Speaking now for the Orphans' Home and other legatees, against whom no charge is made, we have a right to insist that this allegation of undue influence be proved by competent evidence only. *Hatch v. Bayley*, 12 Cush. 80.

Remarks of the testator, if any, are not admissible to show extraneous acts of undue influence, fraud or duress. For that purpose they are only hearsay, not judicial evidence. *Potter v. Baldwin*, 138 Mass. 429; *Shailer v. Bumstead*, 99 Mass. 112-128.

The rule of *Shailer v. Bumstead* excludes admissions by anybody subsequent to the execution of the will.

Even if the wife had stated in terms to some third person, prior to the will, that she meant to control the testator in making it, and no evidence of any act of hers thereto appeared, the allegation of undue influence would stand unproved. The abortive thought is not the act and does not prove the act. *Commonwealth v. Felch*, 182 Mass. 23.

In this case there is not one particle of evidence of any act of influencing the testator in making his will. In the largest construction it would only tend to show that in certain little matters the wife might have believed or said she could influence him. It does not amount to proof of even a disposition so to do improperly, unduly or in respect to his will; it does not amount to a case of opportunity to influence a will, coupled with a disposition so to do, which was held not enough to prove this issue. *McKeone v. Barnes*, 108 Mass. 346.

At this period Mrs. Blake was in Dorchester. *McKeone v. Barnes*, 108 Mass. 345-347.

The cases *May v. Bradlee*, 127 Mass. 414; *Lewis v. Mason*, 109 Mass. 169, are not attacked by us here. If there was any evidence of an act influencing the maker of the will, then the

temper and spite of the person influencing might be shown, to give color and character to his act; but if there is no act, it cannot be inferred from mere desire to influence, if proved, and this case has no such proof.

The finding in issue excludes, we submit, any existing delusion in testator. *Whitney v. Ticomby*, 136 Mass. 147.

There is not even the scintilla of evidence here. If there was, it would not suffice. There must be evidence upon which a jury might reasonably and properly find. *Toomey v. London, etc. R. Co.* 3 C. B. N. S. 146; *Denny v. Williams*, 5 Allen, 5; *Butterfield v. Western R. Corp.* 10 Allen, 583; *Brightman v. Eddy*, 97 Mass. 481.

A jury is not to form its verdict upon a guess at the truth gathered from the evidence, but from a real solid conviction of it founded upon a careful scrutiny and examination of the proof. *Haskins v. Haskins*, 9 Gray, 393.

Besides, this is not a common-law proceeding. In probate appeals, issues to a jury differ widely from jury trials at common law. Their conclusiveness is not regarded in the same light. *Burlen v. Shannon*, 99 Mass. 206; *Newell v. Homer*, 120 Mass. 281; *Shailer v. Bumstead*, 99 Mass. 181.

Where no evidence was given of any influence exerted at the time of making the will, nor of any fraud, misrepresentation or constraint of any kind in procuring a will to be made, it was held error to submit the question to the jury. See, *Eckert v. Flory*, 48 Pa. St. 46; *Stulz v. Schaffle*, 18 Eng. Law & Eq. 576; *Williams v. Goude*, 1 Hagg. Ecc. 577; *Armstrong v. Huddleston*, 1 Moore, P. C. 478.

Gardner, J., delivered the opinion of the court:

To authorize the submission of the second issue to the jury, there must have been evidence upon which they might reasonably and properly infer that the testator was unduly influenced in making the alleged will. *Denny v. Williams*, 5 Allen, 1; *Butterfield v. Western R. Corp.* 10 Allen, 582.

The alleged testate was eighty years old October 7, 1880, when he married Mrs. Blake. He was a believer in spiritualism, and it was claimed that she exercised her influence over him as a medium of communication between him and the spirit of his first wife.

It is unnecessary to review all the testimony. We think that there was evidence in the case upon which the jury might reasonably infer that the alleged will was procured to be made through the undue influence and fraud of Eliza C. Stetson.

Exceptions overruled.

Bridget HARNEY,
r.
Joseph P. SHAW.

1. The **testimony** of builders unacquainted with the work embraced in a contract, **based on an estimate** of the necessary amount of material, which was uncertain, is **inadmissible** to show that the

price named was below a fair price for the work.

(Suffolk—Decided March 22, 1886.)

ON plaintiff's exceptions. *Overruled.*

The defendant, a builder, entered into a contract with one Kelly to erect a dwelling-house. This building was in the process of construction at the time the plaintiff was injured. The plaintiff claimed that her injuries were caused by a falling board, which she claimed dropped from the roof of said house by reason of the negligence of persons employed thereon.

It was in controversy whether the defendant had charge and control of the part of the work from which the board fell. The defendant claimed that he had sublet the same to one Goodwin, and that consequently the action could not be maintained. The plaintiff claimed that the defendant had control of the whole building and that the persons at work thereon were his servants and agents. The evidence was conflicting upon this subject.

The plaintiff offered to show by the testimony of experienced builders that the subcontract claimed to have been made with Goodwin was an unreasonable one; that the consideration to be paid Goodwin therefor, by the defendant, was much below a fair price. The plaintiff was not permitted to show the amount of lumber and materials necessary to do the work which it was claimed Goodwin had agreed to do under the subcontract.

Mr. J. E. Cotter, for plaintiff:

If a subcontract was made as claimed by the defendant, then, under the decision in *Hilliard v. Richardson*, 8 Gray, 849, this action could not be maintained; consequently the existence or non-existence of the subcontract was a material issue at the trial.

The evidence as to amount of material necessary to do the work was admissible, because it had a tendency to show that the contract alleged to have been made was contrary to the uniform course and conduct of men. *Bradbury v. Dwight*, 3 Met. 31; *Upton v. Winchester*, 106 Mass. 330; *Brewer v. Housatonic R. R. Co.* 107 Mass. 277; *Norris v. Spofford*, 127 Mass. 85.

Mr. C. G. Keyes, for defendant:

The evidence which was excluded was clearly inadmissible for the purposes named. Inadequacy of consideration alone is no ground for refusing to give a contract full force in law and in equity. The testimony of the defendant on cross examination, that the price was reasonable, could not be contradicted by the testimony of the experts offered by the plaintiff. *Dean v. Carruth*, 108 Mass. 242; *Hubbard v. Coolidge*, 1 Met. 93; *Ex parte Allen*, 15 Mass. 65; *Sandborn v. French*, 2 Foster (N. H.) 246; *Davidson v. Little*, 22 Pa. St. 245; *Hitchcock v. Coker*, 6 Ad. & E. 438; *Eames v. Whittaker*, 123 Mass. 342.

C. Allen, J., delivered the opinion of the court:

We do not understand from the bill of exceptions that the plaintiff offered direct testimony of experienced builders, acquainted with the work embraced in the alleged subcontract, to show that the price named was much below a fair price for that work. Their opinion of

value was to be based on an estimate of the necessary amount of lumber, which itself, so far as we can see, was an uncertain element. This was too remote. The case does not fall within the principle of the decisions cited for the plaintiff.

Exceptions overruled.

Mary E. KEYES

v.

William E. CARLTON *et al.*

A voluntary settlement fully executed by a person of sound mind, **without mistake, fraud or undue influence**, is binding on one making it, and **cannot be revoked**, except so far as the power of revocation has been reserved in the deed.

(Suffolk—Filed January 12, 1886.)

ON report, upon reservation for the consideration of the full court. *Bill dismissed.*

Bill to set aside a settlement made by a trust deed.

At the hearing it was found that the plaintiff's father gave her some \$14,000 from time to time while she was living with her husband in Colorado, for the purpose of having it invested in a home in her name for her family, which consisted of herself, her husband and four children; with it she bought a house and lot, then bought another lot and built a house upon it with the money. During the three years and more she and her husband were in Colorado, her husband earned nothing for the support of the family, and she and the family were supported by money sent by her father until his death in 1876. Her husband had persuaded her to mortgage both estates in Colorado for his debts, at high rates of interest. Charles E. Abbott, one of the defendants, who had been an attorney for her father, went to Colorado in the spring or early summer of 1877, and saw the complainant, and as a friend of the family, and at the request of her brother, ascertained the state of her property. The complainant wanted money to live on, as her husband contributed nothing. She and her husband were living together, but not happily; and she was so far under her husband's influence and control, whether from fear or otherwise, that she could not resist his requests to mortgage her property for his debts, and there was great danger that in this way it would all be lost. Mr. Abbott advised her to put her property in trust for herself and children in such a way that it would be out of her power to convey it at her husband's request, and advised her to consult Mr. Richardson, a disinterested and respectable attorney at law.

She consulted Mr. Richardson. She informed him that she wished him to make a deed of trust to Charles E. Abbott and William E. Carleton, her brother, of all her real property, so that her husband could not influence her to mortgage or sell it, as he had a great influence over her which she could not resist. She said that she did not

wish her husband to inherit her property in case of her death, or have any control over it, but that she wanted her children to have it. Mr. Richardson made such a deed.

The deed was sent to Mr. Abbott in Boston and was returned to Mr. Richardson, with a draft of her brother's for \$600 payable to the joint order of Mrs. Keyes and Mr. Richardson, with instructions. The following words were stricken out by the instructions for the new deed: "In trust for the sole and separate use, benefit and behalf of the said Mary Keyes, her heirs and assigns forever, and to take, collect and receive the rents, issues and profits thereof, and apply the same to and for her sole and separate use;" and the instructions requested that the following words be inserted: "In trust to manage, let and take care of the same; to collect the rents, increase and profits thereof, pay over and account for the same to the said Mary E. Keyes or for her use during her life, and after her decease to her children, or for their use; and in further trust to sell the same discharged at their discretion of all trusts; and at any time after the decease of said Mary E. Keyes, if they shall see fit and proper, but only in such case, to convey the same to the children or next of kin of said Mary E. Keyes; and in case it shall not be so conveyed during the lifetime of said children, then to convey the same to their issue."

Mr. Richardson was instructed to rewrite the deed of trust, and further modify it as he thought best, and not to indorse the draft of \$600 until the deed was executed in the modified form. The deed was rewritten in the form in which it now is. The modification was substantially in accordance with the instructions, with a power inserted to appoint new trustees. Mrs. Keyes executed the deed as modified.

The instructions and the deed as modified were carefully read over to Mrs. Keyes by Mr. Richardson and explained to her. He testifies: "I did not think that she comprehended its purport very well, at least in respect to the placing of her property beyond her control, or in its being irrevocable by herself, or herself and the trustees, or the trustees." She said she wanted her children to have her property in case of her death, and that she did not wish Mr. Keyes to inherit any part of it; "that she was afraid of her husband and could not resist his importunities to sell or mortgage it for him." After much hesitation she executed the deed; it was recorded, delivered to her and sent by her to Mr. Abbott, and she received the \$600, which was from her brother.

At this time she contemplated the possibility of leaving her husband, but the possibility that her husband might die first was not mentioned by anyone or considered. She subsequently left her husband to come east, and he died thereafter. She testified that after she had signed the deed, but at the same interview at which she signed it, she asked Mr. Richardson whether she could get the property back if she wanted it, and he said he "supposed she could." There was no corroboration of this, and it is not certain that he advised her that it could be revoked. The court found that he did not; and also that she did not think she could get the property back at her pleasure without the as-

sent of the trustees; that she knew that while she had the control of the property her husband could control the disposition she should make of it, and that it was mainly to prevent this that the property was put in trust, and that the contingency of her surviving her husband did not occur to her or to her advisers, and nothing was said about it. The main purpose was to save the property for herself and children, and put it out of her power to sell or incur it at the solicitation or demand of her husband.

It was also found that the plaintiff thought that she and the trustees together could agree to change the disposition of the property, but not that she held the opinion from anything that was said to her by the trustees or Mr. Richardson, or anybody else.

The court found that no fraud or imposition was practiced upon the plaintiff; that the deed was carefully read over to her, and that there was no mistake in the sense that she thought that the deed contained any other or different provisions than in fact it contained, and no accident in the sense that anything was omitted which was intended to be put in; that she is a woman of ordinary intelligence, who knows about as much and about as little of legal papers and of the management of property, as most women who have been supported by rich fathers and have never themselves done any business or earned or managed money; that the contingency of her surviving her husband was not in her mind nor in that of her advisers; and if it had been there is no means of determining what the provision, if any, would have been.

By her father's will the plaintiff received about \$60,000 in trust to pay the income to her, and on her death to divide the principal among her children. She has four children. The trust property is well invested by competent trustees under the will. Her whole income is about \$3,000 a year.

Mr. G. Merrill, for plaintiff.

Messrs. S. Bancroft and G. H. Poor, for defendants.

Morton, Ch. J., delivered the opinion of the court:

It is settled by the uniform course of the decisions in this Commonwealth that a voluntary settlement, fully executed by a person of sound mind, without any mistake, fraud or undue influence, is binding upon the settlor, and cannot be revoked, except so far as a power of revocation has been reserved in the deed. *Viney v. Abbott*, 109 Mass. 800; *Sewall v. Roberts*, 115 Mass. 262, and cases cited.

In the case at bar, the plaintiff, acting deliberately and under the advice of counsel, executed a deed of settlement, and there is no pretense of any fraud, collusion or undue influence. The deed contains no power of revocation, and it is clear that the power of revocation was intentionally omitted. As first drafted, the deed created a dry trust in favor of the settlor, which probably could have been revoked by her at any time. But if she retained a power of revocation, it would defeat one of the principal objects of the settlement, which was to protect her from the threats or importunities or influence of her husband, and therefore the deed was altered to its present form. Both parties

understood that she was not to have the power to revoke it. It is not therefore a case like some of those cited by the plaintiff, where both parties supposed the settlement to be revocable, and the power to revoke was omitted by mistake. See, *Aylsworth v. Whitcomb*, 12 R. I. 298; *Garnsey v. Mundy*, 9 C. E. Green, 248, and cases cited.

The Justice who heard the case has found that no fraud or imposition was practiced on her; that the deed was carefully read over to her; that there was no mistake in the sense that she thought the deed contained any other or different provision than in fact it contained, and no accident in the sense that anything was omitted which it was intended to put in; and that the contingency of her surviving her husband was not in her mind or in that of her advisers, and if it had been, there are no means of determining what the provision, if any, would have been. From these findings it is clear that there was no mistake in the sense that she wrongly apprehended the contents of the deed. The most that can be said is that she did not, at the time she executed the deed, anticipate or have in her mind what would be its legal effect in the contingency of her husband dying before her. She did not, at the time, think of this contingency, but this is not a mistake which will justify setting aside a settlement; especially when it is not shown that, if this contingency had been in her mind, she would have made a deed in any respect different.

But this was not a purely voluntary settlement. It appears that she was in financial difficulties and in present need of money; and that her brother advanced her, by way of loan, \$600 as a part of the transaction, and on the condition that she would execute this deed of trust. It seems to have been a family arrangement to save her property for the benefit of her children, and to protect it, not only from the demands of her husband but possibly from her own improvidence. It may be that the fact that there was this pecuniary consideration would not prevent a court of equity from setting aside the settlement, upon proof of fraud or concealment, or upon proof of any material misapprehension on her part, of facts which, if known and called to her attention, would have led to a settlement of a different character. But it throws some light upon the transaction, and tends to show that her failure to think of the contingency of her husband's death was immaterial; and that if she had thought of it, there would have been no change in the provisions of the deed. We are of opinion that the plaintiff does not show sufficient cause for setting aside the settlement voluntarily and fairly made by her.

Bill dismissed.

Joseph NASH, *Petitioner*,

v.

John LATHROP.

1. Justice requires that the public should have free access to the opinions of the Supreme Judicial Court of the Commonwealth, and it is against sound public

policy to prevent this, or to suppress and keep from the public the earliest knowledge of the statutes or decisions and opinions of the judges.

2. It was not the intention of the Legislature, in the statutes upon which respondent relies, to limit the existing right of the citizen to have full access to the opinions; nor to confer upon Little, Brown & Co. the right to restrain any person from procuring copies of them.
3. The purpose of the Statute of 1879, chap. 250, was to make provision for the prompt publication of the series of the official reports known as the "Massachusetts Reports" at a reasonable price; but not to give to the publishers thereof the right to suppress and keep the opinions of the justices from the public until they should have printed them in such reports.

(Suffolk—Filed May 10, 1888.)

ON report. Petition for *mandamus*. *Granted*.

The case came on to be heard before a Justice of this court upon the petition and answer, the statements in the answer being taken as true. It further appeared that there were two corporations located beyond the Commonwealth, the Lawyers' Co-Operative Publishing Company of Rochester, N. Y., and the West Publishing Company, which are interested in the procuring of these opinions for publication in the form of weekly reports, and that the petition of said Nash was in the interest of all three parties, and for the purpose of enabling said Nash and the said corporations through said Nash to obtain the opinions. It was agreed that if, in the opinion of the court, *mandamus* should issue, the same should be peremptory.

The petition and answer are as follows:

To the Honorable the Justices of the Supreme Judicial Court, holden at Boston within and for the County of Suffolk:

Your petitioner, Joseph Nash, a citizen of said Boston, respectfully represents that he is the publisher of the "Daily Law Record," a daily paper devoted entirely to legal intelligence, printed and published in said Boston, in which he has published and desires to continue to publish the opinions and decisions of the Supreme Judicial Court of this Commonwealth. In the execution of this enterprise he has applied to John Lathrop, Esq., the reporter of the decisions of the Supreme Judicial Court of this Commonwealth, for leave to examine and copy the opinions and decisions of said court in his hands as reporter, which, under the statutes and laws of this Commonwealth, your petitioner is advised and verily believes he has a right to do; and said Lathrop, being so instructed, as he alleges, by the firm of Little, Brown & Co., of said Boston, who are the publishers of the series of reports of said decisions known as the "Massachusetts Reports," has refused and does refuse to permit and allow your petitioner to examine and make full copies or to make full and valuable abstracts of said opinions and decisions for publication.

And your petitioner further states that by reason of said refusal he is greatly embarrassed

in said publication, which he believes is of great benefit to the bar of this State as well as to the public, and tends to effect an early and wide dissemination of these decisions among those who may be interested therein. And your petitioner further states that he is entirely without remedy in the premises, unless it be conferred by the interposition of this honorable court by its writ of *mandamus*; and he therefore prays that a writ of *mandamus* may issue against said reporter, commanding him to permit and allow the said petitioner to examine all decisions and opinions of the court, and to copy the same at such times and in such manner as will not interfere with the business of his office.

Joseph Nash,
Petitioner.

Respondent's Answer.

Respondent says that by Public Statutes, chap. 159, § 61, he is bound to keep in some safe and convenient place in Boston the written opinions of the court in all law cases argued in the several counties, until their publication in the reports, and also his own dockets and copies of papers in such cases, and to afford due facilities for their examination. And he says that he has fully complied with the said statute, and has always furnished and is still ready to furnish such facilities; but he insists upon his right to refuse to permit copies or abstracts to be taken for publication.

And he further says that by virtue of the Statute of 1879, chap. 280, and of a contract made in pursuance thereof, a copy of which is hereto annexed, marked A, and by virtue of the extension of said contract duly made at the expiration thereof in 1884, Little, Brown & Co. have the exclusive right of publication of the reports of the decisions of the Supreme Judicial Court, and this defendant has no right to publish the same, or to furnish the same to others for publication, without the assent of said Little, Brown & Co.; that heretofore the petitioner has been permitted by respondent, with the assent of said Little, Brown & Co., to take abstracts of opinions, from time to time, for publication; but that recently the West Publishing Company of St. Paul, Minn., and the Lawyers' Co-Operative Publishing Company of New York, and other foreign publishers, have availed themselves of the liberty thus granted petitioner to publish the decisions of this court in the form of reports for sale to the profession, in competition with the authorized series of reports and to the injury of said Little, Brown & Co., and to the prejudice of the rights secured them by said contracts and statute. For this reason, at the request of said Little, Brown & Co., he has refused and claims that he is bound to refuse petitioner the privilege of copying and abstracting opinions for publication.

John Lathrop.

Exhibit A.

Articles of agreement entered into this first day of May, A. D. eighteen hundred and seventy-nine, between the Commonwealth of Massachusetts, by Henry B. Peirce, Secretary, party of the first part, and Augustus Flagg, John Bartlett, T. W. Deland, J. M. Brown, George Flagg and Charles C. Soule, copartners under the firm name and style of Little, Brown & Co., doing business in Boston in the County of Suffolk, party of the second part.

The party of the second part hereby covenants and agrees with the party of the first part to publish the decisions of the Supreme Judicial Court of this Commonwealth aforesaid, from and including volume one hundred and twenty-six of the series of Massachusetts Reports, upon the following terms: to wit, to print and publish the reports promptly and within the time now required by law, from the manuscript to be supplied to them by the reporter, uniform in size, style and form with volume one hundred and twenty-four of said series, and not inferior thereto in quality of work or material; to keep always on hand for sale in Boston a sufficient number of the volumes which they shall so publish to supply the public demand therefor; to furnish to the State a number of copies of each volume, equal to the number of towns and cities in this Commonwealth, at any time during the term of said contract, and one hundred copies in addition, at the price of one dollar and seventy-five cents per copy, and to sell the same to the public in this State at the price of three dollars and twenty-five cents per copy at retail; and to pay to the reporter in equal monthly installments the sum of four thousand five hundred dollars per annum for and towards his compensation and clerk hire. But in case the number of volumes to be published during the term of this contract shall fall short of two volumes per annum on the average, the amount to be paid to the reporter shall be reduced proportionately.

The party of the first part hereby covenants and agrees with the party of the second part, that during the term of this contract the party of the second part shall be furnished by the official reporter with the decisions of the Supreme Judicial Court for publication; and that the said reporter shall prepare and furnish said decisions to said party of the second part, seasonably for publication, according to this contract and the existing requirements of law, and shall prepare and furnish therefor suitable head notes, tables of cases and indexes, and shall, in the usual manner of authors, superintend the publication, correction and proofreading of such reports, and that the stereotype plates and copyright of the volumes to be published under this contract by the party of the second part shall be the property of said party of the second part, and that said reporter shall not publish, or furnish for publication, any reports of said decisions in any other manner.

This contract shall continue for the period of five years from date, with the option on the part of the Commonwealth to extend the same for a further period of five years, by a written notice given at any time before the expiration of said first period by the Secretary of the Commonwealth.

In witness whereof, etc.
Massachusetts Acts and Resolves, 1879, chapter 280.

An Act Relating to the Publication of the Decisions of the Supreme Judicial Court.

Be it enacted, etc., as follows:—

Section 1. The Secretary of the Commonwealth is hereby authorized and directed to enter into a contract in writing, on behalf of the Commonwealth, with the firm of Little, Brown & Co., of Boston, for the publication of the decisions of the Supreme Judicial Court from and

including volume one hundred and twenty-six of the series of Massachusetts Reports, upon the following terms:

Said firm shall agree to print and publish the reports promptly and within the time now required by law, from the manuscript to be supplied to them by the reporter, uniform in size, style and form with volume one hundred and twenty-four of said series, and not inferior thereto in quality of work or material; to keep always on hand for sale in Boston a sufficient number of the volumes which they shall so publish to supply the public demand therefor; to furnish to the State a number of copies of each volume, equal to the number of towns and cities in this Commonwealth at any time during the term of said contract, and one hundred copies in addition at the price of one dollar and seventy-five cents per copy; and to sell the same to the public in this State at the price of three dollars and twenty-five cents per copy at retail; and to pay to the reporter in equal monthly installments the sum of four thousand five hundred dollars per annum, for and towards his compensation and clerk hire. But in case the number of volumes to be published during the term of the contract shall fall short of two volumes per annum on the average, the amount to be paid to the reporter shall be reduced proportionately. Said contract shall continue for the period of five years from its date, with the option on the part of the Commonwealth to extend the same for a further period of five years by a written notice given at any time before the expiration of said first period by the Secretary of the Commonwealth, who is hereby authorized in his discretion so to extend the same, and the performance thereof on the part of said Little, Brown & Co., shall be secured by a bond in the penal sum of twenty thousand dollars, with sureties satisfactory to the Secretary and Treasurer of the Commonwealth, and the form of said contract and bond shall be approved by the Attorney-general.

Section 2. During the term of the contract herein provided for, the reporter of decisions of the Supreme Judicial Court shall not be required or allowed to publish the reports thereof, but shall prepare and furnish the same to said Little, Brown & Co., seasonably for publication according to said contract and the existing requirements of law, and shall prepare and furnish therefor suitable head notes, tables of cases and indexes; and shall, in the usual manner of authors, superintend the publication, correction and proofreading of such reports, and shall perform the other duties of his office according to the present requirements of law, and shall receive from the treasury of the Commonwealth a salary of three hundred dollars a year, and in the same proportion for any part of a year, which sum, with the amount to be paid to him under the said contract, shall be in full compensation for his services and for clerk hire and the incidental expenses of his office; and the stereotype plates and copyright of the volumes published under said contract shall be the property of said firm.

Section 3. All sums of money received by the reporter for the copies of opinions, rescripts and other papers, shall be paid over by him quarterly to the Treasurer of the Commonwealth, with a detailed statement of the same.

Section 4. This Act shall take effect upon its passage.

Approved April 29, 1879.

Messrs. Augustus Russ, Robert B. Bishop, Archibald M. Howe and George T. Lincoln, for petitioner:

The question before the court in this case is, whether in this Commonwealth, where all its citizens are presumed to know the law, and are governed and controlled by the presumption that they have such knowledge, the final decisions and expositions of the law, by the tribunal of last resort, may be examined and published freely by anyone who may choose to make such publication; and whether the official reporter of these decisions has any right or authority to refuse to permit and allow this petitioner, or any other citizen of the Commonwealth, to examine and make copies of such opinions, although he may desire the same for publication.

From the beginning of the system of reporting in Massachusetts to 1879, the reporter himself was the proprietor of his own work in the volumes of reports. The first statute passed upon the subject, that of 1803, chap. 133, so contemplated; it provided for the payment of a certain sum to the reporter, "which, together with the profits arising from the publication of his said reports," should be in full compensation for his services as reporter. 2 Mass. Gen. Laws, 94. And all subsequent statutes upon the subject, down to 1879, were upon the same basis.

The legal position is stated in the case of *Wheaton v. Peters*, 8 Pet. 658, 668 (33 U. S. bk. 8, L. ed.). In this case the court says: "It may be proper to remark that the court are unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by the court; and that the judges thereof cannot confer on any reporter any such right."

The course of legislation in Massachusetts has been clearly based upon the principle that no individual proprietorship existed or could exist in the opinions of the court.

In 1874, upon an order of inquiry to consider whether any legislation was necessary or expedient "to make the decisions of the Supreme Judicial Court accessible to the public before their official publication, and for the more speedy publication of such decisions" (Journal of Ho. Rep. Mass. 1874, p. 26), the Statute of 1874, chap. 43, was enacted, now Pub. Stat. chap. 159, § 61.

At this time the cases argued and decided, but not reported, had accumulated to the extent of sufficient manuscript for five volumes (see editor's note to 110 Mass.), and it had become extremely difficult for the public to ascertain what the law, as determined by the decided cases, was.

The Statute of 1859, chap. 196, § 48, now Pub. Stat. chap. 150, §§ 12, 13, made it the duty of the court to file a rescript containing a brief statement of the grounds and reasons of the decision, and gave the court liberty to file an opinion afterward. There is nothing now to prevent the court from following the old method of delivering opinions in open court; but the obligation to file a rescript, with authority to file the opinion afterwards, has resulted in the discontinuance of that method.

In the year 1879 an Act was passed, chap. 280 of the Acts of 1879, which is the basis of the claim by the respondent, that Messrs. Little, Brown & Co. have the exclusive right to publish the opinions of the court as well as the matter prepared by the reporter.

In *Wheaton v. Peters*, *supra*, one of the questions at issue was whether the volumes of *Wheaton's Reports* were properly copyrighted, but the court unanimously declared that, whether they were or not, the opinions of the court were not the subject of copyright.

The case of *Banks v. Manchester*, 23 Fed. Rep. 143, 145, is directly in point. In that case, under a statute which provided that the publisher of the reports "shall have the sole and exclusive right to publish such reports so far as the State can confer the same" during the period of contract, the court denied the application of the publisher to restrain the publication by others of the opinions of the court during this time; and such publications may be of everything which is the work of the judges, including the syllabus and the statement of the case, as well as the opinion. The copyright of the volume does not interfere with such free publication. It protects only the work of the reporter; that is to say, indexes, the tables of cases, and the statement of points made and authorities cited by counsel. *Little v. Gould*, 3 Blatchf. 165, 362; *Chase v. Sanborn*, 4 Cliff. 306; *Myers v. Callaghan*, 5 Fed. Rep. 726; *S. C. 10 Biss. 139*, *Myers v. Callaghan*, 20 Fed. Rep. 441.

That the duty of affording due facilities to all persons for the examination of such decisions was to continue, as a statutory obligation upon the reporter, is confirmed by the revision and consolidation of all the public statutes of the Commonwealth by authority of the Legislature in 1882. The obligation upon the reporter as originally enacted in the Statute of 1874 is continued and contained in the Public Statutes, chap. 159, § 61.

The Statute of 1879 adds confirmation to this view by requiring, section 3, that "All sums of money received by the reporter for the copies of opinions, rescripts and other papers shall be paid over by him quarterly to the treasurer of the Commonwealth."

The Statute of 1879 has in nowise diminished the right of the public to free access to them, nor the obligation of the reporter to the public existing before it was passed.

Any other construction would be in derogation of common right; and not to be adopted unless expressly demanded by the text of the statute. *Sedgwick, Stat. Law*, 2d ed. 296 and cases cited.

As the contract of the Commonwealth made by the Secretary of State with Messrs. Little, Brown & Co. derives all its force and validity from the Statute of 1879, it must conform to it, is to be construed with reference to it, and, so far as it departs from it, is void. A public agent must conform strictly to the terms of his agency, and in so far as he departs from it, his act is void. *Peirce v. U. S. The Floyd Acceptance*, 1 Nott & Hunt, 270; *Mayor of Baltimore v. Reynolds*, 20 Md. 1; *Lee v. Munroe*, 7 Cranch, 366; (11 U. S. bk. 3, L. ed. 373), *Story, Ag. § 807 a*.

We submit that copyright cannot be taken

out upon the opinions of the court, and that copyright of the volume does not cover the opinions which it contains.

Copyright at common law does not exist in this country, and the only privileges and rights of copyright are those derived from statute. *Wheaton v. Peters, supra*.

The statute upon the subject is as follows: "Any citizen of the United States or resident therein, who shall be the author, inventor, designer or proprietor of any book * * * and the executors, administrators or assigns of any such person, shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing," etc., the same. Rev. Stat. U. S. § 4952.

In this country Congress having the exclusive power to legislate upon the subject, and having confined the benefit of copyright to a citizen who shall be the author, and to his executors, administrators and assigns, has, as we submit, not included the power of the State to obtain copyright. In discussing this question the distinction is constantly made between reports of judicial decisions, and the decisions themselves. See, *Nelson, J., in Little v. Gould*, 2 Blatch. 165; *Drummond, J., in Myers v. Callaghan*, 5 Fed. Rep. 733.

"It should be borne in mind that as a general thing there is but a small part of the report of a case which is the subject of copyright." *Drummond, J., in Myers v. Callaghan*.

The decisions of the highest court in the Commonwealth are the final determination of the law upon the questions to which they relate, as much so as the statutes passed by the Legislature; and they are the right and possession of the people from the time they are made, and no power exists by which the people can be constitutionally deprived of them from that time. They are a part of the judicial proceedings of the State, which should be open, to the end that they may be known of all men in order to be obeyed and conformed to by them. The opinions of the court are its decisions upon points of law, and constitute the law upon the points decided. It is not correct to say that the people can know the law from the formal decrees entered in causes. The opinions of the courts are the law; the decree in a cause is the application of the law to the cause. It is truly, therefore, said in the preface to the first volume of *Massachusetts Reports*: "It is rarely, if ever, possible to discover from the record the ground of the decision" (p. 6).

The contention of defendant goes much further than regulation; it amounts to prohibition of a knowledge of the laws to most of the community. No book, no legal magazine, no periodical, no newspaper shall contain these opinions. Does this carry out the meaning of the Declaration of Rights, which provides that every subject of the Commonwealth "ought to find a certain remedy by having recourse to the laws?" *Mass. Const., Part First, Article XI*.

In the language of one of the distinguished jurists who took part in the discussion of the case of *Wheaton v. Peters*: "The law cannot and ought not to be made the prisoner or the slave of any individual."

The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the

private persons whose conduct may be the subject of such proceedings." Per Lawrence, *J.*, in *King v. Wright*, 8 T. R. 298, 298; cited with approval by Lord Campbell, *C. J.*, in *Lewis v. Levy*, E. B. & E. 587, 559.

"The benefit they produce is great and permanent, and the evil that arises from them is rare and incidental." Per Lord Ellenborough, in *Rex v. Fisher*, 2 Camp. 563, 571.

Messrs. W. G. Russell and Geo. Putnam, for defendant :

The defendant is the reporter of the decisions of this court, holding his office by appointment, as provided in Pub. Stats., chap. 159, § 56.

By Act of 1805, chap. 133, passed for three years, and then renewed for three years at a time until 1815, when it was renewed without limitation, it was provided that the Governor should appoint a reporter, whose duty it should be, by personal attendance and by any other means in his power, to obtain reports of decisions made and to be made, and to "annually publish the same."

He was to be paid a salary of \$1,000 per annum, and was to have the profits arising from the publication of the reports. The salary was reduced to \$300 in 1843, but otherwise, until the present contract with the publishers was made in 1879, the reporter's position was substantially unchanged, except so far as it may have been changed by Stat. 1874, chap. 43, the Act now under construction.

The Statute of 1874, chap. 43, was passed to meet the inconvenience occasioned by want of access to the papers in cases decided but not published. It required the County of Suffolk to furnish a "safe and convenient place" in Boston where the reporter should keep his opinions and other papers in cases decided in all the counties, "until their publication in the reports," and to "afford due facilities for their examination."

The reporter continued after, as well as before, the Act of 1874, to copyright and publish the reports. His compensation was unchanged, and was, as before, mainly derived from the profits of sales.

In 1880 the Public Statutes reenacted Stat. 1874, chap. 43, in chapter 159, § 61; and in § 63 of the same chapter reference is made to the Statute of 1879, chap. 280, and a portion of its provisions is reenacted. The main part of the Statute of 1879 is a private Act, and would naturally not appear in the Public Statutes.

Before publication the author or owner of a manuscript has the right to prevent its publication by others without copyrighting it. Nor is it a publication, so as to deprive the author or owner of his exclusive right, if he permits the examination of his manuscript by others who are interested in its subject matter. *Drone*, Copyr. 118, 119, 289 *et seq.* *Tompkins v. Halleck*, 133 Mass. 32, 45.

That the Commonwealth is the owner of the written opinions filed in the several cases by the judges in the performance of their official duty seems hardly questionable. *Re Gould*, Superior Court, Conn. February, 1886 (*post* p. 925); *Law Record*, February 17, 1886; *Drone*, Copyr. 161, 239, 243; *Copinger*, Copyr. 126; *Shortt's Law of Literature*, 54.

It is difficult to see, however, why the Commonwealth cannot copyright, or permit a pub-

lisher to copyright, the opinions of its Judges given in the course of their employment. *Re Gould*, *supra*; *Drone*, Copyr. 161, 239, 243.

There is no reason for supposing that the court in the case of *Whetton v. Peters*, 8 Peters, 591, meant anything more than that its opinions belonged to the United States and could not be copyrighted by any individual without the authority of Congress.

In England, in early times, the King was accustomed to grant a patent giving the exclusive right to publish books of law. The exclusive right of the patentee appears to have been founded on the King's ownership, and on the fact that the judges were paid by him, as well as on his prerogative. *Miller v. Taylor*, 4 Burr. 2315; *Stationers v. Parker*, Skinner, 234; *Stationers v. Seymour*, 1 Mod. 256, 258; *Drone*, Copyr. 161. See, *Gurney v. Longman*, 13 Ves. 493.

When the King ceased to issue law patents, no doubt seems to have been entertained that the copyrights of the reporters covered the opinions as reported by them. *Butterworth v. Robinson*, 5 Ves. 709; *Saunders v. Smith*, 3 My. & Cr. 711.

Morton, Ch. J., delivered the opinion of the court :

This is a petition for a *mandamus* to compel the reporter of decisions to allow the petitioner, who is the publisher of the "Daily Law Record," a daily paper devoted to legal intelligence, to examine and take copies of the opinions and decisions of the Justices of the court, which are in the regular custody of the reporter.

The answer sets up that, by virtue of the Statute of 1874, chap. 280, and of a contract made in pursuance thereof, Little, Brown & Co. have the exclusive right of publication of the reports of the decisions of the Supreme Judicial Court, and respondent has no right to publish the same or furnish the same for publication without the consent of Little, Brown & Co.; that heretofore the petitioner has been permitted by the respondent, with the consent of said Little, Brown & Co., to take abstracts of opinions for publication, but that recently the West Publishing Co. of St. Paul, Minnesota, and the Lawyers' Co-Operative Publishing Co. of Rochester, New York, and other foreign publishers, have availed themselves of the liberty thus granted the petitioner to publish the decisions of the court in the form of reports for sale to the profession, in competition with the authorized series of reports, and to the injury of said Little, Brown & Co., and to the prejudice of the right secured them by said contract and statute; and that for this reason the respondent, at the request of said Little, Brown & Co., has refused, and claims that he is bound to refuse, petitioner the privilege of copying and abstracting opinions for publication.

The presiding Justice before whom the petition was heard has found that the statements of fact in the answer are true.

The question whether the State has an absolute property in the opinions of the Justices after they are filed with the reporter; whether it has a copyright in such opinions which it can exercise itself or assign to an individual; and whether a copyright on the volumes of the re-

ports covers such opinions so as to prevent any person from publishing them till after they have been published in the volumes of the reports, are not necessarily involved in this case.

It may be decided upon a narrower question, which is whether the State has granted to Little, Brown & Co. that exclusive right of the first publication of the opinions of the Justices; in other words, whether it has conferred upon that firm the power of saying that the opinions shall not be made public until they are published in their reports.

The decisions and opinions of the Justices are the authorized expositions and interpretations of the laws which are binding upon all the citizens. They declare the unwritten law and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions; and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes or the decisions and opinions of the Justices. Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the Legislature.

It can hardly be contended that it would be within the constitutional power of the Legislature to enact that the statutes and opinions should not be made known to the public. It is its duty to provide for promulgating them.

While it has the power to pass reasonable and wholesome laws regulating the mode of promulgating them, so as to give accuracy and authority to them, we are not called upon to consider what is the extent or the limitation of this power; because we are satisfied that it was not the intention of the Legislature in the statutes upon which the respondent relies to limit the previously existing right of the citizen to have full access to the opinions, or to confer upon Little, Brown & Co. the right to restrain any persons from procuring copies of them, whether for their own use or for publication in the newspapers or in law magazines or papers.

The policy of the State always has been that the opinions of the Justices, after they are delivered, belong to the public.

The office of reporter of decisions was first established by the Statute of 1808, chap. 133. His duties were to obtain true and authentic reports of the decisions of the Supreme Judicial Court and to publish them annually. He was paid a salary by the Commonwealth, "which, together with the profits arising from the publication of his said reports, shall be full compensation for his services." These provisions, with a change in the amount of the salary, were continued through the two revisions of the law, until 1871.

At first the practice of the Justices was to deliver their opinions orally, and the reporter took minutes for his reports. But these opinions were public and any person present might take minutes and publish them. The statutes did not provide, and no claim was ever made, that the reporter had an exclusive right to the first publication. In later times the practice has been for the Justices to write out their opinions and file them with the reporter, though occasionally it happens that opinions are delivered

orally from the bench and minutes taken by the reporter for his reports. But it has always been customary for the reporter to allow the public free access to the opinions and to furnish copies, upon receiving a reasonable compensation.

Up to 1874 no public office was provided for the reporter, but he was obliged to keep his papers at his private office or at his home. In that year, owing undoubtedly to the difficulty felt by the public in the exercise of the right to examine the opinions of the Justices, the Legislature passed a statute, entitled "An Act to Provide for the Custody and Examination of the opinions of the Supreme Judicial Court before their Publication in the Reports," Stat. 1874, chap. 48. It provides that the reporter shall keep in some safe and convenient place, to be provided by the County of Suffolk in the City of Boston, the written opinions of the court in all law cases argued in the several counties, until their publication in the reports; and also his dockets and copies of papers in such cases, and shall afford due facilities for their examination; for which purpose he shall be allowed a sum not exceeding \$1,500 per year, to be expended in clerk hire and incidental expenses. This statute is a clear recognition of the common right to the knowledge of the opinions of the Justices, the object of its enactment being to furnish additional facilities for the exercise of this right. This statute was in substance reenacted in the revision of 1882, and is now in force. Pub. Stat. chap. 159, § 61. It is in view of this course of legislation and of this established policy of the Commonwealth that we must construe the Statute of 1879, chap. 250, upon which the respondent relies. It provides that the Secretary of the Commonwealth shall make a contract with Little, Brown & Co. for the publication of the reports, on the terms therein contained.

By the first section that firm is to publish the reports promptly, according to a standard therein fixed; to sell them for a fixed price and to pay the reporter a salary for and towards his compensation and clerk hire. The second section provides that under the terms of the contract "The reporter of decisions of the Supreme Judicial Court shall not be required or allowed to publish the reports thereof, but shall prepare and furnish the same to said Little, Brown & Co. seasonably for publication according to said contract," and "the stereotype plates and copyright of the volumes published under said contract shall be the property of said firm."

The third section provides that "All sums of money received by the reporter for the copies of opinions, receipts and other papers shall be paid over by him quarterly to the Treasurer of the Commonwealth, with a detailed statement of the same."

The contract made in pursuance of this statute contains the provision that "The reporter shall not publish or furnish for publication any reports of said decisions in any other manner," differing from the statutes by the addition of the words "or furnish for publication." We do not think that those words add anything to the meaning of the contract. But if the added words are beyond the scope of the statute and give any right not sustained by it, they are beyond the authority conferred upon the secretary and can have no effect. We must look to the statute only to determine whether the re-

spondent has the right which he claims in his answer.

The purpose of the statute was to make provision for the prompt publication of the series of official reports known as the "Massachusetts Reports," at a reasonable price.

The first and second sections look only to this purpose and deal with no other subject. They do not in terms confer upon Little, Brown & Co. the power to interfere with the public and common right to examine and procure copies of the opinions of the Justices, and they do not upon any reasonable construction confer such a power by-implication.

The provisions that the reporter, during the term of the contract, "shall not be required or allowed to publish the reports," and that "the copyright of the volumes published under said contract shall be the property of said firm," were necessary to define clearly the rights of the firm and the duties of the reporter. Under the previous laws the reporter was obliged to publish the reports, and he had the copyright in the volumes in his own name.

The provisions in question were needed to repeal the existing laws and to carry out the scheme of the new law. But the Legislature did not attempt to determine whether the copyright covered the opinions of the Justices.

The intent of the statute was that Little, Brown & Co. should have the right of publishing the reports which had before vested in the reporter.

The words "to publish the reports" in the second section are manifestly used in the same sense in which the same words are used in the first section, and refer to the issue to the public of the "Massachusetts Reports." It would be a strained construction to hold that they were intended to prohibit the reporter from allowing the public the right to examine the opinions or to prepare copies or extracts.

The third section, providing that the reporter shall account to the State for all sums of money received for copies, tends to show that the Legislature expected that the immemorial custom of furnishing copies to the public would be continued. The construction claimed by the respondent is in derogation of the right of the public and ought not to be adopted, unless such was clearly the intention of the Legislature.

It was its intention, without doubt, that Little, Brown & Co. should have the exclusive right of publishing the authorized series of Massachusetts Reports, but we cannot see in the statute any intention to give to that firm the right to suppress and keep from the public the opinions of the Justices until they should print them in the reports.

We are therefore of opinion that the claim of the respondent cannot be sustained.

Similar questions have arisen in several cases in other jurisdictions. While such cases have not the weight of authorities, because each case depends in some measure upon the statute of the State in which it arose, differing from our statute, yet the general current of the cases support the principles upon which our decision rests. *Banks v. Manchester*, 23 Fed. Rep. 145; *Myers v. Callaghan*, 20 Id. 445; *Chase v. Sanborn*, 4 Cliff. 806; *Little v. Gould*, 2 Blatchf. 165; *Re Banks*, U. S. Cir. Ct. Minn. [27 Fed. Rep. 50].

In order to prevent misconstruction, we desire to add that while it is the duty of the reporter to allow the public free access to the opinions in his custody, he has the right to make such reasonable regulations as to the method of examining and obtaining copies of them as he may deem necessary to secure the safety of his papers and the orderly administration of the affairs of his office.

Mandamus to issue.

SUPREME COURT OF CONNECTICUT.

In the Matter of GOULD *et al.*

1. The State of Connecticut has lawfully taken to itself a **copyright of the opinions of its Supreme Court of Errors.**
2. Having, by its Comptroller, entered into a contract with Banks & Bros. giving exclusive rights and use and protection of the State's copyright upon condition that they sell the volumes thereof at a fixed price, **the court cannot order copies opinions delivered to others for publication.**
3. The courts and their records are open to all, but **opinions are no part of the record. Judgments stand independent of these.**

(Filed December, 1885.)

THIS matter comes before this court on a motion of the applicants for an order instructing the reporter as to his official duty. The question is: shall the official reporter of this court deliver to any applicant, who offers to pay the legal fees, copies of the judicial decisions of this court, when the same are desired for publication, before the publication thereof in the Connecticut Reports, or the advance sheets thereof. The parties to the controversy are the applicants for such copies who, through certain citizens of Connecticut, have asked for them for the purpose of publishing the opinions, namely: William Gould, Jr., & Co., Albany, New York; and the West Publishing Company, St. Paul, Minnesota. The opposing parties are Messrs. Banks & Bros., law book-sellers and publishers of New York City.

Exhibit A is a copy of the statute under which it is agreed that the Comptroller of the State made with said Banks & Bros., at its date, a certain contract for the publication of the Connecticut Reports, a copy of which follows, marked "Exhibit B."

These publishing companies have requested the reporter to furnish copies of the opinions of the court as soon as delivered to him, for the purpose of publishing the same before their publication in the Connecticut Reports. The reporter declined to furnish these copies, until this court may pass on the question, in compliance with notice from said Banks & Bros., who claim that the furnishing copies for publication would be not only a violation of the contract of the State with them, but would also destroy the right of the State thereafter to copyright these opinions in the form of the Connecticut Reports.

There is great demand for their cheap and prompt publication.

In accordance with the provisions of their contract, Banks & Bros. have caused each set of opinions or parts of the Reports to be copyrighted in the name of the Secretary of State, as required by law. They have issued and furnished the Reports for \$2, and in parts for \$3 per volume. They had received many orders for these advance parts; but when the new periodicals appeared, many of these orders were countermanded, and their sale largely diminished.

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Exhibit A.

(Senate Bill No. 66.)

Chapter 35.

An Act in Addition to an Act Relating to Courts. *Be it enacted by the Senate and House of Representatives in General Assembly convened:*

Section 1. The Judges of the Supreme Court of Errors shall, from time to time, appoint a reporter of its judicial decisions, who shall receive a salary of three thousand dollars, with one thousand dollars additional thereto during the occupancy of the office by the present reporter.

Sec. 2. After the forty-eighth volume, now in press, the Reports shall be published by the State, under the supervision of the Comptroller, who shall cause the several volumes to be stereotyped, and to be copyrighted in the name of the Secretary, for the benefit of the people of the State.

Sec. 3. The Reports so prepared and published shall be furnished by the Comptroller to the citizens of this State at a stated price, to be fixed by the Comptroller and the library committee. The Comptroller shall send one copy of each volume of Reports published under his supervision, to the town clerk of each town for the use of the people of the town, one copy to each county law library association, and one copy to each college library in this State.

Sec. 4. Section thirteen of chapter four, title four (page 47), of the General Statutes of this State, and all Acts and parts of Acts inconsistent herewith, are hereby repealed; this repeal, however, not affecting the rights of the reporter in the forty-eighth volume now in the press.

Approved March 22, 1882.

Exhibit B.

This contract between Wheelock T. Batcheller, Comptroller of the State of Connecticut, acting for the State under authority conferred by chapter 35 of the Acts of 1882, of the first part, and David Banks, of New York City, and Anthony B. Banks, of Albany, N. Y., constituting the firm of Banks & Bros., of the second part, witnesseth; that the party of the second part is to have the printing and sale of, and is to print and sell, the next five volumes of the Connecticut Law Reports, commencing with volume forty-nine, (49,) upon the following terms and conditions:

(1) The size of the pages and the type are to be the same as in vol. 48; the paper, the binding, and all work to be equal in all respects to the best of the last ten volumes. The reporter is to direct as to all matters of detail. The volumes are not to exceed six hundred and fifty (650) pages each, but the deficiency in one volume may be counted against the excess of another.

(2) The volumes are to be stereotyped, with a right on the part of the State to have them, or any of them, electrotyped if preferred; reasonable notice being given. The plates are to belong to the State, but are to be stored by Banks & Bros., and to be kept by them well insured, for the benefit of the State. Banks & Bros. are to have the exclusive right to print from the plates so long as this contract is observed by them, and are to replace them, if destroyed or defaced (beyond ordinary wear) in use, being entitled to the insurance money for that purpose if they are destroyed by fire. The State is, how-

ever, to have the right to demand the custody of the plates if it desires, the demand of the Comptroller being taken to be the demand of the State, in which case they are to be sent by Banks & Bros. to the Comptroller of the State, at the expense of the State, to be stored in the capitol; in which case Banks & Bros. are to cease to be responsible for them, but to have the same right as before to take them for use, returning them again at the expense of the State.

(3) A copyright of each volume is to be taken out by Banks & Bros., and at their expense, in the name of the Secretary of the State, for the benefit of the State, and is to belong to the State. The copyright papers are to be sent to the Comptroller. The copyright is not to be used by the State in any way adversely to Banks & Bros. so long as they keep this contract. The title page of each volume is to state that the volume is "published for the State of Connecticut by Banks & Bros."

(4) The reporter is to furnish copy at his convenience, sending the same by express, at the expense of Banks & Bros. Proofs are to be sent to him, and returned by him, by mail, at their expense. He is to read and correct the ordinary proofs sent authors, and Banks & Bros. are to pay him thirty dollars (\$30) upon each volume to procure a copy-reader. After the first proof corrected by him, six proofs are to be sent him of the sheets as corrected, either before the plates are cast, or after, as he may prefer. There is to be no allowance to Banks & Bros. for the time occupied in making alterations required by the reporter, or corrections made necessary by his fault, unless the time so spent shall exceed sixty-five dollars (\$65), reckoned at 50 cents per hour for alterations of type, and 60 cents per hour for alterations of plate; such excess to be paid by the reporter when his fault, otherwise by the State. The printing is to be done as fast as copy is furnished by the reporter, and the entire volume is to be got out and ready for sale within thirty days after the last proof is corrected. It is to be no ground for claim or complaint on the part of Banks & Bros. if the printing is delayed or suspended by the copy not being ready, or the proof not being returned promptly. No proofs or advance sheets are to be furnished from the printing office to any person but the reporter, except in the way of the regular quarter parts got out for subscribers, as hereinafter provided. The reporter is to be furnished, without charge, two of each quarter parts thus got out, and he is to make no charge for the preparation of the list of cases or other matter that may go upon the covers of the parts.

(5) Banks & Bros. are to get out each volume in four equal or nearly equal parts, to be sent by mail, or otherwise delivered at their expense, to all persons in the State who shall subscribe therefor, and prepay three dollars (\$3): provided that if the Comptroller shall so decide, the volumes shall be got out in only two parts at two dollars (\$2) for the two.

(6) Banks & Bros. are to furnish the State one hundred and seventy copies (170) of each volume, bound in best law calf, and any number that the State shall order besides, in the best Boston lamb skin, all at two dollars (\$2) per copy, to be paid within thirty days after delivery; the same to be delivered at the

comptroller's office, within thirty days after the volume is issued. The copies in calf are to be stamped thus (with a right on the part of the Comptroller to change the form):

"Furnished by the State to the Town of"—and the names of the several towns are to be written, in a plain hand, below, upon each volume; a list of the towns to be furnished by the Comptroller. All the books so marked are to be done up in strong paper by Banks & Bros., and, if the Comptroller shall desire, are to be expressed by them to the various towns, the expressage to be paid by the State.

(7) The copies of each volume are to be retailed in the market by Banks & Bros. at two dollars (\$2) per copy, and to be furnished to the trade at one dollar and seventy-five cents (\$1.75) per copy; and they are to keep the market always supplied with the volumes at these prices.

(8) All the back volumes of the Connecticut Reports owned by Banks & Bros., viz., vols. 1 to 35, inclusive, are to be furnished to any citizen of Connecticut at three dollars (\$3) per volume in sets, and at that price for any odd volumes, except vols. 13 to 21, inclusive.

(9) Banks & Bros. agree to reprint and stereotype volumes thirteen to twenty-one, inclusive, whenever they get out of print, if the State shall so desire, and shall take of them one hundred copies of each volume at four dollars (\$4) per copy, the same to be delivered at the Comptroller's office.

(10) Banks & Bros. are not to assign this contract without the consent of the Comptroller, but it may pass with their business through any change of their firm and to their successors in business. The Comptroller is to have the right to rescind the contract if Banks & Bros., or their successors, fail in the faithful performance of it.

(11) All the rights of the Comptroller under this contract are to pass to and vest in every successor in his office, and in any other agent or officer whom the State may designate for the purpose. In all cases in which any action of the State is spoken of, the action of the Comptroller is to be taken as the action of the State. All the obligations of Banks & Bros. under this contract are to be considered as guaranteed by every individual member of the firm, and the members are to sign their names individually for the purpose of making such individual guaranties.

Dated at Hartford this seventh day of September, 1882.

Wheelock T. Batcheller,
Comptroller of Public Accounts of the State of Connecticut.
David Banks,
[Seal.] A. Bleecker Banks,

Composing the Firm of Banks & Bros.

Mr. L. E. Stanton, for applicants, William Gould, Jr. & Co.

Mr. H. S. Stearns, for West Publishing Company:

Cited Banks v. Manchester, 23 Fed. Rep. 143 and *Wheaton v. Peters*, 8 Pet. 591.

Mr. Charles E. Gross, for Banks & Bros.:
Cited the Statutes of the State and Wheaton v. Peters, 8 Pet. 591; *Chase v. Sanborn*, 4 Cliff. 306; *Little v. Gould*, 2 Blatchf. 165, 362, 367; *Same v. Same*, 18 How. 165 (59 U. S. bk. 15, L. ed. 328); *Myers v. Callaghan*, 5 Fed. Rep. 726; *S. C.* 20 Fed. Rep. 441; *Drone*, Copyr. 161, 255; *Banks v. De Witt*, 42 Ohio St. 268.

Pardee, J., delivered the opinion of the court:

For the information of the public the State of Connecticut publishes reports of cases argued and determined in the Supreme Court of Errors. The volume is prepared for publication by the official reporter, and contains the opinions written by the judges, together with head notes to all cases, foot notes to some of them, statements of facts, a table of cases, and an index to subjects, the work of the reporter. The judges and the reporter are paid by the State; and the product of their mental labor is the property of the State; and the State, as it might lawfully do, has taken to itself the copyright. The statute requires the Comptroller to supervise the publication of the volumes, taking a copyright for the benefit of the State. Under this, that officer, for a valuable consideration, granted to Banks & Bros., who agree to print and sell the reports at a fixed price, the protection of the copyright for a limited period. During three or four years the State, with knowledge, has acquiesced in the terms of this contract and accepted the resulting benefits. If, therefore, we should now direct the reporter to furnish copies of opinions to the petitioners, that they may sell them to the public, in advance, for their own profit, we should in effect advise the State to a breach of contract.

It is for the State to say when and in what manner it will publish these volumes; and the taking of the copyright in no sense offends the rule that judicial proceedings shall be public. The courts and their records are open to all. The reasons given by the Supreme Court of Errors for its determination in a given cause constitute no part of the record therein. The judgment stands independently of these. Moreover, these are accessible to all who desire to use them in the enforcement of their rights.

The application for an order that the reporter furnish copies of all opinions to the petitioners is denied.

Abram J. KNOWLES, *Appt.*,

Levi G. NORTHROP.*

Direct evidence of a forgery and of the physical impossibility of an instrument having been signed by one of those by whom it purports to be signed is a **good ground for granting a new trial**, for newly discovered evidence, where the evidence upon the question at the former trial consisted of opinions as to the genuineness of signatures.

(Hartford—Filed February 13, 1886.)

APPEAL from a judgment of the Superior Court sustaining a demurrer to a complaint asking for a new trial on the ground of newly discovered evidence. *Reversed.*

The substance of the pleadings and the facts involved are stated in the opinion.

Messrs. Taylor & Taylor, for plaintiff:

It cannot be said that Gad D. Northrop and Cordelia Dennis were ever married, for the testimony of Cordelia and Lossing tend to prove, if anything, but one marriage ceremony, and that a formal one, and before no other person

than Justice Cutler. *Blackburn v. Crawford*, 8 Wall. 175 (70 U. S. bk. 18, L. ed. 186).

Where the court finds a witness in his or her testimony to have deliberately and willfully falsified even in one material particular, his or her testimony should be treated as false in all. 8 Graham & Waterman, *New Trials*, top pp. 1542, 1545.

The manufacture and forgery of the certificate is a distinct and independent fact not offered on the former trial, and is not cumulative evidence. *Waller v. Graves*, 20 Conn. 311.

Mr. L. D. Brewster, for defendant.

Pardee, J., delivered the opinion of the court:

This is a complaint asking for a new trial for newly discovered evidence.

In 1881 the defendant brought an action of ejectment against the plaintiff and recovered judgment. In the trial of that cause it was a material question whether Gad Northrop and Cordelia Dennis, father and mother of the plaintiff, were ever lawfully married. In support of the claim that they were so married, the plaintiff, with other evidence, offered and the court received what purported to be a certificate of such marriage signed by the officiating magistrate and by Thomas Lee and Morgan L. Emeigh as witnesses of the ceremony.

The present complainant alleges that since that trial he has learned that at least seven persons will testify that during several months prior and several weeks subsequent to the date of that certificate, Morgan L. Emeigh, one of the persons whose names are thereto appended as witnesses, was in the State of Louisiana; and that at least six persons will testify that one Zeno A. Lossing, at the request of Gad Northrop, prepared the certificate and signed thereto the name of the magistrate without his authority; also, that although he used all reasonable diligence in preparing his case for trial, he was unable to discover the evidence aforesaid before the close thereof.

The defendant demurred to the complaint, "Because on the facts stated the plaintiff is not entitled to the relief therein sought, and because it sets forth only such evidence as goes to prove the invalidity of said certificate; whereas, the evidence offered on the trial of said case abundantly proved the said marriage without reference to said certificate, and the alleged newly discovered evidence would make no difference with the result of the case and would not be sufficient to turn the case in favor of the defendant."

The Superior Court sustained the demurrer.

Upon the trial of the action of ejectment the plaintiff introduced as a witness his mother, who testified to the marriage; no other person did so. Others testified that the father and mother were at the house of the latter on the night named in the certificate; that during many years thereafter they lived together as husband and wife, and that the father introduced her as his wife. The plaintiff also put in evidence a record of the marriage, of the age of the mother, of the birth of the son, and of other family items in the family Bible, which he claimed were made by the father; also evidence that immediately before or at the birth of the son, the mother spoke of Gad Northrop as

*See, *Northrop v. Knowles*, ante, 271.
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being her husband; and that the father pointed out to the son the place of the marriage.

The defendant offered evidence tending to prove that the marriage certificate was a forgery; and claimed that the living together of the father and mother was always unlawful.

For the purpose of testing the sufficiency of the demurrer, we are to assume that the present complainant can now present in court several persons who will testify that it is physically impossible that Morgan L. Emeigh could have been present at the marriage of the father and mother of the defendant, as the certificate declares him to have been; and several others who will testify to their actual knowledge of the forgery of the certificate at the instigation of the father.

In the trial of the action of ejectment, the plaintiff introduced the certificate, doubtless, because he thought it would weigh in his favor; and in view of the nature and character of the evidence introduced by the parties respectively, his belief was well founded. If, upon another trial, witnesses testify in accordance with the complainant's allegation, it is the right of the jury to believe them; and if jurors believe that Gad Northrop procured a forged certificate, they may and probably will believe that he did so because he could not procure a genuine one. They may well rely upon this rule as governing men in such matters, namely: that they prefer a genuine document to a forged one.

It is true that upon the former trial the defendant introduced witnesses who testified that in their opinion the signature affixed to the certificate was not that of the magistrate; and this is denying the genuineness of it in one form; and the introduction of witnesses who were eyewitnesses to the act of forgery is doing the same thing in another form.

When the certificate was offered in evidence, if the defendant believed it to be a forgery, he had the right to rely, the magistrate being dead, upon the result of a comparison of signatures to substantiate his position. Instances wherein forgers have left eyewitnesses to their acts, who can be found and called into court and made to testify, are so rare that the defendant was not required to know or suspect the existence of such. Upon such an inquiry the testimony of persons who were witnesses to the act of forgery stands, by its character, so entirely apart from the testimony of those who give opinions upon comparison of signatures, that the former species in reality constitutes evidence tending to prove a new and independent fact; and the same remark is applicable to the testimony of those persons who will testify that Emeigh, one of the witnesses, was in Louisiana when the certificate declares that he was in New York.

There is error in the judgment of the Superior Court.

In this opinion the other Judges concurred.

STATE of Connecticut

v.

Loring BOSWORTH, *App't.*

1. All offenses involving continuous action, and which may be continued from day to day, may be so alleged.

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END OF VOL. I.

2. Cruelty to animals is an offense of a continuing nature, and may consist of overworking, underfeeding or depriving them of proper protection; and a demurrer to a complaint which charges all these acts in separate counts is properly overruled.

(Hartford—Decided May 6, 1886.)

APPEAL from a decree overruling a demurrer. *Affirmed.*

The case is stated in the opinion.

Messrs. Hall & Bennett, for appellant.

Messrs. Bill & Phelps, for the State:

The alleged error that there is more than one offense in each of the several counts is of the most technical and formal character and is not to be favored. *Rawson v. State*, 19 Conn. 295.

It is proper to charge offenses of a prolonged and continuous character as committed from one date to another. If, however, it is not admissible to allege a period of time instead of a single date, the superfluous allegations "and from said date to the 14th of January, A. D. 1885," or "from thence to the 14th day of January, 1885," contained in the complaint may be rejected as surplusage. 2 Swift's Dig. 400; *People v. Adams*, 17 Wend. 475; *Commonwealth v. Pray*, 18 Pick. 359; *Commonwealth v. Wood*, 4 Gray, 11; *Commonwealth v. Woods*, 9 Gray, 131; *Commonwealth v. McKenney*, 14 Gray, 1; *Commonwealth v. Boyle*, 14 Gray, 3; *Commonwealth v. Frates*, 16 Gray, 236; *Commonwealth v. Keyon*, 1 Allen, 6; *Commonwealth v. Blake*, 12 Allen, 188; *Commonwealth v. Wolcott*, 110 Mass. 69; *U. S. v. La Cote*, 2 Mason, 129; *Collins v. State*, 58 Ind. 5; *Cook v. State*, 11 Ga. 53; *State v. Brown*, 8 Murphy, 224; *State v. Waller*, 3 Murphy, 229; *State v. Hendricks*, Cam. & Nor. (N. C.) 369; 1 Ld. Raymond; 10 Mod. 249; 4 Mod. 101.

Carpenter, J., delivered the opinion of the court:

The only question presented by this record which we can notice is that which arises on the demurrer. The only ground of demurrer is that several offenses are alleged in each count.

The first count charges the defendant with cruelly overworking certain animals named, from the 1st to the 14th day of January, 1885. The second count charges him with neglecting to provide said animals during said period with proper food, drink and protection. The third charges that during said period he deprived said animals of proper sustenance.

Properly construed there is but one offense in each count. Perhaps it may be said that there is but one offense charged in all the counts. The court below must have so regarded it, as there was but one fine imposed. The gist of the offense is cruelty to animals. That may consist of overworking, underfeeding, or depriving of proper protection; or all these elements may combine and constitute the offense.

But aside from this, all offenses involving continuous action, and which may be continued from day to day, may be so alleged. This is obviously an offense of that character, and the demurrer was properly overruled.

In this opinion the other Judges concurred.

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Cases cited (Conn.) 416

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Johnson v. Higgins (Conn.) 179

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Cases cited (Mass.) 440

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National Union Bank v. Copeland (Mass.) 596

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Tillinghast v. Phillips (R. I.) 808

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Id.

5. The appointment and qualification of an **executor** will relate back to validate his prior acts, as the payment of a **legacy** to a legatee, and such executor will not be answerable to trustee process served by a creditor of the legatee on the day of the probate of the will but a day after the payment of the legacy.

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6. Where **assignee of insolvent debtor** in **another State** affirms sale to citizen of this State, creditor may attach goods here as property of insolvent; rights determined here as though no assignment had been made.

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Pond v. Baker (Vt.) 397

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Potter v. McKenney (Me.) 674

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Woodward v. Ham (Mass.) 200

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Loomis v. Lewis (Mass.) 496

21. If at the time of the **attachment** of

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Cowley v. McLaughlin (Mass.) 539

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Gove v. Learoyd (Mass.) 913

2. Where surety on promissory notes of a bankrupt pays money to creditor and holder of notes, and receives an agreement by which such creditor as principal and other holders as sureties agree to indemnify him, he cannot sue such creditor to recover the money, although estate of bankrupt is more than sufficient to pay debts in full; he is concluded by the agreement.

Wilson v. Whitmore (Mass.) 587

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Benton v. Holland (Vt.) 733

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1. A proceeding under the Bastardy Act is a civil suit.

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Naugatuck v. Smith (Conn.) 641

4. **Presence of defendant** in district court is not essential to its jurisdiction. *Id.*

5. Where there is a plea in **abatement**, justice has power to dispose of it and, if overruled, statutory issue remains to be tried. *Id.*

6. District court can take **jurisdiction** only in statutory manner, by defendant being bound over. *Id.*

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1. **By-laws** of a mutual beneficial society conflicting with the statute under which it is organized are *ultra vires* and void.

Supreme Council American Legion of Honor v. Perry (Mass.) 715

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2. Where the by-laws of a mutual benefit association, in the nature of a life insurance company, provide that upon the death of a member the benefit shall be paid to his direction, the member may change the beneficiary by surrendering his certificate of membership and procuring a new one payable to the person therein named.

Barton v. Provident Mutual Relief Asso. (N. H.) 856

Barton v. Same (N. H.) 856

3. By Statute of 1877 (chap. 204), the American Legion of Honor and the Knights of Pythias were empowered to **insure the life** of a member for the benefit of "the widow or other dependents upon a deceased member" and such fund was exempted from liability to creditors. Certificates of insurance were issued by each of the societies to a member **payable to his wife and subject to such further disposal** as he might thereafter direct. Subsequently the Act of 1882, chap. 195, § 2, added to the class of beneficiaries after the words "orphans," "or other relatives of deceased members." The wife of the member so named as payee in the two certificates died and the member by will bequeathed the sum payable on each certificate to the claimant with whom he had made a contract of marriage. Both funds were claimed

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by the member's legatee, his mother, and his sister. Held, after the finding of the superior court, that the legatee and the sister were not dependent upon deceased, that the mother alone was entitled to both funds and the Act of 1882 subsequent to the contracts of insurance did not entitle the sister to any part of the funds.

Supreme Council American Legion of Honor v. Perry (Mass.) 715

Hicks v. Perry (Mass.) 715

4. **Bill** by a small minority of members of the Patrons of Husbandry, an unincorporated joint stock company, **for a receiver and sale and distribution of property** dismissed where evidence showed only property to consist of \$100 and a building, well suited for purposes of the society, that a majority opposed the plaintiffs' bill and that the stock of plaintiffs might be sold for as much or more than would result to them after sale and distribution.

Hinckley v. Blothen (Me.) 794

BIGAMY.

SEE POLYGAMY.

BILLS AND NOTES.

I. FORM AND VALIDITY.

II. NEGOTIABILITY.

III. PRESENTATION; DEMAND AND PROTEST.

IV. ACTIONS ON.

SEE ACCORD AND SATISFACTION 2; ALTERATION OF INSTRUMENTS.

I. FORM AND VALIDITY.

1. A note payable "in one — after date" **may be identified** as one payable in one year to **correspond** with one described in the mortgage given to secure it.

Stowe v. Merrill (Me.) 290

2. The validity and effect of a note is to be determined by the **law of the State**, in which the **contract was made** and to be performed.

Gilman v. Stevens (N. H.) 109

3. A note payable on a future day certain, authorizing a **confession of judgment** "at any time hereafter," will authorize judgment at any time after date.

Richards v. Barlow (Mass.) 577

4. A note given for a **pre-existing debt** will not operate as payment without a special agreement.

Gilman v. Stevens (N. H.) 109

II. NEGOTIABILITY.

5. A paper **seal**, without impression, pasted on a corporation note, will not affect its negotiability.

Mackay v. Church (R. I.) 141

6. Promissory note, containing power of attorney to **confess judgment** in favor of "holder," imports that it was drawn on assumption that it would be negotiable; hence, judgment by confession taken by indorsee of payee is valid and will sustain action thereon, although taken in another State.

Richards v. Barlow (Mass.) 577

7. A note **payable** at a future day certain,

or earlier **at the option** of the holder, is not negotiable,

Cases cited (Mass.) 578

III. PRESENTATION, DEMAND AND PROTEST,

8. Where there was no evidence that protest was necessary to hold the indorser, the word "protest" in a **waiver** by the indorser, means notice of demand and refusal.

Johnson v. Parsons (Mass.) 881

9. In Rhode Island the **indorser of a promissory note, by taking security** from the maker, **does not waive demand** upon the maker and notice of nonpayment.

Whittier v. Collins (R. I.) 185

10. If, after the time for demand and notice has passed, the **indorser of a promissory note merely requests the holder not to press** the note against the maker, he **does not thereby waive demand and notice.**

Id.

IV. ACTIONS ON.

11. Although a **suit is maintainable on a lost note**, by filing a **bond** to the satisfaction of the court, **indemnifying** the defendant against any loss, yet **where it is not lost but in the possession of a third person** disputing its ownership, **plaintiff should first establish the fact that he is the owner** of it in a suit with the party in actual possession, **before bringing** his action against the maker.

Cobb v. Tirrell (Mass.) 769

12. **Discharge** is no defense against note made before the passage of the **insolvent law**, and not proved against estate.

Erskine v. Glidden (Me.) 898

13. The fact that an **acceptance** was made **after the bill was purchased by the payee** will **not admit the defense of want of consideration** between drawer and acceptor.

Arpin v. Owens (Mass.) 204

14. Where in an action on a note the only question is as to what constituted the **consideration**, and the defendant has testified that it was given upon an agreement to transfer certain stock, a written agreement to transfer such stock, in part consideration of a note, but not specifying the note in suit, should not be excluded on the ground that where a witness has testified to a fact, evidence of other facts is not admissible to fortify or render the testimony more probable.

Sawyer v. Orr (Mass.) 511

15. A **corporation issued promissory notes convertible** on certain days **into stock** at the option of the holder, and at the time certain shares were held in trust by trustees "to secure performance" of the notes. Held, a holder of the notes had no right to restrain the company from selling the shares, or to require the trustees to retain the same for the period during which he might exercise such option or, upon his election before the days named in the note, to require the trustees to retain the stock.

Pratt v. American Bell Telephone Co. (Mass.) 760

16. **Note, after due, if not surrendered, can be discharged only by deed**, or on N. E. R., V. I.

sufficient consideration; **payment of another debt then due is not consideration.**

Bragg v. Danielson (Mass.) 727

17. Defendant made a **note for the accommodation** of another, who was not made a party. Upon maturity, the payee induced defendant to pay another note on the promise that he would endeavor to collect the first note from the person for whose accommodation it was made. Held, the promise was without consideration, and the failure of the payee to perform his promise, having the effect to prevent the maker from securing indemnity, did not discharge the defendant. *Id.*

BOARDING HOUSE KEEPER.

SEE INN KEEPER.

BOARD OF HEALTH.

SEE HEALTH.

BONDS.

SEE APPEAL IV; BAIL AND RECOGNIZANCE; EJECTMENT X; EXECUTORS AND ADMINISTRATORS X; GUARDIAN AND WARD 8; INTOXICATING LIQUORS 18; REPLEVIN 2.

1. The signing, sealing and delivery of a bond are *prima facie* evidence of its **acceptance** and approval by the obligee.

Cases cited (R. I.) 805

2. The law favors a **construction** of the condition of a bond as a penalty rather than liquidated damages.

Cases cited (Me.) 297

3. Where a **bond is given, conditioned** that the obligor will **not engage** in a particular business at a time and place named, the **question as to whether the penal sum** will be regarded as liquidated damages for a breach is **determined by the intention** of the parties.

Burrill v. Daggett (Me.) 296

4. A bond in \$500, given upon the sale of a barber shop for \$800, conditioned, that the vendor would not carry on the same business in the town, held, a penalty and not liquidated damages. *Id.*

5. A bond conditioned for the conveyance of realty, running "to A or her assigns," is enforceable by the administrator of A.

Douglas v. Hennessy (R. I.) 885

6. At the suit of a town, equity will correct the omission of an option for redemption of **town bonds** in the hands of a purchaser with notice of the mistake, though the officers of the town signed them without reading and several years elapsed after discovery before sent to correct. Park, Ch. J., and Carpenter, J., dissenting.

Town of Essex v. Day (Conn.) 183

BOUNDARY.

1. **Monuments and survey will control plan** referred to in description in deed.

Bean v. Bachelder (Me.) 893

2. Clause in deed: "**Except a right** which is reserved to **draw water** at the well on the west line of said land," means near the west

line, and is deemed inserted to create easement in grantor.

Maguire v. Sturtevant (Mass.) 518

3. Where a deed relied upon in the case mentions a "contemplated new road," a plan or map of the tract including the land in suit, made by direction of the grantor prior to the deed, on which a "contemplated street" is laid down, is **admissible in evidence**, although not expressly referred to.

Barrett v. Murphy (Mass.) 228

4. In determining the position of a **starting point in a deed**, designated as the "northeast corner of land sold to A," such point being the southeast corner of land of B, the adjoining owner; in an action of ejectment between A and B, holding under a common grantor, **evidence as to what monuments** were in existence and pointed out at the time of the conveyance to B is **competent**. *Id.*

5. Although the description begins at a true corner and not at a monument, yet, **if any monument existed at a point different from the true corner** and was, contemporaneously with the conveyance, pointed out by the grantor or by his authority, **its existence may be shown**, not to vary the description in the deed but to apply the language of the grant and to locate the subject matter. *Id.*

BREACH OF PROMISE.

SEE HUSBAND AND WIFE I.

BRIDGES.

1. Where passageway of city street under bridge was so low as to render **travel unsafe**, and grade could be lowered, court cannot be required to rule, as matter of law, that city could not have removed defect by ordinary care.

Talbot v. Taunton (Mass.) 615

2. Attorney may sign town name to a **petition** asking relief from liability to support a bridge of another town, in absence of statute providing for signature by any particular officer.

Town of Tunbridge v. Town of Royallton (Vt.) 847

8. **Liability of town** for support of bridge located in another town, under Act of 1884 and R. L. 2978. *Id.*

4. Where the **intention of the Legislature** was to **impose the duty** of keeping a bridge in repair **jointly upon the county and a town**, both are liable for **damages** occasioned by a want of repairs; and the **fact that the town officers have always made the necessary repairs**, receiving one half of the expenses thereof from the county, **does not relieve the county** from its liability.

Lyman v. Hampshire County (Mass.) 227

5. Owners of toll bridge from Kittery, Me., to Portsmouth, N. H., are **taxable** in Kittery for portion of bridge in that town, under R. S. 1871, chap. 6, § 8.

Inhabitants of Kittery v. Proprietors of Portsmouth Bridge (Me.) 668

BROKERS.

SEE PRINCIPAL AND AGENT II.

N. E. R., V. I.

BURGLARY.

1. An **indictment** charging an attempt to break into a house with intent to steal, and alleging that the accused, in such attempt, did break open windows, but was intercepted "in the execution of said offense," is **not bad for uncertainty**. The "said offense" is the burglary.

Commonwealth v. Shedd (Mass.) 889

2. Where evidence tends to prove the facts alleged; jury may **infer** from circumstances, conduct and declarations of defendant, the **intent to steal**. *Id.*

8. **Inability of husband to furnish means of support** will not furnish grounds for divorce, although **caused by** his imprisonment for **burglary**.

Hammond v. Hammond (R. I.) 801

BURIAL GROUNDS.

SEE CEMETERIES.

CAMPMEETING.

A **stipulation** in a deed of a lot of land in the grounds of the Winnepesaukee Campmeeting Association, **prohibiting** the erection or use of **buildings** for stores, boarding houses, hotels or stables thereon without the consent of the Association, is **enforceable by injunction**.

Winnepesaukee Campmeeting Assn. v. Gordon (N. H.) 846

CARRIERS.

SEE NEGLIGENCE II; RAILROAD COMPANIES; STREET RAILWAY COMPANIES.

OF GOODS.

1. Change of character to that of **agent to keep goods** for buyer is not inconsistent with **right to retain goods for freight**.

Hall v. Dimond (N. H.) 848

2. **Right to stoppage in transitu** ceases when goods are delivered to buyer, or he takes actual or constructive possession. *Id.*

3. The **seizure of intoxicating liquors** intended for illegal use in Vermont, while in the hands of an express company who is transporting them on the order of the seller, a resident of another State, to be delivered to the purchaser in this State C. O. D., is a lawful exercise of police power and not void as a **regulation of commerce**.

State v. O'Neil (Vt.) 775

4. An express company carrying goods on order of seller to deliver to purchaser C. O. D. is **agent of seller**, and title does not pass until after performance of conditions precedent, delivery and payment. *Id.*

5. **Admissions of freight agent** or of general superintendent, made **after delivery** of goods, are not competent to establish liability of principal for injury to goods transported.

Boston & Maine R. R. Co. v. Ordway (Mass.) 721

CEMETERIES.

1. A **public cemetery cannot be laid**

out within twenty rods of a dwelling house, **without consent** of the owner, although the land to be so used had been procured by voluntary purchase. Gen. Laws, chap. 4, § 2. *Stevens v. City of Manchester* (N. H.) 165

2. A license from heirs to the widow, to erect a monument on their cemetery lot, will authorize the builder to remove the same upon failure of the widow to pay therefor. The monument being placed upon gravel, with no other foundation, did not become a fixture or part of the realty.

Fletcher v. Evans (Mass.) 198

CHALLENGE.

SEE JURY.

CHARGE OF COURT.

SEE INTOXICATING LIQUORS 37; TRIAL IV.

CHARITIES.

SEE DEVISE AND LEGACY VIII.

1. Bequest "for the special support of the worthy, deserving, poor, white, American, protestant, democratic widows and orphans residing in the Town of Bridgeport, Conn.," is not void for **uncertainty in class** designated.

Beardsley v. Selectmen of Bridgeport (Conn.) 639

2. A devise of the residue of testator's estate, to be disposed of for charitable purposes, is a devise in trust; and the words "**in trust**" need not be used.

White v. Ditson (Mass.) 485

CHARTERS.

SEE CORPORATIONS; MUNICIPAL CORPORATIONS.

CHattel MORTGAGES.

SEE MORTGAGE.

CHECKS.

A check given to the order of a **person under** an assumed or **fictitious name**, and indorsed by him by such name, is valid and collectible against the drawer by a *bona fide* holder for value, although fraudulently procured by the payee.

Robertson v. Coleman (Mass.) 503

CHILDREN.

SEE INFANTS.

CHURCHES.

SEE RELIGIOUS SOCIETIES.

CLOUD UPON TITLE.

SEE EQUITY III.

COLLATERAL SECURITY.

SEE PLEDGE AND COLLATERAL SECURITY.

COMMISSIONERS.

SEE COUNTIES 2-4.

N. E. R., V. I.

COMMON PLEAS.

SEE COURTS 10.

COMPOSITION WITH CREDITORS.

1. Where scheme of composition is to give each creditor notes of debtor for a certain per cent of the respective debts, a **note** for the balance of a book account, **not included** in notes provided for by composition deed, is not released or barred by the deed.

Preston v. Eitter (Mass.) 564

2. Clause in composition deed, by which creditors discharged debtor from all indebtedness, **construed** in connection with other provisions and limited to debts within intention of parties. *Id.*

COMPOUNDING.

A note and mortgage, made by a mother to protect herself from prosecution for **embezzlement**, will be canceled as without consideration and obtained by undue influence.

Foley v. Greene (R. I.) 17

CONFESSIONS.

SEE EVIDENCE VI; JUDGMENT I.

CONFLICT OF LAWS.

1. Where the jurisdiction of a court of limited jurisdiction depends on some fact which can be decided without deciding the case on its merits, the **jurisdiction may be questioned and disproved collaterally**, although the jurisdictional fact is averred of record and has been, on evidence, actually found by the court. But when the question of jurisdiction is so involved in the subject matter of the suit that it cannot be separately decided, the judgment rendered is conclusive in collateral proceedings.

Cases cited (R. I.) 819

2. U. S. Constitution, art. IV., requiring full faith and credit to be given in each State to the judicial proceedings of every other State, applies only where court whose judgment is invoked had **jurisdiction**; and a finding or recital of such jurisdiction will not prevent inquiry.

Cases cited (Me.) 797

CONNIVANCE.

SEE HUSBAND AND WIFE V.

CONSTABLE.

1. **Surety** on constable's bond, **not a party** to suit thereon, cannot review judgment; **may impeach** it for want of jurisdiction in suit against himself.

City of Fall River v. Riley (Mass.) 743

2. Although a constable has no authority to serve **process** in a **civil action** unless directed to him, yet where a constable has served a writ which was not directed to him it may be amended by inserting such direction, and thereby the service made good.

Cases cited (Me.) 473

CONSTITUTIONAL LAW.

SEE STATUTES.

1. **Preamble** may be resorted to where meaning of Act is ambiguous.
Tripp v. Goff (R. I.) 806

2. Constitutional inhibition against **unusual punishments** does not apply to cumulative punishments for distinct offenses in same prosecution.
State v. O'Neil (Vt.) 775

3. The **Act of 1884, No. 112, authorizing** the Governor to appoint **special prosecutors** of criminal offenses, is **not in conflict** with that Article of the **Constitution** which requires that "State Attorneys shall be elected."
Re Snell (Vt.) 279

4. P. S. chap. 127, chap. 276, relating to **adulteration of milk**, is not unconstitutional on the ground that it confines the testimony to the analysis of samples taken by the inspector, which samples are destroyed in making the analysis so that the testimony can not be controverted.
State v. Groves, State v. Stone, State v. Cutting, State v. Hunter (R. I.) 820

5. The seizure of **intoxicating liquors** intended for illegal use in Vermont, while in the hands of an express company who is transporting them on the order of the seller, a resident of another state, to be delivered to the purchaser in this State, C. O. D., is a lawful exercise of police power and not void as a regulation of commerce.
State v. O'Neil (Vt.) 775

6. While a statute making **reputation evidence of guilt** is unconstitutional, a statute (R. I. Pub. Stat. chap. 80, § 3,) making the reputation of premises admissible in evidence to prove sale of liquors, but leaving the jury free to find the accused guilty or not, is not unconstitutional.
State v. Wilson (R. I.) 888

7. N. H. Laws, 1881, c. 37, authorizing any magistrate to commit any **minor** charged with an offense punishable by **imprisonment**, to the reformed school, is unconstitutional and in conflict with article 15 of the Bill of Rights, guarantying the right of trial by jury.
State v. Ray (N. H.) 67

8. U. S. Constitution, art. IV, requiring full faith and credit to be given in each State to the **judicial proceedings** of every other State, applies only where court whose judgment is invoked had jurisdiction, and finding or recital of jurisdiction will not prevent inquiry.
Cases cited (Me.) 797

9. It is against public policy to limit the free access of the **public** to the **records** and opinions of the court.
Nash v. Lathrop (Mass.) 918

10. It seems opinions are not part of the record.
Re Gould (Conn.) 925

CONTEMPT.

Judge of Probate, under R. L. § 2085, can imprison for contempt **executor** who willfully refuses to perform order of probate court to pay money for maintenance of testator's
N. E. R., v. I.

widow and children during settlement of estate.
Leach v. Peabody (Vt.) 617

CONTINUANCE AND ADJOURNMENT.

1. **Matter in abatement** must be pleaded before continuance. (Me.) 676

2. Adjournment or continuance of case referred is in **discretion** of committee.
Shaler & Hall Quarry Co. v. Campbell (Conn.) 867

3. **Case referred to auditor** or committee runs from term to term by continuance; case continues until appointment of auditor or committee is revoked; reappointment is made by rule of court without motion; omission of clerk to enter is error which may be corrected at any time. *Id.*

CONTRACTS.

I. VALIDITY.

II. CONSTRUCTION.

III. ENFORCEMENT.

SEE BILLS AND NOTES; CHECKS; COMPOUNDING; DEED; GAMING; INDEMNITY; INFANTS; INTEREST; MASTER AND SERVANT I; MUNICIPAL CORPORATIONS III; PARTNERSHIP; PRINCIPAL AND AGENT; RELEASE; SALE; SPECIFIC PERFORMANCE; STOCK TRANSACTIONS; SUBROGATION; SUBSCRIPTIONS.

I. VALIDITY.

1. The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two **minds must meet** on this point, and if anything remains to be done before either assents, it may be an inchoate contract but it is not a perfect sale.
Cases cited (Vt.) 781

2. A **bid** in answer to advertisement for proposals for a building does not constitute contract until **accepted** and conditions complied with.
Howard v. Maine Industrial School (Me.) 894

3. A **release** by one of several joint vendors of the joint claim for payment for personal property sold binds all the vendors, and each of the other vendors is debarred from thereafter maintaining suit for his share.
Osborn v. Martha's Vineyard R. R. Co. (Mass.) 452

4. A release to an infant cosigner of a promissory note, after he has repudiated the contract, will not release the other signer.
Young v. Currier (N. H.) 54

5. Where the whole **capital** is not **subscribed** a signer for certain part of entire capital proposed who took no part in organization, is not liable on his subscription.
Rockland, Mt. Desert & Sullivan S. B. Co. v. Sewell (Me.) 791

6. Where **several mutually agree** to pay money to be expended for a lawful object of common interest to the parties, the **promise of each** is considered as made in **consideration** of the promise of the others; and

after expenditures have been made in advance of the enterprise, relying upon the subscriptions, it is no defense to an action against a delinquent subscriber for the collection of his subscription that the expenditures were made under the direction of a corporation organized by the associates in conformity with the original plan, of which he did not choose to become a member.

Osborn v. Crosby (N. H.) 791

7. Party relying on contract **without consideration** does so at his peril.

Bragg v. Danielson (Mass.) 727

8. The rule that a simple agreement by a creditor to **accept a smaller sum** for his debt is not binding, is not to be extended beyond its precise import; and if a consideration for such agreement is found to exist, courts will not inquire into its adequacy.

Cases cited (Mass.) 219

9. A **settlement**, even when intended to cover whole subject matter, can be corrected when made under mutual mistake; as, where a cow actually with calf was supposed not to be with calf and was rated at a value below her worth.

Newell v. Smith (Conn.) 648

II. CONSTRUCTION.

10. Court cannot write into contract terms understood by neither party at time of making.

Pratt v. American Bell Telephone Co. (Mass.) 760

11. There is no material difference of principle in the rules of **interpretation**, between **wills and contracts**, except what naturally arises from different circumstances of the parties.

Cases cited (N. H.) 821

12. To ascertain the **intention** of the parties of a contract regard must be had to the nature of the instrument, the situation of the parties, and the purpose they had in view. *Id.*

13. Contract for **future delivery of stock**; party making can deliver any shares of same stock; is not limited to identical shares in his possession when contract made.

Pratt v. American Bell Telephone Co. (Mass.) 760

14. A **corporation** issued promissory **notes** convertible on certain days into stock at the option of the holder; and at the time certain shares were held in trust by trustees "to secure performance" of the notes. Held, a holder of the notes had no right to restrain the company from selling the shares, or to require the trustees to **retain the same** for the period during which he might exercise such option or, upon his election before the days named in the note, to require the trustees to **retain the stock**. *Id.*

15. Agreement **assigning**, for one year, **letters patent** owned by assignor, for purpose of being sold by assignee with letters patent owned by him, for mutual benefit, construed as pooling the properties and entitling each party to share in all sales of any or all the patents; assignee having sold only patents originally owned by himself, assignor is entitled to share in the money received therefor. Assign-

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or not having warranted validity of his patent, fact that it proved to have been anticipated by a prior patent did not work a failure of consideration. The fact that contract provided for return to assignor of letters patent in case assignee failed to dispose thereof, does not render the transaction one of bailment only.

Carpenter and Loomis, JJ., dissenting. *Fowler v. Mallory* (Conn.) 649

16. The particle "A" is not necessarily a singular term, but is frequently used in the sense of "any," and is then applied to more than one individual object.

National Union Bank v. Copeland (Mass.) 596

17. Agreement by a partner to sell to his co-partner his interest in store, stock of goods, etc., at cost for most of the property, the balance at an appraisal, if value could not be agreed upon, the terms cash, and a forfeit of \$500 to be paid by the one who breaks the contract: the forfeit is liquidated damages.

Maxwell v. Allen (Me.) 557

18. A bond in \$500 given upon the sale of a barber shop for \$300, conditioned that the vendor would not carry on the same business in the town, held, a **penalty and not liquidated damages**.

Burrill v. Daggett (Me.) 296

III. ENFORCEMENT.

19. Only **parties to a contract**, or their successors in law or fact, or, at the most, those who are interested in the subject matter, can maintain a suit to enforce it.

Cases cited (R. I.) 872

20. An **executory contract** will not be enforced as a trust in equity at the suit of a mere **volunteer**. *Id.*

21. Mode in which one party shall enable himself to carry out contract is no concern of other party, before breach.

Pratt v. American Bell Telephone Co. (Mass.) 760

22. Simple contract, after breach, can be **discharged** only by deed or on sufficient consideration.

Bragg v. Danielson (Mass.) 727

23. Recovery may be had for **beneficial services** rendered in partial performance of special contract, not exceeding contract price, and deducting damages caused by breach.

Blood v. Wilson (Mass.) 912

CONTRIBUTORY NEGLIGENCE.

SEE NEGLIGENCE IV.

CONVERSION.

SEE TROVER AND CONVERSION.

CORPORATIONS.

- I. ORGANIZATION; BY-LAWS.
- II. STOCK AND STOCKHOLDERS.
- III. OFFICERS; TRUSTEES.
- IV. DISSOLUTION.
- V. ACTIONS.

SEE BANKS AND BANKING; BENEVOLENT SOCIETIES; MUNICIPAL CORPORATIONS; RAILROAD COMPANIES; STOCK TRANSACTIONS; STREET RAILWAYS; TAXES; WATER COMPANIES.

I. ORGANIZATION; BY-LAWS.

1. A **grant or reservation to the inhabitants of a town**, an unincorporated body, is merely to the inhabitants living at the time.

Cases cited (R. I.) 878

2. **By-laws of a mutual beneficial society**, conflicting with the statute under which it is organized, are *ultra vires* and void.

Supreme Council American Legion of Honor v. Perry (Mass.) 715

Hicks v. Perry (Mass.) 715

II. STOCK AND STOCKHOLDERS.

3. **Certificate of organization** of corporation may be *prima facie* evidence stockholder had not paid for stock.

Grindale v. Stone (Me.) 788

4. **Identity of name** is *prima facie* proof defendant is person who signed certificate. *Id.*

5. **Liability of subscriber to creditor** of company for unpaid subscription, under R. S. chap. 46. *Id.*

6. Where the **whole capital** is **not subscribed** a signer for certain part of entire capital proposed, who took no part in organization, is not liable on his subscription.

Rockland, Mt. Desert & Sullivan S. B. Co. v. Sewell (Me.) 791

7. **Creditor's bill** to reach unpaid stock subscription cannot be maintained without proof that plaintiff recovered valid judgment against corporation, and cannot resort to original claim against it if judgment appears to be void.

Remington v. Samana Bay Co. (Mass.) 707

8. **Equity** has no general jurisdiction of bill by single creditor, not on behalf of others, to reach unpaid stock subscription, not making other stockholders parties and making corporation a nominal party only, when corporation has ceased to exist. *Id.*

9. A **sale of stock** induced by the statement of the president of the company, that others paid par, is **misrepresentation** for which the purchaser may recover.

Coolidge v. Goddard (Me.) 801

10. A **subscriber to invalid special stock certificates** may recover the amount paid therefor without interest and less dividends received, against the assignee in insolvency of the corporation, without offering before the filing of the petition in insolvency to rescind or return the certificates or the dividends.

Reed v. Boston Machine Co. (Mass.) 772

11. The legal title to shares of corporate stock, which are "assignable only on the books" of the corporation, will not pass by an **assignment** of the shares neither made nor recorded on the books of the corporation.

Lippitt v. Wood Paper Co. (R. I.) 118

III. OFFICERS; TRUSTEES.

12. **Liability of officers seeking to make secret profits.**

Cases cited (Me.) 888

13. The purchase of land by the director of a railroad company, over which he expects the way may be located, is not necessarily to be considered to have been made in trust for the company, at its option, although a director of such a company is, in equity, its trustee.

Sandy River R. R. Co. v. Stubbs (Me.) 887

14. It is the **duty of a director to know financial standing** of corporation; he cannot secure personal advantage over other creditors.

Clay v. Twole (Me.) 669

15. A **bank is bound**, in favor of one who acted in reliance thereon, by the authority appearing on its records, as a vote of its trustees to one of its officers to assign mortgages held by the bank, although such record of authority was, in fact, a false entry.

Holden v. Phelps (Mass.) 768

16. Where the **treasurer** of a manufacturing company, with authority "to hire and pay for necessary stores," took a **lease** under seal to himself, and the company went into possession, and a portion of the rent was paid by the paper of the company, held, that the circumstances were not inconsistent with holding that the company occupied under the lessee named, and that in an action in equity it was not liable under the covenants in the lease.

Haley v. Boston Belting Co. (Mass.) 81

17. It is not a breach of duty for a **treasurer** of a literary society to **expose its funds to attachment** by creditors of society.

Literati v. Heald (Mass.) 580

IV. DISSOLUTION.

18. Corporation dissolved **before judgment**; judgment cannot be foundation of **creditor's bill**.

Remington v. Samana Bay Co. (Mass.) 707

19. Bill by a small **minority of members** of the Patrons of Husbandry, an unincorporated joint stock company, for a receiver and sale and distribution of property, dismissed, where evidence showed only property to consist of \$100 and a building, well suited for purposes of the society, that a majority opposed the plaintiff's bill, and that the stock of plaintiffs might be sold for as much or more than would result to them after sale and distribution.

Hinckley v. Blothen (Me.) 794

V. ACTIONS.

20. A **writ** cannot be amended so as to substitute as defendant, a partnership in place of a defendant named as a corporation, which did not in fact exist, as service upon the supposed corporation brought nobody into court.

Sawyer v. New York Clothing Co. (Vt.) 482

21. A plea of the **general issue admits plaintiff's corporate power to sue.**

Cases cited (Me.) 792

23. On **demurrer** to declaration against corporation **charter** is **not before court**.

Morrissey v. Providence & Worcester R. R. Co. (R. I.)

806

COSTS.

1. Under N. H. Gen. Laws, chap. 233, § 5, the **plaintiff** cannot be **allowed** more costs than damages, when the title to real estate is not in question, and the damages recovered do not exceed \$13.33.

Jones v. Lane (N. H.)

163

2. Where execution against **executor** for costs is invalid under P. S. chap. 173, § 53, the judgment may be cured by *remittitur* as to the costs, and new execution can be issued against estate for damages.

Look v. Luce (Mass.)

562

3. An **action against** the **indorser** of a **writ**, for costs recovered by the defendant in the suit, may be maintained, under R. S. chap. 81, § 7, when the return of the proper officer upon the execution for such costs shows that the officer demanded payment of the indorser and he neglected to pay or to show personal property sufficient to satisfy the execution.

Chesley v. Perry (Me.)

790

COTENANTS.

SEE JOINT TENANTS AND TENANTS IN COMMON.

COUNSEL.

SEE ATTORNEY AND COUNSEL.

COUNTERCLAIM.

SEE SET-OFF AND COUNTERCLAIM.

COUNTIES.

1. Where the intention of the Legislature was to impose the **duty of keeping a bridge in repair** jointly upon the county and a town, both are liable for damages occasioned by a want of repairs; and the fact that the town officers have always made the necessary repairs, receiving one half of the expense thereof from the county, does not relieve the county from its liability.

Lyman v. Hampshire Co. (Mass.)

227

2. Under Act, 1875, chap. 200, providing for the construction for **public improvements** by the county commissioners of Hampshire County, the commissioners must first apportion the cost to towns, persons and corporations benefited, and **appeal** lies therefrom to the supreme court, and the commissioners have no authority to reserve questions for review.

Re County Comrs. of Hampshire Co.

(Mass.) 201

3. The annual **salary** provided for **county commissioners** is in full payment for services and traveling expenses.

County of Bristol v. Gray (Mass.)

97

4. Salaries of, include traveling expenses; duty as to prisoners; as to house of correction, to provide supplies, etc., to govern employment of prisoners.

Id.

N. E. R., V. I.

COURTS.

I. MISCELLANEOUS MATTERS.

II. JURISDICTION.

SEE CONFLICT OF LAWS; JUSTICES OF THE PEACE.

I. MISCELLANEOUS MATTERS.

1. It is against public policy to limit the free access of the public to the records and opinions of the court.

Nash v. Lathrop (Mass.)

918

2. But Conn. Act of 1893 does confer this right on publishers of **Connecticut Reports**.

Re Gould (Conn.)

925

3. A member of a military company is **disqualified** from hearing as **justice** a case in which the company is **party in interest**.

Kentish Artillery v. Gardiner (R. I.)

890

II. JURISDICTION.

4. When the jurisdiction of a court of limited jurisdiction depends on some fact which can be decided without deciding the case on its merits, the jurisdiction may be **questioned** and disproved **collaterally**, although the jurisdictional fact is averred of record and has been, on evidence, actually found by the court. But when the question of jurisdiction is so involved in the subject matter of the suit that it cannot be separately decided, the **judgment** rendered is **conclusive in collateral proceedings**.

Cases cited (R. I.)

819

5. **Probate courts** in Rhode Island are courts of limited jurisdiction.

Peoples' Savings Bank of Providence v. Wilcox (R. I.)

818

6. A court of probate is not vested with equity powers to administer an **estoppel** in a controversy between the widow and strangers having no interest, except purchasers of land belonging to the estate.

Hewitt's Appeal (Conn.)

461

7. Judge of probate, under R. L. § 2085, can imprison for contempt executor who willfully refuses to perform order of probate court to pay money for maintenance of testator's widow and children during settlement of estate.

Leach v. Peabody (Vt.)

617

8. On appeal from the probate court, the superior court takes the case as it stood in the probate court and can do no more than the probate court could have done. This rule is not changed by the Practice Act.

Hewitt's Appeal (Conn.)

461

9. **Superior court** cannot, in action for fund in co-operative life insurance corporation, dispose of real estate of decedent.

Supreme Council American Legion of Honor v. Perry (Mass.)

715

Hicks v. Perry (Mass.)

715

10. The court of **common pleas** has original jurisdiction of an action on a judgment of a court of magistrates for less than \$100, begun by attachment of real estate, under R. I. Pub. Stat. cap. 198, § 3.

Clark v. Rice (R. I.)

132

11. Authority to restrain **abuse of corporate powers** by cities and towns, under P. S. chap. 27, § 129, is vested in the **supreme court** exclusively; it is not included in equity powers transferred to superior court by P. S. chap. 151, § 2.

Baldwin v. Wilbraham (Mass.) 588

12. During term the court may **vacate an order of dismissal**, but after entry of judgment at end of term, the remedy is by writ of review or petition filed within one year. Pub. Stat. chap. 187, §§ 16-25.

Pierce v. Lamper (Mass.) 479

13. When cause dismissed in supreme court under Rule 54, and a general order made on last day of term to enter judgment in cases ripe for judgment, the judgment is deemed to have been entered on the last day of the term. *Id.*

COVENANT.

1. The **right to sue** upon a covenant depends upon **privity** of estate with the original covenantee and not with the original covenantor.

Cases cited (Mass.) 328

2. **Right of assignee** of covenantee to sue on a covenant to which he is **not a party**.

Cases cited (Mass.) 328

3. A stipulation in a deed of a lot of land in the grounds of **Winnepesaukee Campmeeting Association prohibiting the erection or use of buildings** for stores, boarding houses, hotels or stables thereon, without the consent of the Association, is enforceable by injunction.

Winnepesaukee Campmeeting Asso. v. Gordon (N. H.) 846

4. Covenant creating pure **negative restriction**, not enforceable; covenants must "touch and concern" or "support" and be for "benefit of the estate;" unusual incidents cannot attach to land.

Norcross v. James (Mass.) 327

5. A covenant in a deed conveying a stone quarry, that the covenantor will never open or work or allow others to open or work any quarries on his adjoining lands, will not be enforced by injunction against subsequent grantees of the adjoining premises at the suit of subsequent grantees of the original covenantee. *Id.*

6. What covenants **run with the land**.

Cases cited (Mass.) 328

7. In **action against heir** for breach of warranty in deed from deceased grantor, objection that declaration does not allege that estate had been settled and that defendant had received anything therefrom should be by demurrer; it comes too late at trial.

Eddy v. Chase (Mass.) 573

8. Covenant and **tort** may be joined in a single cause.

Crawford v. Parsons (N. H.) 328

CRIMINAL LAW.

I. INTENT; PRINCIPAL AND ACCESSORY.

II. INDICTMENTS.

III. EVIDENCE.

IV. VERDICT; PUNISHMENT.

V. NEW TRIAL; APPEAL; EXCEPTIONS.

N. E. R., V. I.

SEE ADULTERATION; ADULTERY; ASSAULT AND BATTERY; BAIL, ETC.; BASTARDY; BURGLARY; COMPOUNDING; CONSTITUTIONAL LAW 2, 3, 6; EMBEZZLEMENT; FORGERY; GAMING; HOMICIDE; HOUSE OF ILL FAME; HOUSE OF REFUGE; INCEST; INTOXICATING LIQUORS; JAIL; JUNK DEALER; LARCENY, ETC.; PERJURY; POISONING; POLYGAMY; VAGRANCY.

I. INTENT; PRINCIPAL AND ACCESSORY.

1. Whether defendant was so **intoxicated** as to be unable to form **intent** to commit assault is question for jury.

Commonwealth v. Hogenlock (Mass.) 105

2. It is not error to refuse, in action for illegal sale of intoxicating liquors, to charge that testimony of "spotters" or **informers**, employed to procure sales and bring prosecutions, is to be received with great caution and distrust.

State v. Hoxsie (R. I.) 29

3. Although conviction may be had on uncorroborated testimony of **accomplice**, yet evidence to be competent as corroborative must tend to convict defendant of crime charged.

Commonwealth v. Hayes (Mass.) 543

II. INDICTMENTS.

4. Indictment for **statutory offense** is sufficient if it follows language of the statute.

Commonwealth v. Hobbs (Mass.) 541

5. Whatever circumstances are necessary to constitute the **crime** imputed must be **set out**, and all beyond is **surplusage**.

Cases cited (Vt.) 355

6. Indictments for cruelty to animals may allege a **period of time** instead of a single date, the offenses involving continuous action.

State v. Bosworth (Conn.) 928

7. Where **two counts charge same crime**, one ending with and the other without the words "contrary to the form, force, etc., and against the peace," the defective count may be **amended** by adding the words prescribed by the Constitution.

State v. Amadon (Vt.) 855

III. EVIDENCE.

8. No inference can be drawn from **failure of defendant to testify**.

Commonwealth v. Hanley (Mass.) 743

9. Evidence fairly tending to prove a point sought to be established is **material**.

Commonwealth v. Saville (Mass.) 590

10. Evidence in reference to **similar transactions** of the same general character is admissible to show **criminal intent**. *Id.*

11. Admissibility of **declarations, threats** and confessions of **persons other than the accused**.

Cases cited (Conn.) 885

12. **Declarations** of an intention to commit a crime are no less susceptible of being **false** than declarations of the opposite cast, namely: declarations of an intention to abstain from the commission of that or a similar crime. *Id.*

13. **Weight of evidence** of good character is for the jury to determine; the old rule that only in cases of doubt such evidence is considered is not now the law.

Commonwealth v. Leonard (Mass.) 870

14. While a statute making reputation evidence of guilt is unconstitutional, a statute (R. I. Pub. Stat. chap. 80, § 8), making the reputation of premises admissible in evidence to prove sale of liquors, but leaving the jury free to find the accused guilty or not, is not unconstitutional.

State v. Wilson (R. I.) 888

15. Evidence that rooms in which gaming implements were found were resorted to for gaming prior to seizure tends to prove **implements were kept for gaming** at time of seizure, and is competent.

Commonwealth v. Certain Gaming Implements (Mass.) 578

IV. VERDICT; PUNISHMENT.

16. **Verdict of guilty is a conviction**, although no sentence or judgment is pronounced; so held as to suit on licensed liquor dealer's bond, under Act of 1882, § 2.

Quinlard v. Knodler (Conn.) 868

17. If charge is supported by evidence, conviction may be had, although **another offense would be equally shown** by the evidence; rule applied to offense of playing an unlawful game and of being present merely.

Commonwealth v. Hogarty (Mass.) 611

18. Constitutional inhibition against **unusual punishments** does not apply to cumulative punishments for distinct offenses in same prosecution.

State v. O'Neil (Vt.) 775

V. NEW TRIAL; APPEAL; EXCEPTIONS.

19. A **motion for a new trial** in a criminal case, upon the grounds that the verdict was against the weight of evidence and of newly discovered evidence, is addressed to the **discretion** of the court below; and its action overruling the motion cannot be reviewed by this court.

Commonwealth v. Ruissseau (Mass.) 785

20. Where the court below overruled one motion for a new trial, it is **not required to hear another motion based upon the same grounds** and supported by the same evidence. *Id.*

21. **Decision of trial justice on motion** in superior court, to **quash** complaint because no proper copy of conviction had been transmitted, is **not reviewable**.

Commonwealth v. Everson (Mass.) 575

22. Claimant in *in rem* proceeding against gaming implements cannot, after pleading in court below, for **first time object in supreme court** that notice was not properly served.

Commonwealth v. Certain Gaming Implements (Mass.) 578

23. **Objection to evidence** not taken at trial cannot be considered in supreme court.

Commonwealth v. Savtelle (Mass.) 590

24. A **defect** that does not affect the merits

N. E. R., V. I.

of the case, or the evidence necessary to be given to maintain the indictment, can be regarded as only **formal**.

Cases cited (Vt.)

853

25. **Exceptions** cannot be sustained to a refusal to grant a motion in **arrest of judgment** on the ground that there was want of proof of a material allegation in the indictment.

State v. Gerriah (Me.)

840

CRUELTY TO ANIMALS.

SEE ANIMALS 3.

DAMAGES.

SEE EJECTMENT II; EMINENT DOMAIN; INTEREST; JUDGMENT; LIBEL AND SLANDER; MILLS AND DAMS; NEGLIGENCE III; RAILROAD COMPANIES IV; WAYS III.

1. Recovery may be had for **beneficial services** rendered in **partial performance** of special contract, not exceeding contract price and deducting damages caused by breach.

Blood v. Wilson (Mass.)

913

2. Loss of **use of horse injured by defective highway** is a proper element of recoverable damages.

Brown v. Town of Southbury (Conn.) 423

3. When **submission to arbitrators** is for appraisal of damages only, **under fire insurance policy**, a valid award, although evidence of damage in action on policy, will not support action on award.

Soars v. Home Ins. Co. (Mass.)

534

4. In an action by a lessee of a mill against his lessor, for a diversion of water depriving the plaintiff of the demised water power, damages for **loss of profits** being claimed in the declaration, and loss of profits being a damage the parties could have reasonably anticipated, proof of the profits of the business done at the mill is admissible on the question of damages.

Crawford v. Parsons (N. H.)

823

5. Motion to set aside verdict for **excessive damages**, in action for personal injuries, raises no question of law, and is not reviewable.

Paine v. Grand Trunk Railway Co.

(N. H.) 841

6. The **admissions of a demurrer** overruled to a complaint for negligence are **conclusive as to the right to nominal damages** and *prima facie* as to substantial damages; and the **burden of proof** is on defendant to **show want of negligence** on trial for **substantial damages**.

Crogan v. Schiele (Conn.)

805

7. **Punitive damages** are allowed in an action for **mere profits** only when the defendant has shown malice or bad faith.

Herreshoff v. Tripp (R. I.)

46

8. A bond in \$500, given upon the sale of a barber shop for \$300, conditioned, that the vendor would not carry on the business in the town, held, a **penalty** and not liquidated damages.

Burrill v. Daggett (Me.)

207

9. **Forfeit** provided in a contract between partners, to buy and sell interest in a stock of goods, etc., is **liquidated damages**.

Maxwell v. Allen (Me.) 357

10. **Interest** is allowed in **admiralty** upon damages for collision; and other courts have adopted the admiralty doctrine.

Cases cited (Mass.) 527

11. In an action for negligent destruction of property by flooding or breakage of a water dam, where party injured has been, by awaiting result of a test case, kept out of the sum which would have reimbursed him at the time so long that it is no longer an indemnity, the jury may consider such **delay** and give **interest on the original damages**.

Frazier v. Bigelow Carpet Co. (Mass.) 535

DEATH.

SEE EJECTMENT IX.

1. The fact that a person was alive at a certain time affords **presumption** that he was alive a month later.

Commonwealth v. McGrath (Mass.) 515

2. **Letters testamentary** are **prima facie** evidence of the death of testator.

Cases cited (Mass.) 737

3. **No action** for damages for causing death of human being lies **at common law**.

Sherman v. Johnson (Vt.) 631

DEBT.

SEE INTEREST.

An action for debt on judgment will not lie upon a decree in the alternative rendered on a bill to foreclose a mortgage.

Burges v. Souther (R. I.) 819

DEBTOR AND CREDITOR.

SEE ACTION OR SUIT; ASSIGNMENT FOR BENEFIT OF CREDITORS; ATTACHMENT; BANKRUPTCY; BILLS AND NOTES; BONDS; CORPORATION AND CREDITORS; CONTRACTS; FRAUD AND FRAUDULENT CONVEYANCES III; GARNISHMENT; INSOLVENCY; LIEN; MORTGAGE; PAYMENT; POOR DEBTOR; SETTLEMENT.

DECEDENTS' ESTATES.

SEE ASSIGNMENT 5; DESCENT AND DISTRIBUTION; DEVISE AND LEGACY; EXECUTORS AND ADMINISTRATORS; GIFTS; WILL; WITNESS I.

DECEIT.

An unsatisfied judgment in **assumpsit** on a loan is **not a bar** to a subsequent action in case for deceit.

Whittier v. Collins (R. I.) 128

DEED.

I. FORM; VALIDITY.

II. RECORD.

III. CONSTRUCTION

SEE BOUNDARY; EASEMENT; GRANT; LANDLORD AND TENANT II; MORTGAGE.

N. E. R., V. I.

I. FORM; VALIDITY.

1. A **grant** of the **uses** of and dominion over lands **conveys** the land itself.

Cases cited (Me.) 294

2. A **deed to one, his heirs** and assigns forever, of the right of building and maintaining a dam, with a right to so much of said premises as may be necessary, held, to convey **a fee**.

Monmouth v. Plimpton (Me.) 294

Woodbury v. Plimpton (Me.) 294

3. "**Heirs**" is necessary to create an estate of inheritance in the grantee, if he takes to his own use and not in trust.

Cases cited (Mass.) 218

4. The **consideration** named in a deed is **prima facie** evidence that it was for the property therein described alone.

Dawes v. Berry (Me.) 899

5. A **mortgage** signed and recorded but **omitting seals** may be **reformed** by the addition of seals, against a subsequent attaching creditor having notice.

Bullock v. Whipp (R. I.) 809

6. **Instructions** by grantor to attorney drawing deed are **not ordinarily privileged** communications.

Todd v. Munn (Conn.) 821

II. RECORD.

7. One taking conveyance and **not recording** it is **bound by judgment** in ejectment against grantor, execution having been previously levied.

Smith v. Hodsdon (Me.) 787

III. CONSTRUCTION.

8. **Description** of monuments and survey will control plan referred to in description in deed.

Bean v. Batchelder (Me.) 892

9. Where one part of description requires a **lane** at a certain distance to be taken as **boundary**, and another part calls for a lane at another distance as same boundary, and two lanes are shown to have been in existence, there is a latent ambiguity.

Thornell v. City of Brockton (Mass.) 582

10. **Parol testimony** is admissible to explain latent ambiguity in description, and proper meaning is a question for the jury. *Id.*

11. A clause in a deed **reserving the right to take** from a cistern in the house on the granted premises "all the **water** which the grantee, his heirs or assigns shall not use" means only so much of the water as may not be used by the occupants in a reasonable enjoyment of the premises conveyed.

Wilcox v. Kendall (N. H.) 847

12. Where a clause in a deed is strictly an exception, the **part excepted remains** in the **grantor** as of his former title; but where the effect of the clause is to create some right or **easement** not before existing, it is a reservation operating by way of an **implied grant**; and on its acceptance by the grantee in the deed, the reservation containing no words of in-

heritance, the vendor has only a life estate in the easement.

Bean v. French (Mass.) 218

18. A **reservation** in a deed of a strip of land for an **open passageway**, to be used in common forever, does not have the effect of excepting the strip; it is merely a reservation of a right of way.

King v. Murphy (Mass.) 484

14. Deed by owner in fee reserved **house occupied by doweress**; held, entire estate in house and land under it was **excepted** and that **reversion** thereof did **not pass**.

Kimball v. Withington (Mass.) 757

15. A **grant or reservation to the inhabitants of a town**, an unincorporated body, is merely to the inhabitants living at the time.

Cases cited (R. I.) 873

16. In 1746, pursuant to a vote of the freemen of a town, the town clerk conveyed to a purchaser a beach property, taking from him a bond to the town treasurer providing that the inhabitants of the town should have the right to take from the beach, sand, seaweed, shells and drift stuff. Held, that the successor in title to the purchaser could maintain trespass *q. c. f.* against an inhabitant of the town for asporting sand, and the reservation or stipulation was no protection to the defendant.

Newport Hospital v. Carter (R. I.) 871

17. Reservation in deed from the Commonwealth reserving **passage way in Back Bay District**, construed, and held that information by the Commonwealth will lie for the removal of obstructions, although all abutting owners have released their rights.

Harbor and Land Comrs. v. Williams (Mass.) 869

18. **Exceptions** from the grant must be **construed** in case of doubt most strongly **against the grantor**.

Cases cited (Me.) 842

19. A deed **bounded the premises** by the center of a road; and following the **description** appeared these words: "**Excepting the roads** laid out over said lands." **Held, the deed conveyed the fee** within the limits of the way, subject to the easement of the public in the way.

Wellman v. Dickey (Me.) 842

20. Clause, "except a **right** which is **reserved to draw water** at the well on the west line of said land," means near the west line, or on the west part of the land, and is deemed inserted to create easement in grantor.

Maguire v. Sturtevant (Mass.) 518

21. Where a deed recites the right of the grantee to erect and maintain a wall on an adjoining lot, such **recitals** cannot affect rights in a wall constructed under circumstances different from those therein provided for.

McLaughlin v. Cecconi (Mass.) 766

22. In a grant of a right to draw water from a pond after the grantor's grist mill is supplied from the same pond, his right to continue to **use the water power** in the mill, for a purpose not necessary for the operation of the mill, is **not implied**.

Crawford v. Parsons (N. H.) 823

23. A deed made "in consideration of our

support during our natural lives and \$60 paid to us annually to our satisfaction," held, words did not import that **annuity** had been paid, and that, as one of the grantors had lived six years, their representative was entitled to recover \$60 from grantee.

Gage v. Hoyt (Vt.) 637

24. Where conveyance of land to **railroad** provided that it was to furnish grantor two **crossings** and one was built, any **obstruction** thereto or change of grade of road entitles grantor to nominal damages; grantor cannot demand expense of changing grade of approaches to crossing.

Williams v. Clark (Mass.) 603

25. **Restriction** in deed against building on part intended for future street will not amount to dedication; measure of compensation when taken for street.

Central Land Co. v. Providence (R. I.) 873

26. The erection of an open porch, covered with a roof and supported by posts, is within a restriction providing that "no building shall be erected" within a certain distance of the street line.

Bagnall v. Davies (Mass.) 83

27. A **stipulation** in a deed of a lot of land in the grounds of Winnepesaukee Campmeeting Association, **prohibiting the erection or use of buildings** for stores, boarding houses, hotels or stables thereon without the consent of the Association, is enforceable by **injunction**.

Winnepesaukee Campmeeting Assn. v. Gordon (N. H.) 846

28. It is the **province of the court** to construe deed offered in evidence.

Eddy v. Chase (Mass.) 573

DEFAULT.

SEE JUDGMENT.

DEFINITIONS.

1. A. The particle "**a**," is not necessarily a singular term, but is frequently used in the sense of "any," and is then applied to more than one individual object.

National Union Bank v. Copeland (Mass.) 596

2. "**Assignee**" in a bond to convey may be the administrator of the obligee.

Douglas v. Hennessy (R. I.) 895

3. "**Character**" synonymous with "reputation," in Pub. Stat. R. I. chap. 80, § 3, making character of premises evidence of sale of intoxicating liquors.

State v. Wilson (R. I.) 898

4. **Child, children, and issue**, in testamentary gifts.

Barney v. Arnold (R. I.) 133

5. **Conveyance**. A lease for a term of years is not in the ordinary sense a conveyance of land, and the word conveyance in several statutes has been held not to apply to such lease.

Cases cited (Me.) 844

6. **Dependent**, in policies of life insurance and by-laws of benefit societies, making fund payable to dependents of deceased members,

means those dependent for support, and therefore does not include one with whom a member had made a contract of marriage but who was not dependent upon him for support.

Supreme Council American Legion of Honor v. Perry (Mass.) 715

Hicks v. Perry (Mass.) 715

7. **Fraud** consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end desired.

Cases cited (Conn.) 824

8. **Issue, child, children.**

Barney v. Arnold (R. I.) 188

9. **Lease** of land for a term of years is not in the ordinary sense a conveyance of land, and the word conveyance in several statutes has been held not to apply to such lease.

Cases cited (Me.) 844

10. **"Person"** may be extended to include bodies politic and corporate.

Ricker v. American Loan & Trust Co. (Mass.) 788

American Loan & Trust Co. v. Street Comrs. of Boston (Mass.) 788

11. **Personal actions** are those which are brought for the recovery of a debt, or for damages for a breach of contract for a specific personal chattel, or for satisfaction in damages because of some injury to the person or personal or real property.

Cases cited (Mass.) 440

12. **"Reputation"** synonymous with character, in R. I. Pub. Stat. chap. 80, § 3, making character of premises evidence of sale of intoxicating liquors.

State v. Wilson (R. I.) 888

DEMURRER.

SEE NEGLIGENCE 19, 28; PLEADING V.

DEPOSITIONS.

1. Where **party** does not attend, caption may be **adjourned** to place other than that named in notice, on account of sickness of witness.

Lowd v. Bowers (N. H.) 848

2. Under § 10, chap. 229, Gen. Laws, a **party who gives notice of the taking of depositions**, and does not take a deposition in pursuance thereof, is **liable to the adverse party** in the sum of twenty-five cents a mile for actual travel of himself or his attorney to attend the same, although he is not guilty of actual fault or neglect, the failure being caused by the unexpected omission of the witness to attend.

Robertson v. Northern R. R. (N. H.) 850

DEPOSITORS.

SEE BANKS AND BANKING.

DESERTION.

SEE HUSBAND AND WIFE 19.

DISTRIBUTION AND DESCENT.

1. The **right of a widow** in premises set out to her as a homestead, under the Act of N. E. R., V. I.

1868, is an estate for life and **may be alienated.**

Lake v. Page (N. H.) 116

2. Under the **Statute of Distributions**, there being none nearer of kin living, the **children of deceased brother** and sisters **take equal shares per capita.**

Nichols v. Shepard (N. H.) 162

3. **Claimants take per stirpes** only when they stand in **unequal degrees** or claim by representation; but when all stand in **equal degree**, they take **per capita.** *Id.*

DEVISE AND LEGACY.

I. GENERAL RULES OF CONSTRUCTION.

II. DESCRIPTION OF DEVISEE; OF LEGATEE.

III. ABSOLUTE OR LIFE ESTATES.

IV. VESTED OR CONTINGENT ESTATES.

V. CONDITIONS; ACCUMULATIONS.

VI. POWER OF SALE; CONVERSION.

VII. RIGHTS OF WIDOW.

VIII. TRUSTS; CHARITIES.

IX. LEGACIES; WHEN VEST; PAYMENT; CHARGE ON LAND.

X. LAPSED LEGACIES.

XI. ACTIONS; LEGATEES.

XII. PARTICULAR DEVISES CONSTRUED.

SEE TRUSTS; WILL.

I. GENERAL RULES OF CONSTRUCTION.

1. The **interpretation of a will** is the **ascertainment of the testator's intention.**

Kennard v. Kennard (N. H.) 168

2. When an intention is revealed in the entire structure of a will, **individual clauses** are to be construed **with reference to that intention.**

Cases cited (Mass.) 196

3. Where a will will admit of **two constructions**, that is to be preferred which will render it **valid.**

Cases cited (Conn.) 815

4. **Words** will be read in **natural sense** to effect intent and avoid partial intestacy, although some remote consequences may not have been in testator's mind.

Dove v. Johnson (Mass.) 729

5. A **copy of a will executed and proved according to the laws of another State** may be filed here with a copy of its probate, and will then have the same effect in the disposition of property both real and personal, situated in this State, as though it had **executed and proved according to the law of this State.**

Kennard v. Kennard (N. H.) 168

6. The words **"I give, devise and bequeath"** import a **present interest**, unless other provisions clearly manifest a different intention.

Cases cited (Conn.) 815

II. DESCRIPTION OF DEVISEE; OF LEGATEE.

7. Where a **testator devised** his estate **"to the issue or children"** of his said two daughters who may then be living, **"to be equally divided among all such issue or children, share and share alike;"** the words **"issue or children"** cannot be read as meaning

"child or children," but, that **all issue** of the said daughters **take per stirpes**.

Hall v. Hall (Mass.) 238

8. Devise for life to daughter; remainder to children; limitation over; provisions in case of death without children; **child, children and issue** distinguished.

Barney v. Arnold (R. I.) 188

9. Specific personal legacies to **grandchildren** by name in one clause of a will will not limit the construction of a subsequent clause containing a bequest to the same grandchildren as a **class**, so as to exclude an equal distribution to a grandchild born after death of testator.

Webster v. Weston (Conn.) 191

10. Provision that "**issue** of any deceased daughter shall take the mother's share" makes a **subclass**.

Dove v. Johnson (Mass.) 729

11. Bequest of income "to all my daughters in equal shares" is a **gift to a class**; survivors take the whole; words "in equal shares" simply determine proportion in which income is to be divided. *Id.*

III. ABSOLUTE OR LIFE ESTATES.

12. A devise of the income and rents and **profits or use** and occupancy of land, is construed as a devise **in fee**.

Cases cited (R. I.) 817

13. **Realty was devised to a trustee in fee, to pay over the income** to certain named *cestuis que trustent*, their heirs and assigns, no time being limited during which payment was to continue. **Provision was made by the will as to one of the cestuis que trustent**, that in case of his insolvency or of an attachment of his equitable estate, his right to income should terminate and his share be paid by the trustee to A, B and C, their heirs and assigns; also, that the **trustee might** in certain contingencies **pay over** to the *cestui* his **whole interest** in the trust property "**in fee simple** for his own use," free from all trusts. **Held**, that the *cestuis que trustent* took an **equitable estate in fee simple**.

Greene v. Wilbur (R. I.) 815

14. **R. S. chap. 73, § 6**, applied to particular devise; construed to be a life estate with remainder in fee simple to heirs of life tenants.

Plummer v. Hilton (Me.) 898

15. Devise of real estate to **wife**, "to remain hers so long as she shall **remain unmarried** after my decease," confers **life estate** only; subsequent provision authorizing her to sell so much as she may find necessary does not enlarge estate to a fee.

Nash v. Simpson (Me.) 699

16. Devise to A of one half of **residuary estate**, and should A die before her husband, then to such of her children as shall be alive, etc. **Held**, life estate to A during life of her husband and **contingent remainder** to children, and the property being personal, A obliged to give bond under statute.

Security Co. v. Hardenberg (Conn.) 269

17. Testamentary devise for life, with **power to sell** and appropriate, **not to en-**

large life estate; limited power to mortgage life interest.

Rhode Island Hospital Trust Co. v. Commercial Nat. Bank (R. I.) 20

18. Where the gift is absolute and the **time of payment only postponed**, time not being of the substance of the gift but relating only to the payment, does not suspend the gift but merely defers the payment.

Cases cited (Conn.) 815

IV. VESTED OR CONTINGENT ESTATES.

19. Whether a devise is **vested or contingent depends upon whether the condition** of its taking effect must happen sometime or may never happen.

Cases cited (Conn.) 814

20. It is the **present right of future enjoyment** whenever the possession becomes vacant, and not the certainty that the possession will become vacant before the estate limited in remainder **determines, which distinguishes a vested from a contingent remainder**.

Kennard v. Kennard (N. H.) 168

21. A will nominating the husband of testatrix executor of her estate, giving him his support out of the estate for life, and all that remains to go to **devisee during her lifetime, remainder to her children**, gives the husband possession during his life, including the maintenance of his second wife and reasonable expenses for defending the estate; on his death the devisee takes only a life estate with remainder to the child of the devisee subject to open and let in after-born children of devisee.

Webb v. Goodnough (Conn.) 391

22. Devise to children; **issue of deceased child stand in place of parent**; take a vested interest.

Gibbens v. Gibbens (Mass.) 93

23. Devise of **residue to testator's wife and children**, trustees, to pay certain annuities to the wife and testator's children for their lives; on the death of the last trustee then testator gave, devised and bequeathed a portion of the estate to his grandchildren then living, to be equally divided among them *per capita* and not *per stirpes*, and their heirs forever; and among the children, *per stirpes*, and widows of such grandchildren as shall have died at the expiration of the trust. **Held**, grandchildren take vested interest as a class, opening to let in afterborn grandchildren, and no part of the estate is intestate by reason of the **statute against perpetuities**.

Farnam v. Farnam (Conn.) 312

24. Certain bequests construed and held vested, notwithstanding **postponement of payment**.

Pond v. Allen (R. I.) 879

25. A by his will gave \$10,000 to B in trust for C, the income to be paid to C for life, **with remainder** to the children of C, if she had any, and if she had none then to D. C had no children. D died in the lifetime of C, leaving one child. **Held**, that the **remainder became vested** in D immediately on the death of the testator, subject to be devested by the birth of a child to C; and that on the death of C

without children the fund passed to the heir at law of D.

Vandewalker v. Rollins (N. H.) 858

26. B bequeathed \$12,000 to E and F in trust to pay the income to C for life, remainder to her children, if she had any, and if she had none, to such person or persons as she might appoint, and made E and F general residuary legatees. C died, leaving no child and without making any appointment of the fund. E and F both died before C. Held, that upon the death of B the remainder became vested in E and F, subject to be divested by the birth of a child to C; and that upon the death of C without children the fund passed to the legal representatives of E and F. *Id.*

V. CONDITIONS; ACCUMULATIONS.

27. A devise of real estate at the expiration of a life estate upon condition that the devisee maintains the life tenant and provides for her decently, from the proceeds of the real estate or otherwise, and for that purpose he is authorized to use the real estate by farming the same; and in case of his failure to provide for the life tenant, she was empowered to call on the selectmen to provide for her, in her own house; he takes the estate upon condition subsequent.

Birmingham v. Lesan (Me.) 260

28. When he has failed to perform the condition subsequent, the heirs of the deviser have a right to create a forfeiture by an entry therefor, although the will contained no clause to that effect. *Id.*

29. Such a forfeiture cannot be enforced by proceedings in equity. *Id.*

30. A provision that the income of the estate, and further sums as her wants demand, shall be given to a married woman during her marriage relation with her husband, but that relation ceasing by death of her husband or otherwise, the whole estate shall go to the legatee, is a valid condition.

Thayer v. Spear (Vt.) 856

31. Accumulation may extend to lives in being and twenty-one years thereafter. Cases cited (Mass.) 196

VI. POWER OF SALE; CONVERSION.

32. No particular form of words is necessary to create power of sale.

Ames v. Ames (R. I.) 38

33. It seems a power to sell will not authorize a mortgage.

Rhode Island Trust Co. v. Commercial Nat. Bank (R. I.) 20

34. Power to sell vests by implication title to estate.

Hanson v. Brewer (Me.) 900

35. Power of sale restricted to estate not specifically devised, construed. *Id.*

36. The quality of property, for purposes of transmission by will or inheritance, is not changed from that in which testator or intestate left it, unless there is some clear act or intention by which he has impressed upon it a definite character, either as money or

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land. And when for the security of the fund-money is converted into land by a judicial decree, the land is substituted for the fund, and goes to the person who would have taken the fund had it remained specifically personal estate.

Vandewalker v. Rollins (N. H.) 858

VII. RIGHTS OF WIDOW

37. Widow takes legacy as purchaser, when she relinquishes her statutory rights.

Borden v. Jenks (Mass.) 705

38. Specific as well as general legacies abate in favor of provision to widow. *Id.*

39. Relinquishment by wife of right to share in personal property of husband entitles her to preference in payment of legacy in consideration thereof. *Id.*

40. Under Mass. statute, when widow accepts provision of will, she is not entitled to dower, unless intention plainly appears; failure to waive provision of will operates as acceptance in lieu of dower. *Id.*

VIII. TRUSTS; CHARITIES.

41. Sufficiency of devise in trust to create estate in fee, considered.

Ames v. Ames (R. I.) 38

42. Provision giving whole estate to certain sons, "assuming that they will not fail to do for another son as their fraternal regard may require," does not create a trust and is not in cumbrance on real estate.

Rose v. Porter (Mass.) 750

43. The holder of property under a bequest to him for the support of another holds it in trust for that purpose.

Buffington v. Mazam (Mass.) 459

44. A devise of the residue of testator's estate to one, "to be disposed of by him for such charitable purposes as he shall think proper," is a devise in trust. It is not essential that the words "in trust" be used.

White v. Dilson (Mass.) 485

45. The trustee of such a trust is not exempt from giving bond. *Id.*

46. Bequest "for the special support of the worthy, deserving, poor, white, American, protestant, democratic widows and orphans residing in the Town of Bridgeport, Conn.," is not void for uncertainty in class designated.

Beardsley v. Selectmen of Bridgeport (Conn.) 689

IX. LEGACIES; WHEN VEST; PAYMENT; CHARGE ON LAND.

47. Bequests by codicil stand on same footing, in regard to payment, as bequests by will.

Pond v. Allen (R. I.) 879

48. Where the terms of a bequest import a gift and a direction to pay at a subsequent time, the legacy vests at the death of the testator and not at the time of payment.

Cases cited (Conn.) 815

49. Where the gift is to be severed instantly from the general estate for the benefit of the legatee, and in the meantime the interest is to be paid to him, it is indicative of the intent of

the testator that the legatee shall, at all events, have the principal and is to wait only for the payment until the day fixed.

Cases cited (Conn.) 815

50. When will devisees whole estate to one for life and codicil provides legacies to others, **codicil** changes will to that extent; the legacies are payable in the usual time and are not subject to the life estate.

Beardsley v. Selectmen of Bridgeport (Conn.) 639

51. **Postponement** of payment of devise is question of **intention**.

Borden v. Jenks (Mass.) 705

52. **Legacies charged** on the land are an **equitable lien** on the entire real estate; but the part undisposed of by the residuary devisee should be first applied in payment.

Lovejoy v. Raymond (Vt.) 405

53. The **English doctrine**, that where a **legacy payable in futuro** is a **charge** on real estate it is discharged by the death of the legatee before the time of payment, is **not law** in Rhode Island.

Pond v. Allen (R. I.) 879

X. LAPSED LEGACIES.

54. In a residuary testamentary disposition to sons, **devisees** being individually named take as **tenants in common**; on **death of one**, devise **lapses** and becomes intestate estate; residuary devise carries lapsed devises, but not gifts which fall with the residue itself.

Church v. Church (R. I.) 189

55. Bequest, "to J. and M., the additional sum of \$2,000 each," is not a gift of \$4,000 to a class, going to survivor; if one dies, legacy to him lapses.

Claffin v. Tilton (Mass.) 728

XI. ACTIONS; LEGATEES.

56. **Pecuniary legatee** may sue for legacy, **within three years** from grant of letters, without giving refunding bond. P. S. chap. 187, applies to distributees.

Steere v. Wood (R. I.) 804

57. Legacy less than **debt owing by legatee** to estate cannot be subjected to a judgment against him.

Armour v. Kendall (R. I.) 802

58. Legatee owing estate, entitled only to excess of legacy over debt. *Id.*

59. Equity may **sequester rents** of realty charged with payment of debts or legacies.

Pond v. Allen (R. I.) 879

XII. PARTICULAR DEVISES CONSTRUED.

60. Particular will construed, as to **lapsing of bequest** upon death of legatee before death of testator and **distribution of share** of devisee dying after testator.

Goddard v. Whitney (Mass.) 198

61. By statute (1877, chap. 204), the American Legion of Honor and the Knights of Pythias were empowered to **insure the life** of a member for the **benefit** of "the **widow** or other dependents upon a deceased member" and such fund was exempted from liability to

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creditors. Certificates of insurance were issued by each of the societies to a member payable to his wife and subject to such further disposal as he might thereafter direct. Subsequently the Act of 1882, chap. 195, § 2, added to the class of beneficiaries after the words "orphans" "or other relatives of deceased members." The wife of the member so named as payee in the two certificates died and the member by will bequeathed the sum payable on each certificate to the claimant with whom he had made a contract of marriage. Both funds were claimed by the member's legatee, his mother and his sister. Held, after the finding of the Superior Court, that the legatee and the sister were not dependent upon deceased, that the mother alone was entitled to both funds and the Act of 1882, subsequent to the contracts of insurance did not entitle the sister to any part of the funds.

Supreme Council American Legion of Honor v. Perry (Mass.) 715

Hicks v. Perry (Mass.) 715

DISCHARGE.

SEE BANKRUPTCY; INSOLVENCY; RELEASE.

DISTRICT AND PROSECUTING ATTORNEYS.

1. The Act of 1884, No. 112, authorizing the **Governor to appoint** special prosecutors of criminal offenses, is not in conflict with that article of the Constitution which requires that "State Attorney shall be elected," etc.

Re Snell (Vt.) 279

2. Where defendant and his copartner were indicted for arson and it appeared that the latter was on the premises shortly before the fire, it was not error for the District Attorney to **comment** upon defendant's **omission to call him as a witness**.

Commonwealth v. Haskell (Mass.) 104

DIVORCE.

SEE HUSBAND AND WIFE.

DOGS.

SEE ANIMALS.

DOWER.

1. The **right** of a widow in premises set out to her as a homestead, under the Act of 1868, is an **estate for life** and **may be alienated**.

Lake v. Page (N. H.) 116

2. Right of widow's dower is a mere **chose in action** until assigned and **not subject** to payment of her **debts**; neglect to have assigned not a fraud to give jurisdiction in equity.

Maxon v. Gray (R. I.) 27

3. **Demand** is good, although for more land than is described in writ in action of dower.

Williams v. Williams (Me.) 679

4. Demand need not be made by divorced wife upon cotenants of former husband. *Id.*

5. Demandant's husband held lands by descent from his father, whose widow was entitled to dower therein; widow applied for assignment

of dower, which was made without objection; **assignment bound all parties** and defeated demandant's right to dower therein.

Id.

6. Widow has right to **priority** in payment of **legacy** in consideration of relinquishing dower; but when she has no dower right, as where there has been a settlement in lieu has no precedence.

Borden v. Jenks (Mass.) 705

7. The **judgment** in an action of **dower** is not binding on one who was not a **party** or privy.

Stowe v. Merrill (Me.) 290

8. A **tenant** in fee simple of land, **subject** to a widow's dower or life estate in an undivided half, **may have partition**.

Allen v. Libbey (Mass.) 72

9. A wife in the lifetime of her husband, can **bar** her **right** of dower in no other mode than prescribed by statute; a conveyance thereof by deed signed by the husband will not operate against her by way of equitable estoppel.

Mason v. Mason (Mass.) 106

10. Under Mass. statute, when widow **accepts provision of will**, she is not entitled to dower, unless intention plainly appears; failure to waive provision of will operates as acceptance in lieu of dower.

Borden v. Jenks (Mass.) 705

11. **Deed** by owner in fee **reserved** house occupied by doweress; held, entire estate in house and land under it was excepted and that **reversion** thereof did **not pass**.

Kimball v. Withington (Mass.) 757

DRAINS AND SEWERS.

1. Where a laborer was injured by the falling of earth or the caving in of a city sewer caused by the negligence of the foreman, superintendent, or overseer, employed by the city, held, the city was not liable because the **negligence** was that of a **fellow servant**.

Conley v. Portland (Me.) 797

2. The **entry upon land** by a **city** for constructing a sewer or way, must be after and not before the taking of the land; yet where the city has legally done some work on the land resumption of such work within two years will not render it liable to trespass under the statute.

Wilcox v. City of New Bedford (Mass.) 754

EASEMENT.

I. CREATION; EXTENT OF.

II. ABANDONMENT; EXTINGUISHMENT.

I. CREATION; EXTENT OF.

1. Clause in deed, "Except a right which is reserved to draw water at the well on the west line of said land," means near the west line, and is deemed inserted to create easement in grantor.

Maguire v. Sturtevant (Mass.) 518

2. The **owner** of the **soil** over which another has an easement of flowage, is **entitled** to the **herbage**.

Cases cited (Mass.) 449

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3. A person having the right of flowage through another's land, while not exercising his right has no right to interfere with ordinary **farm fences** maintained by the owner of the servient estate for the protection of his land.

Smith v. Langelwald (Mass.) 449

4. One having right of way appurtenant to his land may remove unlawful **obstructions**; intention to make unjustifiable use of way at future time does not make him a trespasser.

Hayes v. De Vits (Mass.) 749

5. Grant of **right of way**; when **personal** is **not assignable** or inheritable, and cannot pass to a trustee in insolvency or to a corporation succeeding the individual grantees.

Hall v. Armstrong (Conn.) 881

6. Where a clause in a deed is strictly an exception, the part excepted remains in the grantor as of his former title; but where the effect of the clause is to create some right or easement, not before existing, it is a **reservation operating** by way of an **implied grant**; and on its acceptance by the grantee in the deed, the reservation containing no words of inheritance, the vendor has only a life estate in the easement.

Bean v. French (Mass.) 218

7. A school district erected a one-story building and, by recorded instrument called a lease, contracted with individuals for the construction of a second story, to be used by them "so long as the house shall stand" with easements of way, etc., and so it was occupied for 80 years; held, a conveyance of "school house and lot under hall" did not convey any title to second story.

Peaks v. Blethen (Me.) 263

II. ABANDONMENT; EXTINGUISHMENT.

8. Mere **nonuser**, even for twenty years, will not conclusively show an abandonment of right of way.

Cases cited (Mass.) 484

9. Nonuser for more than twenty years with adverse use of the servient estate inconsistent with the existence of an easement will extinguish it.

Cases cited (Mass.) 449

10. Owner of easement having a mill privilege, may abandon it; mere nonuser does not show abandonment; to have that effect, non-user must be accompanied with decided acts showing intention to abandon.

Eddy v. Chase (Mass.) 574

11. Where the **owner** of the dominant estate **close** his access to a **way** over adjoining premises, with **intention** of abandoning the way, it operates as a present abandonment of the easement, which does not pass to a subsequent grantee.

King v. Murphy (Mass.) 434

EJECTMENT.

I. WHEN LIES.

II. PLEADING; EVIDENCE; DAMAGES; PRACTICE.

I. WHEN LIES.

1. A **real action** lies at common law for

a remainder of land in fee expectant on the termination of a life estate, and such an action is a plain, adequate and complete remedy for the remainderman whose title is disputed.

Walker v. Walker (N. H.) 250

2. Cause of action for **mesne profits** accrues when the trespasses are committed, and not after recovery in ejectment, and a recovery can be had only for such time as lies within the limits of the Statute of Limitations.

Herreshoff v. Tripp (R. I.) 46

II. PLEADING; EVIDENCE; DAMAGES; PRACTICE.

3. **Declaration** in trespass and ejectment must show plaintiff's estate.

Taylor v. O'Neil (R. I.) 802

4. **General issue** and special pleas pleaded; verdict on general issue, in effect verdict on all the pleas.

Burdick v. Burdick (R. I.) 861

5. **Recovery** in ejectment must be for a definite portion of the premises described in the declaration, and the verdict cannot be for the excess, in value of a homestead interest.

Canfield v. Hard (Vt.) 851

6. In action for **mesne profits** counsel fees paid by plaintiff in ejectment cannot be recovered.

Herreshoff v. Tripp (R. I.) 46

7. **Punitive damages** are allowed in an action for **mesne profits**, only when the defendant has shown malice or bad faith. *Id.*

8. One taking **conveyance** and not recording it, is bound by judgment in ejectment against grantor, execution having been previously levied.

Smith v. Hodsdon (Me.) 787

9. On **death of defendant**, citation to all interested, without naming anyone, to defend, will not authorize entry of judgment for land or for costs. R. S. chap. 104.

Trask v. Trask (Me.) 662

10. The **bond** required on taking exceptions to rulings of a special court of Common Pleas provided by R. I. Pub. Stat. chap. 195, § 2, covers damages incurred by wrongful occupation where relation of landlord and tenant had never existed.

Union Co. v. Whitley (R. I.) 47

ELECTIONS.

SEE VOTERS AND ELECTIONS.

EMANCIPATION.

SEE PARENT AND CHILD.

EMBEZZLEMENT.

1. **Evidence** as to similar transactions of the same general character is admissible to show criminal intent, although it does not, in terms, refer to the specific matters charged in indictment.

Commonwealth v. Sawtelle (Mass.) 590

2. Embezzlement retains so much of the character of larceny that it is **essential** to the commission of the crime that the owner

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be deprived of the property embezzled, by an adverse holding or use.

Commonwealth v. Este (Mass.) 214

3. Where a town treasurer credits himself with lawful payments made out of the proceeds of notes drawn by him as treasurer, but fails to charge himself with the notes, he cannot be charged with embezzlement as to the portion of the proceeds used and intended to be used lawfully, even if the use was contrived as part of a scheme to defraud the town. *Id.*

4. A note and mortgage made by a mother to protect her son from prosecution for embezzlement will be canceled, as without consideration and obtained by undue influence.

Foley v. Greens (R. I.) 17

EMINENT DOMAIN.

SEE MUNICIPAL CORPORATIONS; RAILROAD COMPANIES; WAYS.

1. **Interests in water** may be taken for public utility.

Hamor v. Bar Harbor Water Co. (Me.) 691

2. Legal taking of private property under eminent domain must be evidenced by writing describing estate taken, and this rule applies to taking of interests in water as well as in land. *Id.*

3. Railroad company, after acquiring right to land, so long as it does not infringe any common land rights of adjacent owners, is not liable for damages for cutting off natural drainage, shutting off view, light and air, etc.

Cassidy v. Old Colony R. R. Co. (Mass.) 606

4. Right in equity of mortgagee to have damages received for mortgaged land taken for public use applied on his debt is not taken away by Mass. Act 1881, chap. 110, providing statutory proceeding, unless made a party.

Wood v. Westborough (Mass.) 593

5. Owner of property legally taken under eminent domain can recover damages only in statutory manner; but if taken illegally can recover in action on the case.

Hamor v. Bar Harbor Water Co. (Me.) 691

EQUITY.

I. JURISDICTION.

II. FRAUD; ACCIDENT OR MISTAKE.

III. QUIA TIMET ACTIONS; CLOUD ON TITLE.

IV. ACTIONS; PLEADING; EVIDENCE; PRACTICE.

SEE ACCOUNT; INJUNCTION; MAXIMS; RECEIVER; SEQUESTRATION; TRUSTS.

I. JURISDICTION.

1. **Partition** between tenants in common, in equity, is matter of right; equity has concurrent jurisdiction.

Nash v. Simpson (Me.) 699

2. Jurisdiction of equity for **discovery and account**.

Webb v. Fuller (Me.) 295

3. Equitable jurisdiction for accounts, extends to cases where there are circumstances

of complication for difficulties in the way of adequate relief at law, even if the accounts are all on one side.

Cases cited (Me.) 296

4. For some years before the death of a mother her two sons managed her property, consisting of bonds, stock and money, they changed its form and converted it to their own use, and after her death refused to account therefor with the administrator. Held, that equity was a proper remedy for an account.

Webb v. Fuller (Me.) 295

5. Equity will not enforce a forfeiture for a breach of a condition subsequent.

Birmingham v. Lesan (Me.) 260

6. Bill by a small minority of members of the Patrons of Husbandry, an unincorporated joint stock company, for a receiver and sale and distribution of property dismissed where evidence showed property only to consist of \$100 and a building, well suited for purposes of the Society, that a majority opposed the plaintiffs' bill, and that the stock of plaintiffs might be sold for as much or more than would result to them after sale and distribution.

Hinckley v. Blethen (Me.) 794

II. FRAUD; ACCIDENT OR MISTAKE.

7. The grantor of a deed procured by fraudulent representations and who repudiated it, is not a necessary party to a bill by a subsequent vendee to cancel it.

Paine v. Baker (R. I.) 153

8. Where the grantee of a warranty deed against whom judgment had gone, in an action of trespass by one having a right of fishery in the premises, induced his grantor to make a bond of indemnity conditioned to pay the judgment in trespass and costs;—Held, **representations honestly made, though untrue**, that the grantor was in law liable under his covenants, were not fraud to cancel the bond.

Abbott v. Treat (Me.) 694

9. **Mistake**, to be ground for equitable relief, must be of a material nature and must have been the determining ground of the transaction.

Cases cited (Conn.) 189

10. A **voluntary settlement**, in trust without reservation, is irrevocable, except for mistake, fraud or undue influence.

Keyes v. Carlton (Mass.) 916

11. Bill in equity will not lie against administrator of married woman's estate to recover bond claimed to be given by mistake to intestate in her lifetime, because there is **adequate remedy at law**.

Southworth v. Kimball's Admr. (Vt.) 349

12. Where a gift was made by the payee of a promissory note, equity will compel the administrator of the payee to indorse the note to the donee, it appearing that the indorsement was omitted by the payee through **accident**.

Hodge v. Cole (Mass.) 93

13. A **mortgage**, signed and recorded but **omitting seals**, may be reformed by the addition of seals against a subsequent attaching creditor having notice.

Bullock v. Whipp (R. I.) 809

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14. At the suit of a town, equity will correct the **omission of an option for redemption of town bonds** in the hands of a purchaser with notice of the mistake, though the officers of the town signed them without reading and several years elapsed after discovery before sent to correct. Park Ch, J., and Carpenter J. dissenting.

Town of Essex v. Day (Conn.) 183

III. QUIA TIMET ACTIONS; CLOUD ON TITLE.

15. **Chap. 43 of Laws 1888**, does not authorize a bill in equity to establish the title to real estate, in a case in which there is a plain, adequate and complete **remedy at law**.

Walker v. Walker (N. H.) 250

16. Equity will not interfere to remove a cloud, in favor of a party out of possession, claiming under legal title, against one in possession under an illegal tax title.

Weaver v. Arnold (R. I.) 129

17. A bill in equity may be **maintained by an attaching creditor, to remove the cloud of a tax deed** upon the title to real estate of the debtor which he has attached.

Perham v. Haverhill Fiber Co. (N. H.) 855

18. A petition under R. S. chap. 104, §§ 47, 48, **praying that the respondent be summoned** into court to show cause why he should not **bring an action** to try an asserted title to real estate, should contain such a description of the real estate as will **give notice** to the respondent to what land the petition referred.

Oliver v. Look (Me.) 339

IV. ACTIONS; PLEADING; EVIDENCE; PRACTICE.

19. A **suit in equity is not commenced until the bill is filed**.

Clark v. Slayton (N. H.) 49

20. When the **cause of action** did not exist at the time the suit was commenced, the suit **cannot be maintained by a supplemental bill** setting out the cause of action after it had arisen.

Birmingham v. Lesan (Me.) 260

21. An **assignee of a claim in suit in equity** proceedings is **not required to indorse the bill** in equity, or the writ in which the bill may be inserted by, R. S. chap. 82, §§ 128, 129.

Stevens v. Shaw (Me.) 836

22. A bill in equity **cannot be amended** by engrafting upon it anything which arose after the commencement of the suit. That **must be presented by supplemental bill**.

Birmingham v. Lesan (Me.) 260

23. **Oath** to answer will not make it evidence, where bill did not require answer under oath.

Clay v. Towle (Me.) 669

24. **Under Public Statutes, R. I. chap. 192, § 9**, which gives to either party in equity proceedings the right to a jury trial of questions of fact raised by the pleadings, and provides that the verdict shall be conclusive unless set aside for cause, the **verdict given must stand unless palpably wrong**.

That the court might have drawn a different conclusion from the evidence is immaterial.

Tierney v. Clafin (R. I.) 875

23. The evidence at a jury trial of issues in equity, under Public Statutes, R. I. chap. 192, § 9, was reported to the court on a petition for a new trial. **Held**, that this evidence was before the court only in support of the petition for a new trial, and that for the purposes of the equity suit the court could only consider the pleadings and the verdict of the jury. *Id.*

26. Under Vt. R. L. § 780, supreme court will not revise error in admission of testimony by master unless exception is taken and filed.

Bruce v. Continental Life Ins. Co. (Vt.) 835

27. A full court will not set aside a finding in equity because of improper ruling on evidence, if upon all the facts the verdict or decree is satisfactory.

Carlton v. Rockport Ice Co. (Me.) 474

ERROR.

1. Writs of error lie to defects apparent on record.

Tyler v. Brakine (Me.) 666

2. Abbreviated record of judgment in default, complying with R. S. chap. 79, § 11, is valid.

Lewiston Steam Mill Co. v. Merrill (Me.) 666

3. Extended record should be obtained, if necessary, to show alleged error in law. *Id.*

4. Party desiring to reverse judgment for error should require clerk to complete and attest record; no relief can be had by writ of error until this is done.

Tyler v. Brakine (Me.) 666

ESTOPPEL.

1. Declaration of son of party to his father in presence of other party, and fact that father remained silent, admissible as admission.

Johnson v. Day (Me.) 793

2. Where defendant claims the goods alleged to have been purchased were charged to him without authority, evidence that they were sent to him marked with his address is proper in connection with evidence of bills and drafts therefor to which he made no response or repudiation.

Sturtevant v. Wallack (Mass.) 494

EVIDENCE.

I. PRESUMPTIONS.

II. DOCUMENTARY.

III. SECONDARY.

IV. PAROL OR EXTRINSIC.

V. DECLARATIONS; ADMISSIONS.

VI. CONFESSIONS.

VII. OPINIONS; EXPERTS.

VIII. COMPETENCY; RELEVANCY.

SEE CRIMINAL LAW III; DEATH; ESTOPPEL; EJECTMENT II; FRAUD AND FRAUDULENT CONVEYANCES; IDENTITY; INTOXICATING LIQUORS V; LIBEL AND SLANDER III; NEGLIGENCE; NEW TRIAL; TRIAL; WITNESS.

N. E. R., V. I.

I. PRESUMPTIONS.

1. The fact that a person was alive at a certain time affords presumption that he was alive a month later.

Commonwealth v. McGrath (Mass.) 515

II. DOCUMENTARY.

2. "Record of Massachusetts Volunteers," printed under chap. 98 of the Resolves of 1866, and recognized in Stat. 1866, chap. 301, § 1, is a public document and evidence of facts contained therein.

City of Worcester v. Inhabitants of Northborough (Mass.) 544

3. Although parties who have testified to a fact or issue are not entitled, as matter of right, to fortify their testimony by swearing to other facts to make their testimony more probably true, where no evidence is introduced to show improbability, yet this rule cannot exclude a document which affords independent evidence of the principal facts alleged.

Sawyer v. Orr (Mass.) 511

4. Oath to answer will not make it evidence where bill in equity did not require answer under oath.

Clay v. Tools (Me.) 669

III. SECONDARY.

5. Where a witness has examined a public record and swears that he has made a true copy, such copy may be admitted to show the contents of the record.

State v. Lynde (Me.) 290

6. The testimony of a lawyer of another State is admissible to prove the laws of that sister State.

Kennard v. Kennard (N. H.) 168

7. Proof of foreign law is a question of fact to be proved by competent witnesses.

Jenno v. Harrisville (N. H.) 325

IV. PAROL OR EXTRINSIC.

8. Parol testimony is admissible to explain a latent ambiguity in the description in a deed.

Thornell v. City of Brockton (Mass.) 582

9. Parol evidence not admissible to prove express trust.

Todd v. Munson (Conn.) 821

10. In an action upon a policy of insurance on a "woolen mill and contents" parol evidence is admissible to show what the contents were.

Wheeler v. Traders Ins. Co. (N. H.) 319

11. Where plaintiff offered evidence to prove that he made a contract of purchase of an interest in a mine, on oral representation of defendants and upon condition that certain written reports as to the condition and quality of the mine should be verified, testimony offered by defendants to show that contracts made by some of the subscribers, who were not present when contract of plaintiff was made, were not conditional, is incompetent. The fact that some of the subscribers to the agreement had lent money to the com-

pany is not competent to prove the value of the stock.

Bruce v. Nickerson (Mass.) 753

V. DECLARATIONS; ADMISSIONS.

12. Declarations of a party are material only when he speaks **against** his own interest, except when part of *res gesta*; adverse possession cannot be proved by mere declarations of party in possession.

Saugatuck Congregational Society v. East Saugatuck School District (Conn.) 861

13. When a vendor remains in possession after conveyance alleged to have been in fraud of creditors, his declarations as to his title are admissible.

Osgood v. Eaton (N. H.) 114

14. Declaration of son of party to his father in presence of other party, and fact that father remained silent, admissible as admission.

Johnson v. Day (Me.) 793

15. Admissions of railroad freight agent or of general superintendent, made after delivery of goods, are not competent to establish liability of principal for injury to goods transported.

Boston & Maine R. R. Co. v. Ordway (Mass.) 721

16. No person is to be affected by the words or acts of others, unless he is connected with them, either personally or by those whom he represents or by whom he is represented.

Cases cited (Conn.) 885

VI. CONFESSIONS.

17. Confessions to be admissible must be free and voluntary; whether it is voluntary should be first decided by court and submitted to jury, with instruction to exclude it, if satisfied from all the evidence that it was not voluntary.

Commonwealth v. Preece (Mass.) 567

18. Confession is admissible to show criminal intent, although it does not, in terms, refer to the specific matters charged in indictment.

Commonwealth v. Sawtelle (Mass.) 590

19. Confession drawn from young boys in custody, without warning them against criminating themselves, is not inadmissible as matter of law, but its weight must be left to the jury.

Commonwealth v. Preece (Mass.) 567

VII. OPINIONS; EXPERTS.

20. Exclusion of opinion of witness.

Carpenter v. Corinth (Vt.) 408

21. One who has been engaged in buying, selling and cutting hay, for fifteen years, is qualified to give an opinion in his own behalf as to value of hay.

Patton v. Bell (Mass.) 561

22. There is no rule which requires a witness to be an expert, to testify to size, shape, and appearance of a visible object, as a jewel.

Berney v. Dinmore (Mass.) 546

23. The effect of a bridge as an obstruction

tion of a river may be a subject for the testimony of experts; and their opinions are not excluded by the question being the issue to be decided.

Gault v. Concord R. R. Co. (N. H.) 254

24. In an action for injury caused by a board falling from a building in course of construction, defense being that defendant had sublet his contract, expert testimony is inadmissible to show that the consideration was inadequate and contract unusual.

Harney v. Shaw (Mass.) 915

25. Whether a highway was in good repair at the time of the accident is not a subject for expert testimony.

Yeaw v. Williams (R. I.) 128

VIII. COMPETENCY; RELEVANCY.

26. The issue being whether the defendant was negligent in driving at the time of the collision with the plaintiff, former acts of negligence in driving are not admissible.

Whitney v. Gross (Mass.) 512

27. Questions on cross examination, upon collateral and immaterial matter, are in discretion of court.

Commonwealth v. Fitzpatrick (Mass.) 545

28. The jury may find from the appearance of a young man, without other evidence, that he was not twenty-one years old.

Cases cited (Mass.) 226

29. Evidence of clerk in public office, as the Adjutant General's Department, is competent, as to course of business, preceding his entry into the office.

City of Worcester v. Inhabitants of Northborough (Mass.) 544

30. The question was whether the plaintiff, while selectman, borrowed and paid to the defendant's treasurer for its benefit the sum of \$200. The treasurer denied it, and to strengthen his testimony, his book of accounts was introduced, on which there was no entry of such payment; held, evidence was not admissible in rebuttal to prove other discrepancies in the treasurer's accounts, to weaken the evidence of nonentry.

Burnham v. Town of Stratford (Vt.) 345

EXCEPTIONS.

1. Error must affirmatively appear, to sustain exception.

Johnson v. Day (Me.) 793

2. Exception cannot be sustained to the admission of immaterial evidence, which was not prejudicial.

Warner v. Jones (Mass.) 534

3. Refusal of nonsuit is ordinarily no ground for exception.

Payton v. Sherburne (R. I.) 868

4. Exceptions taken in the court below cannot be heard in this court until the case has been finally disposed of or is ripe for judgment in the court below.

Comins v. Turner's Falls Co. (Mass.) 216

5. Bill of exceptions stated general exception to five pages of charge. Held, not summary exceptions required by R. S. chap. 77, § 51, and should not be allowed.

Ricker v. Leavitt (Me.) 703

6. A point not brought to attention of court at trial **cannot be raised** in supreme court for first time.

Talbot v. Taunton (Mass.) 615

7. Where exceptions to a referee's report do not seem to have been of sufficient importance to warrant the transfer to the law term, the case will be discharged.

Errol v. Bragg (N. H.) 112

8. When a case has been heard by the court of common pleas **without a jury**, both as to law and facts, and the facts as found by the court are brought upon the record by a bill of exceptions, Pub. Stat. R. I. cap. 220, § 10, gives the supreme court power to **revi.** the rulings of law made by the court of common pleas upon the facts so found.

Resroth v. Coon (R. I.) 85

EXECUTION.

1. **Legacy** less than debt owing by legatee to estate cannot be subjected to a judgment against him.

Armour v. Kendall (R. I.) 802

2. **Lands held by one as trustee** or mortgagee, under deed absolute, cannot be taken on execution by one having actual notice.

Clark v. Watson (Mass.) 725

3. **Personal property subject to a mortgage** cannot be taken on execution against the mortgagor, except in a suit in which it has been attached on *meane* process.

Cases cited (Mass.) 497

4. Where there is a valid attachment of **mortgaged personal property**, and the mortgagee appears, and the mortgage is adjudged valid and is satisfied by the attachment creditor, the property is subject to sale under execution; and the fact that the mortgage was paid five minutes after the execution levied is immaterial.

Loomis v. Lewis (Mass.) 496

5. Lawyer's **law books not exempt** from execution, under P. S. chap. 209, § 4.

Petition of Church (R. I.) 862

6. A **levy** under R. S. chap. 78, § 4, is **not void** because it takes two **parcels** of a farm lying side by side, **at separate** instead of joint appraisal.

Hathorn v. Corson (Me.) 384

7. A **levy** upon real estate is **not invalidated because it embraces other land** than that belonging to the debtor.

Virgie v. Stetson (Me.) 283

8. Execution sale of defendant's interest in real estate is not rendered invalid by **omission to levy on** and sell his **equity of redemption** therein as such.

Cowles v. Dickinson (Mass.) 618

9. A **purchaser of real estate** at an execution sale **may**, in equity, **avoid conveyances** previously made by the judgment debtor in **fraud** of his creditors.

Belcher v. Arnold (R. I.) 15

EXECUTORS AND ADMINISTRATORS.

I. APPOINTMENT; REVOCATION.

II. ADMINISTRATORS DE BONIS NON.

N. E. R., V. I.

III. JOINT EXECUTORS.

IV. FOREIGN EXECUTORS.

V. CONSTRUCTION AND LITIGATION OF WILLS.

VI. RIGHTS; LIABILITIES.

VII. ACCOUNTS; COMPENSATION.

VIII. CLAIMS AGAINST ESTATE; SALE.

IX. ACTIONS BY AND AGAINST; PRACTICE.

X. BONDS; LIABILITIES OF SURETIES.

SEE WILL.

I. APPOINTMENT; REVOCATION.

1. Granting letters; interest of estate to be observed; **person entitled to residue preferred** as appointee.

Johnson v. Johnson (R. I.) 147

2. W. died a **resident** of Providence. Letters of administration were granted to A in Tiverton, where W. had formerly resided, and subsequently letters of administration were granted in Providence to B. In a bill of interpleader against A and B to determine which was entitled to the assets of W., held, that the letters of administration granted in Tiverton were void; and that want of jurisdiction in the Probate Court of Tiverton could be shown collaterally, although the decree of the Probate Court described W. as "late of Tiverton."

Peoples Savings Bank v. Wilcox (R. I.) 818

3. The **cancellation of an administrator's bond** by the court of probate **does not revoke** the appointment of the administrator, nor does it disqualify him from bringing suit as administrator.

Clark v. Rice (R. I.) 132

II. ADMINISTRATORS DE BONIS NON.

4. An administrator *de bonis non* **derives his title directly from the testator** and not from the executor.

Cases cited (Me.) 659

5. In the absence of statutory authority, an administrator *de bonis non* has **no recourse against his official predecessor** for *deviation* or maladministration.

Id.

6. An administrator *de bonis non* is officially interested in the **executor's bond** to the amount of the unadministered estate; but he cannot sue thereon without the authority of the judge of probate except where his interest has been specifically ascertained.

Waterman v. Dockray (Me.) 659

III. JOINT EXECUTORS.

7. One executor by his single indorsement **may transfer a note** made to two executors jointly.

Cases cited (R. I.) 148

8. Where **powers coupled with a trust** are given to two or more to be executed by them jointly, **if one renounces** the other or others will take the power as if it were originally given only to them, to the end that the trust may not fail of execution or suffer detriment or delay.

Petition of Bailey (R. I.) 173

IV. FOREIGN EXECUTORS.

9. Letters testamentary have no greater ex-

tratorritorial force than letters of administration.

Cases cited (R. I.) 148

10. An executor or administrator under the laws of one State can **indorse a note** so as to enable the indorsee to sue in another State where there are no creditors in the latter

Cases cited (R. I.) 142

V. CONSTRUCTION AND LITIGATION OF WILLS.

11. Suit for construction of a will; all parties interested should have notice.

Lincoln v. Aldrich (Mass.) 728

12. Where trustee attempts to settle rights of parties by **fictional account** in probate court, supreme court will not construe will, but reverse decree. *Id.*

13. If will is ambiguous, **trustee should seek instructions** by suit in equity; all interested should have notice. *Id.*

14. Sess. L. 1882, p. 146, does not authorize to be paid out of the estate, **costs and expenses** incurred before the appointment of an executor and administrator, as in litigating a will.

Brown v. Eggleston (Me.) 308

VI. RIGHTS; LIABILITIES.

15. Where a trustee has, within his authority and discretion, **invested in terminable securities**, such as municipal and corporate bonds, at a premium, it is proper for him to retain from the actual income or annual interest upon such securities, such amounts as will, at the date of the maturity of the securities, leave the original capital intact, and to pay over to a **life beneficiary**, only the **net income** remaining after such deductions, although at the time of account filed such securities were at a higher premium in the stock markets. Holmes, J., dissenting.

New England Trust Co. v. Eaton (Mass.) 372

16. A **promise** by an administrator to pay a claim against the estate **does not bind** either the **estate** or the **sureties** on his bond so as to take the case out of the three years' limitation contained in the Statute.

Judge of Probate v. Ellis (N. H.) 238

17. An executor **does not**, by giving bond to pay his testator's debts and legacies, under Pub. Stat. chap. 129, § 6, 7, **make the debts his own** so that an action will lie against him personally for them.

Jenkins v. Wood (Mass.) 206

18. Judge of probate, under R. L. § 2065 can imprison for **contempt** executor who willfully refuses to perform order of probate court to pay money for maintenance of testator's widow and children during settlement of estate.

Leach v. Peabody (Vt.) 617

VII. ACCOUNTS; COMPENSATION.

19. Upon the **settlement** of the account of a testamentary trustee in the probate court, it may be determined whether a

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sum of money should be treated as the capital or as the **income** of a trust fund.

New England Trust Co. v. Eaton (Mass.) 372

20. When there has been a **willful breach** of duty by an executor or administrator, interest will be allowed with **annual rests**.

Cases cited (Mass.) 491

21. **Decree** of probate judge on settlement of administration, if not appealed from, has same **effect as judgment at law**.

Simmons v. Goodell (N. H.) 889

22. Leave to **appeal from a decree** of the probate court, allowing the settlement of an **administrator's account**, cannot be granted when the terms of the settlement were agreed to by counsel for the petitioners, and there was no fraud, and the only **errors in the account** were such as would have been discovered by reasonable diligence on the part of the petitioners and their counsel.

Ahearn v. Mann (N. H.) 164

23. The amount of **compensation** and its allowance are in **discretion of the court**.

Cases cited (Mass.) 491

VIII. CLAIMS AGAINST ESTATE; SALE.

24. Where several **claims** against a decedent's estate have been **purchased by one person**, they should be allowed, and appeal taken in name of original owners.

Armory v. Greer (Vt.) 629

25. A claim against a decedent's estate cannot be **set off** against a claim of the administrator for rent of realty; there is a want of mutuality in the claims.

Harris v. Taylor (Conn.) 392

26. A decree under Gen. Laws, chap. 199, § 25, finding that the assets in the hands of the administrator have been expended in defraying expenses of last sickness and funeral of deceased, will operate merely to **discharge** such administrator until other assets may come into his hands; and a creditor may therefore prove his debt and have it listed for any future distribution.

Clough v. Clark (N. H.) 241

27. **Appeal** does not lie from appointment of commissioners by probate court on claims against alleged insolvent estate.

Putney v. Fletcher (Mass.) 746

28. Where the statute (Pub. Stat. R. I. cap. 179, § 16,) required notice of **sale of decedent's estate** to be published "for four successive weeks," held, a publication in a daily paper, inserted twice each week for two weeks and every day for two following weeks, was sufficient.

Petition of Harris (R. I.) 26

IX. ACTIONS BY AND AGAINST; PRACTICE.

29. The validity of an administrator's **act depends upon its character rather than upon the locality** where it is done.

Cases cited (R. I.) 148

30. An administrator can maintain a **bill to set aside** his intestate's **conveyances in fraud** of creditors only to the extent of deficiency of assets to pay administration ex-

penses; but creditors may be admitted as parties plaintiff.

Estes v. Holland (R. I.) 148

81. It is generally held, in the absence of an empowering statute, an administrator cannot act for creditors by impeaching his intestate's fraudulent conveyances.

Cases cited (R. I.) 149

82. **Bill for discovery of assets** for payment of debts may be maintained by administrator.

Janerin v. Curtis (N. H.) 8

83. A bond conditioned for the conveyance of realty, running "to A or her assigns," is enforceable by the administrator of A.

Douglass v. Hennessy (R. I.) 885

84. The appointment and qualification of an executor will relate back to validate his prior acts, as the payment of a legacy to a legatee; and such executor will not be answerable to trustee process served by a creditor of the legatee on the day of the probate of the will but a day after the payment of the legacy.

Pinkham v. Grant (Me.) 704

85. The **Statute of Limitations**, limiting actions in *assumpsit* to six years, Pub. Stat. R. I. cap. 205, § 8, begins to run in favor of executors and administrators as soon as they are qualified. Executors and administrators may reduce this time to three years, Pub. Stat. R. I. cap. 189, § 8; cap. 205, § 9, by giving the notices provided in the last named section.

Knowles v. Whaley (R. I.) 150

86. **Pecuniary legatee may sue** for legacy within three years from grant of letters, without giving refunding bond; P. S. chap. 187, applies to distributees.

Steere v. Wood (R. I.) 804

87. On death of defendant, citation to all interested, without naming any one, to defend, will not authorize entry of judgment for land or for costs. R. S. chap. 104.

Trask v. Trask (Me.) 662

88. Execution against estate of decedent for costs is invalid under P. S. chap. 178, § 53, and levy thereunder is void; defect in judgment may be cured by remitting costs, when new execution may issue for damages.

Look v. Luze (Mass.) 562

89. **Appeal** may be taken by administrator from refusal of probate judge to act on representation of insolvency of estate.

Putney v. Fletcher (Mass.) 746

90. **Errors in decree** of probate judge, corrected only on appeal; errors in record of decree, corrected at any time.

Simmons v. Goodell (N. H.) 889

X. BONDS; LIABILITIES OF SURETIES.

41. Where the same person is designated in a will as executor and trustee, the capacities are distinct, and when his duties as executor have been fully performed, in order to relieve the sureties on his bond as executor and to effect transfer of the estate to him as trustee, the action of the probate court is necessary.

White v. Ditson (Mass.) 485

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42. Where no settlement of account and discharge as executor has taken place, the sureties on the executor's bond are liable for the residue of the personal estate after payment of debts and legacies, not disposed of for charitable purposes, with a deduction for executors' commissions. *Id.*

43. Sureties on an executor's bond are liable only for the proceeds of land sold by the executor as such, and not for proceeds of land sold under a trust power given by the will and going into the *residuum* of the estate. *Id.*

44. Sureties on an executor's bond are not liable for the proceeds of lands sold under a power in the will, in excess of the amount required for the payment of debts and legacies. *Id.*

45. Sureties on administrator's bond who have paid judgment are subrogated to rights of principal and of heirs paid in full by him.

Stetson v. Moulton (Mass.) 740

46. Entries made by the executor, now deceased, of items paid for charities, etc., in a family expense book, but not designated as payments on account of the trust nor made for the purpose of charging the persons to whom the payments were made, are mere declarations and not admissible in evidence in favor of the sureties of the executor.

White v. Ditson (Mass.) 485

EXEMPTION.

SEE EXECUTION; HOMESTEAD; TAXES.

EXPERTS.

SEE EVIDENCE VII.

FACTORS.

SEE PRINCIPAL AND AGENT II.

FALSE IMPRISONMENT.

SEE ARREST.

A clerk in a restaurant who directed a police officer to take into custody a person who refused to pay for a well-done steak because he had ordered a rare steak, but who did not otherwise participate in the arrest and subsequent imprisonment, held, liable for the wrongful imprisonment.

McGarrahan v. Lavers (R. I.) 807

FENCES.

1. Under R. S. chap. 23, to recover double the expense of building a division fence, the whole of the portion assigned to defendant must have been built by plaintiff.

Cobb v. Corbitt (Me.) 903

2. A person having the right of flowage through another's land, while not exercising his right, has no right to interfere with ordinary farm fences maintained by the owner of the servient estate for the protection of his land.

Smith v. Langewald (Mass.) 449

FERÆ NATURÆ.

SEE ANIMALS I.

FIRE INSURANCE.

SEE INSURANCE II.

FIRES AND FIRE DEPARTMENTS.

1. A city is not liable for negligent acts of officers of fire department, unless by statute, or unless city government expressly ordered the act.

Burrill v. City of Augusta (Me.) 697

2. R. I. Pub. Laws, cap. 688, relating to fire-escapes, are insufficient to impose penalty on owner of building, because not defining person upon whom duty shall rest nor specifying the time of performance.

Maker v. Slater Mill & Power Co.

(R. I.) 176

3. R. I. Pub. Laws, cap. 688, requiring the erection of fire-escapes, do not create a duty between an owner and the employee of his tenant, to give him a right of action against the owner for injury sustained by a fire. *Id.*

FISH AND FISHERIES.

Commissioners of shell fisheries; lease of tide-flowed lands by lots in one lease, amounting in all to more than one acre, *ultra vires*, and void under P. S. chap. 146, § 3.

State v. Burdick (R. I.) 870

FIXTURES.

1. Portable boiler and engine, not attached to realty, except as belted to shaft and fastened to floor by cleats or screws, but not removable except by removing a shed built over them, are not, as matter of law, permanent improvements of the building.

Carpenter v. Walker (Mass.) 586

2. Machines may remain chattels for all purposes, even though physically attached to the freehold by the owner, if the mode of attachment indicates that it is merely to steady them for their more convenient use, and not to make them an adjunct to the building or soil.

Cases cited (Mass.) 587

3. A license from heirs to the widow, to erect a monument on their cemetery lot, will authorize the builder to remove the same upon failure of the widow to pay therefor. The monument being placed upon gravel, with no other foundation, did not become a fixture or part of the realty.

Fletcher v. Evans (Mass.) 198

FORECLOSURE.

SEE MORTGAGE VI.

FORFEITURES.

SEE EQUITY V; INTOXICATING LIQUORS 20, 21.

FORGERY.

1. Direct evidence of a forgery, and of the physical impossibility of an instrument having been signed by one of those by whom it purports to be signed, is good ground for granting a new trial for newly discovered evidence, where the evidence upon the question at the

former trial consisted of opinions as to the genuineness of signatures.

Knowles v. Northrup (Conn.) 927

2. The indictment might properly allege that the intent was to defraud the person whose name is forged to an order on a savings bank.

Rounds v. State (Me.) 471

3. It is immaterial under which count verdict is based, where the offense was the same under each count, and there is no repugnancy between them; and an entry of a *not. pros.* as to the first count will not render the record erroneous. *Id.*

FRAUD AND FRAUDULENT CONVEYANCES.

I. WHAT AMOUNTS TO; EVIDENCE OF.

II. MISREPRESENTATIONS.

III. FRAUD UPON CREDITORS.

IV. ACTIONS; PRACTICE.

SEE EQUITY II.

I. WHAT AMOUNTS TO; EVIDENCE OF.

1. Fraud consists in deception practiced in order to induce another to part with property, or surrender some legal right, and which accomplishes the end desired.

Cases cited (Conn.) 824

2. Party entering into contract, in absence of fraud, is conclusively presumed to understand and to assent to its terms.

Jackson v. Olney (Mass.) 885

3. Right of widow's dower is a mere chose in action until assigned, and not subject to payment of her debts; neglect to have assigned, not a fraud to give jurisdiction in equity.

Mason v. Gray (R. I.) 27

4. Fact that defeasance limiting estate under deed absolute on face is not of record, is not a fraud and will not affect grantor's rights against one having notice.

Clark v. Watson (Mass.) 725

5. Evidence on part of maker that signature was obtained by fraud must be sufficient to establish the fraud.

Jackson v. Olney (Mass.) 885

II. MISREPRESENTATIONS.

6. Representation of what the law will permit or require is not ordinarily a cognizable fraud.

Abbott v. Treat (Me.) 694

7. Where the grantee of a warranty deed, against whom judgment had gone in an action of trespass by one having a right of fishery in the premises, induced his grantor to make a bond of indemnity conditioned to pay the judgment in trespass and costs, held, representations honestly made though untrue, that the grantor was in law liable under his covenants, were not fraud to cancel the bond. *Id.*

8. Where there is evidence which justifies finding that defendant was induced to give note in suit by false and fraudulent representations, credibility and weight of testimony are exclusively for determination of

trial judge, when case is tried without a jury.

Miller v. Kellough (Mass.) 581

9. Representations of purchaser's agent, which are not absolutely falsifications of fact, are merely **expressions of opinion**; as, that the land had been sold for taxes, and was valueless; but that there were no buildings upon it, being unaccompanied by any circumstances of fact, are fraudulent.

Carlton v. Rockport Ice Co. (Me.) 474

10. A sale of stock, induced by the false statement of the president of the company that others paid par, is **misrepresentation** for which the purchaser may recover.

Coolidge v. Goddard (Me.) 301

11. The owner of goods may recover them in **replevin** from any to whom they had been pledged by a broker who procured possession of them fraudulently, for the purpose of selling them to an undisclosed principal, when in fact there was no principal, although a sale had been entered on the owner's books as a sale directly to the broker.

Rodliff v. Dallinger (Mass.) 508

12. Where a sale is agreed to to an unknown but existing party, as, to an undisclosed principal, the fact that it fails does not turn it into a sale to the party conducting the transaction.

Cases cited (Mass.) 511

13. A note and mortgage made by a mother to protect her son from prosecution for embezzlement will be canceled as without consideration and obtained by undue influence.

Foley v. Greene (R. I.) 17

III. FRAUD UPON CREDITORS.

14. **Public Statutes, R. I. cap. 173, § 1, of fraudulent conveyances**, is a substantial reenactment of the English statutes on the same subject, 13 and 27 Elizabeth; and, although it omits the proviso in favor of *bona fide* purchasers for value in the English statutes, must be construed like the English statutes and as if the proviso had not been omitted.

Tierney v. Olafin (R. I.) 875

15. Mortgage by insolvent debtor, to secure loan made at time, is valid in absence of fraud.

Clay v. Towle (Me.) 669

16. A mortgage made by insolvent corporation, with intent to give preference, is void when creditor knew of insolvency and that preference was fraudulent; equity will declare mortgage void.

Id.

17. Conveyance preferring certain creditors; not of itself fraudulent.

Osgood v. Thorne (N. H.) 6

18. A bank is bound in favor of one who acted in reliance thereon, by the authority appearing on its records, as a vote of its trustees, to one of its officers to assign mortgages held by the bank, although such record of authority was, in fact, a false entry.

Holden v. Phelps (Mass.) 768

19. An unrecorded chattel mortgage, made in good faith, will be sustained against

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a voluntary assignee for the benefit of the creditors of the mortgagor.

Wilson v. Eaton (R. I.) 18

20. A purchaser of real estate at an execution sale may, in equity, avoid conveyances previously made by the judgment debtor in fraud of his creditors.

Belcher v. Arnold (R. I.) 15

21. A fraudulent grantee, holding only a voidable title, may convey an indefeasible estate to an innocent purchaser.

Cases cited (N. H.) 161

22. When a vendor remains in possession after conveyance alleged to have been in fraud of creditors, his declarations as to his title are admissible.

Osgood v. Eaton (N. H.) 114

IV. ACTIONS; PRACTICE.

23. Action for fraud is maintainable, where one having inchoate mechanic's lien failed to perfect it, through fraudulent declarations of defendant.

Alexander v. Church (Conn.) 828

24. An administrator can maintain a bill to set aside his intestate's conveyances in fraud of creditors only to the extent of deficiency of assets to pay administration expenses; but creditors may be admitted as parties plaintiff.

Estes v. Howland (R. I.) 148

25. The grantor of a deed procured by fraudulent representations, and who repudiated it, is not a necessary party to a bill by a subsequent vendee to cancel it.

Paine v. Baker (R. I.) 153

26. Debtor may testify as to his intent, in action by assignee in insolvency to recover money claimed to have been paid in fraud of insolvent law.

Stearns v. Gosselin (Vt.) 784

27. To recover property obtained by fraud, evidence of other similar purchases admissible.

Bradley Fertilizer Co. v. Fuller (Vt.) 400

28. The surplus in the hands of mortgagee may be recovered at law as well as in equity, and the Statute of Limitations will apply to the right of recovery without demand; and the pendency of an action to set aside an alleged fraudulent conveyance of the equity of redemption will not suspend the statute.

Reynolds v. Hennessy (R. I.) 863

FRAUDS, STATUTE OF.

Constructive receipt and acceptance of goods must be proved by clear and unequivocal acts.

Clark v. Labreche (N. H.) 8

GAMING.

1. The provision 'in Pub. Stat. R. I. cap. 246, § 16, "All bonds, notes, judgments, mortgages, deeds or other securities, as well as promises, given or made for money * * * won at any game or by betting at any race or fight * * * shall be utterly void," applies to wagers on the result of a game

made by others than the players of the game as well as to wagers made by the players themselves.

McGrath v. Kennedy (R. I.) 811

2. A deposited with a stakeholder the amount of his wager on a match at pool between C and D. While the games were being played but after it was clear that A would lose, A denounced the match to the stakeholder as a fraud, and notified the stakeholder not to pay the money over. At the close of the match, the stakeholder paid over the amount to the winner of the wager; whereupon, A sued the stakeholder for his deposit. Held, that A should recover. *Id.*

3. A conviction of the offense of being present at an unlawful game will not be avoided by the fact that the evidence also showed the defendant was guilty of the offense of actually taking part in the game.

Commonwealth v. Hogarty (Mass.) 611

4. A person being present at an unlawful game, and also actually taking part in it, is not guilty of two offenses and liable to a double punishment. *Id.*

5. Claimant in *in rem* proceeding against gaming implements cannot, after pleading in court below, for first time object in supreme court that notice was not properly served.

Commonwealth v. Certain Gaming Implements (Mass.) 576

6. Evidence that rooms in which gaming implements were found were resorted to for gaming prior to seizure tends to prove implements were kept for gaming at time of seizure, and is competent. *Id.*

7. The charter of Middlebury, authorizing it to "suppress and restrain * * * all descriptions of gaming," repeals by implication an earlier statute empowering the selectmen to permit or forbid the use of billiard tables. The grant of power to restrain gaming confers the right to license billiard playing.

Re Snell (Vt.) 279

GARNISHMENT.

SEE ATTACHMENT.

1. The maker of a negotiable sight draft, not payable in this State, cannot be held as trustee of the payee of the draft, under Gen. Laws. chap. 249, § 15.

Chadbourn v. Gilman (N. H.) 52

2. Public school teacher is not a public officer within law exempting salaries from attachment; teacher's salary, when earned, is an existing debt liable to attachment.

Seymour v. Over River School District (Conn.) 648

3. Filing sworn account; heading no part of account; order of justice; force and effect; liability of garnishee, how fixed.

Eddy v. Providence Machine Co. (R. I.) 81

4. Facts stated upon information and belief in the answers of a trustee in proceedings by trustee process are to be conclusively taken as true; even though an adverse

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claimant has appeared in the case to maintain his right.

Emery v. Bidwell (Mass.) 281

5. Where the plaintiff seeks to contradict the answers of the trustee, a bill in aid of trustee process, and for the removal of an obstruction or impediment placed by the trustee in the creditor's way, cannot be maintained. *Id.*

GIFTS.

The intestate deposited money in bank in the name of another. Held, not evidence of gift without evidence of delivery of passbook and acceptance by donee; and upon the question of intent evidence was admissible to show the depositor's intention was to avoid a rule of the bank providing that one depositor could not draw interest on amount over \$1,000.

Scott v. Ford (Mass.) 221

GRANT.

In 1748, pursuant to a vote of the freemen of a town, the town clerk conveyed to a purchaser a beach property, taking from him a bond to the treasurer providing that the inhabitants of the town should have the right to take from the beach, sand, seaweed, shells and drift stuff. Held, that the successor in title to the purchaser could maintain trespass *q. c. f.* against an inhabitant of the town for asporting sand; and the reservation or stipulation was no protection to the defendant.

Newport Hospital v. Carter (R. I.) 871

GUARDIAN AND WARD.

1. A guardian, an elder brother, is not guilty of a breach of duty in permitting one of the wards approaching majority to receive his own wages and apply them to the common support of the family; nor is he liable for the moneys so used.

Shurtleff v. Rile (Mass.) 450

2. A guardian is liable on his bond for loss to the ward, of rents which he received or might have received by the use of reasonable diligence. *Id.*

3. A guardian is liable for the value of real estate sold for taxes where he had money of the estate with which to pay the taxes and where the time to redeem expired before the ward came of age; otherwise, where the ward came of age after assessment of the tax and before the sale therefor. *Id.*

4. A conservator can not be made personally liable for debts incurred by his ward before his appointment. Such claims should be prosecuted against the ward if living, and after his death, against his estate.

Brown v. Eggleston (Conn.) 803

5. Decree of probate judge on settlement of administration concludes infant whose guardian had notice.

Simmons v. Goodell (N. H.) 889

6. Judgment for costs against next friend and attorney of plaintiff cannot be reviewed on his petition, under P. S. chap. 187, § 23, providing for review within one year where

judgment has been rendered without the knowledge and in the absence of a party.

Manning v. Nettleton (Mass.) 718

7. The statutory **foreclosure of a mortgage bars the right of redemption** of the mortgagor and of **all persons** claiming under him, including minor heirs. Such heirs have no right to redeem on showing want of actual notice, or the failure to have guardian *ad litem* appointed and notice given to him.

Thompson v. Paris (N. H.) 285

8. A guardian's **bond** under R. S. of 1841, chap. 112, § 10, part 6, not construed as a common-law bond because containing conditions additional but not inconsistent with the statutory form.

McFadden v. Hewett (Me.) 334

HACKS.

A complaint is sufficient substantially in the words of ordinance prohibiting a **continuous stopping** of a vehicle in any street for a longer time than twenty minutes.

Commonwealth v. Rowe (Mass.) 911

HEALTH.

Under Pub. Stat. chap. 80, the **board of health** in order to **take possession of and destroy infected articles**, where it does not appear that the patients could not have been removed, depends upon the issuing of a warrant by two justices under §§ 40, 48; and for a seizure not thus conducted the members of the board will be personally liable.

Brown v. Murdock (Mass.) 229

HIGHWAYS.

SEE WAYS.

HOMESTEAD.

1. Under Gen. Laws. chap. 188, § 1, there may be a **right of homestead in land** on which there is no building, but which is **occupied as a part of the place of his home**, by the owner **living in a hired house**.

Rogers v. Ashland Savings Bank (N. H.) 326

2. One may have a **homestead in a house** which he has erected on land occupied by him **under a verbal agreement** to convey.

Canfield v. Hard (Vt.) 351

3. A married man cannot **relinquish** his right by any **oral statement** nor by acknowledging himself as tenant to one who claims under a mortgage executed by the original owner of the land after the erection of his house.

Id.

4. The right of a **widow** in premises set out to her as a homestead, under the Act of 1868, is an **estate for life and may be alienated**.

Lake v. Page (N. H.) 116

HOMICIDE.

1. **Threats** are admissible in evidence, not because they give rise to a presumption of law as to guilt, which they do not; but because from them, in connection with other circum-

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stances and on proof of the *corpus delicti*, guilt may be logically inferred.

Cases cited (Conn.) 835

2. **Declarations of an intention to commit a crime** are no less susceptible of being false than declarations of the opposite cast, namely: declarations of an intention to abstain from the commission of that or a similar crime.

Cases cited (Conn.) 835

3. The exclusion of evidence to show **threats** made by another against the deceased, held, not error where such testimony would not tend to prove that such person committed the homicide or in any way affected the case against the accused.

State v. Beaudet (Conn.) 833

4. Admissibility of **declarations, threats and confessions** of persons other than the accused.

Cases cited (Conn.) 835

HORSE AND STREET RAILWAYS.

SEE STREET RAILWAYS.

HOUSE OF ILL FAME.

Where defendant lived in the house and rented rooms to women boarders as weekly tenants, held, she might be convicted under the statute, upon evidence that she knew the women used the rooms for purpose of prostitution; and that **evidence of specific acts of immorality was unnecessary**.

State v. Smith (R. I.) 121

HOUSE OF REFUGE.

N. H. Law, chap. 87, authorizing any **magistrate to commit any minor** charged with an offense punishable by imprisonment, to the **reform school**, is unconstitutional and in conflict with article 15 of the Bill of Rights, guarantying the right of trial by jury.

State v. Ray (N. H.) 67

HUSBAND AND WIFE.

I. MARRIAGE; BREACH OF PROMISE.

II. HUSBAND.

III. WIFE; SEPARATE PROPERTY; CONTRACTS; TORTS; SUITS.

IV. CONTRACTS AND CONVEYANCES BY AND BETWEEN.

V. DIVORCE; ADULTERY; CONNIVANCE; ALIMONY.

SEE DOWER.

I. MARRIAGE; BREACH OF PROMISE.

1. A **certificate of marriage** issued by a magistrate is in the nature of an **original document**, and is admissible in evidence to **prove the facts** therein stated without other authentication.

Northrop v. Knowles (Conn.) 271

2. **Reputation of concubinage or non-marriage is not admissible to disprove marriage** where actual ceremonial marriage is relied on.

Id.

3. The legal **marriage of a female infant terminates the father's right** to her custody and services.

Aldrich v. Bennett (N. H.) 66

4. **Assumpsit for breach of promise of marriage** is an action *ex contractu*, not "trespass on the case" within R. I. Pub. Stat. cap. 206, § 9, authorizing arrests.

Malone v. Ryan (R. I.) 16

II. HUSBAND.

5. **The husband alone is liable** for the wrongful detention of **property** by his wife, which was **delivered in specie** to her in his presence, with his approval, and detained for their use.

Doherty v. Madgett (Vt.) 346

Southworth v. Kimball's Admr. (Vt.) 349

III. WIFE; SEPARATE PROPERTY; CONTRACTS; TORTS; SUITS.

6. **Property delivered** to a married woman by mistake cannot be said to have been delivered to her on the faith or credit of her **separate estate** or for its benefit.

Cases cited (Vt.) 351

7. To charge the separate estate of a married woman it must be shown that the **debt**, for the payment of which the promise was made, went to the benefit of her **separate estate**, or for her benefit on the credit of such estate.

Cases cited (Vt.) 350

8. Under Rhode Island statutes, a married woman by agreement with her husband cannot create a charge, lien, or trust on or in her separate statutory property for the repayment of money borrowed of him, which a court of equity will enforce.

Fallon v. McAlonen (R. I.) 812

9. **The real estate of a married woman**, derived by her from her husband, may be attached and taken on execution by levy for her debts. The provision of the Revised Statutes, 1871, chap. 61, § 1, prohibiting her from conveying such real estate without the joinder of her husband, relates only to her voluntary conveyance.

Virgie v. Stetson (Me.) 283

10. A married woman in Maine may lease in her own name alone, for a term of years, real estate conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, although by statutory provision she cannot convey the same without the joinder of her husband.

Perkins v. Morse (Me.) 343

11. The law will not raise an implied promise against a married woman.

Southworth v. Kimball's Admr. (Vt.) 350

12. A married woman is not liable on a contract made by her husband, for a partnership consisting of himself and wife.

Bowker v. Bradford (Mass.) 457

13. A loan made by a wife to her husband on promise to return, being a contract which she has no capacity to make, is not recoverable by her personal representative, against the personal representative of the husband; and the fact that the wife survived the husband makes no difference.

Kneil v. Egleston (Mass.) 455

14. Married woman received real and per-

sonal property under a will, not limited to her separate use; personally being attached for her husband's debts in supporting family, she gave her note, renewed it, and after husband's death, promised in writing to pay it; held, she had no separate estate in property husband's rights were not affected by Vt. R. L. § 2822, passed after personalty vested in him; note was void, and there was no consideration for new promise.

Hubbard v. Bugbee (Vt.) 682

15. The Act of 1884, whereby a married woman could sue and be sued, has no application to a case brought before its passage.

Doherty v. Madgett (Vt.) 346

16. Bill in equity will not lie against administrator of married woman's estate to recover bond claimed to be given by mistake to intestate in her lifetime, because there is adequate remedy at law.

Southworth v. Kimball's Admr. (Vt.) 349

17. If a wife makes unlawful sales of intoxicating liquors in the absence of her husband there is no presumption she acts under his coercion; but if husband is near enough to influence wife, although not in same room, he is not absent.

Commonwealth v. Flaherty (Mass.) 530

18. Tort for conversion by wife will not survive her death.

Cases cited (Vt.) 350

19. An action may be maintained under R. S. chap. 24, § 45, against a married woman, deserted by husband, for reimbursement for pauper supplies furnished upon her application.

Peru v. Poland (Me.) 895

IV. CONTRACTS AND CONVEYANCES BY AND BETWEEN.

20. The incapacity of husband and wife to enter into contracts with each other remains as at common law.

Kneil v. Egleston (Mass.) 455

21. Under a statute requiring that "the deed or instrument should be shown and explained to" the wife, a certificate of acknowledgment omitting a statement to that effect is fatally defective.

Paine v. Baker (R. I.) 153

22. Tenancy by entireties is a joint tenancy as modified by common-law doctrine that husband and wife are one person, and not changed by statute.

Pray v. Stebbins (Mass.) 521

23. Statutes enabling married women to take and hold separate property do not apply to an estate granted to husband and wife which conveys common-law rights incapable of severance.

Id.

V. DIVORCE; ADULTERY; CONNIVANCE; ALIMONY.

24. In the absence of express provisions in the statute conferring jurisdiction in divorce, the general principles of the ecclesiastical courts of England will obtain, respecting connivance, collusion, condonation or recrimination; but the canon law was

never adopted in Massachusetts, and the subject is regulated wholly by statute.

Cases cited (Mass.) 496

25. That the liberal divorce law of the State was one of the inducements to the petitioner to come here will not make her any the less a domiciled inhabitant of the State.

Fosdick v. Fosdick (R. I.) 38

26. The findings of the courts of other States, upon the jurisdictional question of the residence of the parties, are not binding upon the courts of this State in suits for divorce.

Gregory v. Gregory (Me.) 796

27. Articles of separation containing no express stipulation against divorce are not bar for causes prior to execution.

Fosdick v. Fosdick (R. I.) 38

28. Inability of husband to furnish means of support will not furnish grounds for divorce, although caused by his imprisonment for burglary.

Hammond v. Hammond (R. I.) 801

29. Adultery may be no bar to granting alimony.

Cross v. Cross (N. H.) 114

30. A corrupt intention is necessary to constitute connivance.

Cases cited (Mass.) 436

31. To constitute connivance on part of libellant in divorce on ground of adultery, it must appear that he either desired or intended or was willing that libelee should commit adultery. Knowledge acquired in procuring evidence is not sufficient.

Robbins v. Robbins (Mass.) 494

32. Where the husband is willing that his wife shall commit adultery, provided he can thereby obtain a divorce, it will be connivance to prevent his obtaining the divorce.

Cases cited (Mass.) 437

33. Wife's right to alimony will not be defeated by fraudulent conveyance by husband.

Janerin v. Curtis (N. H.) 8

IDENTITY.

1. Identity of name is *prima facie* proof defendant is person who signed certificate.

Grindle v. Stone (Me.) 788

2. The name of a person is the verbal designation by which he is known; but the visible presence of a person affords surer means of identifying him than his name.

Robertson v. Coleman (Mass.) 503

3. A check given to the order of a person under an assumed or fictitious name, and indorsed by him by such name, is valid and collectible against the drawer by a *bona fide* holder for value, although fraudulently procured by the payee.

Id.

INCEST.

1. Words imputing crime of incest are actionable *per se*.

Rea v. Harrington (Vt.) 624

2. Knowledge of relationship is necessary to constitute the crime.

Id.

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INDEMNITY.

1. Although a suit is maintainable on a lost note, by filing a bond to the satisfaction of the court indemnifying the defendant against any loss, yet where it is not lost, but in the possession of a third person disputing its ownership, plaintiff should first establish the fact that he is the owner of it, in a suit with the party in actual possession, before bringing his action against the maker.

Cobb v. Tirrell (Mass.) 769

2. Where surety on promissory notes of a bankrupt pays money to creditor and holder of notes, and receives an agreement by which such creditor as principal and other holders as sureties agree to indemnify him, he cannot sue such creditor to recover the money, although estate of bankrupt is more than sufficient to pay debts in full; he is concluded by the agreement.

Wilson v. Whitmore (Mass.) 587

INDICTMENTS.

SEE ADULTERATION; ADULTERY; ASSAULT AND BATTERY 5; BURGLARY; CRIMINAL LAW II; FORGERY; GAMING; HOMICIDE; INTOXICATING LIQUORS IV; LARCENY AND RECEIVING STOLEN GOODS; LOTTERIES; PENALTY.

INFANTS.

SEE GUARDIAN AND WARD.

1. The legal marriage of a female infant terminates the father's right to her custody and services.

Aldrich v. Bennett (N. H.) 56

2. The statutory foreclosure of a mortgage bars the right of redemption of the mortgagor and of all persons claiming under him, including minor heirs. Such heirs have no right to redeem on showing want of actual notice, or the failure to have guardian *ad litem* appointed and notice given to him.

Thompson v. Paris (N. H.) 235

3. A release to an infant cosigner of a promissory note, after he has repudiated the contract, will not release the other signer.

Young v. Currier (N. H.) 54

4. Negligence—A young child strayed from its home upon a railroad track, crossed the track and fell into an adjoining trench. The track was not fenced on the trench side. Held, on demurrer to the declaration, that the company was, as to the plaintiff, under no obligation so to fence its tracks that the plaintiff could not get from them upon the adjoining land, and that the action could not be maintained.

Morrissey v. Providence & Worcester R. R. Co. (R. I.) 806

5. Where a boy about nine years old had voluntarily placed himself in danger by engaging in the sport of riding upon the runner of a sleigh drawn by a horse, and after leaving the runner was driven into by the defendant who was driving at a moderate rate, held, recovery could not be had.

Messenger v. Dennis (Mass.) 759

INJUNCTION.

SEE TRADE-MARK.

1. A person may be restrained in equity from interfering with or using a wall of another's house which has been maintained by the latter for thirty years.

McLaughlin v. Cecconi (Mass.) 766

2. A stipulation in a deed of a lot of land in the grounds of the Winnepesaukee Campmeeting Association, prohibiting the erection or use of buildings for stores, boarding houses, hotels or stables thereon without the consent of the Association, is enforceable by injunction.

Winnepesaukee Campmeeting Asso. v. Gordon (N. H.) 846

INNKEEPER.

1. The failure of a guest to comply with printed regulations of which he has notice, directing him upon leaving his room to "lock the door and leave the key at the office," will not exempt the innkeeper from liability for loss of wearing apparel, stolen from the room, without proof shown by the innkeeper that such loss was occasioned by failure to comply with the regulations.

Burbank v. Chapin (Mass.) 79

2. The statute which provides that a licensed innholder may supply intoxicating liquors to guests, who have resorted to his house for food and lodging, clearly excludes those who resort there for the purpose of procuring and drinking intoxicating liquor on Sundays.

Commonwealth v. Hagan (Mass.) 216

INSANE PERSONS.

1. Probate of will is not evidence of mental capacity on collateral issue; decree of probate court not admissible as evidence of capacity of testator, in suit by devisee to set aside a mortgage, on ground of want of capacity in testator to convey.

Brigham v. Fayerweather (Mass.) 786

2. Person *non compos mentis* cannot acquire settlement by residence; follows settlement of father.

Inhabitants of Winterport v. Inhabitants of Newburgh (Me.) 687

INSOLVENCY.

I. ADJUDICATION; EFFECT.

II. ASSIGNEE.

III. DISCHARGE; REVIVAL.

SEE POOR DEBTOR.

I. ADJUDICATION; EFFECT.

1. Adjudication of insolvency takes effect as of date of filing petition, although petition had not then upon it requisite number of creditors.

Clay v. Towle (Me.) 669

2. An attachment lien is not extinguished by insolvency proceedings.

Gay v. Raymond (Mass.) 89

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3. A special lien by contract will not be affected by the insolvency of the debtor.

Howe v. Wiscassett Brick & Pottery Co. (Me.) 891

4. Validity of transfer of property by insolvent is referable to date of filing petition.

Clay v. Towle (Me.) 669

5. A subscriber to invalid special stock certificates may recover the amount paid therefor, without interest and less dividends received, against the assignee in insolvency of the corporation, without offering before the filing of the petition in insolvency to rescind or return the certificates or the dividends.

Reed v. Boston Machine Co. (Mass.) 772

6. Mortgage by insolvent debtor, to secure loan made at time, is valid in absence of fraud.

Clay v. Towle (Me.) 669

7. Mortgage by insolvent corporation with intent to give preference, within four months of filing petition, is void when creditor knew of insolvency and that preference was in fraud of insolvent law.

Id.

8. An action cannot be maintained by a surviving partner against the insolvent estate of a deceased partner, for a debt due from such estate to the partnership, though the partnership be insolvent, unless the action is pending at the time of the representation of insolvency by the administrator. The only remedy is before the commissioners of insolvency.

Bird v. Bird (Me.) 285

II. ASSIGNEE.

9. The assignee in insolvency is entitled to the amount due on a policy on the life of the insured, providing for payment to the insured if he survived until a certain day and in case of his death for the benefit of his children, upon the happening of the first contingency.

Bassett v. Parsons (Mass.) 225

10. A payment made by an assignee, under order of court in a proceeding in insolvency, will not interrupt the running of the Statute of Limitations; and this is so although the United States Bankrupt Act was in force at the time.

Benton v. Holland (Vt.) 788

Hanks v. Holland (Vt.) 788

11. Debtor may testify as to intent in action by assignee to recover money claimed to have been paid in fraud of insolvent law.

Stearns v. Gosselin (Vt.) 784

III. DISCHARGE; REVIVAL.

12. Discharge is no defense against note made before the passage of the insolvent law, and not proved against estate.

Erskine v. Glidden (Me.) 898

13. Appeal does not lie from decree granting insolvent a discharge under R. S. chap. 70, he having made composition, even although an examination by creditors had been refused.

Morgan v. Boothby (Me.) 840

14. A letter to create a new obliga-

tion after discharge in insolvency must show intent to waive discharge. A letter containing "I wish I could give you some money * * I shall not take any notice of your abuse of me till I have paid you the amount I owe you, which I shall surely do," held, not sufficient waiver.

Dennan v. Gould (Mass.) 480

INSTRUCTIONS.

SEE TRIAL IV.

INSURANCE.

- I. MARINE.
- II. FIRE.
- III. LIFE.

I. MARINE.

1. The insured in a marine insurance policy is liable in an action for pro rata premium, under the continuation clause of a policy, when the vessel was at sea at the expiration of the term of insurance, although a previous action has been brought on the premium note and judgment has been rendered thereon.

Insurance Co. of North America v. Rogers (Me.) 792

2. In an action for the premium due upon a marine insurance policy in the name of a part owner, for the benefit of whom it may concern, the defendant offered evidence to show other insurance which would make an overinsurance upon his part of the vessel, and claimed to be liable for only a ratable proportion of the premium. Held, that if this proposition is sound in law, the burden is upon the defendant to show that the policies were simultaneous and not intended to cover the interests of some other owners. *Id.*

II. FIRE.

3. When agent employed to procure insurance on principal's property to a certain amount has done so, his agency is accomplished, and he has no authority to surrender policy or make further insurance.

Wilson v. New Hampshire Fire Ins. Co. (Mass.) 569

4. An insurance company insuring property used in a business is presumed to have in mind the nature of the undertaking and the usual methods of doing the business.

Cases cited (N. H.) 323

5. A policy upon a woolen mill and contents, with knowledge that naptha is necessarily used in the business, waives a printed condition of the policy that it shall be void if the assured uses naptha, and recovery sustained where the fire was not occasioned by its use.

Wheeler v. Traders Ins. Co. (N. H.) 319

6. If an insurer has knowledge of the assured's title, it is a waiver of the condition making an inaccurate statement of the title an avoidance of the policy.

Cases cited (N. H.) 323

7. The execution of a policy with full knowledge of existing facts, which by its conditions render it void, is a waiver of

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those conditions, because otherwise it would be a fraud.

Cases cited (N. H.) 323

8. When submission to arbitrators is for appraisal of damages only, under fire insurance policy, a valid award, although evidence of damage in action on policy, will not support action on award.

Soars v. Home Ins. Co. (Mass.) 534

9. Invalid award by referees to assess damages on loss under fire insurance policy has no effect on rights of parties. *Id.*

10. In an action upon a policy of insurance on a "woolen mill and contents," parol evidence is admissible to show what the contents were.

Wheeler v. Traders Ins. Co. (N. H.) 319

III. LIFE.

11. It is duty of company to preserve its solvency, and to that end it may change from percentage to contributive plan.

Bruce v. Continental Life Ins. Co. (Vt.) 633

12. A circular issued by company may be used in determining meaning of policy. *Id.*

13. Non-forfeiture paid up policy is not forfeited by failure to pay interest on premium notes, regarded by company as a loan to assured. *Id.*

14. A reduced, "non-forfeiture," "paid up" policy of life insurance, held, upon certain stipulations, not to be forfeited for nonpayment of interest.

Covales v. Continental Life Ins. Co. (N. H.) 247

15. Condition of policy, that on failure to pay interest on notes policy should determine, except that proportionate paid up policy would be issued; four premiums of \$100 each were paid partly in cash and partly in notes past due; held, no forfeiture, estate of insured entitled to \$400, deducting notes reduced by dividends or profits.

Bruce v. Continental Life Ins. Co. (Vt.) 633

16. Where the by-laws of a mutual benefit association, in the nature of a life insurance company, provide that upon the death of a member the benefit shall be paid to his direction, the member may change the beneficiary by surrendering his certificate of membership and procuring a new one made payable to the person therein named.

Barton v. Provident Mutual Relief Assn. (N. H.) 353

17. Where a policy was made "payable to A. (the wife of the insured), and the children of the insured," and the insured and wife assigned the policy as collateral to plaintiff, and it appearing that at the date of the policy the insured had four children by a former wife, and subsequently one was born by the second wife, A., and that A. died before the insured, held, that the proceeds of the policy should be paid each one fifth to the plaintiff and the four children by the first wife.

Connecticut Mut. L. Ins. Co. v. Baldwin (R. I.) 126

18. The assignee in insolvency is entitled to the amount due on a policy on the life of the insured providing for payment to the insured if he survived until a certain day and in case of his death for the benefit of his children upon the happening of the first contingency.

Bassett v. Parsons (Mass.) 225

19. By Statute (1877, chap. 204) the American Legion of Honor and the Knights of Pythias were empowered to insure the life of a member for the benefit of "the widow or other dependents upon a deceased member," and such fund was exempted from liability to creditors. Certificates of insurance were issued by each of the societies to a member, payable to his wife and subject to such further disposal as he might thereafter direct. Subsequently the Act of 1882, chap. 195, § 2, added to the class of beneficiaries after the word "orphans," "or other relatives of deceased members." The wife of the member so named as payee in the two certificates died, and the member by will bequeathed the sum payable on each certificate to the claimant with whom he had made a contract of marriage. Both funds were claimed by the member's legatee, his mother and his sister. Held, after the finding of the Superior Court that the legatee and the sister were not dependent upon deceased, that the mother alone was entitled to both funds, and the Act of 1882, subsequent to the contracts of insurance, did not entitle the sister to any part of the funds.

Supreme Council American Legion of Honor v. Perry (Mass.) 715

Hicks v. Perry (Mass.) 715

INTEREST.

1. Where contract of sale stipulates that if plaintiff is entitled to recover for a breach of contract the measure of damages shall be at a certain rate on the quantity of goods not delivered, the plaintiff, in the event of the recovery, is entitled to interest from the date of his demand.

Thomas v. Wells (Mass.) 747

2. Interest is allowed in admiralty upon damages for collision and other courts have adopted the admiralty doctrine.

Cases cited (Mass.) 527

3. In an action for negligent destruction of property by flooding or breakage of a water dam where party injured has been by awaiting result of a test case, kept out of the sum which would have reimbursed him at the time so long that it is no longer an indemnity, the jury may consider such delay and give interest on the original damages.

Frazer v. Bigelow Carpet Co. (Mass.) 525

INTOXICATING LIQUORS.

I. STATUTES; CONSTITUTIONALITY AND CONSTRUCTION.

II. LICENSES; CONSTRUCTION.

III. STATUTES REGULATING; PROCEEDINGS.

IV. INDICTMENTS, INFORMATIONS AND COMPLAINTS.

V. EVIDENCE.

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VI. INSTRUCTIONS; VERDICT; APPEAL; COSTS.

I. STATUTES; CONSTITUTIONALITY AND CONSTRUCTION.

1. R. I. Pub. Stat. chap. 80, § 3, making the reputation of premises admissible in evidence to prove sale of liquors, but leaving the jury free to find the accused guilty or not, is not unconstitutional.

State v. Wilson (R. I.) 888

2. In Pub. Stat. R. I. chap. 80, § 3, providing the character of the premises shall be evidence of sale of intoxicating liquors, character is synonymous with reputation. *Id.*

3. The seizure of intoxicating liquors intended for illegal use in Vermont, while in the hands of an express company who is transporting them on the order of the seller, a resident of another State, to be delivered to the purchaser in this State C. O. D., is a lawful exercise of police power and not void as a regulation of commerce.

State v. O'Neil (Vt.) 775

4. Section 2, Acts 1882, No. 48, by which officer may seize liquor without warrant, is constitutional. *Id.*

5. Statute which provides that a licensed innholder may supply intoxicating liquor to guests, who have resorted to his house for food and lodging, clearly excludes those who resort there for the purpose of procuring and drinking intoxicating liquor on Sundays.

Commonwealth v. Hagan (Mass.) 216

6. The purpose of Pub. Stat. chap. 100, § 13, is to permit the use of such entrances only as are directly upon the street.

Commonwealth v. Ferden (Mass.) 911

7. P. S. chap. 100, § 12, prohibiting screens and requiring unobstructed view of premises, construed.

Commonwealth v. Kelly (Mass.) 884

Commonwealth v. Barnes (Mass.) 887

Commonwealth v. Donahue (Mass.) 888

Commonwealth v. Flannery (Mass.) 888

Commonwealth v. McGrath (Mass.) 888

Commonwealth v. Sansville (Mass.) 888

II. LICENSES; CONSTRUCTION.

8. A licensee to sell intoxicating liquors, is bound at his peril to see that its conditions are complied with by his servants or lose the protection of his license.

Cases cited (Mass.) 520

9. When person licensed to sell in one town sends liquors to another town, where there are no licenses, for sale, he is guilty of illegal selling in the latter town, and the liquors are forfeited to the State.

Re Liquors of Young & Lyon (R. I.) 818

10. Where there is an entrance to licensed premises through a gate on street in which there is a school house within limit prohibited by statute of 1882, chap. 220, question whether license is avoided thereby depends upon purpose for which gate is used and is for the jury.

Commonwealth v. Everson (Mass.) 575

11. Where person is licensed to sell "in front

and rear room," a partition wall between the rooms, not with the prohibition of P. S. chap. 100, § 12, although it obstructs the view into rear room.

Commonwealth v. Barnes (Mass.) 887

12. The Act of licensee's agent in violation of P. S. chap. 100, § 12, prohibiting screens and requiring unobstructed view of premises, will render the licensee liable for the penalty, although the act was without his knowledge and in opposition to his will.

Commonwealth v. Kelly (Mass.) 884

13. To maintain suit on bond given to obtain license, it is not necessary to show that principal had been convicted of violation of license or that bond had been approved or sureties notified.

Oggeshall v. Pollitt (R. I.) 805

III. STATUTES REGULATING; PROCEEDINGS.

14. It is a violation of the law if the sales were made incidental or subordinate to the main business of defendant's store.

State v. Hozsie (R. I.) 29

Re Liquors of Young & Lyon (R. I.) 818

15. In a prosecution for keeping for sale intoxicating liquors without a license, it is immaterial whether the proceedings under the search warrant were regular or not, or whether the liquors were exposed or concealed.

Commonwealth v. Henderson (Mass.) 505

16. The offense of unlawfully keeping and selling intoxicating liquors is a separate offense from that of keeping and maintaining a tenement as a nuisance. Former acquittal or conviction as to the former is not pleadable against the latter.

Commonwealth v. Hanley (Mass.) 743

17. In prosecution under Mass. Stat. 1885, chap. 90, § 1, prohibiting sale, etc., of intoxicating liquors, except as therein, authorized, defendant is not necessarily the seller, when sale was made by a servant without his knowledge and against his directions.

Commonwealth v. Wachendorf (Mass.) 520

18. If a person uses premises for illegal sale or keeping of intoxicating liquors, at any time or on a single occasion covered by complaint, he is guilty under the statute.

Commonwealth v. Kerrssey (Mass.) 514

19. Directions to officer to search and seize under the Maine Liquor Law is matter of form and may be amended at any time before final judgment, by inserting directions omitted when it was actually served by an authorized officer.

State v. Hall (Me.) 472

20. Intoxicating liquors are not relieved from forfeiture under P. S. chap. 87, § 37, by mere delay on part of seizing officer.

Re Liquors of Hozsie (R. I.) 863

IV. INDICTMENTS, INFORMATIONS AND COMPLAINTS.

21. Information for forfeiture under Pub. Stat. chap. 87, held sufficient.

Re Liquors of Young & Lyon (R. I.) 818

22. Information for seizure of intoxicat-

ing liquors sufficient without adding "with force and arms," etc.

Re Liquors of Hozsie (R. I.) 863

23. A complaint for obstructing the view of premises where liquor is sold under license is sufficient, if it alleges that defendant having a license maintained curtains and shutters in the room named, against the law.

Commonwealth v. Keefe (Mass.) 460

24. An indictment should set forth the specific offense and the use of generic terms applicable to several sections of the statute; describing different crimes and penalties is insufficient.

State v. Leavitt (N. H.) 239

25. An indictment charging the keeping and sale at a time and place stated, is not bad for omission to repeat the time in further allegation that defendant thereby maintained a nuisance.

State v. Buck (Me.) 903

26. Indictment for keeping fermented cider need not negative intention to sell out of State.

State v. Perkins (N. H.) 1

V. EVIDENCE.

27. If a wife makes unlawful sale of intoxicating liquors in the absence of her husband there is no presumption that she acts under his coercion; but if husband is near enough to influence wife, although not in same room, he is not absent.

Commonwealth v. Flaherty (Mass.) 530

28. No inference can be drawn from failure of defendant to testify.

Commonwealth v. Hanley (Mass.) 743

29. If the license produced proves the allegation in the complaint that it proves also that defendant was licensed to sell in another room is not a variance.

Commonwealth v. Keefe (Mass.) 460

30. Proof of license is matter of defense and need not be negated by State.

State v. Hozsie (R. I.) 29

31. Where there was evidence tending to show that the place searched was a resort for persons who did not live there and that a number of persons were found there in a state of intoxication, it cannot be said, as a matter of law, that all the evidence was not sufficient to sustain the verdict that defendant kept intoxicating liquors with intent to sell.

Commonwealth v. Mead (Mass.) 209

32. Proof of former conviction for selling, etc., intoxicating liquor, more than three years before present trial, may be shown.

State v. O'Neil (Vt.) 775

33. There is no error in the exclusion of a question to a police officer as to whether he did not know there were places in the town other than defendant's where liquors were unlawfully sold and which he might also have searched.

Commonwealth v. Fitzpatrick (Mass.) 545

34. A witness having testified that the beer sold by defendant was a weak beer, it was open to the prosecution to show that he had

previously testified that he thought it was **lager beer**, for the purpose of contradicting his present testimony, if for no other purpose.

Commonwealth v. Moinehan (Mass.) 591

85. To convict defendant of keeping beer for sale in violation of P. S. chap. 100, § 27, government must prove that at the time of the keeping it contained more than 3 per cent of alcohol by volume at 60 degrees Fahrenheit.

Commonwealth v. Magee (Mass.) 504

86 When the chemist and state assayer testified to his having analyzed the beer and that he found it contained three and fifty-eight hundredths per cent alcohol, the case was properly submitted to the jury. *Id.*

VI. INSTRUCTIONS; VERDICT; APPEAL; COSTS.

87. It is not error to refuse in action for illegal sale, of intoxicating liquors, to charge that testimony of "spotters" or informers, employed to procure sales and bring prosecutions, is to be received with great caution and distrust.

State v. Hossie (R. I.) 29

88. Where there was evidence tending to show that defendant illegally sold intoxicating liquors on the Lord's Day to persons not guests at his inn, the case was properly submitted to the jury on indictment for illegal sale and maintaining a common nuisance.

Commonwealth v. Leighton (Mass.) 502

89. Verdict of guilty is a conviction, although no sentence or judgment pronounced; so held as to suit on licensed liquor dealer's bond under Act of 1882, § 2.

Quinlard v. Knoedler (Conn.) 862

40. Constitutional inhibition against unusual punishments does not apply to cumulative punishments for distinct offenses in same prosecution.

State v. O'Neil (Vt.) 775

41. Recognizance on appeal to appear on first term of Superior Court; statute passed after appeal changing term from second to first Monday, no ground for dismissing complaint.

Commonwealth v. Parker (Mass.) 722

Commonwealth v. McPherson (Mass.) 722

Commonwealth v. Holbrook (Mass.) 723

Commonwealth v. Murphy (Mass.) 723

42. Costs before grand jury are costs of prosecution.

State v. Fife (Me.) 898

INTOXICATION.

SEE ASSAULT AND BATTERY 6; CRIMINAL LAW I.

JAIL.

1. The special limitation (Pub. Stat. chap. 225, § 9), runs against a bond for liberty of jail yard from first of two breaches, and mere want of knowledge of breach is not fraud to toll Statute.

Pearce v. Curran (R. I.) 889

2. Chap. 96, Laws 1888, requiring certain persons committed to jail to be discharged by the jailer at the expiration of a certain time, does not restrict the power of

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discharging them under Gen. Laws. chap. 268, § 9, for inability to pay fine and costs.

Siekens' Petition (N. H.) 254

JOINT TENANTS AND TENANTS IN COMMON.

1. Trustees take as joint tenants.

Franklin Institution for Savings v. People's Savings Bank (R. I.) 23

2. Tenancy by entireties is a joint tenancy as modified by common law doctrine that husband and wife are one person, and not changed by statute.

Pray v. Stebbins (Mass.) 521

2. When a single action of **assumpsit** is an adequate and convenient mode of recovering money which one of several common owners of a chattel expressly or impliedly promised to pay his cotenants for his exclusive use of it, the promisees may join in such action at common law, and their several rights in the damages may be established and enforced by a necessary form of judgment and execution.

Brooks v. Howison (N. H.) 243

3. Where their shares of the value of his use of the common property are to be allowed as a payment to him by them as his co-sureties, and their claim, and other related affairs are entitled to a joint and complete adjustment which cannot be made at law, the inadequacy of remedy at law, is a ground of chancery jurisdiction. *Id.*

4. A release by one of several joint vendors, of the joint claim for payment for personal property sold, binds all the vendors and each of the other vendors is debarred from thereafter maintaining suit for his share.

Osborn v. Martha's Vineyard R. R. Co. (Mass.) 452

5. All part owners of a vessel, except such as have been paid or have settled, must join in an action to recover earnings; in case of bankruptcy of one, his assignee must join.

Stinson v. Fernald (Me.) 290

JUDGMENT.

I. CONFESSION; DEFAULT.

II. VALIDITY; CONCLUSIVENESS; RES JUDICATA.

III. FOREIGN.

IV. ARREST; REMITTITUR.

SEE AUDITA QUERELA; COSTS; DAMAGES; EXECUTION; INTEREST; SET-OFF AND COUNTERCLAIM.

I. CONFESSION; DEFAULT.

1. A note payable on a future day certain, authorizing a confession of judgment "at any time hereafter" will authorize judgment at any time after date.

Richards v. Barlow (Mass.) 577

2. Promissory note containing power of attorney to confess judgment in favor of "holder", imports that it was drawn on assumption that it would be negotiable; hence, judgment by confession taken by indorsee of payee is valid and will sustain action thereon, although taken in another State. *Id.*

3. A **default admits** all the **material allegations** of the writ **except** the amount of damages.

Cases cited (N. H.) 158

II. VALIDITY; CONCLUSIVENESS; RES JUDICATA.

4. A **judgment in rem** is an act of sovereign power and **good against all the world**.

Cases cited (Mass.) 737

5. **Attachment** against **nonresident** and service by publication, is proceeding *in rem*, and the judgment is **void** as a **personal judgment**.

Eastman v. Dearborn (N. H.) 166

6. At common law a judgment is void unless rendered upon **personal notice** to defendant or his appearance to the action.

Cases cited (N. H.) 167

7. Judgment is invalid, where return does not show **service** giving jurisdiction.

City of Fall River v. Riley (Mass.) 743

8. When the jurisdiction of a court of **limited jurisdiction** depends on some fact which can be decided without deciding the case on its merits, the **jurisdiction** may be **questioned** and disproved collaterally, although the jurisdictional fact is averred of record and has been on evidence actually found by the court. But when the question of jurisdiction is so involved in the subject matter of the suit that it cannot be separately decided, the judgment rendered is conclusive in collateral proceedings.

Cases cited (R. I.) 819

9. A judgment is **evidence against third persons** of the fact of its rendition, but not of the facts which were in issue between the parties to it.

Harrington v. Wadsworth (N. H.) 49

10. **One neither a party nor privy may set up as estoppel** a judgment which could be regarded as **virtually recovered on his behalf**.

Cases cited (R. I.) 146

11. The **burden rests upon a party setting up a judgment** as an estoppel, to show that the matters in question were adjudicated by it.

Cases cited (N. H.) 158

12. **Probate of will is not evidence of mental capacity** on collateral issue; decree of probate court not admissible as evidence of capacity of testator, in suit by devisee to set aside a mortgage, on ground of want of capacity in testator to convey.

Brigham v. Fayerweather (Mass.) 736

13. A judgment in an action by lessee against lessor for **covenants broken**, in which the jury were instructed to consider the lessee's liability for rent, is **not res judicata** in a **subsequent action** by the lessor for rent for subsequent period.

Parsons v. Crawford (N. H.) 840

14. A judgment rendered **upon a default** for the price of goods sold, the amount thereof being fixed by agreement, is **not a bar to an action** by the purchaser for a **breach of warranty** of the quality of the goods.

Parker v. Roberts (N. H.) 157

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15. An **unsatisfied judgment** in *assumpsit* on a loan is **not a bar** to a **subsequent action** in case for **deceit**.

Whittier v. Collins (R. I.) 128

16. Where **successive mortgages** cover two tracts of land, **judgment upon the first mortgage** in an action relating to one tract, will **not be a bar** in a **subsequent proceeding** relating to the other tract preventing inquiry as to the amount actually due upon such mortgage or the good faith of its consideration.

Dooley v. Potter (Mass.) 85

III. FOREIGN.

17. U. S. Constitution, art. IV, requiring full **faith and credit** to be given in **each State** to the judicial proceedings of every other State applies only where court, whose judgment is invoked, had jurisdiction and a finding or recital of such jurisdiction will not prevent inquiry therein.

Cases cited (Me.) 797

IV. ARREST; REMITTITUR.

18. A party is not aggrieved and no **ground for arrest** of judgment exists, until some unauthorized order or judgment adverse to him is entered.

Sullivan v. New Bedford Inst. for Savings (Mass.) 593

19. **Remittitur** may be filed as to costs improperly inserted in judgment against estate of decedent under P. S. chap. 178, § 53, thereupon, execution, may issue against estate for amount of damages.

Look v. Luce (Mass.) 563

JUNK DEALER.

Under a statute and ordinance requiring licensed junk dealer to keep book, it is competent to prove in a prosecution for receiving stolen goods that he knew the statute requirement.

Commonwealth v. Leonard (Mass.) 370

JURY.

SEE NEW TRIAL I.

1. **Intermarriage** of aunt or uncle of juror with aunt or uncle of plaintiff will **not disqualify juror after relationship dissolved** by death.

Sprague v. Bigelow (Mass.) 535

2. That one called as a juror had **contributed money** for the **prosecution** of **violators generally** is **not cause for challenge** in action for violating liquor law.

State v. Hozzie (R. I.) 29

3. N. H. Laws, 1881, chap. 37, authorizing any magistrate to commit any minor charged with an offense punishable by imprisonment, to the reform school is **unconstitutional** and in conflict with art. 15, of the Bill of Rights guarantying the right of **trial by jury**.

State v. Ray (N. H.) 67

JUSTICES OF THE PEACE.**SEE APPEAL V.**

1. A member of a military company is **disqualified** from hearing as justice a case in which the company is **party in interest**.

Kentish Artillery v. Gardiner (R. I.) 890

2. Matter in **abatement** must be pleaded before continuance.

Otis v. Ellis (Me.) 675

3. Justice courts are the successors of courts of magistrates, and the clerk of a justice court is the **proper person to certify records and papers of the court of magistrates** to which his justice court succeeded.

Clark v. Rice (R. I.) 132

4. *Audita querela* will not lie to set aside judgment of justice of the peace in which **excessive costs** were inadvertently allowed plaintiff in defendant's presence which defendant might have had corrected, and where he did not offer to pay what was legally due.

Johnson v. Roberts (Vt.) 623

LACHES.

In an action for negligent destruction of property by flooding or breakage of a water dam, where party injured has been, by awaiting result of a test case, kept out of the sum which would have reimbursed him at the time so long that it is no longer an indemnity, the jury may consider such delay and give interest on the original damages.

Frazier v. Bigelow Carpet Co. (Mass.) 525

LANDLORD AND TENANT.**I. RIGHTS AND LIABILITIES OF PARTIES.****II. LEASES; RENT.****III. TENANT AT WILL; NOTICE TO QUIT.****IV. USE AND OCCUPATION.****I. RIGHTS AND LIABILITIES OF PARTIES.**

1. A **landlord cannot maintain trespass for injury** to the premises let, **done by the tenant** during the tenancy. His remedy is **trespass on the case**.

Carroll v. Rigney (R. I.) 152

2. In an action by a lessee of a mill against his lessor, for a diversion of water, depriving the plaintiff of the demised water power, **damages for loss of profits** being claimed in the declaration, and loss of profits being a damage the parties could have reasonably anticipated, proof of the profits of the business done at the mill is admissible on the question of damages.

Crawford v. Parsons (N. H.) 323

II. LEASES; RENT.

3. A **lease** for a term of years is **not** in the ordinary sense a **conveyance** of land and the word conveyance in several statutes has been held not to apply to such lease.

Cases cited (Me.) 344

4. A school district erected a one-story building, and, by recorded instrument called a lease, contracted with individuals for the construction of a second story, to be used by them "so long as the house shall stand" with easements of way etc., and so it was occupied for thirty

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years; held, a conveyance of "schoolhouse and lot under hall" did not convey any title to second story.

Peaks v. Blithen (Me.) 263

5. Lease of land provided that if company, lessee, at any time wished to **abandon** business, it could have a year to remove buildings; January 11, company voted to sell its property, and February 22 voted that directors might run the factory; property sold in August; held **vote did not indicate purpose** to abandon business, that there was **no forfeiture**, and that lessee had one year from August to remove buildings.

Waterman v. Clark (Vt.) 619

6. Where the **treasurer of a manufacturing company**, with authority "to hire and pay for necessary stores," took a lease under seal to himself and the company went into possession and a portion of the rent was paid by the paper of the company, held, that the circumstances were not inconsistent with holding that the company occupied under the lessee named and that in an action in equity it was not liable under the covenants in the lease.

Haley v. Boston Belting Co. (Mass.) 81

7. In an **action against a tenant for rent**, it is competent for the defendant to prove as a **defense**, that after delivery of the lease, plaintiff made an **oral agreement** that the **rent should be reduced**; the **consideration** being, a change in the business position of the defendant which might be of advantage to the plaintiff and of detriment to defendant, should plaintiff fail to keep his promise.

Hastings v. Lovejoy (Mass.) 218

8. A judgment in an **action** by lessee against lessor for **covenants broken** in which the jury were instructed to consider, the lessee's liability for rent is **not res judicata** in a **subsequent action** by the lessor for rent for subsequent period.

Parsons v. Crawford (N. H.) 840

III. TENANT AT WILL; NOTICE TO QUIT.

9. Landlord may terminate **tenancy at will**, by new lease to third party; new lessee may eject original tenant.

Gronsbra v. Bourgies (Mass.) 747

10. Tenancy by **sufferance** does not imply previous letting; it may exist without.

Payton v. Sherburne (R. I.) 368

11. **Tenancy at will does not pass by descent or devise.** *Id.*

12. Action by tenant at will will not lie against landlord for **procuring new lessee** to bring ejectment.

Gronsbra v. Bourgies (Mass.) 747

13. Under Pub. Stat. R. I. chap. 232, § 1, **tenants at will must quit** on day named in notice given by lessor.

Payton v. Sherburne (R. I.) 368

14. **Query**: if notice to quit to tenant at will is not reasonable, whether tenant has not right to remove his effects after tenancy terminated. *Id.*

IV. USE AND OCCUPATION.

15. No inconsistency between **relation** of landlord and tenant and that of mortgagor and mortgagee; mortgagee may maintain action

against mortgagor for use and occupation upon a contract to pay therefor.

Murray v. Riley (Mass.) 516

LARCENY AND RECEIVING STOLEN GOODS.

1. The offense of knowingly receiving stolen property is distinct from the offense of receiving embezzlement property, the punishment differing.

Commonwealth v. Leonard (Mass.) 870

2. Indictment for receiving stolen goods, several counts describing different articles as stolen, and charging defendant with receiving, is good. *Id.*

3. Indictment for concealing stolen goods property may be collectively valued; it must affirmatively appear the goods had some value either inferentially or by inspection.

State v. Gerrish (Me.) 840

4. Statute and ordinance requiring licensed junk dealer to keep book; it is competent to prove that he knew the statute requirement in a prosecution for receiving stolen goods.

Commonwealth v. Leonard (Mass.) 870

5. The fact that a person is known by a certain name, and so addressed by others, is evidence to prove the identity of the person on whom the larceny was committed.

Cases cited (R. I.) 184

6. Possession of stolen property is *prima facie* evidence of guilt.

State v. McAndrews (R. I.) 188

7. Evidence of stealing goods in one county and of their transportation to another is evidence of a single transaction, and admissible in corroboration of an accomplice.

Commonwealth v. Hayes (Mass.) 548

8. Weight of evidence of good character is for the jury to determine; the old rule that only in cases of doubt such evidence is considered, is not now the law.

Commonwealth v. Leonard (Mass.) 870

LEASES.

SEE LANDLORD AND TENANT II.

LEGACIES.

SEE DEVISE AND LEGACY.

LIBEL AND SLANDER.

I. WORDS ACTIONABLE.

II. PRIVILEGED COMMUNICATIONS; JUSTIFICATION; MITIGATION.

III. PLEADING; EVIDENCE; DAMAGES.

I. WORDS ACTIONABLE.

1. Words imputing a possible crime as incest are actionable *per se*, although not believed by the hearer, and although the charge could not be true.

Rea v. Harrington (Vt.) 624

2. A mere animadversion in a circular upon a transaction had with a firm, in which it is stated that the members of the firm, naming them, "are not worthy of our support," even though coupled with the

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epithets "base treachery," "foul and unfair dealings," is not actionable *per se*.

Donaghue v. Caffey (Conn.) 267

II. PRIVILEGED COMMUNICATIONS; JUSTIFICATION; MITIGATION.

8. If a privileged communication be couched in language too violent for the occasion it furnishes evidence of malice.

Cases cited (R. I.) 187

4. A petition of citizens to a town council asking the removal of a constable because he is utterly devoid of principle, ignorant of the duties of his office, and that he has maliciously and wickedly assaulted and arrested innocent persons is a privileged communication and does not imply malice.

Kent v. Bongarte (R. I.) 136

5. Verbal slander is not such a provocation as will justify or mitigate libel.

Sprague v. Bigelow (Mass.) 535

6. The truth must be specially pleaded, if defendant wishes to take advantage of it either for justification or mitigation of damages.

Donaghue v. Caffey (Conn.) 267

III. PLEADING; EVIDENCE; DAMAGES.

7. Declaration for slander must definitely set out time words uttered; an averment that they were uttered "about the first day of April 1884," held insufficient on demurrer.

Cole v. Babcock (Me.) 678

8. Evidence is admissible to prove that the defendant repeated the slanderous words subsequently to bringing the suit.

Rea v. Harrington (Vt.) 624

9. It is proper to allow the plaintiff to testify as to his mental sufferings caused by the slander; in effect, that he could not sleep nights, could not work etc. *Id.*

10. Extent of circulation of libelous pamphlet may be shown against publisher as evidence of injury; all of several deliveries to different persons are to be treated as substantiating allegation of publication.

Sprague v. Bigelow (Mass.) 535

11. The plaintiff claiming exemplary damages, it was error to exclude evidence, to prove that the defendant was a man of no property. But as the error could only affect the exemplary damages, the judgment will be affirmed, if the plaintiff enters a remittitur of such damages.

Rea v. Harrington (Vt.) 624

12. It is the obloquy of the charge that produces damage not the exposure to punishment, and hence, no defense that plaintiff had not in fact committed the offense charged, that the hearers did not believe the charge, or that the charge was improbable or even impossible. *Id.*

13. In an action for libel brought by two or more partners, damages cannot be recovered for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business.

Donaghue v. Caffey (Conn.) 267

LICENSE.

SEE GAMING; INTOXICATING LIQUOR II.

1. A party appearing at the hearing on a petition for a license, **waives objection to sufficiency of notice of application.**

Quinn v. Middlesex Electric Light Co. (Mass.) 108

2. A license to operate a **stationary steam engine** at the licensee's "shoe manufactory" sufficiently prescribes the place for its use in a building connected therewith and the designation of the building renders unnecessary any other description of the materials and construction thereof.

Alter v. Dodge (Mass.) 481

3. A license to run a **stationary engine of certain power**, will not authorize the running of a number of engines, whose combined power do not exceed that amount.

Quinn v. Middlesex Electric Light Co. (Mass.) 108

4. A license to run steam engine is not a public trust like a liquor license; but it will pass to a transferee of the engine. *Id.*

5. A statute which makes the use of any **stationary engine** without a license a common nuisance, will not authorize the licensing so that it cannot be made a private nuisance.

Quinn v. Lowell Electric Light Co. (Mass.) 101

6. Statute and ordinance requiring licensed **junk dealer** to keep book; it is competent to prove in a prosecution for receiving stolen goods, that he knew the statute requirement.

Commonwealth v. Leonard (Mass.) 370

7. A licensee to sell **intoxicating liquors**, is bound at his peril to see that its conditions are complied with by his servants or lose the protection of his license.

Cases cited (Mass.) 520

LIEN.

1. A **special contract** for manufacturing bricks, providing for their sale and payment of cost first, is inconsistent with a statutory lien.

Howe v. Wiscasset Brick and Pottery Co. (Me.) 891

2. **Hauling** sand and lumber will not give right to lien.

Webster v. Real Estate Improvement Co. (Mass.) 910

3. A **mechanic's lien** cannot be enforced upon several lots of land for work done on some of them and also upon other lots not described in petition and not contiguous to any therein mentioned, for a general balance of account due under an entire contract.

Rice v. Nantasket Co. (Mass.) 581

4. A **special lien** by contract will not be affected by the **insolvency** of the debtor.

Howe v. Wiscasset Brick and Pottery Co. (Me.) 891

5. Action for **fraud** is maintainable, where a sub-contractor having inchoate lien failed to perfect it, through fraudulent declaration of defendant that contractor had been paid al-

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though it does not appear that demand has been made on contractor.

Alexander v. Church (Conn.) 823

6. **Judgment in rem** cannot be rendered against property attached in action to enforce lien, where defendant is general owner and made contract on which lien is based, and no general notice of action given under R. S. chap. 91, § 44.

Martin v. Darling (Me.) 674

LIFE INSURANCE.

SEE INSURANCE III.

LIMITATION OF ACTIONS.

- I. REAL ACTIONS; ADVERSE POSSESSION.
- II. WHEN STATUTE BEGINS TO RUN.
- III. SUSPENSION AND REMOVAL OF EFFECT.

I. REAL ACTIONS; ADVERSE POSSESSION.

1. Cause of action for **mesne profits** accrues when the trespasses are committed, and not after recovery in **ejectment**, and a recovery can be had only for such time as lies within the limits of the Statute of Limitations.

Herreshoff v. Tripp (R. I.) 46

2. **Nonuser** for more than twenty years with adverse use of the servient estate inconsistent with the existence of an easement will extinguish it.

Cases cited (Mass.) 449

3. That a **wall** has been built on a person's land for more than **thirty years**, and has, during that length of time, been maintained by his predecessor and himself, is sufficient to justify a finding that by possession alone he had a title to the land under the same.

McLaughlin v. Cecconi (Mass.) 766

4. **Adverse possession** cannot be proved by declarations of party in possession, except when part of *res gesta*; they are only material when he speaks against his own interest.

Saugatuck Congregational Society v. East Saugatuck School District (Conn.) 861

II. WHEN STATUTE BEGINS TO RUN.

5. The Statute of Limitations limiting actions in **assumpsit** to six years, Pub. Stat., R. I., chap. 205, § 8, begins to run in favor of **executors and administrators** as soon as they are qualified. Executors and administrators may reduce this time to three years, Pub. Stat. R. I., chap. 189, § 8; chap. 205, § 9, by giving the notices provided in the last named section.

Knowles v. Whaley (R. I.) 150

6. The special limitation (Pub. Stat. chap. 225, § 9), runs against bond for **liberty of jail yard** from first of two breaches, and mere **want of knowledge** of breach is not fraud to toll Statute.

Pearce v. Curran (R. I.) 889

7. A **suit in equity** is not commenced until the bill is filed.

Clark v. Slayton (N. H.) 49

III. SUSPENSION AND REMOVAL OF EFFECT.

8. The **surplus** in the hands of **mortgagee** may be recovered at law as well as in equity,

and the Statute of Limitations will apply to the right of recovery without demand; and the pendency of an action to set aside an alleged fraudulent conveyance of the equity of redemption will not suspend the statute.

Reynolds v. Hennessy (R. I.) 868

9. A promise, by an administrator, to pay a claim against the estate does not bind either the estate or the sureties on his bond, so as to take the case out of the three years' limitation contained in the statute.

Judge of Probate v. Ellis (N. H.) 288

10. An acknowledgment of a debt made to a stranger is ineffectual to remove the bar of the Statute of Limitations, unless intended to be communicated to the creditor.

Parker v. Remington (R. I.) 890

11. An enforced part payment will not affect running of Statute.

Cases cited (Vt.) 764

12. A payment made by an assignee under order of court in a proceeding in insolvency will not interrupt the running of the Statute of Limitations; and this is so although the United States Bankrupt Act was in force at the time.

Benton v. Holland (Vt.) 788

Hanks v. Holland (Vt.) 788

13. Defendant was indebted to a firm and also to an individual member thereof; on request for payment on the accounts, he paid a sum exceeding the individual debt, without directions as to application. Held, the excess was properly credited to the firm account and was a part payment to remove the bar of the Statute of Limitations.

Way v. Grov (Vt.) 481

LIS PENDENS.

1. A purchaser *pendente lite* need not be made a party.

Cases cited (Me.) 788

2. One taking conveyance and not recording it, is bound by judgment in ejectment against grantor, execution having been previously levied.

Smith v. Hodsdon (Me.) 787

3. The voluntary assignment by one partner of firm property, made pending an application for the appointment of a receiver, will be made subject to the rights of the receiver and with notice of the proceedings as *lis pendens*.

Arnold v. Providence Lumber Co.
(R. I.) 44

LOCAL IMPROVEMENTS.

SEE MUNICIPAL CORPORATIONS III.

LOGS AND LUMBER.

1. Record on error containing writ to attach certain logs and return of officer that he did attach and mark them and filed copy of attachment, will sustain judgment *in rem*.

Lewiston Steam Mill Co. v. Merrill
(Me.) 666

2. The seller of manufactured lumber, including shingles, sold and delivered with-

out an official survey, cannot recover the price, such sales being prohibited by R. S. chap. 41, § 21.

Richmond v. Foss (Me.) 300

LOTTERIES.

1. An offer to sell and actually selling a lottery ticket is but one offense.

Cases cited (Mass.) 508

2. Advertisements promising presents of different values in return for subscriptions to newspaper to be determined by drawing of numbers given to subscribers, is indictable as a lottery.

State v. Willis (Me.) 663

3. Indictment for maintaining, is good, although it does not disclose name of prosecutor entitled to portion of penalty.

Id.

4. Indictment not bad for duplicity in charging "lottery, scheme or device of chance, and that defendant printed, published and circulated advertisement.

Id.

5. Indictment charging that at place and on day named defendant was concerned in, by selling ticket, not bad on demurrer for omitting "then and there."

Id.

6. Indictment for inserting advertisement of lottery in newspaper published in another State, but circulated in this State, is bad unless it avers that defendant was concerned in circulation in this State.

Id.

7. When lottery ticket set out in indictment does not appear on its face to be a ticket, it may be averred and proved as such.

Id.

LUNACY.

SEE INSANE PERSONS.

MALICIOUS PROSECUTION.

Plaintiff must prove defendant's action was without probable cause and terminated in his favor; one who terminates suit against him by paying demand, or by consenting to being charged on account, cannot say action was without probable cause; probable cause is for court where no dispute in facts.

Startwell v. Parker (Mass.) 751

MANDAMUS.

Mandamus will not lie in favor of a spiritual society against selectmen of town to compel them to allow it an equal share of public money given to religious societies, where money had been divided before petition brought; nor will it lie against successors in office of selectmen.

Spiritual Athenaeum Soc. v. Selectmen of Randolph (Vt.) 630

MARINE INSURANCE.

SEE INSURANCE I.

MARRIAGE.

SEE HUSBAND AND WIFE I.

MASTER AND SERVANT.

- I. CONTRACT OF HIRING; WAGES.
- II. LIABILITY OF MASTER; NEGLIGENCE;
FELLOW SERVANTS.
- III. ACTS OF SERVANTS.

I. CONTRACT OF HIRING; WAGES.

1. **Contract** for labor at fixed price per day for no fixed period is **defeasible at will** of either party.

Merrill v. Western Union Tel. Co.
(Me.) 677

2. A master **reserving the right to terminate a contract** of service if not satisfied has the right to terminate the contract although his **dissatisfaction is without cause**.

Cases cited (Vt.) 628

3. A contract for services, the employer to have the **right to determine amount of compensation**, and the manner of its payment, the *employee* is bound by the determination of his employer acting in good faith, and payment of the amount determined extinguishes the claim.

Lee's Appeal (Conn.) 426

4. Sufficiency of acceptance of **assignment of wages** under Rhode Island Act of 1878.

O'Neil v. Dunn (R. I.) 50

II. LIABILITY OF MASTER; NEGLIGENCE; FELLOW SERVANTS.

5. R. I. Pub. Laws, chap. 688, requiring the **erection of fire escapes**, do not create a duty between an owner and the employee of his tenant, to give him a right of action against the owner for injury sustained by a fire.

Maker v. Slater Mill & Power Co.
(R. I.) 176

6. The master is liable for **furnishing defective machinery**, as insufficiently guarded saws, if he knew or ought to have known of defect, and servant did not and could not know of it.

Hull v. Hall (Me.) 672

7. Where a **car** is received from another road, it is the **duty of the receiving company** to furnish proper inspection by competent and suitable inspectors, acting under proper superintendence, rules and instructions, and a **neglect** so to do is **negligence** in the company which will render it **liable for personal injuries to an employee** of the road, resulting from such neglect.

Keith v. New Haven & N. R. R. Co.
(Mass.) 226

8. The **employee on a train running on Sunday** previous to chap. 87, Stat. 1884, unless the running was a work of necessity or charity, cannot recover damages for injury to his person.

Read v. Boston & Albany R. R. Co.
(Mass.) 390

9. **Assumption of risks—Contributory negligence**—An employer is not liable for injury to an employee where employee neg-

lected to avail himself of the protections afforded and which were known to him as where plaintiff's injury resulted from his apron catching in a plainly visible shaft, and which might have been prevented had he placed the ladder on the opposite side of the box.

Russell v. Tillotson (Mass.) 444

10. If the employment is attended with **extraordinary danger** or risks which are fully known to the workman, when he enters on the employment, he assumes those risks also.

Joyce v. Worcester (Mass.) 487

11. It is those risks alone which cannot be obviated by the adoption of a **reasonable measure of precaution** by the master, that the servant assumes.

Cases cited (Conn.) 277

12. Where a servant was hired to make size and do whatever the foreman desired, was directed by the foreman to assist the belting an engine in a dark cellar and told "to hurry," held, he was guilty of **contributory negligence** and assumed the risks of his employment and could not recover for injury by falling into an unguarded elevator well.

Taylor v. Carew Mfg. Co. (Mass.) 210

13. Where a **railroad laborer**, for his own convenience and merely at the suggestion of the foreman, rode on a hand car, which was run into by a train, held, he **assumed the risks** of the position.

McGrath v. New York & N. E. R. R. Co.
(R. I.) 124

14. In an action for damages for injuries received by servant in the course of his employment, where previous instructions had fully covered the law of the case and no evidence of defendant's negligence, plaintiff is not entitled to the instruction, knowledge of the danger was not conclusive evidence of neglect in failing to avoid it.

Joyce v. Worcester (Mass.) 487

15. A breakman in the employ of one company, on its cars, being in use under contract with another company, on the latter's track, may recover against the latter for an injury resulting from the negligence of one of its employees who, as to plaintiff is not a **fellow servant**.

Zeigler v. Danbury & N. R. R. Co.
(Conn.) 273

16. Where a laborer was injured by the falling of earth or the caving in of a city sewer, caused by the negligence of the foreman, superintendent, or overseer, employed by the city, held, the city was not liable because the negligence was that of a fellow servant.

Conley v. Portland (Me.) 797

17. **Damages** are not recoverable from the master for **personal injuries** sustained through **negligence of fellow journey-men carpenters** in constructing an unsafe staging where proper materials therefor had been furnished.

Hoppin v. Worcester (Mass.) 213

III. ACTS OF SERVANTS.

18. In prosecution under Mass. Stat. 1885,

chap. 90, § 1, prohibiting sale, etc., except as therein authorized, defendant is not necessarily the seller, when sale was made by a servant, without his knowledge and against his directions.

Commonwealth v. Wachendorf

(Mass.) 520

19. But the act of a servant in putting up a screen in violation of P. S. chap. 100, § 12, without the knowledge and in opposition to the will of his master, will render the master liable therefor.

Commonwealth v. Kelly (Mass.)

384

20. A licensee to sell intoxicating liquors is bound at his peril to see that its conditions are complied with by his servants, or lose the protection of his license.

Cases cited (Mass.)

520

21. Declaration for damages for assault committed by a servant of defendant, must allege that assault was committed while acting within scope of employment.

McCann v. Tillinghast (Mass.)

568

MAXIMS.

1. *Communis error facit jus.*

Paine v. Baker (R. I.)

153

2. *Id certum est, quod certum rediti potest.*

Hopkins v. Young (R. I.)

151

3. *In pari delicto potior est conditio defendentis.*

Foley v. Greens (R. I.)

17

4. *Ut res magis valeat quam pereat.*

Douglas v. Hennessy (R. I.)

885

MECHANIC'S LIEN.

SEE LIEN.

MERGER.

SEE MORTGAGE IV.

MILITIA.

"Record of Massachusetts Volunteers" printed under chap. 98, of the Resolves of 1866 and recognized in Stat. 1866, chap. 301, § 1, is a public document and evidence of facts contained therein.

City of Worcester v. Inhabitants of Northborough (Mass.)

544

MILLS AND DAMS.

1. The owner of the soil over which another has an easement of flowage, is entitled to the herbage.

Cases cited (Mass.)

449

2. A person having the right of flowage through another's land, while not exercising his right has no right to interfere with ordinary farm fences maintained by the owner of the servant estate for the protection of his land.

Smith v. Langewald (Mass.)

449

3. In a grant of a right to draw water from a pond after the grantor's grist mill is supplied from the same pond, his right to continue to use the water power in the mill, for a purpose not necessary for the operation of the mill, is not implied.

Crawford v. Parsons (N. H.)

323

4. Owner of easement having a mill

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privilege may abandon it; mere non-user does not show abandonment; to have that effect, non-user must be accompanied with decided acts showing intention to abandon.

Eddy v. Chase (Mass.)

574

5. Injunction will be granted to restrain a mill owner from opening his gates and allowing water to run to waste when the plaintiff, an owner on the other side of the stream, taking his water from the same dam, has a right to all the water not needed for use by the defendant.

Fuller v. Daniels (N. H.)

13

6. In an action for negligent destruction of property by flooding or breakage of a water dam where party injured has been, by awaiting result of a test case, kept out of the sum which would have reimbursed him at the time so long that it is no longer an indemnity, the jury may consider such delay and give interest on the original damages.

Frazer v. Bigelow Carpet Co. (Mass.)

535

7. In an action by a lessee of a mill against his lessor, for a diversion of water, depriving the plaintiff of the demised water power, damages for loss of profits being claimed in the declaration, and loss of profits being a damage the parties could have reasonably anticipated, proof of the profits of the business done at the mill is admissible on the question of damages.

Crawford v. Parsons (N. H.)

323

8. A claim under the Mill Acts for damage by flooding by a mill dam is not a controversy which may be the subject of a personal action at law or of a suit in equity within the meaning of R. S. chap. 114.

Cases cited (Mass.)

440

MINES AND MINING.

A covenant in a deed conveying a stone quarry that the covenantor will never open or work or allow others to open or work any quarries on his adjoining lands, will not be enforced by injunction against subsequent grantees of the adjoining premises at the suit of subsequent grantees or the original covenantee.

Norcross v. James (Mass.)

337

MINORS.

SEE INFANTS.

MISREPRESENTATIONS.

SEE FRAUD AND FRAUDULENT CONVEYANCES II.

MISTAKE.

SEE EQUITY II.

MORTGAGE.

I. FORM; VALIDITY.

II. RECORD; PRIORITY, NOTICE.

III. RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE.

IV. ASSIGNMENT; PAYMENT; MERGER.

V. REDEMPTION.

VI. FORECLOSURE.

VII. TRUST DEEDS.

SEE DEED.

I. FORM; VALIDITY.

1. Where the instrument executed contemporaneously with an absolute deed uses the words "redeemed," "redemption," "refund," an intention to create a mortgage will be implied therefrom.

Cases cited (Mass.) 517

2. Whether conveyance of land accompanied by agreement by grantee to reconvey on condition, is a mortgage or a sale, depends on intention of parties.

Murray v. Riley (Mass.) 516

3. A bond given by the grantee, three years after the delivery of an absolute deed, conditioned to reconvey to the grantor, cannot be considered a defeasance, so as to constitute the deed a mortgage, under the Statutes of Maine. R. S. chap. 90, § 1.

Stowe v. Merrill (Me.) 290

4. It is not necessary for the mortgagee to sign the mortgage, in order to make an agreement in relation to the time of redemption, inserted in the mortgage binding upon him; and it is not necessary to insert such agreement in the notice of foreclosure of such a mortgage.

Id.

5. A mortgage signed and recorded but omitting seals may be reformed by the addition of seals against a subsequent attaching creditor having notice.

Bullock v. Whipp (R. I.) 809

6. A mortgage of land in the actual adverse possession of one claiming to hold adversely to the mortgagor, is void as to such claimant.

Canfield v. Hard (Vt.) 851

7. Mortgage of all the goods, etc., in and about a certain building, is valid as to all articles that can be identified.

Cases cited (Vt.) 400

8. Owner does not lose right to sell or mortgage, by fact that chattels are in wrongful possession of another.

Dahill v. Booker (Mass.) 571

II. RECORD; PRIORITY; NOTICE.

9. Fact that defeasance limiting estate under deed absolute on face is not of record is not a fraud and will not affect grantor's rights against one having notice.

Clark v. Watson (Mass.) 725

10. Where there is a valid attachment of mortgaged personal property and the mortgage appears, and the mortgage is adjudged valid and is satisfied by the attachment creditor, the property is subject to sale under execution and the fact that the mortgage was paid five minutes after the execution levied is immaterial.

Loomis v. Lewis (Mass.) 496

11. The assignee of a mortgage recorded before another mortgage of prior date, will not be affected by the fact that his assignor had actual notice of the existence of the prior mortgage nor will his rights to a first lien be disturbed by the fact that the mortgage older in date was recorded prior to his assignment.

Moree v. Curtis (Mass.) 75

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12. That the registry of a mortgage bore a date earlier than the mortgage itself, and that the mortgage notes were dated a year earlier than the mortgage, do not prevent its operating at once when delivered, and do not prevent its being notice that the mortgage created a present charge upon the property. The date is only material, if at all, in fixing the time for payment of the debt secured. 765

Jacobs v. Denison (Mass.)

13. Possession of land by a person other than the mortgagor is notice to the mortgagee of his right of title.

Canfield v. Hard (Vt.) 851

III. RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE.

14. In trover by mortgagor against third party for conversion of mortgaged property, where mortgagee had taken property for breach of condition, held, this application of property should be considered in mitigation of damages.

Dahill v. Booker (Mass.) 571

15. Under the facts, held, mortgagor could not maintain trover for sale of all mortgaged goods together by mortgagee.

Dahill v. Booker (Mass.) 571

16. Lands held by one as mortgagee, under deed absolute on face, cannot be taken on execution by one having absolute notice of mortgage; mortgagor may enjoin sale.

Clark v. Watson (Mass.) 725

17. The demand of a mortgagee of chattels, upon an attaching officer, for all the mortgaged chattels attached, if specifying only a portion thereof, is defective as to the residue; even though referring to the book and page of the mortgaged record.

Woodward v. Ham (Mass.) 209

18. No inconsistency between relation of landlord and tenant and that of mortgagor and mortgagee; mortgagee may maintain action against mortgagor for use and occupation upon a contract to pay therefor.

Mundy v. Riley (Mass.) 516

19. Mortgaged personal property attached as property of mortgagor; mortgagee cannot maintain replevin without forty-eight hours' notice required by R. S. chap. 81, § 44.

Potter v. McKenney (Me.) 674

20. Mass. Act 1881, chap. 110, providing proceeding for application of damages received for mortgaged land taken for public use, does not take away right of mortgagee or assignee from remedy in equity against mortgagor.

Wood v. Westborough (Mass.) 598

IV. ASSIGNMENT; PAYMENT; MERGER.

21. A mortgage to secure an agreement to support another during life, is assignable; and the condition may be performed by an assignee, unless the support is required by the mortgagee to be furnished personally.

Ottaqueches Savings Bank v. Holt (Vt.) 280

22. A bank is bound, in favor of one who acted in reliance thereon, by the authority ap-

pearing on its **records** as a vote of its trustees to one of its officers to assign mortgages held by the bank, although such record of authority was in fact, a false entry.

Holden v. Phelps (Mass.) 768

28. Where the debt is secured by a **mortgage of two tracts**, an entry is made upon one, if the value of such tract fails to liquidate the debt, it will operate as payment *pro tanto*.

Dooley v. Potter (Mass.) 85

24. Where **land is subject to two mortgages** held by different persons, and the first mortgagee is in possession for the purpose of foreclosure, his quitclaim conveyance to a purchaser of the equity of redemption operates as an assignment of the first mortgage, and not as a discharge of it, justice requiring the instrument to have that effect.

Green v. Currier (N. H.) 854

V. REDEMPTION.

25. **Equity of redemption** is a legal estate and purchaser thereof can maintain a real action for the premises.

Cowles v. Dickinson (Mass.) 618

26. A decree on bill to **redeem**, requiring the payment of the mortgage on a certain day, and on default from thenceforth to stand dismissed, is a final decree.

Hazard v. Robinson (R. I.) 882

27. On a **decree for redemption**, a year from the **date** of the decree will ordinarily be **allowed**.

Murphy v. New Hampshire Savings Bank (N. H.) 110

28. The statutory **foreclosure** of a mortgage **bars** the right of **redemption** of the mortgagor and of all persons claiming under him, including minor heirs. Such heirs have no right to redeem on showing want of actual notice or the failure to have guardian *ad litem* appointed and notice given to him.

Thompson v. Paris (N. H.) 235

29. **After foreclosure** without sale, **suit** by the mortgagee for the whole amount of the debt is a **waiver of foreclosure** and **revives** the right of **redemption**.

Hazard v. Robinson (R. I.) 882

VI. FORECLOSURE.

30. **Foreclosure proceedings** in equity are of the nature of proceedings *in rem* and are **not** ordinarily **intended** to act *in personam*.

Burges v. Souther (R. I.) 819

31. Where **successive mortgages** cover two tracts of land, judgment upon the first mortgage in an action relating to one tract will not be a bar in a subsequent proceeding relating to the other tract preventing inquiry as to the amount actually due upon such mortgage or the good faith of its consideration.

Dooley v. Potter (Mass.) 85

32. A **notice of foreclosure**, published in three successive issues of a weekly newspaper and **recorded** the next day after the last publication, is **sufficient** under the Statutes of Maine, R. S. chap. 90, § 5.

Stowe v. Merrill (Me.) 290

33. An **action for debt on judgment**

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will **not lie upon a decree** in the **alternative** rendered on a bill to foreclose a mortgage.

Burges v. Souther (R. I.) 819

34. A judgment creditor, by **levying upon** and selling his debtor's **equity of redemption**, recognizes the validity of the mortgage and after purchasing at such sale cannot contest the same; but if the sale is of the debtor's interest or estate without mentioning the mortgage he may contest the same.

Cowles v. Dickinson (Mass.) 618

35. Execution sale of defendant's interest in real estate is not rendered invalid by omission to levy on and sell his equity of redemption therein as such. *Id.*

36. The **surplus in the hands of mortgagee** may be **recovered at law** as well as in equity and the Statute of Limitations will apply to the right of recovery without demand and the pendency of an action to set aside an alleged fraudulent conveyance of the equity of redemption will not suspend the Statute.

Reynolds v. Hennessy (R. I.) 863

VII. TRUST DEEDS.

37. Trustee, deed to whom is absolute in form, is only one who can make **declaration of trust**, record of which will be notice.

Clark v. Watson (Mass.) 725

38. **Lands** held by one as trustee under deed absolute on face, may be **taken on execution**, if trust is not on record and execution creditor has no notice of trust. *Id.*

MUNICIPAL CORPORATIONS.

I. GRANT.

II. POWERS; ORDINANCES.

III. LOCAL IMPROVEMENTS; CONTRACTS.

IV. TORTS.

a. ACTS OF AGENTS.

b. DEFECTIVE WAYS; NOTICE; EVIDENCE.

V. OFFICERS.

VI. PARTICULAR CHARTERS CONSTRUED.

SEE ADULTERATION; BRIDGES; CEMETERIES; COUNTIES; DRAINS AND SEWERS; FIRES AND FIRE DEPARTMENTS; INTOXICATING LIQUORS; LICENSE; POOR AND POOR LAWS; SCHOOLS AND SCHOOL DISTRICTS; TAXES.

I. GRANT.

1. A **grant** or reservation to the **inhabitants** of a town, an unincorporated body, is merely to the inhabitants living at the time.

Cases cited (R. I.) 873

II. POWERS; ORDINANCES.

2. **Districts are towns**, and the inhabitants of districts have all the powers, rights, privileges and immunities of town, except the right of electing representatives.

Hill v. Selectmen of Easthampton (Mass.) 497

3. **City ordinance** regulating the use of **public grounds** and **restricting sermons**, lectures and addresses thereon, is valid; the statute requiring by-laws of towns to be

recorded, has no application to the City of Boston; the ordinance in question is not invalid because not published.

Commonwealth v. Davis (Mass.) 380

4. P. S. chap. 27, § 15, authorizing a city to prohibit persons under a penalty, from **riding or driving faster than a rate to be specified**, does not authorize imposition of penalty for driving "at an immoderate gait, so as to endanger or expose to injury any person standing," etc., on street.

Commonwealth v. Ray (Mass.) 524

5. A **complaint is sufficient substantially in the words of ordinance** prohibiting a continuous stopping of a vehicle in any street for a longer time than twenty minutes.

Commonwealth v. Rowe (Mass.) 911

6. Words "other public purposes" in P. S. chap. 28, § 18, authorizing city councils to make **appropriations for celebrations**, etc., may include open air concerts.

Hubbard v. City of Taunton (Mass.) 581

7. A town or district may appropriate money to celebrate the centennial anniversary of its incorporation.

Hill v. Selectmen of Easthampton (Mass.) 497

8. Mass. P. S. chap. 27, § 129, giving authority to determine in equity petition of ten taxable inhabitants to restrain town from illegally **appropriating money**; supreme court has exclusive jurisdiction; such authority is not within general equity powers transferred to superior court by P. S. chap. 151, § 2.

Baldwin v. Wilbraham (Mass.) 538

9. Authority to restrain abuse of corporate powers by cities and towns, under P. S. chap. 27, § 129, is vested in supreme court exclusively; the matter is not within the general principles of **equity jurisprudence** and is not included in the equity powers transferred to superior court by P. S. chap. 151, § 2. *Id.*

II. LOCAL IMPROVEMENTS; CONTRACTS.

10. It is not the duty or within the power of the selectmen of a town, to **alter a highway** for the purpose of **changing the line of travel**.

Pratt v. Amherst (Mass.) 197

11. No **appeal** lies from refusal of city council to **lay out way**, where charter gives exclusive authority to council and general statutes provide only for appeal from "municipal officers" defined to be "mayor and alderman."

City of Biddeford v. County Comrs. of York Co. (Me.) 661

12. A claim for damages arising from **change in the grade of a street** cannot form the subject of arbitration, under P. S. chap. 188.

Osborn v. City of Fall River (Mass.) 439

13. The entry upon land by a city, for **constructing a sewer or way** must be after and not before the taking of the land; yet where the city has legally done some work on the land, resumption of such work within two years will not render it liable to trespass under the Statute.

Wilcox v. City of New Bedford (Mass.) 754

N. E. R., v. I.

14. A bid in answer to advertisement for proposals for a building does not constitute contract until accepted and conditions complied with.

Howard v. Maine Industrial School (Me.) 894

15. In 1746, pursuant to a vote of the free-men of a town, the town clerk conveyed to a purchaser a beach property, taking from him a bond to the town treasurer providing that the inhabitants of the town should have the right to take from the beach, sand, seaweed, shells and drift stuff. Held, that the successor in title to the purchaser could maintain trespass q. c. f. against an inhabitant of the town for asporting sand; and the reservation or stipulation was no protection to the defendant.

Newport Hospital v. Carter (R. I.) 871

IV. TORTS.

a. ACTS OF AGENTS.

16. A city is not liable for **negligent acts of officers of fire department**, unless by statute, or unless city government expressly ordered the act.

Burrill v. City of Augusta (Me.) 697

17. Where a laborer was injured by the **falling of earth** or the caving in of a city sewer caused by the negligence of the foreman, superintendent, or overseer, employed by the city, held the city was not liable because the negligence was that of a fellow servant.

Conley v. Portland (Me.) 797

b. DEFECTIVE WAYS; NOTICE; EVIDENCE.

18. The **liability of a highway to become defective is not in itself a defect**.

Cases cited (Mass.) 543

19. It is the **duty of a town** in making and repairing highway, to **consider the natural effects of rain and snow and ice**.

Hampson v. Taylor (R. I.) 117

20. A town is liable for injury caused by a defective highway only where the defect might have been removed or the injury prevented by **reasonable diligence** or care on its part.

Flanders v. Norwood (Mass.) 448

21. Where **passageway** of city street under bridge was so low as to render travel unsafe and grade could be lowered, court cannot be required to rule as matter of law, that city could not have removed defect by ordinary care.

Talbot v. Taunton (Mass.) 615

22. Under Pub. Stat. chap. 52, § 18, town is liable for defect in highway as a loose cover of a cesspool without actual notice, if it might have had notice by exercise of proper diligence, although defect had not existed for any particular time.

Post v. Boston (Mass.) 543

23. Town is liable for damages, where cover of a cesspool was liable to come off through natural causes which reasonable diligence should guard against. *Id.*

24. Plaintiff was injured by falling in a coal hole insecurely fastened by the owner of the premises. Held, the city was not li-

able in the absence of proof of notice or facts showing officers ought to have known of its condition or that the covering was not constructed as required by Ordinance 1883, chap. 26, §§ 24, 25.

Hanscom v. Boston (Mass.) 723

25. A city is not liable for an injury resulting from the defective condition of the **planking between the tracks of a railroad**, where the highway crossed a grade and was located after the construction of the railroad, where a statute (Pub. Stat., chap. 112, sec. 124), imposed the duty of protecting the tracks upon the railroad company.

Scanlan v. Boston (Mass.) 92

26. Where the selectmen, having no power to remove a **temporary structure erected by a railroad company** which obstructed the highway, complained of the structure to the county commissioners and railroad commissioners, they did all they were required to do, and the town is not liable for an injury subsequently sustained by reason of the obstruction.

Flanders v. Norwood (Mass.) 448

27. A **judgment** in favor of a teamster, in an action for negligence against him for obstructing the highway by his team, is **available** by way of **estoppel** in a subsequent action by the same plaintiff against the town.

Hill v. Bain (R. I.) 145

28. Where street in city was laid out and accepted it will be **presumed** in an action for personal injury that **city council did all required** by statute in the premises.

Talbot v. Taunton (Mass.) 615

29. In an **action against a town for injuries upon a highway**, the fact that the **selectmen's certificate** of the laying out of the highway was **not returned** to the town clerk and recorded as required by G. L. chap. 61, § 14, until after the expiration of thirty days, **will not avail** the defendant to show that there was **no legal highway**.

Randall v. Conway (N. H.) 844

30. An action is not maintainable against a town, for a personal injury **not received within the limits** of a highway, but within five feet of the curbstone which the town was not bound to repair.

Stone v. Attleborough (Mass.) 458

31. Where **two causes combined to produce the injury**, both in their nature proximate, the one being the defect in the highway, and the other an occurrence for which neither party is responsible, the corporation is liable, provided the injury would not have been sustained but for the defect in the highway.

Hampson v. Taylor (R. I.) 117

32. Loss of **use of horse** injured by defective highway is a proper element of recoverable damages.

Brown v. Town of Southbury (Conn.) 422

33. **Notice** to be given to selectmen before suit brought, under P. A. 1874, p. 196, need not be in technical terms. A general description of the character of the injury is sufficient.

Id.

34. Notice to the city of the proximate cause of injury complained of, as, that a drain across the sidewalk caused plaintiff to stumble and

fall into a sewer, is sufficient, under Stat. 1877, chap. 234.

Grogan v. Worcester (Mass.) 440

35. Notice of injury received on highway by reason of "a pile of timber and a pile of hay" sufficiently states cause of injury, under P. S. chap. 52, § 19.

Davis v. Charlton (Mass.) 566

36. Where notice, under P. A. 1874, p. 196, describes injury as caused by a sluice across the highway it is sufficient as to place; and proof that only one of three sluices between points named was defective is admissible.

Brown v. Town of Southbury (Conn.) 422

37. Under Mass. Stat. 1874, chap. 344, requiring written notice of defect in highway to be given to selectmen, a notice alleging injury caused by "an obstruction," but not specifying the character of the obstruction, will not be sufficient and cannot be remedied by parol evidence of verbal notice or actual knowledge.

Roberts v. Douglas (Mass.) 166

38. The notice required by Stat. 1863, chap. 32, is only for purpose of calling attention of authorities to the physical condition of highway, not for setting out legal ground of liability.

Canterbury v. Boston (Mass.) 584

39. **Evidence** in action for injury from defective road; the burden is on **plaintiff to show due care** on his part.

Merrill v. North Yarmouth (Me.) 904

40. Where, in action for injury received through defect in highway, evidence showed that a pile of timber was so situated that court could not, as matter of law, rule that it did not render road defective, **evidence should go to the jury**.

Davis v. Charlton (Mass.) 566

41. In an action for injury resulting from the **stumbling of a horse**, it is **competent to show** that other travelers about the time passed over the highway in safety, and to show the plaintiff's habits of driving at other places, and to show that the horse had been by plaintiff's direction shod as a stumbler.

Sprague v. Bristol (N. H.) 111

42. Where the **surveyor of the town testified to the safe condition** of the road, it was proper to ask in **cross examination** whether he had not **subsequently removed the alleged negligent obstruction**.

Yeo v. Williams (R. I.) 122

43. Whether a highway was in good repair at the time of the accident is not a subject for **expert testimony**.

Id.

44. In action against city for injury through defect in street, question whether plaintiff exercised **due care** is one of **fact for jury**.

Talbot v. Taunton (Mass.) 615

45. Whether the fact that the middle post of three posts on the edge of a road stood out between the line of the others was negligence, was properly left to the jury.

Yeo v. Williams (R. I.) 122

V. OFFICERS.

46. **Independent election of same person** by each branch of city council is not valid.

election, under ordinance providing for election by either branch with concurrence of the other.

Saunders v. City of Lawrence (Mass.) 755

47. Town board of registration, in deciding upon **qualifications of electors**, act in *quasi* judicial character, and are exempt from personal liability for errors of judgment without proof of malice or willful disregard of duty in refusing to register a duly entitled elector.

Perry v. Reynolds (Conn.) 647

48. **Milk inspectors** have no power, under P. S. chap. 57, § 1, to appoint an agent who shall have the right, in the absence of an inspector, to take samples of milk from carriages used for its conveyance.

Commonwealth v. Smith (Mass.) 500

49. When members of **water board**, whose conduct is to be investigated by a committee under Stat. 1888, chap. 195, have been **removed from office**, and object of further investigation is to procure evidence for another suit, or the remaining questions are moot questions of no practical bearing, petition to compel attendance of witnesses before committee will be denied.

Osborne v. Wilson (Mass.) 518

50. In an **investigation by common council**, under Stat. 1888, chap. 195, into the conduct of members of a municipal board, a witness should not be compelled to furnish evidence which might be used against him in a subsequent suit. *Id.*

VI. PARTICULAR CHARTERS CONSTRUED.

51. **Biddeford**—Charter gives exclusive authority to council to lay out highways. No right of appeal from refusal to lay out.

City of Biddeford v. County Comrs. of York Co. (Me.) 661

52. **Boston**—Rev. Ord. chap. 87, § 11, regulating use of public grounds and restricting sermons, lectures and addresses thereon is valid. Statute requiring by-laws of towns to be recorded has no application to Boston. Ordinance need not be published.

Commonwealth v. Davis (Mass.) 380

53. Appointment of milk inspectors. Delegation of power.

Commonwealth v. Smith (Mass.) 500

54. Power of Water Board to conduct investigations and examine witnesses, under Stat. of 1888, chap. 195.

Osborne v. Wilson (Mass.) 518

55. Authority to construct footway over railroad previously constructed.

Boston & A. R. R. Co. v. Boston (Mass.) 94

56. Liability, under Pub. Stat. chap. 52, § 18, for defect in highway, without actual notice.

Post v. Boston (Mass.) 542

57. City not liable for defective condition of planking between railroad tracks on highway, (Pub. Stat. chap. 112, § 124).

Scanlan v. Boston (Mass.) 92

58. Plaintiff was injured by falling in a coal hole insecurely fastened by the owner of the premises. Held, the city was not liable in N. E. R., v. L.

the absence of proof of notice or facts showing that officers ought to have known of its condition, or that the covering was not constructed as required by ordinance 1888, chap. 26, §§ 24, 25.

Hanscom v. Boston (Mass.) 723

59. Notice under Stat. 1882, chap. 32, before action for damages caused by defective streets.

Canterbury v. Boston (Mass.) 584

60. **Camden**—Exemption of town hall from taxation.

Inhab. of Camden v. Camden (Me.) 298

61. **Easthampton** is the same corporate municipality which was established in 1786, and by "its incorporation" the Legislature included the Act which was the commencement of its corporate existence.

Hill v. Selectmen of Easthampton (Mass.) 497

62. **Fall River**—Claim for damages for change in the grade of street (Broadway) cannot form the subject of arbitration under P. S. chap. 188.

Osborn v. City of Fall River (Mass.) 489

63. **Granville**—Appointment of town collector under P. S. chap. 27, § 90.

Phelon v. Inhab. of Granville (Mass.) 578

64. **Lawrence**—Independent election of same person by each branch of city council is not valid election, under ordinance providing for election by either branch with concurrence of the other.

Saunders v. City of Lawrence (Mass.) 755

65. **Manchester**—Cemeteries are prohibited by Gen. Laws, chap. 49, § 2, within twenty rods of dwelling house, without consent of owner.

Stevens v. City of Manchester (N. H.) 165

66. **Middlebury**—Restraining gaming. *Re Snell* (Vt.) 279

67. Construction of bond by Eaton, reserving or granting to inhabitants in 1746, right to take sand, seaweed, etc., from beach.

Newport Hospital v. Carter (R. I.) 871

68. **New Bedford**—Particular charter authorizing a city to prohibit persons under a penalty, from riding or driving faster than a rate to be specified, does not authorize imposition of penalty for driving at an immoderate gait, so as to endanger or expose to injury any person standing, etc., on street.

Commonwealth v. Ray (Mass.) 524

69. **Newburyport**—License of stationary steam engines, under Pub. Stat. chap. 102, § 47.

Alter v. Dodge (Mass.) 481

70. **Providence**—Abatement of nuisance, under Act of 1882.

Tripp v. Goff (R. I.) 806

71. **Randolph**—Distribution of rents granted to religious societies under R. L. § 2707.

Spiritual Athenaeum Soc. v. Selectmen of Randolph (Vt.) 680

63. **Southbury**—Sufficiency of notice describing defective highway as condition precedent to action for injuries, under P. A. 1874, p. 196.

Brown v. Town of Southbury (Conn.) 423

73. **Taunton**—Authority to make appro-

priation for open air concerts, under P. S. chap. 28, § 18.

Hubbard v. City of Taunton (Mass.) 581

74. Regularity of laying out of Fourth Street—Liability of City for maintaining bridge too low for omnibuses to pass thereunder.

Talbot v. Taunton (Mass.) 615

75. **Whittingham**—Oath of taxpayer under Statute, 1880; listing under R. L. § 326.

Newell v. Town of Whittingham (Vt.) 401

76. **Wilbraham**—Authority under P. S. chap. 27, § 10, to purchase land and erect a building for town purposes and also as a Memorial Hall to perpetuate the memory of the men who died for their country.

Baldwin v. Wilbraham (Mass.) 538

77. **Worcester**—Sufficiency of notice under Stat. 1877, chap. 234, of defect in street, causing injury.

Grogan v. Worcester (Mass.) 440

MURDER.

SEE HOMICIDE.

NATURALIZATION.

SEE ALIENS.

NEGLECTANCE.

I. WHAT AMOUNTS TO.

II. RAILROAD COMPANIES.

III. PRACTICE; EVIDENCE; DAMAGES.

IV. CONTRIBUTORY NEGLIGENCE.

V. ACTIONS FOR DEATH.

SEE MASTER AND SERVANT II; MUNICIPAL CORPORATIONS IV; WAYS VI.

I. WHAT AMOUNTS TO.

1. Negligence is **failure to perform some act required by law**, or doing it in improper manner.

Nolan v. New York & N. H. R. R. Co. (Conn.) 826

2. R. I. Pub. Laws, cap. 688, requiring the **erection of fire escapes**, do not create a **duty between an owner and the employee** of his tenant, to give him a right of action against the owner for injury sustained by a fire.

Maker v. Slater Mill & Power Co. (R. I.) 178

II. RAILROAD COMPANIES.

3. The giving of the **written notice prescribed by statute**, Laws 1883, p. 283, is a **condition precedent** to the right to maintain an action for damages against a railroad company, based upon its **statutory liability**, for an injury alleged to have been caused by the defendant's track creating a defect in a highway.

Fields v. Hartford & Wethersfield Horse R. R. Co. (Conn.) 825

4. A railroad is bound to the exercise of **greater care in running its trains than in the condition of its station grounds**; in latter case it is bound to exercise reasonable care for safety of passengers.

Moreland v. Boston & Providence R. R. Corp. (Mass.) 909

N. E. R., V. I.

5. The **firing up of an engine**, by reason of which plaintiff's horse was frightened and injured, will not constitute negligence, where the act is one of the ordinary and necessary incidents of running the train, and it appeared that the railroad and highway were adjoining each other for more than a mile, and it would be necessary to fire up somewhere upon that space.

Lamb v. Old Colony R. R. Co. (Mass.) 7

6. **Person who, while waiting at station** is invited by agent to sit in empty car, is a **passenger** in care of company, and may recover for an injury sustained by jumping from the car upon its being suddenly moved out from the station.

Shannon v. Boston & Albany R. R. Co. (Me.) 631

7. Where plaintiff claimed damages for injuries received in **crossing defendant's track with a horse and wagon**, at **high way crossing** partially obstructed by a car which had left the track, and at which the defendant had not stationed a man to warn travelers of danger, held, the question of negligence was properly left to the jury.

Paine v. Grand Trunk R. Co. (N. H.) 941

8. Where it is necessary to **cross a railroad track** to reach the train, a **passenger** has a **right to rely** to some extent upon the giving of proper **signals of danger**; the fact that he did not look to see if a train was approaching is not conclusive of a want of due care on his part.

Sonier v. Boston & A. R. R. Co. (Mass.) 46

9. It is **negligence** for one seeing or hearing an approaching train, running at ordinary speed, to **attempt to cross the track in front of the train**.

State v. Maine C. R. R. Co. (Me.) 23

10. Person injured in **jumping from moving train** must show excuse, which is generally for the jury.

Shannon v. Boston & Albany R. R. Co. (Me.) 63

11. Where train at night time **stopped before reaching station**, and passenger was injured in consequence of leaving track, held, negligence properly left to jury.

Boss v. Providence & W. R. R. Co. (R. I.) 3

12. Where a **passenger** is injured in a place where he has a right to be, and the company has omitted to give proper warning, the question of his due care should be submitted to the jury.

Sonier v. Boston & A. R. R. Co. (Mass.) 46

13. **Plaintiff must by affirmative proof satisfy the jury that no want of due care on the part of the injured party helped to produce the accident.**

State v. Maine C. R. R. Co. (Me.) 23

14. A young child strayed from its home upon a railroad track, **crossed the track and fell into an adjoining trench**. The track was not fenced on the trench side. Held, on demurrer to the declaration, the

the company was, as to the plaintiff, under no obligation so to fence its tracks that the plaintiff could not get from them upon the adjoining land, and that the action could not be maintained.

Morrissey v. Providence & Worcester R. R. Co. (R. I.) 806

15. A railroad company is under no obligation to locate its tracks, construct fences and adjust the running of its trains so as to make it safe for children unlawfully to trespass on its right of way.

Nolan v. New York & N. H. R. R. Co. (Conn.) 826

III. PRACTICE; EVIDENCE; DAMAGES.

16. The question of duty is one of law; of performance is one of fact. *Id.*

17. Finding on negligence, as question of law, is reviewable; as question of fact, not. *Id.*

18. While a demurrer to a complaint for negligence causing personal injury admits a cause of action, in the absence of proof the plaintiff is entitled to recover only nominal damages; to recover more, he must show the extent of the damages, which defendant may controvert. *Id.*

19. The issue being whether the defendant was negligent in driving at the time of the collision with the plaintiff, former acts of negligence in driving are not admissible.

Whitney v. Gross (Mass.) 512

20. In action for injury caused by a board falling from a building in course of construction, defense being that defendant had sublet his contract, expert testimony is inadmissible to show that the consideration was inadequate and contract unusual.

Harney v. Shaw (Mass.) 915

21. In estimating the damages for negligence causing death, the jury may consider the expense of board, nursing and medical aid, with compensation for loss of time, physical and mental pain, including such sum as they may assess on account of distress or anxiety of mind experienced in view of death.

Corliss v. Worcester N. & R. R. Co. (N. H.) 163

22. Motion to set aside verdict for excessive damages in action for personal injuries raises no question of law and is not reviewable.

Paine v. Grand Trunk R. Co. (N. H.) 841

IV. CONTRIBUTORY NEGLIGENCE.

23. Where plaintiff's testimony merely tends to show contributory negligence, the question is for jury.

Boss v. Providence & W. R. R. Co. (R. I.) 89

24. Where evidence as to contributory negligence is conflicting, it is for the jury to say whether the plaintiff, a girl of six years and seven months, used such care as is reasonably expected of one of her years.

Mattay v. Whittier Machine Co. (Mass.) 482

25. Tender age cannot raise a duty when none otherwise existed; but where a duty exists the degree of care required toward infants may be different from that required toward adults.

Nolan v. New York & N. H. R. R. Co. (Conn.) 826

26. Where a boy about nine years old had voluntarily placed himself in danger by engaging in the sport of riding upon the runner of a sleigh drawn by a horse, and after leaving the runner was driven into by the defendant, who was driving at a moderate rate, held, recovery could not be had.

Messenger v. Dennis (Mass.) 759

V. ACTIONS FOR DEATH.

27. Under N. H. Laws of 1879, chap. 85, an action for negligence resulting in death survives to the administrator.

Corliss v. Worcester N. & R. R. Co. (N. H.) 163

NEGOTIABLE INSTRUMENTS.

SEE BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE.

SEE NEW TRIAL II.

NEW TRIAL.

I. FOR MATTERS PERTAINING TO JURY; EVIDENCE AND VERDICT.

II. COUNSEL; NEWLY DISCOVERED EVIDENCE.

III. PRACTICE.

SEE CRIMINAL LAW V.

I. FOR MATTERS PERTAINING TO JURY; EVIDENCE AND VERDICT.

1. Where there was no intermeddling with juror or misconduct on his part, a casual remark of a stranger, overheard by juror and not calculated to influence his mind, is not ground for new trial.

Coules v. Merchants (Mass.) 595

2. Verdict will not be set aside unless clearly against evidence.

Gray v. Gray (Me.) 894

3. A verdict will not be disturbed where the evidence is conflicting, though the court would have adopted a different conclusion.

Boss v. Providence & Worcester R. R. Co. (R. I.) 89

4. A new trial will not be granted for the introduction of incompetent or immaterial evidence, if it tended to prove a point which the jury by their verdict did not find to have been proved.

Rogers v. Kenrick (N. H.) 249

5. A verdict will not be set aside for the admission of evidence competent for some purpose, and not shown to have been offered or used for a purpose for which it was incompetent. *Id.*

6. Plaintiff offered one witness on an important issue to show fraud, so early in the trial that if admitted he could have procured the attendance of other witnesses. The court at first ruled against his admission,

but on further consideration **decided to admit** the witness; but not until it was **too late** to summon the other witnesses. **Held, a good cause for a new trial.**

Bradley Fertilizer Co. v. Fuller (Vt.) 409

7. The fact, that in case of a **view** the **jury acquires information** which they may properly **treat as evidence**, presents no insuperable obstacle to the granting of a new trial on the ground that the verdict was against the weight of the evidence.

Keith v. New Haven & N. R. Co.
(Mass.) 226

II. COUNSEL; NEWLY DISCOVERED EVIDENCE.

8. The use of a chalk diagram for **illustration of argument** is matter of discretion for the trial court.

Rogers v. Kenrick (N. H.) 249

9. When counsel obtained a new trial on exceptions and **failed to re-enter the case** in the court below, alleging that, deceived by the similarity of the name of another case on the docket of the court below, he supposed the re-entry had been made, the court granted a **new trial on the ground of accident and mistake.**

Burrough v. Hill (R. I.) 866

10. Requisites of **newly discovered evidence.**

Knowles v. Northrup (Conn.) 927

11. **Direct evidence of a forgery**, and of the physical impossibility of an instrument having been signed by one of those by whom it purports to be signed, is a **good ground for granting a new trial** for newly discovered evidence, where the evidence upon the question at the former trial consisted of opinions as to the genuineness of signatures. *Id.*

III. PRACTICE.

12. The **certificate of the trial judge**, containing "the portion of the evidence against which it is claimed the verdict has been rendered," required by Rule 48 to be signed within five days, cannot be **amended**; but a party may show by affidavits that such statement contains all material evidence.

Chafee v. Sprague (R. I.) 43

13. A motion for a new trial is **addressed to the discretion of the superior court**, unless upon the admitted facts the defendant is entitled as matter of law to a new trial.

Commonwealth v. Keenan (Mass.) 746

14. **Year** within which petition for new trial may be filed **runs from entry of judgment**; in case of exceptions or appeal, runs from affirmance.

Burrough v. Hill (R. I.) 866

15. No exception lies to **discretion of court** on refusal of new trial, on **evidence alone.**

Gronsbra v. Bourgies (Mass.) 747

NONSUIT.

Refusal of nonsuit is ordinarily no ground for exception.

Payton v. Sherburne (R. I.) 868

N. E. R., V. I.

NOTICE.

SEE *LIS PENDENS*; *MORTGAGE II*; *MUNICIPAL CORPORATIONS IV*.

1. Purchaser of merchandise from agent is justified in **paying to agent**, in **absence of notice of limitation of authority**; and a notice limiting such authority, printed in red ink on the top of a bill head forwarded with the merchandise, held, not so prominent as to hold the purchaser at fault in not observing it.

Trainer v. Morison (Me.) 698

2. Where the statute (Pub. Stat. R. I. cap. 179, § 16) required notice of **sale of decedent's estate** to be published "for four successive weeks," held, a publication in a daily paper inserted twice each week for two weeks and every day for two following weeks was sufficient.

Petition of Harris (R. I.) 26

3. Under Mass. Stat. 1874, chap. 244, requiring **written notice of defect in highway** to be given to selectmen, a notice alleging injury caused by "an obstruction," but not specifying the character of the obstruction, will not be sufficient and cannot be remedied by parol evidence of verbal notice or actual knowledge.

Roberts v. Douglas (Mass.) 105

4. The law **imputes notice** where parties are **put on inquiry**, as by record of a will charging testator's realty with the payment of legacies.

Lovejoy v. Raymond (Vt.) 405

NUISANCE.

SEE *INTOXICATING LIQUORS*.

1. A statute which makes the use of any **stationary engine without a license** a common nuisance will not authorize the licensing so that it cannot be made a private nuisance.

Quinn v. Lowell Electric Light Co.
(Mass.) 101

2. Where the **Act of 1882 provided for the abatement of an evil** by the town council "of any such place or places," in **case the owner neglects to abate it**, upon notice to do so, and for the **recovery of the cost** of such abatement; and the **preamble** refers to "certain low grounds in the compact part" of the town; an **action to recover the cost** of the abatement **does not lie, unless the evils alleged are stated to be within the designated locality, according to the preamble.**

Tripp v. Goff (R. I.) 806

OCCUPATION.

SEE *USE AND OCCUPATION*.

OFFICE AND OFFICER.

I. *ELECTION; APPOINTMENT; SALARY.*

II. *POWERS; LIABILITIES.*

III. *OFFICERS DE JURE AND DE FACTO.*

SEE *CORPORATIONS III*; *COUNTIES 2-4*; *MUNICIPAL CORPORATIONS V*; *SHERIFF*; *STATE AND STATE OFFICER*; *QUO WARRANTO*.

I. ELECTION; APPOINTMENT; SALARY.

1. Pub. Stat. R. I. cap. 63, provides that a

census shall be taken on a certain day and that six months prior thereto the governor shall appoint a superintendent of the census. Held, the **governor** could make the **appointment** after the date named.

Re Census Superintendent (R. I.) 156

2. Pub. Stat. chap. 27, § 90, requiring **appointment of town collector pro tempore**, is not satisfied by a writing signed with names of all the selectmen by one of them in absence of the others, and with no authority, except as implied from their agreement to the appointment.

Phelon v. Inhab. of Granville (Mass.) 578

8. Such appointee is not an officer *de jure*, and a warrant issued to him under such appointment does not confer authority upon him.

Id.

4. Lawrence—Independent **election of same person by each branch** of city council, is not valid election, under ordinance providing for election by either branch with concurrence of the other.

Saunders v. City of Lawrence (Mass.) 755

5. The **annual salary** provided for **county commissioners** is in full payment for services and traveling expenses.

Bristol v. Gray (Mass.) 97

6. Public school teacher is not a public officer within law exempting salaries from attachment; teacher's salary, when earned, is an existing debt liable to attachment.

Seymour v. Over River School District (Conn.) 648

II. POWERS; LIABILITIES.

7. **Milk inspectors** have no power, under P. S. chap. 57, § 1, to appoint an agent who shall have the right, in the absence of an inspector, to take samples of milk from carriages used for its conveyance.

Commonwealth v. Smith (Mass.) 500

8. Town board of registration, in deciding upon qualifications of electors, act in *quasi* judicial character and are exempt from personal liability for errors of judgment, without proof of malice or willful disregard of duty in refusing to register a duly entitled elector.

Perry v. Reynolds (Conn.) 647

9. The question was whether the plaintiff, while selectman, borrowed and paid to the defendant's treasurer for its benefit the sum of \$300. The treasurer denied it, and to strengthen his testimony, his **book of accounts** was introduced, on which there was no entry of such payment; held, evidence was not admissible in rebuttal to prove other discrepancies in the treasurer's accounts, to weaken the evidence of nonentry.

Burnham v. Town of Strafford (Vt.) 345

* 10. Evidence of clerk in public office, as the Adjutant General's Department, is competent as to course of business preceding his entry into the office.

City of Worcester v. Inhab. of Northborough (Mass.) 544

11. When members of **water board** whose conduct is to be investigated by a committee, under Stat. 1883, chap. 195, have been removed from office, and object of further investigation

is to procure evidence for another suit, or those remaining are moot questions, of no practical bearing on the case, petition to compel attendance of witnesses before committee will be denied.

Osborne v. Wilson (Mass.) 518

12. In an investigation by common council, under Stat. 1883, chap. 195, into the conduct of members of a municipal board, a witness should not be compelled to furnish evidence which might be used against him in subsequent suit.

Id.

III. OFFICERS DE JURE AND DE FACTO.

13. The rule against **collaterally impeaching** the title of an officer *de facto* does not apply when the officer himself seeks to recover compensation.

Phelon v. Inhab. of Granville (Mass.) 578

14. A person declared elected and inducted into office is a *de facto* officer.

State v. Megin (N. H.) 51

15. A town is not stopped by an insufficient appointment by the selectmen, to deny the title of a collector *de jure* in a suit by him for compensation for services claimed by virtue of his office.

Phelon v. Inhab. of Granville (Mass.) 578

OPINIONS.

SEE EVIDENCE VII.

ORDINANCES.

SEE MUNICIPAL CORPORATIONS II.

OYSTERS.

SEE FISH AND FISHERIES.

PARENT AND CHILD.

SEE INFANTS.

1. The legal marriage of a female infant terminates the father's right to her custody and services.

Aldrich v. Bennett (N. H.) 66

2. The departure of a minor daughter from home to obtain temporary employment, taking with her only such articles as she required for immediate use, does not constitute an emancipation, though she receive the wages for her labor for her own use.

Inhab. of Seabrook v. Inhab. of Thorndike (Me.) 261

PAROL EVIDENCE.

SEE EVIDENCE IV.

PARTIES.

SEE ACTION OR SUIT II; FRAUD AND FRAUDULENT CONVEYANCES 25.

PARTITION.

I. WHO MAY HAVE.

II. PRACTICE; PROCEEDINGS.

I. WHO MAY HAVE.

1. Partition between tenants in common, in equity, is matter of right; equity has concurrent jurisdiction.

Nash v. Simpson (Me.) 699

2. For the purpose of making partition of a spring and aqueduct owned in common by several persons, a sale of the whole may be ordered by a court of equity, although the right of one of the owners has become appurtenant to his other real estate.

Allard v. Carleton (N. H.) 853

3. A tenant in fee simple of land, subject to a widow's dower or life estate in an undivided half, may have partition.

Allen v. Libbey (Mass.) 72

II. PRACTICE; PROCEEDINGS.

4. The court having, acquired jurisdiction for construction of will, may compel account and partition also prayed in the bill.

Nash v. Simpson (Me.) 699

5. Complainant in partition must show legal title; but the bill may be retained to enable him to establish title at law. *Id.*

6. After interlocutory judgment assented to, defendants cannot set up want of title in petitioner.

Mt. Hope Iron Co. v. Dearden (Mass.) 719

7. Under N. H. Gen. Stat. 288, § 25, the committee has no authority, without the consent of the parties, to set off to one more than his just share of the estate, and then award that he pay a sum of money to the others to make it equal.

Whitney v. Parker (N. H.) 164

8. Extinguishment of right of way over land may be awarded in partition, but must be allowed for.

Mt. Hope Iron Co. v. Dearden (Mass.) 719

9. Costs in partition include counsel fees.

Redecker v. Bowen (R. I.) 87

PARTNERSHIP.

1. Feme covert cannot enter into a contract of partnership.

Booker v. Bradford (Mass.) 457

2. Partnership may have residence for taxation; when it is a *cestui que trust*, its residence is where its business is carried on.

Ricker v. American Loan & Trust Co.; American Loan & Trust Co. v. Street Comrs. of Boston (Mass.) 738

3. The provisions of Gen. Laws, chap. 117, §§ 1, 2, requiring every firm to file with the town clerk a certificate of their names and residences, do not affect a suit against a partner upon a cause of action not growing out of the affairs of his firm.

Tucker v. Adams (N. H.) 241

4. The voluntary assignment by one partner of firm property, made pending an application for the appointment of a receiver, will be made subject to the rights of the receiver and with notice of the proceedings as *lis pendens*.

Arnold v. Providence Lumber Co. (R. I.) 44

5. When a sheriff, attaching partnership goods as the property of a member of the firm, takes a receipt for them from another member, and leaves them in the possession of the firm, the paramount partner.

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ship title is a defense in an action, on the receipt.

Tucker v. Adams (N. H.) 241

6. A writ cannot be amended so as to substitute as defendant a partnership in place of defendant named as a corporation which did not in fact exist, as service upon the supposed corporation brought nobody into court.

Sawyer v. New York Clothing Co. (Vt.) 433

PARTY WALL.

1. That a wall has been built on a person's land for more than thirty years, and has during that length of time, been maintained by his predecessor and himself, is sufficient to justify a finding that by possession alone he had a title to the land under the same.

McLaughlin v. Ceconi (Mass.) 766

2. Where a deed recites the right of the grantee to erect and maintain a wall on an adjoining lot, such recitals cannot effect rights in a wall constructed under circumstances different from those therein provided for. *Id.*

3. A person may be restrained in equity from interfering with or using a wall of another's house which has been maintained by the latter for thirty years. *Id.*

PATENTS.

Agreement assigning, for one year, letters patent owned by assignor, for purpose of being sold by assignee with letters patent owned by him, for mutual benefit, construed as pooling the properties and entitling each party to share in all sales of any or all the patents; assignee having sold patents originally owned by himself only, assignor is entitled to share in the money received therefor. Assignor not having warranted validity of his patent, fact that is proved to have been anticipated by a prior patent did not work a failure of consideration. The fact that the contract provided for return to assignor of his letters patent in case of failure to dispose of them does not render the transaction one of bailment only.

Carpenter and Loomis, JJ., dissenting.
Fowler v. Mallory (Conn.) 649

PAUPERS.

SEE POOR AND POOR LAWS.

PAYMENT.

SEE LIMITATION OF ACTIONS III; MORTGAGE IV.

1. The rule that a simple agreement by a creditor, to accept a smaller sum for his debt is not binding, is not to be extended beyond its precise import; and if a consideration for such agreement is found to exist, courts will not inquire into its adequacy.

Cases cited (Mass.) 219

2. Defendant was indebted to a firm and also to an individual member thereof; on request for payment on the accounts, he paid a sum exceeding the individual debt, without direction as to application. Held, the excess was properly credited to the firm

account and was a part payment to remove the bar of the Statute of Limitations.

Way v. Grov (Vt.) 431

PENALTIES.

1. A **complaint** is sufficient substantially in the words of ordinance prohibiting a continuous stopping of a vehicle in any street for a longer time than twenty minutes.

Commonwealth v. Rowe (Mass.) 911

2. Under R. S. chap. 23, to recover **double the expense of building a division fence**, the whole of the portion assigned to defendant must have been built by plaintiff.

Cobb v. Corbitt (Me.) 903

3. **Indictment for maintaining lottery** is good, although it does not disclose name of prosecutor entitled to portion of penalty.

State v. Willis (Me.) 663

4. P. S. chap. 127, 276, relating to **adulteration of milk** is not unconstitutional on the ground that it confines the testimony to the analysis of samples taken by the inspector, which samples are destroyed in making the analysis so that the testimony cannot be controverted.

State v. Groves; State v. Stone; State v. Cutting; State v. Hunter (R. I.) 820

5. N. H. Gen. Laws, chap. 115, sec. 11, does not exclude the defense of contributory negligence in an action of debt for **double damages** sustained from being bitten by a dog.

Quimby v. Woodbury (N. H.) 56

PENITENTIARY.

SEE JAIL.

PERJURY.

Rev. Stat. chap. 82, giving action against witness or party for obtaining judgment by perjury, does not extend limitation for review under chap. 89.

Landers v. Smith (Me.) 896

PERSONS.

SEE IDENTITY.

PLEADING.

I. GENERAL RULES; WAIVER.

II. DECLARATIONS OR COMPLAINTS.

III. PLEAS AND ANSWERS.

IV. ABATEMENT; REPLICATION.

V. DEMURRER.

VI. AMENDMENT; AIDER; VARIANCE.

SEE EJECTMENT; EQUITY IV; LIBEL AND SLANDER III.

I. GENERAL RULES; WAIVER.

1. It is a general rule that the **time** of every traversable fact must be stated.

Cases cited (Me.) 678

2. **Public Statutes, R. I., chap. 204, § 33**, allow only such defenses as, without statute, defendant could have availed himself of by suit in equity.

Payton v. Sherburne (R. I.) 871

3. By **pleading to new counts** defend-

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ant **waives** right to move to dismiss them as embracing new cause of action.

Sherman v. Johnson (Vt.) 631

4. **Amendable errors** in declaration are **cured by default**.

Lewiston Steam Mill Co. v. Merrill (Me.) 666

II. DECLARATIONS OR COMPLAINTS.

5. Declaration against master for damages for **assault** committed by **servant** must allege that assault was committed while acting within **scope of employment**.

McCann v. Tillinghast (Mass.) 566

6. **Covenant and tort** may be joined, in a single cause.

Crawford v. Parsons (N. H.) 823

III. PLEAS AND ANSWERS.

7. Objection to **capacity** to sue must be by **plea, not by answer**.

Hoyt's Admr v. Hoyt (Vt.) 688

8. Under the **general issue**, the defendant cannot claim that the plaintiff has sued by the wrong name.

Doherty v. Mudgett (Vt.) 436

9. A plea of the **general issue** admits plaintiff's corporate power to sue.

Cases cited (Me.) 793

10. A **defendant must present all his defenses of the same grade at the same time**. On pleading non-tenure and nothing else, in bar, he is supposed to have no other defense, and if that is adjudged bad on demurrer, he cannot plead anew without leave of court.

Hathorn v. Corson (Me.) 834

IV. ABATEMENT; REPLICATION.

11. Matter in abatement must be **pleaded before continuance**.

Otis v. Ellis (Me.) 675

12. It is **too late, after hearing** on merits for **objection** that **replication** had not been filed in **writing**.

Holt v. Weld (Mass.) 718

V. DEMURRER.

13. The objection of **multifariousness** must be taken by demurrer.

Cases cited (Vt.) 638

14. In action against heirs for **breach of warranty** in deed from deceased grantor, objection that declaration does not allege that estate had been settled and that defendants had received anything therefrom, should be by demurrer; it comes too late at trial.

Eddy v. Chase (Mass.) 573

15. The **admissions of a demurrer** overruled to a complaint for negligence are conclusive as to the right to nominal damages and *prima facie* as to substantial damages; and the burden of proof is on defendant to show want of negligence on trial for substantial damages.

Orogan v. Schiele (Conn.) 305

16. On **demurrer** to declaration **against corporation, charter is not before court**.

Morrissey v. Providence & Worcester R. R. Co. (R. I.) 806

17. **Pleading over** and going to trial after demurrer overruled, is a **waiver** of right to exceptions.

Rea v. Harrington (Vt.) 624

VI. AMENDMENT; AIDER; VARIANCE.

18. An amendment **introducing a new cause** of action, cannot be allowed against a defaulted defendant without notice.

Ball v. Danforth (N. H.) 56

19. **After verdict**, every reasonable **presumption** is made in **favor** of the sufficiency of the **pleading**.

Rea v. Harrington (Vt.) 624

20. When the **general issue** and **special pleas** are pleaded and a verdict is found for the plaintiff on the general issue, which clearly could not have been so found if any of the special pleas had been supported, the verdict is in effect a **verdict** for the plaintiff on **all the pleas**.

Burdick v. Burdick (R. I.) 861

21. **Variance** between complaint and evidence to be fatal must be in material part and calculated to mislead defendant.

Zeigler v. Danbury & N. R. Co. (Conn.) 273

PLEDGE AND COLLATERAL SECURITY.

The **owner of goods** may recover them in replevin from any to whom they had been pledged by a broker, who procured possession of them fraudulently for the purpose of selling them to an undisclosed principal, when in fact there was no principal, although a sale had been entered on the owner's books as a sale directly to the broker.

Rodliff v. Dallinger (Mass.) 508

POISONING.

1. When purchase of poison of uniform manufacture is proved, it is sufficient to admit **evidence of chemist's analysis** of **another box** of same article.

Commonwealth v. Hobbs (Mass.) 541

2. **Indictment** for statutory offense is sufficient if it follow language of the statute. *Id.*

3. Facts that poison used was changed in appearance by foreign coloring matter, and that relative quantity found in food administered did not correspond with that charged in indictment, are immaterial. *Id.*

POLICE POWER.

P. S. chap. 27, § 15, authorizing a city to prohibit persons, under a penalty, from riding or **driving** faster than a rate to be specified, does not authorize imposition of penalty for driving "at an immoderate gait, so as to endanger or expose to injury any person standing," etc., on street.

Commonwealth v. Ray (Mass.) 524

POLYGAMY.

1. To convict under P. S. chap. 207, § 4, it must be **alleged** and proved that defend-

ant had a wife living at time of his second marriage.

Commonwealth v. McGrath (Mass.) 515

2. In case of second marriage, jury is to judge of strength of **presumption of innocence** of defendant as well as of that of **continuance of life of former wife**. *Id.*

POOR AND POOR LAWS.

I. SETTLEMENT.

II. SUPPORT OF, INDENTURES OF, PAUPERS.

I. SETTLEMENT.

1. For purpose of settlement there are **three classes**; aliens; citizens of United States and of other States than Connecticut; citizens of other towns than the town furnishing support. (Conn.) 425

2. When the **home** of a person is **once established** in a town it is **not interrupted** by **temporary absences**, leaving behind articles of apparel and bedding, expressing an intention to return, and in fact **returning to visit**, and to repair wardrobe, or on account of sickness.

Searemont v. Thorndike (Me.) 261

3. A **married woman** whose husband has no settlement, but who has herself acquired a residence through her father, is not an "un-settled woman," within the retroactive provision of the Statutes of 1879, chap. 242, § 2 and does not gain a settlement elsewhere by five years' residence.

Town of Middleborough v. Plymouth (Mass.) 442

4. Stat. 1874, chap. 274, providing that **any woman** of the age of twenty-one years, **residing** in any place for **five years** without receiving relief as a pauper, shall thereby gain a settlement, does not apply to married women.

Cases cited (Mass.) 502

5. In Pub. Stat. chap. 88, § 1, cl. 6, 7, the words "any **unsettled person**" mean unsettled at time statute took effect; "any **unsettled woman**" have same meaning; a woman who had a settlement through a former husband gains no settlement under the statute.

City of Worcester v. Inhab. of Great Barrington (Mass.) 529

6. P. S. chap. 88, § 1 providing that any person of the age of twenty-one years, **having an estate of inheritance and freehold**, shall thereby gain a settlement, does not **apply to married women**.

Inhabitants of Spencer v. Inhabitants of Leicester (Mass.) 502

7. **Father** of person *non compos mentis* will not acquire new settlement by residence of five years, if such person receive relief on application of father.

Inhabitants of Winterport v. Inhabitants of Newburg (Me.) 687

8. Person *non compos mentis* cannot acquire settlement by residence, but **follows settlement of father**. *Id.*

9. A **child adopted** under Stat. 1871, chap. 810, acquires at time of adoption the

settlement of his adoptive father if he has a settlement within the State.

Washburn v. White (Mass.) 441

10. **Alien naturalized** in a town from which he removed to another town, gained a settlement in the latter town by continuous self supporting and tax paying residence for six years.

Town of Vernon v. Town of Ellington (Conn.) 424

11. Rev. Stat. chap. 24, § 8, relating to **loss of settlement; applies to residence** prior to the passage of the Act.

Inhabitants of Rangeley v. Inhabitants of Bowdoin (Me.) 338

II. SUPPORT OF, INDENTURES, OF PAUPERS.

12. **Liability of a town** to support paupers does **not rest on contract** express or implied, but **depends solely upon the statute**, which the Legislature can change.

Cases cited (Me.) 383

13. An action may be maintained under R. S. chap. 24, § 45, against a **married woman deserted** by her husband, for **reimbursement** for pauper supplies furnished upon her application.

Peru v. Poland (Me.) 895

14. Town furnishing relief to a pauper is not required to wait until it has stopped giving relief before bringing suit for **reimbursement**.

City of Worcester v. Inhabitants of Northborough (Mass.) 544

15. Under P. S. chap. 84, § 14, there can be a recovery against the town of settlement only for board and attendance furnished within **two years** of date of writ. *Id.*

16. **Actions upon indentures**, by inspectors, binding out as apprentices state paupers, **are barred**, unless brought during the term of apprenticeship, or within **two years** after the expiration thereof.

Johnson v. Gibbs (Mass.) 220

17. It was the **intention of the Legislature** to put **state paupers**, bound as apprentices by the inspectors of the state almshouse, **upon the same footing** as town paupers bound out by the overseers of the poor, and to give to such **inspectors the same powers**, with the same **limitations and incidents**, as those vested in the overseers. *Id.*

POOR DEBTOR.

1. Where a **justice of the peace** and of the quorum is commissioned to **act for all the counties**, he **may sit** as a magistrate in a **poor debtor's disclosure** under R. S. chap. 86, in any county in the State.

Blake v. Peck (Me.) 835

2. Where a **debtor** who has **cited the creditor** to a disclosure **upon his execution bond** refuses to disclose before the magistrate selected by the creditor, who is qualified to act he **forfeits** his bond, although he **procures** an officer to select another magistrate and then makes a disclosure in which the creditor participates. *Id.*

3. In **proceedings** under the statute for the **relief of poor debtors**, Pub. Stat., chap.

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162, § 50, the **right of appeal**, given "in like manner as from the judgment of a trial justice in civil actions" is confined to "a party aggrieved by the judgment." Chap 155, § 28. Hence, where the debtor was **convicted**, under **some specifications** of fraud and **acquitted upon others**, the **creditor is not a party aggrieved** so as to give him the right of appeal.

Smith v. Dickinson (Mass.) 217

4. **Poor debtor's oath**; competency of magistrate to admit to take; objections to competence addressed to appointing judge.

Osgood v. Thorne (N. H.) 6

PREScription.

SEE WAYS I.

PRESUMPTION.

SEE EVIDENCE I.

PRINCIPAL AND AGENT.

I. AUTHORITY OF AGENT.

II. BROKERS; FACTORS.

SEE MUNICIPAL CORPORATIONS IV.

I. AUTHORITY OF AGENT.

1. **Purchaser of merchandise from agent** is **justified in paying** to agent, in absence of **notice of limitation of authority** and a notice limiting such authority printed in red ink on the top of a bill head forwarded with the merchandise, held, not so prominent as to hold the purchaser at fault in not observing it.

Trainer v. Morison (Me.) 698

2. Where there is evidence that a **letter** in reply to one received by defendant from plaintiff was **written by a salesman in the employ of defendant**, who had authority to make the original contract to which the letter related, but whose authority to write any letters for him is denied by defendant, the **question of whether the salesman was authorized by defendant to write such letter** should be **submitted to the jury**.

Thomas v. Wells (Mass.) 747

3. An **agent** will be **liable for the acts of a subagent** employed without authority from his principal.

Barnard v. Coffin (Mass.) 907

4. Where **principal adopts part of agent's transaction**, as by claiming a delivery of goods sold by agent, he **adopts the whole** of it.

McClure v. Briggs (Vt.) 621

5. Where the **treasurer of a manufacturing company**, with authority "to hire and pay for necessary stores," took a lease under seal to himself, and the company went into possession, and a portion of the rent was paid by the paper of the company, held, that the circumstances were not inconsistent with holding that the company occupied under the lessee named, and that in an action in equity it was not liable under the covenants in the lease.

Halcy v. Boston Belting Co. (Mass.) 81

II. BROKERS; FACTORS.

6. If a **factor** makes sales to irresponsible parties through want of care and diligence, or is not attentive to his principal's interests after the sale, he is **liable to the principal for any loss sustained** because of such neglect.

Pinkham v. Crocker (Me.) 836

7. A **factor may sell his principal's goods upon credit** if there be no usage nor instructions to the contrary. *Id.*

8. Under an **oral contract**, a broker is **entitled to compensation** if he substantially effects a sale by **procuring** and introducing a **purchaser**, to whom the owner sells the land.

Desmond v. Stebbins (Mass.) 528

9. The **owner of goods may recover** them in **replevin** from one to whom they had been **pledged** by a broker, who procured possession of them fraudulently for the purpose of selling them to an undisclosed principal, when in fact there was no principal, although a sale had been entered on the owner's books as a sale directly to the broker.

Rodliff v. Dallinger (Mass.) 508

10. Where the owner of a horse placed him for sale in the hands of a commission merchant, who exchanged the horse for another and \$25; held, his authority was terminated by this transaction, and the principal was not liable for subsequent transactions and the board of horses taken in trade.

Wing v. Neal (Me.) 665

PRINCIPAL AND SURETY.

SEE EXECUTORS AND ADMINISTRATORS X.

1. The **relation may be shown to exist by extrinsic evidence**, where it does not appear on the face of the obligation.

Otis v. Von Storch (R. I.) 146

2. Where surety on promissory notes of a **bankrupt** pays money to a creditor and holder of notes, and receives an agreement by which such creditor as principal and other holders as sureties agree to indemnify him, he cannot sue such creditor to recover the money, although estate of bankrupt is more than sufficient to pay debts in full; he is concluded by the agreement.

Wilson v. Whitmore (Mass.) 587

3. The **payee of a note is entitled to the securities held by a surety.**

Barton v. Croydon (N. H.) 58

4. **Sureties** on administrator's bond who have paid judgment are **subrogated to rights of principal** and of heirs paid in full by him.

Stetson v. Moulton (Mass.) 740

5. A **surrender of security** by the creditor to his debtor will **release a surety** for the debtor *pro tanto*.

Otis v. Von Storch (R. I.) 146

6. Defendant made a **note for the accommodation** of another who was not made a party. Upon maturity the payee induced defendant to pay another note on the promise that he would endeavor to collect the first note from the person for whose accommodation it

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was made. Held, the promise was without consideration, and the failure of the payee to perform his promise, having the effect to prevent the maker from securing indemnity, did not discharge the defendant.

Bragg v. Danielson (Mass.) 727

7. Mere **nonaction or passivity** on the part of the creditor, so long as any advantage actually taken or acquired is preserved unimpaired, **will not discharge a surety.**

Otis v. Von Storch (R. I.) 146

PRISONS.

SEE JAIL.

PRIVILEGED COMMUNICATIONS.

SEE DEED 6; LIBEL AND SLANDER II.

PROBATE COURTS.

SEE COURTS 5-8; EXECUTORS AND ADMINISTRATORS.

PROCESS.

SEE WRIT AND PROCESS.

PROMISSORY NOTES.

SEE BILLS AND NOTES.

PROPERTY.

SEE EASEMENT; EMINENT DOMAIN; FIXTURES; HOMESTEAD; PARTY WALLS; PATENTS; SHIPS AND SHIPPING; TAXES; TRADE MARK.

1. **Spirituuous liquor** does not lose its character of **property** by being illegally kept for sale.

Tucker v. Adams (N. H.) 241

2. **Rolling stock of railroad**, is **personal property**; manual possession is not necessary in attachment.

Hall v. Carney (Mass.) 100

PROSTITUTION.

Where defendant lived in the house and rented rooms to women boarders as weekly tenants, held, she might be convicted under the statute upon evidence that she knew the women used rooms for purpose of prostitution, and that **evidence of special acts of immorality was unnecessary.**

State v. Smith (R. I.) 121

PROTEST.

SEE BILLS AND NOTES III.

PUBLIC OFFICERS.

SEE OFFICE AND OFFICER.

QUIA TIMET ACTIONS.

SEE EQUITY III.

QUITAM AND PENAL ACTIONS.

SEE PENALTY.

In an **action to recover a statutory penalty**, founded on and described in two sepa-

rate and distinct statutes, the **declaration** will not be adjudged bad, on demurrer, because of the allegations "by force of the statutes" and "contrary to the form of the statutes."

Blake v. Russell (Me.) 259

QUO WARRANTO.

1. **Writ will not issue until possession of office is taken.**

State v. Meglin (N. H.) 51

2. The **record of the election of officers and canvassing board is not conclusive.** *Id.*

RAILROAD COMPANIES.

- I. IN GENERAL; LIABILITIES.
- II. CROSSINGS; FENCES.
- III. REORGANIZATION.
- IV. CONDEMNATION PROCEEDINGS; DAMAGES.

SEE CARRIERS; MASTER AND SERVANT II; NEGLIGENCE II; STREET RAILWAY COMPANIES.

I. IN GENERAL; LIABILITIES.

1. **Rolling stock of railroad is personal property; manual possession is not necessary in attachment.**

Hall v. Carney (Mass.) 100

2. A railroad company is not liable to **taxation** under general law, where its **charter provides that portion of net income shall be paid to State as a tax**, and that no other tax than "as herein provided" shall be levied.

State v. Knox & Lincoln R. R. Co. (Me.) 678

3. The employee on a train **running on Sunday** previous to chap. 87, Stat. 1884, unless the running was a work of necessity or charity, cannot recover damages for injury to his person.

Read v. Boston & Albany R. R. Co. (Mass.) 390

4. The giving of the **written notice** prescribed by statute, Laws 1883, p. 283, is a **condition precedent to the right to maintain an action for damages against a railroad company, based upon its statutory liability**, for an injury alleged to have been caused by the defendant's track creating a defect in a highway.

Fields v. Hartford & Wethersfield Horse R. Co. (Conn.) 825

5. The **purchase of land by the director of a railroad company, over which he expects the way may be located, is not necessarily to be considered to have been made in trust for the company, at its option, although a director of such a company is, in equity, its trustee.**

Sandy River Railroad Co. v. Stubbs (Me.) 337

II. CROSSINGS; FENCES.

6. When **conveyance of land to railroad provided that it was to furnish grantor two crossings**, and one was built, any obstruction thereto, as by gates required by statute or change of grade of road, entitles grantor to

nominal damages; but grantor cannot demand expense of changing grade of approaches to crossing.

Williams v. Clark (Mass.) 608

7. The **statute, Pub. Laws, 1874, chap. 214, requiring a railroad company to build and maintain crossings is constitutional and applies to railroads built before** its enactment, when the charter of the company made it subject to the general laws then in existence and laws thereafter to be passed.

Portland & R. R. Co. v. Deering (Me.) 475

8. **Fences along tracks are required for protection of animals, not rational beings.**

Nolan v. New York & N. H. R. R. Co. (Conn.) 826

9. A **railroad company is under no obligation to locate its tracks, construct fences and adjust the running of its trains so as to make it safe for children unlawfully to trespass on its right of way.** *Id.*

III. REORGANIZATION.

10. When a new corporation is created on reorganization of the old, to carry into effect the original design, and to issue new preferred stock to take place of the mortgage bonds, the **rights of a bondholder are not impaired**, and he is bound by the foreclosure and reorganization proceedings.

Gates v. Boston & N. Y. A. L. R. R. Co. (Conn.) 464

11. The **trustee being a state officer designated by the Legislature, the laws in relation to his acts form part of the contract; and the mortgage having provided that the bonds might be considered due by any bondholder on default in payment of interest and foreclosure, and be then enforced, a majority having availed themselves of the condition, a small minority should not be allowed to thwart their action.** *Id.*

12. When a mortgage upon its property and franchises is foreclosed, the **title of mortgagor is vested in the trustee, in trust for the mortgage bondholders; and trustee and cestuis que trust have the same powers as mortgagor possessed, and hold subject to the same limitations and obligations, including the obligation to execute the public trust.** *Id.*

13. Where, by partly constructing its road, the company has exercised its delegated right of eminent domain, and obtained subscriptions upon the implied **promise to operate its road, a contract arises to carry into effect the object of its charter; and its capital stock, franchises and property are charged with this public trust.** *Id.*

14. The **State may enforce continuous exercise of its powers and franchises for public use, to the exhaustion of its franchises and corporate property, whatever private right may be embraced in the title of the property.** *Id.*

15. **Each bondholder is through the trustee and the majority of bondholders, a party to the legislative and judicial proceedings accompanying the foreclosure, and actual individual notice is not required.** *Id.*

IV. CONDEMNATION PROCEEDINGS; DAMAGES.

16. Company's right to land condemned to its use is a **continuing right** to all uses **incidental** to beneficial occupation of its roads, by changing grade, cutting trees, etc.

Cassidy v. Old Colony R. R. Co.
(Mass.) 606

17. Company, after acquiring right to land, is not, so long as it does not infringe any common-law rights of adjacent owners, liable for **damages for cutting off natural drainage, shutting off view, light, air, etc.** *Id.*

18. The land owner has a **lien** on the land taken by a railroad, enforceable in equity for his damages, unaffected by the bringing of suit against a former company which took the land, under R. L. § 3371. The judgment under the statute is final as to the amount to be recovered in the subsequent proceeding to foreclose the lien.

Bridgman v. St. Johnsbury & Lake Champlain R. R. Co. (Vt.) 429

19. In suit to **foreclose the equitable lien** on land taken for railroad purposes, the company to whose rights defendant succeeded is not a necessary party; the party now the owner of the land conveyed by the original owner is a necessary party, but not his vendor; nor is the administrator of one of the former owners, all the heirs of such deceased persons being parties; but the court may allow an administrator to be appointed and come in. *Id.*

20. A railroad company is entitled to **damages** for land taken in **locating ways across its track**. In assessing such damages, the use which the company may reasonably be expected to make of its located limits may be taken into consideration, but not interference and inconvenience occasioned to its business, or its increased risk in running its train.

Portland & R. R. Co. v. Deering
(Me.) 475

21. **Witnesses** who have competent judgment, and understand the questions, may give their **opinion** of the **damages** sustained by a railroad corporation from location of a highway across its track. *Id.*

RECEIVER.

1. Bill by a **small minority of members** of the Patrons of Husbandry, an **unincorporated joint stock company**, for a receiver and sale and distribution of property, dismissed, where evidence showed property only to consist of \$100 and a building, well suited for purposes of the Society, that a majority opposed the plaintiffs' bill, and that the stock of plaintiffs might be sold for as much or more than would result to them after sale and distribution.

Hinckley v. Blethen (Me.) 794

2. The **voluntary assignment** by one partner, of firm property, made **pending an application** for the appointment of a receiver, will be made **subject to the rights of the receiver**, and with notice of the proceedings as *his pendens*.

Arnold v. Providence Lumber Co.
(R. I.) 44

RECOGNIZANCE.

SEE BAIL AND RECOGNIZANCE

RECORDS.

SEE APPEAL II; MORTGAGE II.

1. Stat. of 1879, chap. 250, providing for **publication of court decisions**, does not give the publishers the right to suppress the same, or limit the free access of the public thereto.

Nash v. Lathrop (Mass.) 918

2. But it seems that in Connecticut opinions are not part of the record.

In Re Gould (Conn.) 925

3. On **appeal** to the superior court, it is the practice to send up a copy of the complaint in addition to the substance of the charge which is contained in the copy of the judgment, in order that this copy of the complaint may be given in evidence to the jury, and that the jury may not be prejudiced by the judgment of the court below.

Commonwealth v. Keenan (Mass.) 746

4. Failure of extended record of circuit court to show appearance by defendant **can not be controlled** by evidence by clerk, of **docket entries** in district court.

City of Fall River v. Riley (Mass.) 749

REDEMPTION.

SEE MORTGAGE V.

REFORM SCHOOL.

SEE HOUSE OF REFUGE.

RELEASE.

SEE SETTLEMENT.

1. The rule, that a simple agreement by a creditor to accept a **smaller sum** for his debt is not binding, is not to be extended beyond its precise import; and if a consideration for such agreement is found to exist, courts will not inquire into its adequacy.

Cases cited (Mass.) 219

2. **Simple contract after breach** can be **discharged only by deed or on sufficient consideration**.

Bragg v. Danielson (Mass.) 727

3. Defendant made a **note** for the **accommodation of another**, who was not made a party. Upon maturity, the payee induced defendant to pay another note on the promise that he would endeavor to collect the first note from the person for whose accommodation it was made. Held, the promise was without consideration, and the failure of the payee to perform his promise, having the effect to prevent the maker from securing indemnity, did not discharge the defendant. *Id.*

4. A **release by one of several joint vendors**, of the joint claim for payment for personal property sold, binds all the vendors, and each of the other vendors is debarred from thereafter maintaining suit for his share.

Osborn v. Martha's Vineyard R. R. Co.
(Mass.) 452

5. Where there is such a **unity of inter-**

est as to require a joinder of all the parties interested in a personal action, the release of one is effectual as to all.

Cases cited (Mass.) 455

6. A release to an infant cosigner of a promissory note, after he has repudiated the contract, will not release the other signer.

Young v. Currier (N. H.) 54

RELIGIOUS SOCIETIES.

1. City ordinance may provide for restricting preaching or lecturing on public grounds; a city ordinance to this effect not required to be published.

Commonwealth v. Davis (Mass.) 380

2. Mandamus will not lie in favor of a spiritual society against selectmen of town, to compel them to allow it an equal share of public money given to religious societies, where money had been divided before petition brought; nor will it lie against successors in office of selectmen.

Spiritual Athenaeum Soc. v. Selectmen of Randolph (Vt.) 630

REMITTITUR.

SEE JUDGMENT IV.

RENT.

SEE LANDLORD AND TENANT II.

REPLEVIN.

1. The owner of goods may recover them in replevin from one to whom they had been pledged by a broker who procured possession of them fraudulently for the purpose of selling them to an undisclosed principal, when in fact there was no principal, although a sale had been entered on the owner's books as a sale directly to the broker.

Rodliff v. Dallinger (Mass.) 508

2. Bond for return of part only of property; suit should be dismissed for that part only not covered by the bond; plaintiff cannot remedy defect by filing a new bond.

Eastman v. Barnes (Vt.) 847

REPORT AND CASE MADE.

A hypothetical case may be discharged without a decision.

Haasen v. Concord Railroad Co. (N. H.) 240

RES JUDICATA.

SEE JUDGMENT II.

REVIEW.

1. Rev. Stat. chap. 82, giving action against witness or party for obtaining judgment by perjury, does not extend limitation for review under chap. 89.

Landers v. Smith (Me.) 896

2. Judgment for costs against next friend and attorney of plaintiff cannot be reviewed on his petition, under P. S. chap. 187, § 22, providing for review within one year where judgment has been rendered without the knowledge and in the absence of a party.

Manning v. Nettleton (Mass.) 718

N. E. R., V. I.

3. Stranger to suit cannot have review of a judgment. *Id.*

ROADS.

SEE WAYS.

SALE.

I. WHAT CONSTITUTES; VALIDITY.

II. DELIVERY.

III. WARRANTY; BREACH.

IV. RIGHTS OF PARTIES.

SEE EXECUTORS AND ADMINISTRATORS VIII; VENDOR AND PURCHASER.

I. WHAT CONSTITUTES; VALIDITY.

1. The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point, and if anything remains to be done before either assents it may be an inchoate contract, but it is not a perfect sale.

Cases cited (Vt.) 781

2. Where a sale is agreed to to an unknown but existing party, as to an undisclosed principal, the fact that it fails does not turn it into a sale to the party conducting the transaction.

Cases cited (Mass.) 511

3. Where defendant claims the goods alleged to have been purchased were charged to him without authority, evidence that they were sent to him marked with his address is proper in connection with evidence of bills and drafts therefor, to which he made no response or repudiation.

Sturtevant v. Wallack (Mass.) 494

4. Where the owner of a horse placed him for sale in the hands of a commission merchant, who exchanged the horse for another and \$25, held, his authority was terminated by this transaction, and the principal was not liable for subsequent transactions and the board of horses in trade.

Wing v. Neal (Me.) 665

5. Where contract of sale stipulates that if plaintiff is entitled to recover for a breach of contract, the measure of damages shall be at a certain rate on the quantity of goods not delivered, the plaintiff, in the event of recovery, is entitled to interest from the date of his demand.

Thomas v. Wells (Mass.) 747

6. A release by one by several joint vendors, of the joint claim for payment for personal property sold, binds all the vendors, and each of the other vendors is debarred from thereafter maintaining suit for his share.

Osborn v. Martha's Vineyard B. R. Co. (Mass.) 452

II. DELIVERY.

7. Whether legal title to goods passes by delivery to carrier is question of intent, to be gathered from acts and circumstances.

State v. O'Neil (Vt.) 775

8. An express company carrying goods on order of seller to deliver to purchaser C. O. D. is agent of seller, and title does not

pass till after performance of conditions precedent, delivery and payment.

State v. O'Neil (Vt.)

775

9. A sale of goods is not rendered void by the want of a change of possession, as against a creditor who has knowledge of the sale, and assents and becomes a party to it by deriving from it a valuable security.

Parsons v. Hatch (N. H.)

258

III. WARRANTY; BREACH.

10. The question of fact being whether a sale was made with warranty, evidence is inadmissible, of the market value of the goods sold, for the purpose of showing that the price paid by the plaintiff was below that of the market value of goods suitable for defendant's purposes.

Ockershausen v. Durant (Mass.)

760

11. A judgment rendered upon a default for the price of goods sold, the amount thereof being fixed by agreement, is not a bar to an action by the purchaser for a breach of warranty of the quality of the goods.

Parker v. Roberts (N. H.)

157

IV. RIGHTS OF PARTIES.

12. If anyone, not having seen them, orders goods of a certain description at a certain price, and the goods do not answer the description, he may return them or offer to return them within a reasonable time.

Cases cited (Conn.)

382

13. The purchase of hats and caps in classes by dozens, and the statement of the prices therefor at certain sums per dozen, will not prevent the purchaser from returning such single articles as differ in sizes from those ordered, and to have deducted the proportionate price therefor.

Cohen v. Pemberton (Conn.)

331

14. The printed head of a bill or statement sent by the seller to the purchaser, requiring "all claims to be made in three days", not being assented to by the purchaser, will not limit his right to return goods not of the quality purchased, within any reasonable time.

Id.

15. Where an article is delivered to a prospective vendee, trade to beat at an end if he is not satisfied with it, vendee is bound to act honestly and give the article a fair trial; but burden is on vendor, in suing for the price, to prove that vendee was satisfied; it is not enough to show that he ought to have been, and that his dissatisfaction was without reason.

McClure v. Briggs (Vt.)

621

16. Owner does not lose right to sell or mortgage, by fact that chattels are in wrongful possession of another.

Duhull v. Booker (Mass.)

571

17. The owner of goods may recover them in replevin from one to whom they had been pledged by a broker who procured possession of them fraudulently for the purpose of selling them to an undisclosed principal, when in fact there was no principal, although a sale had been entered on the owner's books as a sale directly to the broker.

Rodliff v. Dallinger (Mass.)

508

M. E. R., V. I.

18. The title to wheat sold and paid for and remaining in the vendor's possession until sent for, held, to be in the vendee, and its destruction without negligence of vendor, the loss of vendee.

Levasseur v. Cary (Me.)

893

19. Right to stoppage in transitu ceases when goods are delivered to buyer, or he takes actual or constructive possession.

Hall v. Dimond (N. H.)

848

SATISFACTION.

SEE ACCORD AND SATISFACTION.

SCHOOLS AND SCHOOL DISTRICTS.

I. TEACHERS.

II. DISTRICTS; OFFICERS; SCHOOL- HOUSES.

I. TEACHERS.

1. Extent and reasonableness of punishment of a pupil is a question of fact; teacher has a right to require obedience to rules and submission to authority, and to personally chastise; sound discretion and judgment in infliction of punishment is required, adapted to the offense and offender, and past offenses may be considered.

Sheehan v. Sturges (Conn.)

962

2. Order on treasurer of school district by committee, delivered to teacher, is a cash payment of salary for the month.

Seymour v. Over River School District

(Conn.) 648

3. Public school teacher is not a public officer within law exempting salaries from attachment and garnishee process. *Id.*

II. DISTRICTS; OFFICERS; SCHOOLHOUSES.

4. A school district erected a one-story building, and by recorded instrument called a lease, contracted with individuals for the construction of a second story, to be used by them "so long as the house shall stand," with easements of way, etc., and it was so occupied for thirty years; held, a conveyance of "school-house and lot under hall" did not convey any title to second story.

Peaks v. Blethen (Me.)

263

5. Where there is an entrance to licensed premises through a gate on street in which there is a schoolhouse within limit prohibited by statute of 1882, chap. 220, question whether license is avoided thereby depends upon purpose for which gate is used, and is for the jury.

Commonwealth v. Everson (Mass.)

575

6. Exercise of delegated power of condemning property must strictly follow terms of delegation.

Howland v. School Dist. No. 3 of Little

Compton (R. I.)

867

7. District has no power to locate schoolhouse; this must be done by committee. *Id.*

8. School committee cannot appoint appraisers of land for schoolhouse before district has voted to erect under Gen. Stat.

chap. 58, § 5, and vote to locate is not vote to erect.

Id.

SEAL.

SEE BILLS AND NOTES 5; BONDS 1;
DEED 5.

SEARCH WARRANT.

1. A search warrant is not civil process, within the prohibition of the Sunday Law. *Wright v. Dressel* (Mass.) 199

2. A search warrant need not set forth that there is "reasonable cause" for the complainant's belief that the goods are concealed in the building to be searched; nor, that there is "satisfactory evidence," etc., to justify a warrant for search in the night time. *Id.*

3. An allegation in a complaint and search warrant, that stolen goods are concealed in the "house of E. D., of Granby," imports the house wherein E. D. dwells in Granby; and if he is the only E. D. in Granby, and does not own or occupy any other house, the house is sufficiently described as being in Granby. *Id.*

4. The fact that two buildings are connected with a passageway, where there is no common inclosure within which they stand, and each is in all respects adapted for independent use, and actually thus used except so far as the basement was concerned, is not sufficient to constitute them one building, so as to be covered by a search warrant describing the premises to be searched as a certain building on the corner of the street, occupied as a store and place of common resort.

Commonwealth v. Certain Intoxicating Liquors (Mass.) 208

5. Direction to officer to search and seize, under the Maine Liquor Law, is matter of form and may be amended at any time before final judgment, by inserting directions omitted, when it was actually served by an unauthorized officer.

State v. Hall (Me.) 472

6. A search warrant may be returned to any court having cognizance of the case, although not in the county of the court which issued it.

Wright v. Dressel (Mass.) 199

SEPARATE ESTATE.

SEE HUSBAND AND WIFE III.

SEQUESTRATION.

Equity may sequester rents of realty charged with payment of debts or legacies.

Pond v. Allen (R. I.) 879

SERVANT.

SEE MASTER AND SERVANT.

SERVICE.

SEE ACTION OR SUIT III.

N. E. R., V. I.

SET-OFF AND COUNTERCLAIM.

1. Legatee owing estate, entitled only to excess of legacy over debt.

Armour v. Kendall (R. I.) 802

2. A claim against a decedent's estate cannot be set off against a claim of the administrator for rent of realty; there is a want of mutuality in the claims.

Harris v. Taylor (Conn.) 892

SETTLEMENT.

SEE COMPOSITION WITH CREDITORS; POOR AND POOR LAWS I; RELEASE.

1. Both parties claimed premises; plaintiff was in possession; defendant had procured injunction; pending negotiations for settlement it was agreed that defendant might take possession; no settlement was reached; held, neither party gained or lost anything pending negotiations.

Waterman v. Clark (Vt.) 619

2. A settlement, even when intended to cover whole subject matter, can be corrected when made under mutual mistakes; as, where a cow actually with calf was supposed not to be with calf and was rated at a value below her worth.

Newell v. Smith (Conn.) 648

3. If a debtor gives his creditor a note indorsed by a third person, for a less sum than the debt but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction.

Varney v. Conery (Me.) 286

4. A request made by the payer of a disputed claim, that the payee will not disclose the settlement, is not competent evidence of the payer's admission of liability, in suit by other party for same cause.

Gault v. Concord R. R. Co. (N. H.) 254

SHELL FISHERIES.

SEE FISH AND FISHERIES.

SHERIFF.

SEE CONSTABLE.

1. Under R. S. chap. 81, a sheriff having taken an accountable receipt will not be liable thereon if demand is not made within thirty days from the date of the judgment; a demand upon the receiptor will not excuse want of demand upon the officer.

Shepherd v. Hall (Me.) 359

2. Responsibility of sheriff for safety of prisoners; county commissioners to supply necessities, materials and implements; to govern employment of prisoners; duty of master to dispose of manufactured articles.

Bristol v. Gray (Mass.) 97

3. In an action against a sheriff for neglecting to arrest upon execution a surrendering debtor, evidence of the latter's intention to take the poor debtor's oath may properly be excluded.

Harrington v. Wadsworth (N. H.) 49

SHIPS AND SHIPPING.**SEE INSURANCE I.**

1. All part owners of a vessel, except such as have been paid or have settled, **must join in an action** to recover earnings; in case of bankruptcy of one, his assignee must join.

Sinason v. Fernald (Me.) 290

2. Interest is allowed in admiralty upon damages for collision, and other courts have adopted the admiralty doctrine.

Cases cited (Mass.) 527

SLANDER.**SEE LIBEL AND SLANDER.****SOCIETIES.****SEE BENEVOLENT SOCIETIES; RELIGIOUS SOCIETIES.**

1. Only parties to a contract, or their successors in law or fact, or, at the most, those who are interested in the subject matter, can maintain a suit to enforce it.

Cases cited (R. I.) 872

2. An **executory contract** will not be enforced as a trust in equity at the suit of a mere volunteer.

Cases cited (R. I.) 872

STATE AND STATE OFFICER.**SEE FISH AND FISHERIES.**

1. The **seizure of intoxicating liquors intended for illegal use** in Vermont, while in the hands of an express company who is transporting them on the order of the seller, a resident of another State, to be delivered to the purchaser in this State C. O. D., is a lawful exercise of police power, and not void as a regulation of commerce.

State v. O'Neil (Vt.) 775

2. **Reservation in deed from the Commonwealth**, reserving passageway in Back Bay District, **construed**, and held, that information by the Commonwealth will lie for the removal of obstructions, although all abutting owners have released their rights.

Harbor & Land Comrs v. Williams (Mass.) 869

STATUTE OF FRAUDS.**SEE FRAUDS, STATUTE OF.****STATUTE OF LIMITATIONS.****SEE LIMITATION OF ACTIONS.****STATUTES.****SEE CONSTITUTIONAL LAW; INTOXICATING LIQUORS I.**

1. **Preamble** may be resorted to where meaning of Act is ambiguous.

Tripp v. Goff (R. I.) 806

2. The construction of a **foreign statute**, given to it by the courts of a foreign state, will be given to it upon the subsequent passage of the Act in another State.

Pratt v. American Bell Telephone Co. (Mass.) 700

3. Statutes enabling married women to take and hold **separate property** do not apply to an estate granted to husband and wife which conveys common-law rights incapable of severance.

Pray v. Stebbins (Mass.) 521

4. The periodical **codification** of the statute law stands on a **different footing from new legislation**, and changes will not be presumed unless the intention clearly appears.

Cases cited (Mass.) 24

5. P. S. chap. 127, as amended by chap. 276, relating to **adulteration of milk**, is not unconstitutional on the ground that it confines the testimony to the analysis of samples taken by the inspector, which samples are destroyed in making the analysis, so that the testimony cannot be controverted.

State v. Groves; State v. Stone; State v. Cutting; State v. Hunter (R. I.) 820

6. P. S. chap. 27, § 15, authorizing a city to prohibit persons, under a penalty, from riding or **driving faster than a rate** to be specified, does not authorize imposition of penalty for driving "at an immoderate gait, so as to endanger or expose to injury any person standing," etc., on street.

Commonwealth v. Ray (Mass.) 524

7. The charter of Middlebury, authorizing it to "suppress and restrain * * * all descriptions of gaming," **repeals by implication** an earlier statute empowering the selectmen to permit or forbid the use of billiard tables. The grant of power to restrain gaming confers the right to license billiard playing.

Re Snell (Vt.) 773

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205, § 3. Statute of Limitation; actions <i>ex contractu</i>	150	SEE CORPORATIONS II	
205, § 9. Statute of Limitation; decedents' estates	150	1. A subscriber to invalid special stock certificates may recover the amount paid herefor, without interest and less dividends received, against the assignee in insolvency of the corporation, without offering before the filing of the petition in insolvency, to rescind or return the certificates or the dividends.	
207, § 9. Trespass	17	<i>Reed v. Boston Machine Co. (Mass.)</i>	
207, § 22. Attachment of stock	120	2. A corporation issued promissory notes convertible on certain days into stock at the option of the holder, and at the time certain shares were held in trust by trustees "to secure performance" of the notes. Held, a holder of the notes had no right to restrain the company from selling the shares, or to require the trustees to retain the same for the period during which he might exercise such option or, upon his election before the day	
208, § 9. Attachment of stock	120		
208, § 13. Garnishment	88		
209, § 4, cl. 2. Exemption; working tools	863		
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221, § 2. New trial; time for applying	867		
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227, § 1. Breach of promise	16		

named in the note, to require the trustees to reinstate the stock.

Pratt v. American Bell Telephone Co.
(Mass.) 760

3. Contract for future delivery of stock; party making can deliver any shares of same stock; is not limited to identical shares in his possession when contract made. *Id.*

STRAYS.

SEE ANIMALS 2.

STREET RAILWAY COMPANIES.

The giving of the written notice prescribed by statute, Laws 1888, is a condition precedent to the right to maintain an action for damages against a railroad company, based upon its statutory liability, for an injury alleged to have been caused by the defendant's track creating a defect in a highway.

Fields v. Hartford & W. Horse R. R. Co.
(Conn.) 825

STREETS.

SEE MUNICIPAL CORPORATIONS 11-13;
WAYS.

SUBROGATION.

Sureties on administrator's bond who have paid judgment are subrogated to rights of principal and of heirs paid in full by him.

Stetson v. Moulton (Mass.) 740

SUBSCRIPTIONS.

SEE STOCK TRANSACTIONS.

Where several mutually agree to pay money to be expended for a lawful object of common interest to the parties, the promise of each is considered as made in consideration of the promise of the others; and after expenditures have been made in advancement of the enterprise, relying upon the subscriptions, it is no defense to an action against a delinquent subscriber for the collection of his subscription, that the expenditures were made under the direction of a corporation organized by the associates in conformity with the original plan, of which he did not choose to become a member.

Osborn v. Crosby (N. H.) 845

SUNDAY.

1. Under Stat. of 1880, it is no defense that a note was executed on Sunday, without offer to restore consideration thereof.

Erskine v. Glidden (Me.) 898

2. The employee on a train running on Sunday, previous to chap. 87, Stat. 1884, unless the running was a work of necessity or charity, cannot recover damages for injury to his person.

Read v. Boston & Albany R. R. Co.
(Mass.) 890

3. The statute which provides that a licensed innholder may supply intoxicating liquor to guests who have resorted to his house for food and lodging, clearly excludes those who

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resort there for the purpose of procuring and drinking intoxicating liquor on Sundays.
Commonwealth v. Hagan (Mass.) 216

4. A search warrant is not civil process, within the prohibition of the Sunday Law.

Wright v. Dressel (Mass.) 199

SURETY.

SEE PRINCIPAL AND SURETY.

TAXES.

I. PROPERTY TAXABLE.

II. WHERE AND TO WHOM TAXABLE.

III. ASSESSMENT; LISTS.

IV. COLLECTION; SALE; PURCHASER.

V. ILLEGAL TAX.

I. PROPERTY TAXABLE.

1. Exemption of property of municipal corporation held for public use.

Cases cited (Me.) 299

2. A hall constructed by a town, portions of it being used for offices and public purposes, and a portion being occasionally let for hire, is exempt from taxation.

Inhabitants of Camden v. Camden
(Me.) 298

3. Business corporations taxable only for real estate and personally described in Pub. Stat. R. I. chap. 42, § 11.

Dunnell Mfg Co. v. Newell (R. I.) 877

4. A railroad company is not liable to taxation under general law, where its charter provides that portion of net income shall go to State as a tax, and that no other tax than "as herein provided" shall be levied.

State v. Knox & Lincoln R. R. Co.
(Me.) 678

5. Statute authorizing towns to exempt manufacturing property for ten years does not authorize a second exemption for that period.

Boody v. Watson (N. H.) 2

II. WHERE AND TO WHOM TAXABLE.

6. The estate of a life tenant, who enjoys the use or income of the land, shall pay the taxes on it during the continuance of his estate, and this shall be sold before any resort is had to the reversion or remainder.

Weaver v. Arnold (R. I.) 129

7. Nonresident trustee, holding no trust property in this State, is not liable to taxation in town in this State where *cestui que trust* resides, under P. S. chap. 42.

Anthony v. Caswell (R. I.) 808

8. Personal property of New England Car Trust, a partnership in Boston, held in trust for it by American Loan & Trust Co., is taxable in Boston, to the trustee.

Ricker v. American Loan & Trust Co.
(Mass.) 733

American Loan & Trust Co v.
Street Comrs. of Boston (Mass.) 733

9. Partnership may have residence for purpose of taxation; when a *cestui que trust* its residence is where its business is carried on.
Id.

10. Owners of toll bridge from Kittery, Me., to Portsmouth, N. H., are taxable in Kittery for portion of bridge in that town, under R. S. 1871 chap. 6, § 3.

Inhabitants of Kittery v. Proprietors of Portsmouth Bridge (Me.) 668

III. ASSESSMENT; LISTS.

11. It is well settled that taxes voted by any municipal body must be voted and assessed upon the **grand list last completed** and in force at the time of the voting or laying of the tax, unless otherwise provided by law.

Sprague v. Abbott (Vt.) 848

12. The statute provided that the selectmen should annually assess a state school tax previous to the first day of January, but did not specify the list on which it was to be assessed; held, on general principles of law, that it should be assessed on the list last completed and in force at the time of the assessment; in this case, the quadrennial list completed and legalized by the Legislature Nov. 18, 1882. *Id.*

13. The description in the assessment list must be sufficient to identify the property in case of a sale.

Hopkins v. Young (R. I.) 151

14. When power to assess is limited to certain kinds of personality, assessment roll must show that assessment is made only on such kinds.

Dunnell Mfg. Co. v. Newell (R. I.) 877

15. School committee's certificate attached to rate bill may be contradicted.

Brock v. Bruce (Vt.) 627

16. Lister's oath need not embody statement of compliance with every detail of official duty; thus, it is presumed that valuation relates to time and was on basis required by law. *Id.*

17. Oath taken by listers under Vt. Tax Law of 1880, that they had estimated value of real estate as they "would appraise the same in payment of a just debt due from a solvent debtor," held, equivalent to "at its true value in money," as required by statute. *Id.*

18. The taxpayer interlined in the oath attached to his inventory, required by the Act of 1880, the words "to the best of my knowledge and belief." Held, under R. I. § 326, the listers might proceed to ascertain the amount of the taxpayer's property, appraise the same and double the sum so received as a basis for the delinquent tax. Ross, J., dissenting.

Newell v. Town of Whittingham (Vt.) 401

19. Vt. Statute does not require town clerk to minute date of filing personal list in his office.

Brock v. Bruce (Vt.) 627

20. Validity of lists made in good faith upheld, if errors are result of mistake of judgment only. *Id.*

21. A omission in an assessment list to designate figures, arranged in columns, as intended to represent dollars and cents, may be supplied by such designation applied to the totals or sums of such column.

Hopkins v. Young (R. I.) 151

22. If assessment is entire and any part is void, the whole is void.

Dunnell Mfg. Co. v. Newell (R. I.) 877

IV. COLLECTION; SALE; PURCHASER.

23. School district collector need not be sworn.

Brock v. Bruce (Vt.) 627

24. Tax is not paid under compulsion merely because collector holds warrant to collect by levy or distress.

Dunnell Mfg. Co. v. Newell (R. I.) 877

25. When collector's notice to taxpayer indefinite as to time, etc., it is for jury to say whether taxpayer had refused to pay at all.

Brock v. Bruce (Vt.) 627

26. Town, as purchaser, not estopped to set up title by fact that for two years after sale and before deed was made premises were taxed to and by former owner.

Berry v. Bickford (N. H.) 11

27. If, after a sale of real estate for taxes, purchaser thereof fails to pay the collector, within ten days, the sum bid by him the collector must make a deed to the city or town, and a deed to purchaser is void.

Holt v. Weld (Mass.) 718

28. A bill in equity may be maintained by an attaching creditor to remove the cloud of a tax deed upon the title to real estate of the debtor, which he has attached.

Perham v. Haverhill Fiber Co.

(N. H.) 353

V. ILLEGAL TAXES.

29. Action will not lie for taxes illegally assessed and voluntarily paid; will lie if paid under protest.

Dunnell Mfg. Co. v. Newell (R. I.) 877

TEACHERS.

SEE SCHOOLS AND SCHOOL DISTRICTS.

TELEGRAPH AND TELEPHONE COMPANIES.

1. Telegraph company is liable for actual damages only on failure to deliver telegram whereby party loses benefit of contract for labor defeasible at will of either party.

Merrill v. Western Union Tel. Co.

(Me.) 67

2. A corporation issued promissory notes convertible on certain days into stock at the option of the holder, and at the time certain shares were held in trust by trustees "to secure performance" of the notes. Held, a holder of the notes had no right to restrain the company from selling the shares, or to require the trustees to retain the same for the period during which he might exercise such option or, upon his election before the day named in the note, to require the trustees to retain the stock.

Pratt v. American Bell Telephone Co.

(Mass.) 753

TENANT.

SEE LANDLORD AND TENANT.

TENANTS IN COMMON.

SEE JOINT TENANTS AND TENANTS IN COMMON.

TENDER.

In an action on a **promissory note** made by decedent, **tender** of a deed of release of real estate by his administrator was properly rejected, in the absence of an allegation in the answer, that plaintiff had agreed with intestate to accept such deed and surrender the note.

Willett v. White (Mass.) 446

TRADE-MARKS.

The fair and honest **use of a name** cannot be enjoined when it is used in the **ordinary course of business**, in the manner in which other manufacturers of similar goods use their names, although dealers may be misled thereby. Plaintiffs having stamped upon silver spoons "ROGERS & BRO. A I" were not entitled to enjoin defendants from stamping "C. ROGERS & BROS. A I." *Loomis, J., and Park, Ch. J., dissenting.*

Rogers v. Rogers (Conn.) 411

TRESPASS.

I. TO REAL PROPERTY.

II. TO TRY TITLE.

III. TO PERSONALTY; FOR MESNE PROFITS.

I. TO REAL PROPERTY.

1. A **landlord** cannot maintain trespass for **injury to the premises let**, done by the tenant **during the tenancy**. His remedy is **trespass on the case**.

Carroll v. Rigney (R. I.) 152

2. A tract of land bounded east and west by highways was platted into house and lot streets. A, an owner by purchase of several of these lots, brought trespass *quare clausum* against B, who had purchased one of them, for using the platted street in front of the lots of A and B as a means of access to a house and lot owned by B, situated on the east side of the east bounding highway and not on the plat in question. Held, that A was entitled to recover, notwithstanding B passed over or along his lot in going to and from his house.

Brightman v. Chapin (R. I.) 807

3. In 1746, pursuant to a vote of the free-men of a town, the town clerk conveyed to a purchaser a beach property, taking from him a bond to the town treasurer providing that the inhabitants of the town should have the right to take from the beach, sand, seaweed, shells and drift stuff. Held, that the successor in title to the purchaser could maintain trespass *q. c. f.* against an inhabitant of the town for asporting sand; and the reservation or stipulation was no protection to the defendant.

Newport Hospital v. Carter (R. I.) 871

4. If a land owner allure another upon his premises, by maintaining an **apparent public way**, he will be liable for damages resulting from an **unguarded excavation** adjacent thereto.

Crogan v. Schiele (Conn.) 805

5. When a wrong doer may acquire a right by **adverse possession**, person injured may sue without proof of other actual damage.

Ware v. Allen (Mass.) 782

6. **Declaration in trespass and ejectment must show plaintiff's estate.**

Taylor v. O Neil (R. I.) 802

7. In an action for negligent destruction of property by flooding or breakage of a water dam, where party injured has been, by awaiting result of a test case, kept out of the sum which would have reimbursed him at the time so long that it is no longer an indemnity, the jury may consider such **delay** and give interest on the original damages.

Frazer v. Bigelow Carpet Co. (Mass.) 525

8. Under N. H. G. L. chap. 233, § 5, the **plaintiff cannot be allowed more costs than damages**, when the title to real estate is not in question, and the damages recovered do not exceed thirteen dollars and thirty-three cents.

Jones v. Lane (N. H.) 163

II. TO TRY TITLE.

9. Trespass **cannot be maintained** where the **only question** is the title to the property, that question having been determined adversely to the plaintiff in a real action between the same parties.

Merrill v. Stows (Me.) 894

10. **Judgment conclusive** of title on subsequent writ of entry.

Moran v. Mansur (N. H.) 7

III. TO PERSONALTY; FOR MESNE PROFITS.

11. A license from heirs to the widow, to **erect a monument** on their cemetery lot, will authorize the builder to remove the same upon failure of the widow to pay therefor. The **monument being placed upon gravel**, with no other foundation, did **not** become a **fixture** or part of the realty.

Fletcher v. Evans (Mass.) 198

12. Trespass for **mesne profits** will not lie by lessor for a mere disturbance of the possession of the tenant, where there has been no injury to the freeholder and the reversionary rights of the plaintiff.

Baker v. Kimball (Mass.) 91

TRIAL.

I. ARGUMENT OF COUNSEL

II. BY REFEREE.

III. JURY.

IV. INSTRUCTIONS; VERDICT.

SEE DEPOSITION; EVIDENCE; EXCEPTIONS; JURY; JUSTICES OF THE PEACE; NEW TRIAL; NONSUIT; WITNESSES.

I. ARGUMENT OF COUNSEL.

1. The use of a chalk diagram for **illustration of argument** is matter of discretion for the trial court.

Rogers v. Kenrick (N. H.) 249

2. The fact that **defendant amended** his pleadings during the trial, by setting up an additional or more specific defense, is **not a proper subject of comment** by the plaintiff.

iff's counsel to the jury, and should not influence their verdict.

Taft v. Fiske (Mass.) 748

8. The plaintiff's counsel, in his argument, stated a fact which was not in proof. It was but a single remark, and promptly dealt with by the court. Held, that an exception will not lie, although one will where counsel persistently travel outside the proof.

Rea v. Harrington (Vt.) 724

4. An allusion of counsel to the importance of the case to his client, not found to be unfair or prejudicial in fact, held, not to be of such a character as to show a mistrial as a matter of law.

Gault v. Concord R. R. Co. (N. H.) 254

II. BY REFEREE.

5. The finding of a referee, that the evidence was so conflicting that he was unable to reach a satisfactory decision, will support a judgment in favor of party not having burden of proof.

Cummings v. Remick (N. H.) 72

III. JURY.

6. Where there was no intermeddling with juror or misconduct on his part, a casual remark of a stranger, overheard by juror and not calculated to influence his mind, is not ground for new trial.

Cowles v. Merchants (Mass.) 596

IV. INSTRUCTIONS; VERDICT.

7. An instruction which assumes a fact, and which is not applicable to the facts found, is properly refused.

Pratt v. Amherst (Mass.) 197

8. When whole evidence goes to negative fact relied on and there is only a mere surmise of its existence, an instruction that there is no evidence legally sufficient to establish the issue is proper.

Cartier v. Goff (Mass.) 570

9. A party must show that he was injured by the charge, where the only error, if any, was that it was inapplicable.

Canfield v. Hard (Vt.) 351

10. A request must be wholly sound, in order to make available an exception to a refusal to comply with it.

Rea v. Harrington (Vt.) 624

11. A general verdict will frequently and perhaps ordinarily ascertain and fix the rights and obligations of parties, and when this is manifest general verdicts are proper.

Johnson v. Higgins (Conn.) 179

12. When the general issue and special pleas are pleaded, and a verdict is found for the plaintiff on the general issue, which clearly could not have been so found if any of the special pleas had been supported, the verdict is in effect a verdict for the plaintiff on all the pleas.

Burdick v. Burdick (R. I.) 861

13. The practice obtains generally in this State, to direct the jury to return a verdict upon each of several distinct counts embracing independent matters, rather than

M. E. R., V. I.

to obtain the required information by inquiry of the jury, or by framing special verdicts, although either mode may be resorted to.

Johnson v. Higgins (Conn.) 179

14. After a verdict has been recorded and the jury have separated, the case may be recommitted to them for the correction of a mistake in the verdict.

Dearborn v. Newhall (N. H.) 242

15. Whether justice requires a recommitment, and whether injustice results from it, are questions of fact, to be determined at the trial term.

TROVER AND CONVERSION.

1. Seizure by sheriff will be conversion by plaintiff, although writ not returned into court.

Dawes v. Berry (Me.) 899

2. Facts establishing trover considered.

Boutwell v. Harriman (Vt.) 407

3. Bees are *ferre naturæ* and until reclaimed are only owned *ratione soli*. Trover will not lie against a stranger who appropriated a hive on land not belonging to the plaintiff.

Rezroth v. Coon (R. I.) 35

4. By statute, § 2183, trover survives.

(Vt.) 351

5. The husband alone is liable for the wrongful detention of property by his wife, which was delivered in specie to her in his presence, with his approval, and detained for their use.

Doherty v. Madgett (Vt.) 346

6. The description in the writ must be sufficiently precise to show the identity of the property.

Pond v. Baker (Vt.) 397

7. The report of a committee in an action of trover, in which an attachment issued, is not admissible as evidence on the question of the value of the attached property, in a suit on the bond given on release of such property against an obligor other than the defendant in the original suit.

Trubee v. Wheeler (Conn.) 300

8. The penal sum named in a bond for release of attached property is not *prima facie* evidence of the value of a part of the attached property.

R

9. Taking a chattel by mortgagee for breach of condition is to be considered in mitigation of damages in trover by mortgagee against third person; plaintiff is entitled to damages only for the taking and for the detention up to that time.

Dahill v. Booker (Mass.) 571

TRUSTEE PROCESS.

SEE GARNISHMENT.

TRUSTS.

- I. CREATION; VALIDITY; CONSTRUCTION.
- II. TRUSTEES; POWERS; COMPENSATION.
- III. JOINT; FOREIGN TRUSTEES.
- IV. ACTIONS.

SEE CHARITIES; DEVISE AND LEGACY; EXECUTORS AND ADMINISTRATORS; MORTGAGE VII.

I. CREATION; VALIDITY; CONSTRUCTION.

1. Provision giving whole estate to certain sons, "**assuming that they will not fail to do for another son as their fraternal regard may require,**" does not create a trust and is not incumbrance on real estate.

Ross v. Porter (Mass.) 750

2. **Express trust** in realty cannot be proved by **parol**, in case to establish or enforce trust. Fact that agreement sued on incidentally involves a trust will not prevent proving contract.

Todd v. Munson (Conn.) 821

3. A **voluntary settlement** in trust, without reservation, is **irrevocable**, except for mistake, fraud or undue influence.

Keyes v. Carlton (Mass.) 916

4. While the **condition** in a deed of trust for **creditors**, fixing a definite time within which a creditor **must come in**, will be enforced, yet a provision giving to trustees the power to extend should be reasonably construed to mean successive extensions, and not held to be exhausted by a single extension, or void because not endorsed in writing according to the strict terms in the deed.

National Union Bank v. Copeland (Mass.) 596

II. TRUSTEES; POWERS; COMPENSATION.

5. Even if, in the first instance, the expediency or propriety of measures to be adopted in the management of a trust are to be determined by the trustee, yet an **abuse of their power may be inquired into and remedied** by a court of equity.

Cases cited (Mass.) 602

6. It is the general rule that when **investments** are made in property of a **permanent character** and not in terminable securities, the loss or gain in such investments is that of the **corpus** of the estate.

Cases cited (Mass.) 874

7. **Where a trustee has**, within his authority and discretion, **invested in terminable securities**, such as municipal and corporate bonds, **at a premium**, it is proper for him to **retain from the actual income** or annual interest upon such securities, **such amounts as will**, at the date of the maturity of these securities, **leave the original capital intact, and to pay over to a life beneficiary only the net income** remaining after such deductions, although at the time of account filed such securities were at a higher premium in the stock markets. *Holmes, J.*, dissenting.

New England Trust Co. v. Eaton (Mass.) 872

8. Where trustees under a will have rendered **account** which has been allowed, charging themselves with moneys of the estate, the account is **conclusive** between them and the *cestui que trust*, in an action on their probate bond.

Bassett v. Granger (Mass.) 433

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9. A trustee under a will, to carry on a manufacturing business, may charge **commissions** on sales of goods, in pursuance of an arrangement existing before testator's death.

Turnbull v. Pomeroy (Mass.) 202

10. A trustee may be allowed an additional sum for **extraordinary services** which it was not his duty to render.

Cases cited (Mass.) 204

III. JOINT; FOREIGN TRUSTEES.

11. Where **powers coupled with a trust** are given to **two or more** to be executed by them jointly, if **one renounces the other** or others **will take the power** as if it were originally given only to them, to the end that the trust may not fail of execution or suffer detriment or delay.

Petition of Bailey (R. I.) 173

12. Trustees take as **joint tenants**.

Franklin Institution for Savings v. People's Savings Bank (R. I.) 23

13. **Nonresident trustee**, holding no trust property in this State, is **not liable to taxation** in town in this State where *cestui que trust* resides, under P. S. chap. 42.

Anthony v. Caswell (R. I.) 808

IV. ACTIONS.

14. The **surplus in the hands of mortgagee** may be recovered at law as well as in equity; and the Statute of Limitations will apply to the right of recovery without demand; and the pendency of an action to set aside an alleged fraudulent conveyance of the equity of redemption will not suspend the Statute.

Reynolds v. Hennessy (R. I.) 863

USE AND OCCUPATION.

SEE LANDLORD AND TENANT IV.

No inconsistency between relation of **landlord and tenant** and that of **mortgagor and mortgagee**; mortgagee may maintain action against mortgagor for use and occupation upon a contract to pay therefor.

Murray v. Riley (Mass.) 516

VAGRANCY.

A **complaint** for being an idle and disorderly person which follows the language of Pub. Stat. chap. 207, § 29, is not insufficient because omitting to allege that defendant had any necessity of laboring or supporting herself.

Commonwealth v. Brown (Mass.) 484

VARIANCE.

SEE PLEADING VI.

VENDOR AND PURCHASER.

SEE SALE.

1. **Representations of purchaser's agent**, which are not absolutely falsifications of fact, are merely expressions of opinion, as, that the land had been sold for taxes, and was valueless; but that there were no buildings upon

it, being unaccompanied by any circumstances of fact, are fraudulent.

Carlton v. Rockport Ice Co. (Me.) 474

2. Under an oral contract, a broker is entitled to compensation if he substantially effects a sale by procuring and introducing a purchaser to whom the owner sells the land.

Desmond v. Stebbins (Mass.) 528

VERDICT.

SEE CRIMINAL LAW IV; EQUITY 24; INTOXICATING LIQUOR 89; TRIAL IV.

VOLUNTEERS.

SEE MILITIA.

VOTERS AND ELECTIONS.

SEE OFFICE AND OFFICER I.

1. One whose name has been wrongfully erased from the register of voters of a town may maintain an action against the selectmen, whether he appeared or not before them within the time for registration, to request that his name be put upon the list or be continued thereon, at a meeting held for receiving evidence of the qualification of voters; and this, although there were highly penal provisions in the statute in relation to such registration of voters. P. S. chaps. 6, 7.

Larned v. Wheeler (Mass.) 738

2. Town boards of registration, in deciding upon qualifications of electors, act in quasi judicial character, and are exempt from personal liability for errors of judgment with out proof of malice or willful disregard of duty in refusing to register a duly entitled elector.

Perry v. Reynolds (Conn.) 647

3. The Act of June 14, 1881, relating to the production of packages of votes by the Secretary of State before the court or other proper authority, was not intended to give everybody, or every citizen, or every voter of the county, an absolute right to a recount without due cause shown.

Pearson v. Norton (N. H.) 158

WAGES.

SEE GUARDIAN AND WARD 1; MASTER AND SERVANT I

WARD.

SEE GUARDIAN AND WARD.

WAREHOUSEMAN.

The owner of goods may recover them in repelvin from a warehouseman to whom they had been pledged by a broker, who procured possession of them fraudulently for the purpose of selling them to an undisclosed principal, when in fact there was no principal, although a sale had been entered

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on the owner's books as a sale directly to the broker.

Rodliff v. Dallinger (Mass.) 508

WARRANT.

SEE SEARCH WARRANT.

WARRANTY.

SEE SALE III.

WATER COMPANIES.

1. Interests in water may be taken for public utility.

Hamor v. Bar Harbor Water Co. (Me.) 691

2. Legal taking of private property under eminent domain must be evidenced by writing describing estate taken, and this rule applies to taking of interests in water as well as in land. *Id.*

WATERS AND WATER COURSES.

SEE FISH AND FISHERIES; MILLS AND DAMS.

1. Interests in water may be taken for public utility.

Hamor v. Bar Harbor Water Co. (Me.) 691

2. Legal taking of private property under eminent domain must be evidenced by writing describing estate taken, and this rule applies to taking of interests in water as well as in land. *Id.*

3. When a claimant of an aqueduct title uses the water without an actual promise, express or implied, to pay for the use, assumpsit on the fiction of a promise implied by law is not an appropriate form of action for settling the disputed title.

North Haverhill Water Co. v. Melcalf (N. H.) 255

4. Riparian proprietor on natural stream should use water so that those below may have natural flow, subject to necessary interruption.

Ware v. Allen (Mass.) 733

5. The owner of the soil over which another has an easement of flowage is entitled to the herbage.

Cases cited (Mass.) 449

6. A person having the right of flowage through another's land, while not exercising his right, has no right to interfere with ordinary farm fences maintained by the owner of the servient estate for the protection of his land.

Smith v. Langewald (Mass.) 449

7. In 1746, pursuant to a vote of the freemen of a town, the town clerk conveyed to a purchaser a beach property, taking from him a bond to the town treasurer, providing that the inhabitants of the town should have the right to take from the beach, sand, seaweed, shells and drift stuff. Held, that the successor in title to the purchaser could maintain trespass q. c. f. against an inhabitant of the town for asporting sand, and the reservation or stipulation was no protection to the defendant.

Newport Hospital v. Carter (R. I.) 871

WAYS.

- I. ESTABLISHMENT; DEDICATION; PRESCRIPTION.
 II. LAYING OUT; PROCEEDINGS; DAMAGES.
 III. APPEAL.
 IV. REPAIRS.
 V. TITLE TO FEE; OBSTRUCTIONS.
 VI. DEFECTIVE WAYS; LIABILITY.
 VII. PRIVATE WAYS.
 SEE BRIDGES; EASEMENT; RAILROAD COMPANIES.

I. ESTABLISHMENT; DEDICATION; PRESCRIPTION.

1. Land within limits of a lay-out and alteration of a street becomes part of the street on **acceptance** of the lay-out by the borough, notwithstanding an **appeal** by one owner from the award is pending.

Messer v. Wildman (Conn.) 895

2. **Restriction** in deed against building on part intended for future street will not amount to dedication; measure of compensation when taken for street.

Central Land Co. v. Providence (R. I.) 878

3. A **prescription** presupposes a **grant**, and ought to be continued according to the intent of the original creation.

Cases cited (R. I.) 807

II. LAYING OUT; PROCEEDINGS; DAMAGES.

4. The entry upon land by a city for **constructing a sewer** or way must be after and not before the taking of the land; yet where the city has legally done some work on the land, resumption of such work within two years will not render it liable to trespass, under the statute.

Wilcox v. City of New Bedford (Mass.) 754

5. Under Pub. Stat. chap. 112, § 125, authorizing the construction of "a highway or townway" **across a railroad** previously constructed, when convenience and necessity require a footway may be constructed.

Boston & A. R. R. Co. v. Boston (Mass.) 94

6. Where town surveyor began to build road within two years, as required by statute, and officers of town have provided from time to time to complete other parts of way, with acquiescence of town, there was a sufficient **entry for purpose of construction**.

Gilkey v. Watertown (Mass.) 608

7. **Petition to county commissioners** to lay out must state **termini**; otherwise commissioners have no jurisdiction, and proceeding will be quashed on **certiorari**.

Hayford v. Comrs. of Aroostook County (Me.) 688

8. Proceedings of county commissioners held regular as to **return**, etc., under R. S. chap. 18, § 5; chap. 74, § 6.

State v. County Comrs. of Cumberland Co. (Me.) 660

9. In an **action against a town** for injuries upon a highway, the fact that the **selectmen's certificate** of the laying out of the highway was **not returned** to the town **X. A. R., V. I.**

clerk and recorded, as required by G. L. chap. 61, § 14, until after the expiration of thirty days, will not **avail** the defendant to show that there was **no legal highway**.

Randall v. Conway (N. H.) 844

10. In proceedings to **define boundaries** and **locate anew** an old townway, if courses and distances in report of commissioners show discrepancy between their intention to locate and the description in a plan referred to, it is a mere error of description which will not render location invalid; record furnishes means of correction.

Gilkey v. Watertown (Mass.) 608

11. A **railroad company** is entitled to **damages** for land taken in locating ways **across its track**. In assessing such damages the use which the company may reasonably be expected to make of its located limits may be taken into consideration, but not interference and inconvenience occasioned to its business, or its increased risk in running its trains.

Portland & R. R. Co. v. Deering (Me.) 475

III. APPEAL.

12. **No appeal lies from refusal** of city council to lay out way, where charter gives exclusive authority to council and general statutes provide only for appeal from "municipal officers," defined to be "mayor and aldermen."

City of Biddeford v. County Comrs. of York Co. (Me.) 661

13. **Land of A was taken for a highway**. Pending the proceedings of **condemnation**, A sold the land to B, who claimed damages from the town for the taking. From the decree awarding compensation both A and B appealed to the court of common pleas. **Held**, that A's **appeal was improper** and should have been dismissed at the request of the appellee.

Central Land Co. v. Providence (R. I.) 873
Butts v. Same (R. I.) 878

14. When an **appeal** is taken and prosecuted, under R. S. chap. 18, **from the decision of county commissioners in locating and laying out a way**, any person aggrieved at the commissioners' estimate of damages may file notice of appeal therefrom at any time within sixty days after final decision in favor of such way.

Boston & Maine R. R. Co. v. Comrs. of York County (Me.) 785

15. **Objections** which go to **formality** of proceeding, and do not affect jurisdiction of commissioners, may be **cured** on petition for **certiorari**, on which whole proceedings may be questioned. By statute, **entry** for purpose of constructing any part of way is **deemed a taking** of all lands intended in the laying out or alterations made upon the same petitions.

Gilkey v. Watertown (Mass.) 608

IV. REPAIRS.

16. **Highway surveyors cannot dig for materials** suited for the making or repairing of ways, upon land outside the limits

of the way, **unless it is uninclosed and uncultivated.**

Weilman v. Dickey (Me.)

843

V. TITLE TO FEE; OBSTRUCTIONS.

17. A deed bounded the premises by the center of a road, and following the description appeared these words: "Excepting the roads laid out over said lands." Held: the deed conveyed the fee within the limits of the way, **subject to the easement of the public in the way.** *Id.*

19. Grant of right of way; when personal it is not assignable or inheritable, and cannot pass to a trustee in insolvency or to a corporation succeeding the individual grantees.

Hall v. Armstrong (Conn.)

881

20. The owner of land upon a public way may lawfully plant ornamental or shade trees within the limits of the way, if the public use is not thereby obstructed or endangered; and highway surveyors who destroy such trees without reason or necessity are trespassers.

Weilman v. Dickey (Me.)

843

21. One having right of way appurtenant to his land may remove unlawful obstructions; intention to make unjustifiable use of way at future time does not make him a trespasser.

Hayes v. De Vito (Mass.)

749

22. Reservation in deed from the Commonwealth reserving passageway in Back Bay District, construed, and held, that information by the Commonwealth will lie for the removal of obstructions, although all abutting owners have released their rights.

Harbor & Land Comrs. v. Williams

(Mass.) 869

VI. DEFECTIVE WAYS; LIABILITY.

23. Defendant extended a public paved sidewalk in front of his factory, and five feet from the street line located an open area five feet deep, adjoining the continued sidewalk. Held, he was liable in damages for an injury to the plaintiff, who fell into the area in the night-time, while searching for her child, supposed to be in defendant's factory.

Orogan v. Schiele (Conn.)

805

24. Liability for negligence in maintaining excavation near highway.

Cases cited (Conn.)

808

25. Liability of landowner to trespasser for injury resulting from dangerous condition of his premises, or for an unguarded excavation.

Cases cited (Conn.)

311

26. If a landowner allure another upon his premises by maintaining an apparent public way, he will be liable for damages resulting from an unguarded excavation adjacent thereto.

Orogan v. Schiele (Conn.)

805

27. The dangerous character of an excavation near the highway, rather than its exact location, will determine the liability of the defendant, and the question of negligence is for the jury. *Id.*

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28. The giving of the written notice prescribed by statute, Laws 1888, p. 283, is a condition precedent to the right to maintain an action for damages against a railroad company, based upon its statutory liability, for an injury alleged to have been caused by the defendant's track creating a defect in a highway.

Fields v. Hartford & Wethersfield Horse

R. R. Co. (Conn.)

825

VII. PRIVATE WAYS.

A tract of land bounded east and west by highways was platted into house lots and streets. A, an owner by purchase of several of these lots, brought trespass *quare clausum* against B, who had purchased one of them, for using the platted street in front of the lots of A and B as a means of access to a house and lot owned by B, situated on the east side of the east bounding highway and not on the plat in question. Held, that A was entitled to recover, notwithstanding B passed over or along his lot on the plat in going to and from his house.

Brightman v. Chapin (R. I.)

807

WIDOW.

SEE DEVISE AND LEGACY VII; DOWER.

WIFE.

SEE HUSBAND AND WIFE.

WILL.

I. TESTAMENTARY CAPACITY; UNDUE

INFLUENCE.

II. ATTESTATION.

III. REVOCATION.

IV. PROBATE; LITIGATING WILLS.

V. PARTICULAR CASE.

SEE DEVISE AND LEGACY; EXECUTORS AND ADMINISTRATORS.

I. TESTAMENTARY CAPACITY; UNDUE INFLUENCE.

1. Probate of will is not evidence of mental capacity, on collateral issue; decree of probate court not admissible as evidence of capacity of testator, in suit by devisee to set aside a mortgage, on ground of want of capacity in testator to convey.

Brigham v. Fayerweather (Mass.)

736

2. Testator's extreme age and alleged spiritualistic communications from first wife through his second, held, under the facts, sufficient evidence of undue influence.

Baylies v. Spaulding (Mass.)

914

II. ATTESTATION.

3. It is not necessary that testator and subscribing witnesses sign in the presence of each other.

Welch v. Adams (N. H.)

59

4. In Rhode Island the witnesses to a will must subscribe their names in the presence of the testator. Acknowledgment by a witness in the presence of the testator, of the witness' signature affixed in the testator's absence, is a nullity.

Pawtucket v. Ballou (R. I.)

131

III. REVOCATION.

5. The N. H. Statute, G. L. ch. 198, § 14, provides the only mode by which a will can be revoked, and courts cannot accept even a definite intention to perform the prescribed act for the act itself.

Hoitt v. Hoitt (N. H.) 547

6. Conveying a part of the estate indicates a change of purpose in the testator as to that part, but suffering the will to remain uncanceled evinces that his intention is unchanged with respect to other property.

Cases cited (N. H.) 559

7. Oral declarations of testator, that he understood his will was revoked, are not competent; nor are such declarations competent upon testator's intention not to pass, by his will, after acquired real estate.

Hoitt v. Hoitt (N. H.) 547

8. A will and codicil of a woman are revoked by her subsequent marriage.

Blodgett v. Moore (Mass.) 382

Blodgett v. Foster (Mass.) 382

9. Rule that remarriage acts as revocation of a will is abrogated by statutory provision entitling widow and children not provided for by will, to same share in estate as if testator had died intestate.

Hoitt v. Hoitt (N. H.) 547

10. Where will is not shown to have been expressly revoked, no subsequent changes in circumstances of deceased, as, his second marriage, death of some of his children and legatees, or alienation of certain property, will operate as a revocation by implication. *Id.*

11. Partial revocation only produces an ademption of the subject of the devise, and thus limits the operation of the will to the extent of the revocation. *Id.*

12. The fact that a will is found with memoranda and unexecuted papers, evidencing an inchoate intention to make another will, does not effect a revocation, under G. L. chap. 198, § 14, providing the manner in which wills may be revoked.

Cases cited (N. H.) 558

IV. PROBATE; LITIGATING WILLS.

13. A decree of the probate court admitting a will to probate is final and conclusive upon all the world, until revoked by the court which passed it.

Wolcott v. Wolcott (Mass.) 212

14. It cannot be reviewed by writ of error or *certiorari*, nor be set aside in equity for fraud. *Id.*

15. A certified copy of a foreign will, attested by the register, with the certificate of the presiding judge of the orphans' court to the official character of the register, is a compliance with U. S. R. S. § 905, and is admissible in evidence.

Cases cited (N. H.) 171

16. On an appeal from the probate of a will, the appellant cannot be a witness unless the executor testifies.

Welch v. Adams (N. H.) 59

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17. Sess. L. 1882, p. 146, does not authorize to be paid out of the estate, costs and expenses incurred before the appointment of an executor and administrator, as in litigating a will

Brown v. Eggleston (Ma.) 803

V. PARTICULAR CASE.

18. By statute (1877, chap. 204), the American Legion of Honor and the Knights of Pythias were empowered to insure the life of a member for the benefit of "the widow or other dependents upon a deceased member," and such fund was exempted from liability to creditors. Certificates of insurance were issued by each of the societies to a member, payable to his wife and subject to such further disposal as he might thereafter direct. Subsequently, the Act of 1882, chap. 195, § 2, added to the class of beneficiaries, after the word "orphans," "or other relatives of deceased members." The wife of the member so named as payee in the two certificates died, and the member by will bequeathed the sum payable on each certificate to the claimant, with whom he had made a contract of marriage. Both funds were claimed by the member's legatee, his mother, and his sister. Held, after the finding of the superior court that the legatee and the sister were not dependent upon deceased, that the mother alone was entitled to both funds, and the Act of 1882, subsequent to the contracts of insurance, did not entitle the sister to any part of the funds.

Supreme Council American Legion of Honor v. Perry (Mass.) 715

Hicks v. Perry (Mass.) 715

WITNESS.

I. AFFECTING DECEDENTS' ESTATES.

II. EXAMINATION; REFRESHING MEMORY.

III. IMPEACHMENT.

IV. COMPELLING ATTENDANCE.

SEE EVIDENCE.

I. AFFECTING DECEDENTS' ESTATES.

1. Evidence of what a deceased witness testified to on former trial is competent; where such witness made a statement before judge of trial court in presence of defendant, the testimony is competent as some evidence of admission by defendant.

Pray v. Stebbins (Mass.) 521

2. On an appeal from the probate of a will, the appellant cannot be a witness unless the executor testifies.

Welch v. Adams (N. H.) 59

II. EXAMINATION; REFRESHING MEMORY.

3. Whether leading questions may be put by party calling witness is a question of fact to be determined at the trial.

Osgood v. Eaton (N. H.) 114

4. Error cannot be predicated on mere questions asked of witnesses.

Carpenter v. Corinth (Vt.) 408

5. In an investigation by common council, under Stat. 1888, chap. 195, into the conduct of members of a municipal board, a

witness should not be compelled to furnish evidence which might be used against him in a subsequent suit.

Osborne v. Wilson (Mass.) 518

6. A party disappointed in his witness may, to refresh the witness' recollection, ask him if he has not made contradictory statements; but he cannot prove such statements by other witnesses.

Hildreth v. Aldrich (Me.) 801

III. IMPEACHMENT.

7. Evidence of bias is admissible to impeach credibility of witness; but there is no useful purpose served by its admission upon collateral issue, to show that a certain indictment against defendant was known by the witness to be untrue.

Commonwealth v. Hobbs (Mass.) 541

8. A defendant in proceedings, civil or criminal, who testifies in his own behalf, may be impeached like any other witness, by showing his previous conviction of a felony.

State v. McGuire (R. I.) 121

9. A witness may be impeached by showing contrary statements made out of court.

Sprague v. Bristol (N. H.) 112

10. A party cannot impeach his own witness by proof, through other witnesses, of contradictory statements, unless the witness is one whom the law obliges the party to call.

Hildreth v. Aldrich (Me.) 801

IV. COMPELLING ATTENDANCE.

11. Where members of water board, whose conduct is to be investigated by a committee under Stat. 1883, chap. 195, have been re-

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moved from office, and object of further investigation is to procure evidence for another suit, or those remaining are moot questions of no practical bearing on the case, petition to compel attendance of witnesses before committee will be denied.

Osborne v. Wilson (Mass.) 518

WRIT AND PROCESS.

SEE ACTION OR SUIT; ATTACHMENT; EXECUTION; SEARCH WARRANT; SEQUESTRATION.

1. Reasonable intendments are made in favor of officers' returns. The presumption of law is in favor of their legality.

Cases cited (Vt.) 399

2. A writ cannot be amended so as to substitute as defendant a partnership in place of a defendant named as a corporation which did not in fact exist, as service upon the supposed corporation brought nobody into court.

Sawyer v. New York Clothing Company (Vt.) 453

3. A defendant illegally arrested in a civil action does not, by giving a bail bond, waive his right to object to the service of the writ.

Baker v. Copeland (Mass.) 491

4. Although a constable has no authority to serve process in a civil action unless directed to him, yet, where a constable has served a writ which was not directed to him it may be amended by inserting such direction, and thereby the service made good.

Cases cited (Me.)

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Of writ of entry by death of defendant; notice to heirs under R. S. chap. 104.

(Me.) 662

Statute giving a remedy for negligence resulting in death gives an action in cases of instantaneous death.

(N. H.) 168

ACCORD AND SATISFACTION.

A composition deed made by creditors becomes an accord and satisfaction. (Mass.) 565

Debtor's note indorsed by third person for sum less than debt, taken in satisfaction, is good accord and satisfaction. (Me.) 286

While the payment of a sum smaller than the debt and the giving of a receipt in full will not work a discharge, yet the slightest consideration will sustain the accord and satisfaction; as, payment at a different place, the payment of costs of a suit, the withdrawal of a plea, a threat to go into bankruptcy, or the giving of anything besides money, as the debtor's check or note. (Mass.) 219

ACTION OR SUIT.

SEE ABATEMENT; ASSAULT AND BATTERY; ASSUMPSIT; ATTACHMENT; BASTARDY; BILLS AND NOTES; CONTINUANCE; CONTRACT; COSTS; EJECTMENT; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INSURANCE; JUDGMENT; LIBEL AND SLANDER; LIMITATION OF ACTIONS; LIS PENDENS; MANDAMUS; MUNICIPAL CORPORATIONS; NEGLIGENCE; PLEADING; REPLEVIN; TENDER; TRIAL; TROVER AND CONVERSION.

Right to sue on lost or stolen notes, or notes not in possession of owner and claimed by third person. (Mass.) 770

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If a person receives a paper which he might consider invalid but which he retains without objection, and thereafter so acts as to leave the opposing party to believe that he is treating the service as valid, he cannot afterward rely upon the invalidity. (Mass.) 492

If the service of a writ is defective or insufficient, it is within the discretion of the court to issue an order for further service, under P. S. chap. 161, § 84. (Mass.) 498

A special appearance upon an illegal arrest will not waive defendant's right to object to the service of the writ. (Mass.) 492

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ADJOURNMENT.

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SEE EVIDENCE.

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Constitutionality of statutes relating to the adulteration of milk. *Note* 820

Appointment of milk inspectors, under P. S. chap. 57, § 1. (Mass.) 500

Authority of milk inspector, under P. S. chap. 57, § 1, to delegate power. (Mass.) 501

Any other person as well as an inspector may institute a complaint for selling adulterated milk, under P. S. chap. 57. (Mass.) 507

Sufficiency of complaint, under Pub. Stat. chap. 57, for selling and having in possession adulterated milk. (Mass.) 507, 576

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As bar to alimony. (N. H.) 115

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A husband is bound to exercise a superintendence and protection over his wife. Mere passive acquiescence will prevent his obtaining divorce for adultery. (Mass.) 435

Connivance—Willfully abstaining from taking any step to prevent adulterous intercourse will prevent husband from obtaining divorce. (Mass.) 435

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An appeal will lie from a decree settled by a single justice, although the full court has ordered a decree without stating its form. (Mass.) 369

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Effect of covenant not to quarry or allow others to quarry from adjoining land, upon heirs and assigns of the covenantor, in favor of heirs and assigns of the covenantee. (Mass.) 827

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A bond given in restraint of trade should be construed according to circumstances and intention of the parties, to determine whether sum is **penalty or liquidated damages**. (Me.) 297

Where a smaller amount is secured by an undertaking to pay a larger, in case of non-fulfillment of conditions, the sum so agreed to be paid must always be considered as a penalty and not as liquidated damages. (Conn.) 651

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(Mass.) 765

Record of an instrument which discloses a defect in its execution is a mere nullity and is not noticed for any purpose.

(R. I.) 809

Record of deed is only notice of what it contains and not of contemporaneous agreement.

(Me.) 909

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(N. H.) 159

Only parties or privies can claim under a deed.

(R. I.) 872

Reformation—A mortgage signed and recorded but omitting the seals may be reformed by the addition of seals, against a subsequent attaching creditor having notice.

(R. I.) 810

Equity will reform a deed to make it conform to the real contract between the parties, against all persons except *bona fide* purchasers for value without notice.

(R. I.) 810

Construction; in general—Public grants are construed strictly in favor of the grantor.

(R. I.) 870

Grants by implication are limited to cases of strict necessity.

(Mass.) 217

A deed shall be construed most strongly against the grantor.

(N. H.) 256

In construing a deed the intention of the parties is to govern, and the rule of construction most strongly against the grantor is only to be resorted to when the language is so ambiguous that all other rules of construction fail.

(Mass.) 758

The following words have been held to convey a fee: "Use of", "entire income of", "all the improvements, income and benefit of", "all the profits of", "privileges of", "including all the privilege of".

(Me.) 294

Admissibility of parol evidence to explain latent ambiguity.

(Mass.) 574, 588

Construction of covenants of warranty.

(Mass.) 574

Description and boundaries—Right of landowner to center of road.

(Me.) 842

Office of *habendum* is to define and limit estate granted in premises, but if the estate be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any *habendum*; and if an *habendum* follow, which is repugnant to the premises or contrary to the rules of law and incapable of construction consistent with either, the *habendum* shall be rejected and the deed stand good upon the premises.

(N. H.) 847

Monuments and survey will control plan referred to in description in deed.

(Me.) 898

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(Mass.) 514, 588

Parol evidence is not admissible to vary the rule that courses and distances are controlled by monuments.

(Mass.) 514

Reservations and exceptions—Construction of reservations.

(Mass.) 758; (N. H.) 848

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A reservation of house occupied by doweress should be construed as an exception of the house and land so occupied, and the reversion thereof should not pass.

(Mass.) 758

Appurtenances—A conduit or pipe to conduct water to a house will pass as appurtenant to a grant of a house.

(N. H.) 256

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(N. H.) 847

Restrictions upon the use of property granted must be reasonable and will be liberally construed.

(Mass.) 84

The erection of a porch and projecting portion of a second story is within a restriction that no building shall be erected.

(Mass.) 84

DEFINITIONS.

"Assignee" in bonds may be administrator of obligee.

(R. I.) 887

Connivance is the corrupt consenting of a married party to the conduct in the other of which he complains. There must be corrupt intent in fact. The presumption of law is against it.

(Mass.) 435

Consuls are "a subordinate authority." The appointment or reception of consuls has no legal force; and no action by them, looking to the recognition of any foreign government, can bind either the government or the courts.

(Mass.) 711

Conveyance includes mortgages.

(Me.) 670

Conviction. Verdict of guilty without judgment.

(Conn.) 864

Forthwith, in statute authorizing seizure and forfeiture of intoxicating liquors, within a reasonable time.

(R. I.) 814

Guest.

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"Habit and repute."

(Conn.) 272

"Issue," when meaning "children."

(Mass.) 238

Legacy.

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Life insurance is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life.

(N. H.) 857

"Repute and habit."

(Conn.) 272

Seal. An impression without wax or wafer is considered a seal, but wax or wafer without an impression is not a seal.

(R. I.) 141

Town.

(Mass.) 498

Trade mark. Is a mark applied to articles of trade to tell the buyer who the maker is.

(Conn.) 411

Trade mark. A trade mark is a particular sign or symbol, which, by exclusive use, becomes recognized as the distinguishing mark of the owners of goods, and for the protection of which the aid of equity may be invoked.

(Conn.) 414

Trade mark. It is the appropriation and use by a trader of some name, symbol, devise or combination, which he may lawfully appropriate and use to mark his goods, so that when people see the goods so marked they may know them to be his goods.

(Conn.) 411

DEPOSITIONS.

A party notified to attend the taking of dep.

ositions at a certain place and hour is not bound to attend at the hour; and if in his absence the taking is adjourned to another place without notice to him, the depositions cannot be used against his objection. (N. H.) 844

Right to adjourn to place not named in notice. (N. H.) 844

Liability of party noticing taking of depositions for costs, under G. L. chap. 229, § 10. (N. H.) 851

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Distribution among heirs. *Notes* 188, 233
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Husband has no interest in real estate of wife dying without children. (R. I.) 812

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Definition of legacy. (Mass.) 487

Beneficial society insurance payable to widow, orphans or other dependents of member; power to bequeath by will. (Mass.) 716

Under N. H. R. S. chap. 147, a will executed and proved according to the laws of another State, will have same effect in disposition of real and personal property as though executed and proved according to the laws of this State. (N. H.) 169

Construction—In general, an intention to die intestate as to any part of the estate will not be presumed if the words in the will will carry the whole. (Me.) 701

It is no valid objection if the intention of the testator be not illegal or against good morals, that it is strange, unnatural or absurd. (Conn.) 689

Alienation by testator of a part of a chattel specifically bequeathed, or a part of real estate specifically devised, operates as an *ademption* or revocation *pro tanto*. (N. H.) 550

Construction vesting title in heirs and devisees, rather than in trustees or executors, will be favored. (Me.) 900

Prima facie the first taker is the principal object of testator's bounty, and construction should be made in his favor. (Conn.) 269

Construction of bequests reposing confidence in judgment or discretion of executor or trustee. (Mass.) 486

A devise to grandchildren as a class; equal distribution to child born after death of testator. (Conn.) 191

A general residuary devise will carry every estate or interest not expressly or by implication excluded from its operation. (N. H.) 550

Construction of residuary clauses in will. *Note* 189

An heir is not to be disinherited unless such is the clear intent of the testator. (Mass.) 459

Distribution, when *per capita* and when *per stirpes*. *Notes* 191, 233

"Issue," when meaning "children." (Mass.) 233

The transfer and disposition of personal property is governed by the law of the domicile. (N. H.) 169

Devise to testator's widow, "so long as she shall be and remain unmarried after my decease," is valid and creates a life estate. (Me.) 700

Rule in Shelley's case not in force in Massachusetts. (Mass.) 195

A construction creating a tenancy in common is generally preferred to one creating a joint tenancy. (Mass.) 730

Distinctions between contingent and vested remainders. (Conn.) 818; (N. H.) 169

Words creating vested or absolute estate will not, on doubtful implication from other words, be construed contingent or defeasible. (Conn.) 269

Distinction between vested remainders and executory devisees. (Mass.) 90

Limitations of the mere use of personal property with reversions of remainders over, although allowed, are not to be favored. (Conn.) 269

Adverbs of time, in a devise of a remainder, are construed to relate merely to the time of enjoyment of the estate, and not to the time of vesting. (R. I.) 861

Conditions in restraint of marriage. (Vt.) 856; *Note* 856

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The final vesting of personal property may be postponed to the same extent as real estate. (Mass.) 194

Powers of sale—The contingency on which power of sale may be executed is condition precedent. (Me.) 901

No particular form of words is necessary to create a power of sale. (R. I.) 88; *Note* 33

A direction to executors to divide will not imply a power of sale. (Me.) 900

Construction of power to sell coupled with devise for life. (R. I.) 21

Power to sell will not imply power to mortgage. *Note* 33

A power must be strictly executed, and a purchaser takes at his peril. (Me.) 900

A power of sale to a devisee of a life estate does not enlarge his estate. (Me.) 700

Where naked power of sale is given to executor, the heir or devisee is entitled to possession and profits until sale. (Me.) 900

A naked power of sale is power without interest, and in such case title vests in devisee or heir. (Me.) 900

Gifts dependent upon a definite or indefinite failure of issue. (Mass.) 194

A gift will be construed as a vested remainder rather than an executory devise, if the intention is not clear. (Mass.) 98, 233

A class gift is where the total and ultimate amount of the shares to be taken by any one donee cannot be ascertained until all the persons who are to take, and the ultimate proportions in which they take, are finally ascertained. (Conn.) 313

Where a gift is made to a class, and one dies before testator, the survivors take the whole. *Contra*, where the gift is made *nominatim*. (R. I.) 159

"A residuary gift of personal estate carries not only everything not in terms disposed of, but everything in the event that turns out not to be well disposed of." (N. H.) 859

Rights of widow relinquishing dower, to priority of payment of and interest upon legacy. Specific and general legacies.

(Mass.) 705

Under power to widow to mortgage for support, evidence must show that sum so raised was necessary. (Me.) 900

Charities and trusts—Words sufficient to create precatory trusts. (Mass.) 750

A bequest for the support of another is a trust. (Mass.) 460

Sufficiency of devise in trust to create estate in fee. (R. I.) 88

A court of equity will exhaust all powers at its command to give effect to an intention to found a public charity and to prevent the charity from failing. (Conn.) 639

Trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. (Conn.) 639

Trusts for charitable uses for the benefit of certain classes; validity. (Conn.) 640

Where a trust is established by will for the support of a child or widow during life, the inclination of the court should be, in all doubtful cases, to make the income as large as is fairly consistent with the safety of the principal. (Mass.) 874

A testamentary trust will not fail for want of a trustee. (Conn.) 659

Upon the failure of a trust for accumulation, a resulting trust will arise for the heirs at law. (Conn.) 818

Lapsed legacies pass to residuary legatees and lapsed devises to heirs. (R. I.) 189

Lapse of legacies by death of legatee.

(N. H.) 169

Bequest to class; to legatees, *nominatim*; death of one; lapse; right of survivorship.

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Rule against perpetuities. (Mass.) 194

A bequest, to be valid within the rule against perpetuities, must be such that it must necessarily vest within the prescribed period.

(Conn.) 812

Legacies, when a charge upon land.

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(R. I.) 881

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Premium paid for an investment should not be charged to the income, but any loss should be sustained by the principal. (Mass.) 878

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While the Constitution provides for the election of state attorneys, their duties are defined by the Legislature and they may be excluded entirely from the prosecution of offenses.

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Comments by district attorney upon omission of defendant to call witnesses.

(Mass.) 104

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Right of widow relinquishing dower, to priority of payment of and interest upon legacy. Specific and general legacies. (Mass.) 705

Alienation of widow's homestead interest, under N. H. Act, 1868. (N. H.) 116

The court of probate alone has jurisdiction to assign dower. (Conn.) 461

Proceedings in assignment of dower; demand and notice. (Me.) 679

Bar of dower by conveyance in lifetime of husband. (Mass.) 107

Right of tenant in fee to partition against widow entitled to life estate in an undivided half. (Mass.) 78

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Prescriptive right to drainage of surface water. (Mass.) 606

Liability of municipal corporation for negligence of its officers, agents or servants employed in the construction of public works.

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A covenant, that a parcel of land described in a deed of other land shall forever remain common, creates an easement. (Mass.) 827

An easement may consist in abstaining from doing something upon the servient tenement.

(Mass.) 82

Right of person having right of flowage to remove fences on servient land, when not exercising such right of flowage. (Mass.) 449

The use of an easement, under claim of right, is an adverse use. (Me.) 264

An easement or incorporeal hereditament is not subject to partition. (Mass.) 720

Where an easement is appurtenant to the whole estate, the assignee of any part may claim the right, so far as is applicable to his parcel, provided it can be enjoyed by the several estates without increasing the burden upon the servient estate. (Mass.) 721

An easement appurtenant to a dominant estate, as a supply of water to a house, passes by a grant of the house. (N. H.) 256

Right of inhabitants of town, otherwise than in corporate capacity, to take grant or enjoy reservations in succession. (R. I.) 872

An easement in gross will not be presumed when by fair construction it may be taken to be appurtenant to some other estate.

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Reservation of easements will not be implied in favor of the grantor. (Mass.) 817

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In proving a prescription, the user of the right is the only evidence of the extent to which it has been acquired. (Mass.) 766
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A railroad company having the right of eminent domain, for the construction of its road, cannot take additional lands after it has completed its road. (Mass.) 601

Authority, under Pub. Stat. chap. 112, § 125, to construct highway, townway, and footway across railroad previously constructed. (Mass.) 95

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In taking land by right of eminent domain interest is allowed if payment is delayed. (Mass.) 525

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Jurisdiction; in general—Adequate remedy at law. (R. I.) 864 (Vt.) 850

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nally the only court of chancery, has exercised that jurisdiction more generally than in most of the other States. (Conn.) 465

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Sufficiency of evidence of fraud for cancellation of bond. (Me.) 695

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Equity will reform a deed to make it conform to the real contract between the parties, against all persons except *bona fide* purchasers for value without notice. (R. I.) 810

Jurisdiction to cancel deeds for accident, mistake and fraud. (N. H.) 54

If a deed or will is by power required to be executed in the presence of a certain number of witnesses, and it is executed in the presence of a smaller number, or if it is required to be sealed and the sealing is omitted, equity will supply the defects. (Mass.) 538

A mortgage signed and recorded, but omitting the seals, may be reformed by the additional seals, against a subsequent attaching creditor having notice. (R. I.) 810

Jurisdiction in equity to compel the administrator of payee of a note to indorse the same to a voluntary donee, it appearing that the payee had omitted such indorsement through accident. (Mass.) 94

The court will not aid the nonexecution of a power even where that nonexecution is occasioned by a disability arising from gout. (Mass.) 598

Jurisdiction of creditors' bills, under Gen. Stat. chap. 113. (Mass.) 769

Courts of equity will set off joint and separate debts against each other when the equities of the case require it, although at law such set-off would not be allowed. (R. I.) 808

A bill in equity, as a creditor's bill to reach unpaid stock subscriptions, even when an injunction is issued to restrain the disposition of the property sought to be reached by it, creates no lien upon the property. (Mass.) 708

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Right of attaching creditor to remove cloud of a tax deed from title of attached property. (N. H.) 855

Jurisdiction to appoint receiver and make distribution of property of unincorporated joint stock companies, under R. S. chap. 77. (Me.) 795

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One who has slumbered on his rights, until the diligence of others have overcome all the difficulties, cannot ask a court of equity to aid him in reaping what he has not sown. (Mass.) 594

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On hearing on bill and answer, allegations of answer must be taken as true. (N. H.) 55

Where bill is ordered to be dismissed upon a contingent event, such order is not final decree. (R. I.) 883

Where facts are so clearly stated in a master's report as necessarily to involve a particular consequence, it is for the court to act upon the facts so reported and apply the law. (Mass.) 586

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(Me.) 301

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(Mass.) 450

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(Mass.) 450

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Connivance is the corrupt consenting of a married party to the conduct in the other of which he complains. There must be corrupt intent in fact. The presumption of law is against it.

(Mass.) 435

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(Mass.) 435

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(N. H.) 115

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Where on account of the location of the ticket office it is necessary for a passenger to cross the track in order to reach his train, the railroad is bound to care for the safety of such passenger. (Mass.) 494

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Right of passenger jumping from moving train to recover for injury. (Me.) 681-683

Measure of care required of railroad to passenger after leaving train, while on depot grounds. (Mass.) 909

(b) Contributory Negligence.

One in the full possession of his faculties, who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be but is in fact struck by it, is *prima facie* guilty of negligence; and in the absence of a satisfactory excuse his negligence must be regarded as established. (N. H.) 842

Ordinary prudence requires one who enters upon so dangerous a place as a railroad crossing to use his senses, to listen, to look, or to take some precaution for the purpose of ascertaining whether he may cross in safety. (N. H.) 841

Crossing a railroad track without looking and listening for an approaching train is *prima facie* negligence. (Me.) 682

A person crossing a railroad track is bound to look up and down for the train. (Mass.) 494

Contra.

If a traveler looking along the road could have seen an approaching train in time to escape, it will be presumed in case of collision that he did not look or, looking, did not heed what he saw. (N. H.) 842

Crawling under a car stopped temporarily upon the track is *per se* negligence. (Me.) 682

A passenger ought not to be deemed guilty of contributory negligence when he takes only such risks as under the circumstances a prudent man would take. (Me.) 683

Riding with a portion of the body protruding from the car windows is *per se* negligence. (Me.) 682

A passenger is guilty of contributory negligence who leaves a moving train merely to avoid delay or inconvenience, as where he is carried beyond his station. (Me.) 681-683

There is no such general accord of judicial opinion and precedent in reference to attempt to leave a car while it is in motion as to justify a ruling that it is negligence, as matter of law, to do so. (Me.) 684

Where train stops before reaching depot it is not negligence for passenger to alight, supposing depot has been reached. (R. I.) 40

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In the absence of testimony to show negligence, the case should be taken from the jury. (N. H.) 841

Where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. (N. H.) 842

If there is ground for any difference of opinion among ordinary men, the question should go to the jury. (Me.) 905

If the court can see that if a verdict for the plaintiff should be rendered, it ought to be set aside as unwarranted by the testimony, an instruction to find for defendant should be given. (Me.) 683

When the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. (N. H.) 843

Measure of damages for personal injuries caused by negligence. (Me.) 685

Contributory Negligence—A person sailing a boat, and neglecting to look out for a steam ferry boat which he knew was approaching, is guilty of contributory negligence. (Mass.) 483

If the exigency is one calculated to affect the judgment of him who is to meet it, a mistake in his movements is not contributory negligence. (Me.) 684

The fact that a person takes some risk is not conclusive evidence under all circumstances that he is not using due care. (Mass.) 483

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A new trial will not be granted for the introduction of incompetent or immaterial evidence, if it tended to prove a point which the jury by their verdict did not find to have been proved. (N. H.) 248

When the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. (N. H.) 842

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If the plaintiff's own proof shows conclusive contributory negligence a nonsuit should be entered. (N. H.) 841

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When the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. (N. H.) 842

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To prove the violation of an ordinance *mala prohibita* it is not necessary to show that it was done willfully. (Mass.) 524

A by-law or ordinance, to be valid, must be lawful and reasonable, not oppressive, impartial, fair and general. (Mass.) 524

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While the payment of a sum smaller than the debt and the giving of a receipt in full will

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(Conn.) 411

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(Conn.) 415

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(Mass.) 593

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Ex. J. M.

